COMPARATIVE ADMINISTRATIVE LAW

RESEARCH HANDBOOKS IN COMPARATIVE LAW

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Comparative Administrative Law

Edited by

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Susan Rose-Ackerman
Peter L. Lindseth

Comparative administrative law: an introduction

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Administrative law exists at the interface between the state and society – between civil servants and state institutions, on the one hand, and citizens, business firms, organized groups, and non-citizens, on the other. Civil service law and bureaucratic organization charts and rules provide an essential background, but our emphasis is on the law's fundamental role in framing the way individuals and organizations test and challenge the legitimacy of the modern state outside of the electoral process. There are two broad tasks – protecting individuals against an overreaching state and providing external checks that enhance the democratic accountability and competence of the administration.

Public law is the product of statutory, constitutional, and judicial choices over time; it blends constitutional and administrative concerns. The Germans speak of administrative law as 'concretized' constitutional law, and Americans often call it 'applied' constitutional law. The English, with no written constitution, refer to 'natural justice' and, more recently, to the European Convention on Human Rights (ECHR). The French tradition of *droit administratif* contains within it a whole conceptual vocabulary – *dualité de juridiction*, *acte administratif*, *service public* – that has been deeply influential in many parts of the world (notably francophone Africa, the Middle East, and Latin America). East Asia has a long tradition of centralized, hierarchical, and bureaucratic rule – a sort of 'administrative law' *avant la lettre*. And yet, in forging its own modern variants, East Asia has also drawn on Western (and particularly German and US) models.

Administrative law is one of the 'institutions' of modern government, in the sense that economists and political scientists often use that term (see, for example, North 1990: 3–5, March and Olsen 1989, 1998: 948). It is thus amenable to comparative political and historical study, not just purely legal analysis. Employing this broad perspective, we seek to illuminate both the historical legacies and the present-day political and economic realities that continue to shape the field as we proceed into the twenty-first century.

The distinction between public and private is essential to administrative law, a distinction that common law jurisdictions long sought to downplay by claiming that the same courts and legal principles should resolve both wholly private disputes and those involving the state. Nevertheless, even in the common law world, debates over the proper role and unique prerogatives of state actors are pervasive. Some scholars still assume that one can compartmentalize regulatory activities and actors into either a public or a private sphere. This may be analytically convenient, but it does not fit the increasingly blurred boundary between state and society. Recent developments have also strained another familiar distinction – between justice and administration. In Europe, for example, courts regularly apply the principle of proportionality – if a policy interferes with a right, then it must be designed in the least restrictive way. As a result, courts have begun to impose standards on government policymaking, at least when rights are at stake.

International legal developments are increasingly influencing domestic regulatory and administrative bodies. The project in Global Administrative Law centered at New York

University (Kingsbury et al. 2005), focuses on the administrative law of international organizations, such as the World Trade Organization. Nevertheless, it often draws on domestic models of the administrative process for inspiration. Our focus here is complementary. This collection emphasizes how the practices of multinational and regional bodies have both emerged out of and affected the administrative process in established states.

This volume attempts to capture the complexity of the field while also distilling certain key elements for comparative study. Because administrative law is intimately bound up with the development of the modern state, we begin with a set of historical reflections on its interactions with social and political change over the last two centuries. The remaining parts are broadly thematic. The first concentrates on the relationship between administrative and constitutional law – uncertain, contested, and deeply essential. We next focus on a key aspect of this uneasy relationship – administrative independence with its manifold implications for separation of powers, democratic self-government, and the boundary between law, politics, and policy. The next two parts highlight the tensions between impartial expertise and public accountability. They cover, first, internal processes of decision-making (including transparency, participation, political oversight, and policy or impact analysis), and, second, external legal controls on administrative decision-making (that is, 'administrative litigation' writ large). The final part considers how administrative law is shaping and is being shaped by the changing boundaries of the state. This part confronts two basic structural issues: the evolving boundary between public and private, and the similarly evolving boundary between the domestic and transnational regulatory orders. In considering this second question, the chapters focus on the EU, as the most evolved transnational regulatory order now operating.

1. Administrative law as historical institution

As Bernardo Sordi (chapter 1) stresses in his opening contribution, the emergence of administrative law in Europe was very much a modern phenomenon. It was tied to the increasing 'specificity and subjectivity' of public administrative power since the end of the eighteenth century. Sordi's fundamental claim is that 'administrative power' and 'administrative law' emerged contemporaneously – in other words, the new authority and its legal limitation arose together. This conjunction arguably holds true outside of Europe as well. As John Ohnesorge (chapter 5) notes, in East Asia, for example, the term 'administrative law' was unknown; nevertheless, the prevailing traditional system of government – with its commands from higher to lower level officials; its proliferation of regulatory mandates; its definition of competences; and its ambition for a 'professional, disciplined, meritocratic, and rule-bound' body of public servants – suggests that East Asia may well have been something of a pioneer.

But traditional East Asian law arguably lacked a realm of 'private' right distinct from the realm of public governance. In contrast, Sordi stresses that old regime monarchies in Europe ruled through a corporatist system of privileges and jurisdictions grounded in conceptions of right (notably 'property') that we would today clearly see as private. It was precisely the progressive extrication of 'public' authority from this corporatist old regime, as well as the development of a distinct corps of public servants to pursue and defend these new public prerogatives, that marked the emergence of administrative modernity in the Western world.

Depending on the polity, this emerging corps of public servants often did not conform to the Weberian ideal type of bureaucracy, as Nicholas Parrillo's discussion of the American case makes clear (chapter 3). It is unnecessary to debate bureaucratization as a comparative socio-historical phenomenon to understand the key point. The emergence of administrative law was deeply bound up with the parallel emergence of a specifically public body of officers and state agencies, fulfilling legally defined public purposes vis-à-vis society. In short, what united the more bureaucratic forms of administrative power on the European continent with their relatively less bureaucratized counterparts in Britain and the United States (at least in the nineteenth century) was the increasing importance of positive law – legislation – in framing the limits of public authority. And as legislatures increasingly democratized,[1] the pressure on the state to intervene in society also increased. This went along with demands that its agencies and officials operate in a legally constrained, transparent, and accountable fashion.

Over the course of the nineteenth century, administrative law began to emerge as a means of setting legal limits on emergent administrative power. Owing to different institutional and conceptual starting points (most importantly, different understandings of the relationship of state to society and of justice to administration), the results of this process often differed. The substantive and procedural distinctions are now well known: *Rechtsstaat*/*Etat de droit* enforced by specialized administrative judges, on the one hand; and Rule of Law enforced by the ordinary judiciary, on the other.

Moving from the nineteenth to the twentieth century, Marco D'Alberti's contribution (chapter 4) explores the evolution of administrative law over the last hundred years. D'Alberti builds on the themes raised by Sordi but stresses how changes in the underlying functions of the state in the twentieth century influenced the development of administrative law. The rise of industry with monopoly power and the privatization of formerly state-controlled sectors produced a demand for the control of markets to which all developed states responded, albeit in different ways. Both D'Alberti and Ohnesorge, moreover, highlight the way administrative law has sometimes served as a check on populist or democratic demands by giving organized and powerful economic interest groups a way to challenge policy. They highlight an ongoing tension in the political and historical analysis of administrative law. Public law provisions that are justified as a check on overarching state power can also be a means of entrenching existing private interests. Legal constraints may, under some conditions, limit the ability of democratic governments to constrain concentrated, monopolistic economic interests.

Given these possibilities, which variables have driven the historical process of legal institutionalization in particular cases? Jerry Mashaw's wide-ranging contribution (chapter 2), although using nineteenth-century America as a baseline, identifies seven possible factors: constitutional arrangements; the boundary between public and private law; ideology; the timing of economic or social development; the growth of state activity; positive political incentives; and pragmatic adjustments to administrative necessity. Ohnesorge's discussion of East Asia after its encounter with the West in the late-nineteenth century suggests another factor: borrowing or simple mimicry, what

[1] See, for example, Tilly (2003: 213–17) for 'A Rough Map of European Democratization' over the nineteenth and twentieth centuries.

comparative lawyers have traditionally called legal transplants and what organizational theorists call institutional isomorphism.[2]

We can distill these factors down to three broad dimensions: functional, political and cultural. Under the first, functional, dimension, changes in social and economic conditions put pressure on existing institutional structures and legal categories. These pressures can then generate struggles in the second, political, dimension, where interests compete over the allocation of scarce institutional and legal advantages. In the third and final dimension – the cultural – political and social actors mobilize competing conceptions of legitimacy to justify or resist changes in institutions and in the law (Lindseth 2010).

In times of relative stability, this interaction generally leads to incremental and evolutionary change, in which old institutions and legal categories persist, but are subtly transformed. At moments of historical crisis, by contrast, the process of change can be acute and revolutionary. As Kim Lane Scheppele (chapter 6) suggests, the Russian Revolution was one such moment. In a land where parliamentarianism and the *Rechtsstaat* had little pedigree, the pressures of World War I followed by the Bolshevik Revolution obliterated their prospects entirely. Lenin mobilized a new conception of legitimacy, one that celebrated the triumph of unfettered administration over the constraints of 'bourgeois' parliamentary democracy. After its extension to Eastern Europe after World War II, this model of 'administrative state socialism' lasted until the collapse of communism in 1989. Focusing on the aftermath in Hungary in particular, Scheppele traces how this collapse opened the space for an Eastern European convergence toward Western models, often impelled by the hope of membership in the European Union. In the space of a few short years, Eastern Europeans worked to strike a balance, like their Western counterparts before them, between the ideals of a democratic *Rechtsstaat* and the functional demands of modern regulation. As the subsequent parts seek to show, this quest for balance is ongoing, not just in Europe but elsewhere in the world as well.

2. Constitutional and administrative law

As Jerry Mashaw stresses in his contribution, a state's constitutional structure – for example, presidential or parliamentary, democratic or authoritarian, federal or unitary, tripartite or more multifaceted – can influence the substance and procedures of administrative law. The contributions in this part suggest that constitutional and administrative law interact in important ways, shaping the rights and duties of professional administrators, elected politicians, and judges. Assigning activities to the constitutional or the administrative law category, however, is a challenging enterprise. As Tom Ginsburg points out (chapter 7), even though public administration and the bureaucracy receive little detailed treatment in the texts of most constitutions, they form the backbone of state functioning. Most people are rarely accused of crimes or detained for political activities that implicate constitutional rights. Rather, they much more often deal with offices that grant licenses, allocate benefits, run schools and clinics, and collect taxes. Good administration is central to the performance of these tasks. The commonplace

[2] For other examples, see the contributions by Ginsburg, Shapiro, Prado, Custos, and Rubinstein Reiss, among others in the volume.

nature of such activities should not mislead us into thinking that administration is somehow less important than constitutional law from the standpoint of the public.

Bruce Ackerman (chapter 8) argues that the functional tasks facing the modern state and public demands for transparency and accountability pose a challenge to conventional constitutional thinking that stresses a threefold division of the state into legislative, executive and judicial. Ackerman's line of thinking, in fact, has a deep historical pedigree (see, e.g., Landis 1938). The substantive policy demands facing the modern state have led to all kinds of institutional innovations, beginning with the creation of independent regulatory agencies – for example, central banks and broadcasting commissions. The need for oversight and control to accompany policymaking delegation has led to the creation of monitoring organizations, such as supreme audit agencies, ombudsmen, and judicial review. Ackerman argues that creative and responsive constitutional development needs to go farther, saying goodbye to Montesquieu by rejecting the traditional commitment to a threefold division of power.

One way to approach the links between constitutional structure and administrative law is through the lens of political economy, and more particularly through the work of positive political theory (PPT). Unlike explicitly normative work in constitutional law and political theory, PPT attempts to model state behavior in terms of the self-interest of the actors involved. (For a collection of articles that apply the approach to administrative law see Rose-Ackerman 2007.) Some PPT takes the basic structure of government as given – for example, a presidential democracy that elects representatives through plurality rule in single-member districts. Other work tries to explain the incentives for political actors to create or to modify the constitutional structure of government. Elizabeth Magill and Daniel Ortiz (chapter 9) take an intermediate position in their exploration of PPT. They ask if its insights apply outside of its origins in the study of United States politics. They claim that PPT would predict that parliamentary systems would provide for lower levels of judicial oversight of the administration than presidential systems. PPT explains judicial review in the US as a result of the legislature's desire to check the executive and its inability to do this effectively on its own. Thus, the legislature is the dominant actor that can assign tasks to the courts. In a parliamentary system the same political coalition controls both branches, and so legislators from the majority coalition do not want the courts to intervene to oversee executive action. Court review of administrative action locks in present political choices because statutes are quite easy to change.

In contrast to these expectations, Magill and Ortiz find that courts in the UK, France and Germany are, in fact, quite active in reviewing administrative actions. Either the theory of legislative behavior has limited force, or other factors prevent the government from constraining the courts. The courts themselves seem to be independent actors at least insofar as they assert jurisdiction and oversee the executive. Tom Zwart (chapter 10) suggests that this is exactly what is happening. He argues that if the legislature does not provide aggressive oversight of the executive, the courts will be under pressure from the public and interest groups to take on this role. He gives independent agency to the courts, which are not simply creatures of statutory and constitutional language. Rather, if judges believe that executive discretion needs to be controlled and if the legislature is doing little, they may step in, grant standing to public interest plaintiffs and limit executive power. Zwart shows how the pendulum can swing back and forth between the

courts and the legislature, as it responds to the perception that the courts are being overly aggressive.

Finally, Fernanda Nicola (chapter 11) introduces federalism and central/local relations as a key aspect of constitutional-administrative structure in both the EU and the US. She studies implementation of the EU's waste directive and uses that case as a lens through which to view the problem of intergovernmental cooperation. Strong notions of Member State sovereignty in the EU as well as dual sovereignty in the US make it difficult to carry out a coherent policy in either polity. It is all very well to speak of subsidiarity as a principle for dividing authority, but if the subordinate governments differ in their capacities and organization, and if they must cooperate to achieve policy goals, then simply allocating tasks down the governmental chain will not work. These functional concerns ought to be more transparently balanced against the claims to autonomy and sovereignty of Member States (and US state governments). Although the power and legitimacy of the center differs significantly between the EU and the US, neither is fully hierarchical in the sense that the center can unproblematically exert influence all the way down the chain of implementation. Such a structure raises challenges to the administration of programs that need central control and cross-government cooperation as well as local knowledge and implementation.

Here, Nicola raises an important general issue that comes up again in other contributions. If the structures of administrative and constitutional law hamper competent policy implementation, how is it possible to reconcile established legal traditions with pragmatic efforts to better balance expertise and accountability and with the protection of individual rights? One of us (Lindseth 2010) has argued that this challenge inevitably entails a complex mix of resistance and reconciliation – normative resistance animated by those constitutional traditions, on the one hand, but also a necessary degree of reconciliation to the demands for efficient problem solving, on the other. The result, however, will almost certainly be suboptimal if judged by the criteria of either perspective alone.

3. Administrative independence

Administrative independence is enthusiastically espoused by some and roundly condemned by others. One reason for the controversy is a lack of consensus over what independence is and what it can accomplish. In the contributions in this part, independence generally means that a public entity has some degree of separation from day-to-day political pressures. Martin Shapiro (chapter 18) describes such agencies as 'fall[ing] outside any cabinet department or ministry organization chart'. This seems apt, although many such agencies are still subject to some oversight from core government departments or branches. Even in the US, with a history that goes back to the establishment of the Interstate Commerce Commission in 1887, 'independent agencies' are not completely independent. The President appoints commissioners with Senate approval, and the chair serves in that capacity at the President's pleasure. Most agencies operate with appropriated budget funds, and none has constitutional status. Furthermore, the US lacks independent oversight agencies except for the Government Accountability Office that reports to Congress. Nevertheless, staggered terms that exceed the terms of the President and members of Congress, party balance requirements, and removal only for cause all limit executive control compared with those agencies directly in the presidential chain of command. Independent agencies are also subject to Congressional

oversight, which may be relatively stronger in this context simply because Presidential oversight is attenuated (at least as compared to 'executive agencies').

Administrative independence is often defended as a way to assure that decisions are made by neutral professionals with the time and technical knowledge to make competent, apolitical choices. The heart of the controversy over independence, however, stems from the agencies' disconnect from traditional democratic accountability that flows from voters through elected politicians to the bureaucracy. Attempts to legitimate such agencies in democratic terms often stress the importance of processes that go beyond expertise to incorporate public opinion and social and economic interests. The ideal is an expert agency that is independent of partisan politics but sensitive to the concerns of ordinary citizens and civil society groups. The risk is capture by narrow interests.

Daniel Halberstam (chapter 12) explores the role of independent agencies from a broad constitutional perspective. He begins with the premise that in addition to taking on the task of routine policy implementation, administrative agencies serve as 'compensation for the perceived shortcomings of the generally constituted branches of government'. Agency independence makes this compensation possible and, on Halberstam's account, grounds its legitimacy directly in the primary values of the constitutional enterprise. Because each system tends to have specific understandings of these values and distinctive failings, he argues that administrative agencies in different systems respond to different governance gaps. This perspective leads Halberstam to highlight important differences in the institutional dynamics and constitutional significance of administrative agencies in the United States, Germany and France.

Lorne Sossin (chapter 13), for his part, considers the independence of agencies in common law parliamentary jurisdictions where notions of unitary government policy-making and agency independence are also often in serious tension. Canada, he argues, has a particularly vexed history because of a lack of clarity about the place of such agencies in the structure of government. The other cases he reviews (the UK, Australia and New Zealand) have, in his view, given independent agencies a clearer and more well-articulated position in their governmental structures.

In the US, independent regulatory commissions attempt to address democratic concerns by building in partisan balance. Instead of requiring technocratic expertise or professional credentials, most agency statutes set up a multi-member governing board and require that no more than a majority can be from a single partly. As with the US judiciary, the appointment process is highly political. But with fixed, staggered terms and party balance, agencies can, in principle, respond to changing conditions as their membership changes gradually over time. This feature of US commissions, as Martin Shapiro demonstrates, has not been copied in the EU, although, as we see below, it has influenced agency design elsewhere. The European Union has substituted 'technocratic for democratic legitimacy' according to Shapiro (see also Majone 2001). Agencies have proliferated at the EU level in recent years, but rather than seeking partisan balance based on political party affiliation, Member States are represented on agency boards (Saurer, chapter 36). This practice is a political compromise, but, in practice, it leads to the dominance of technical experts who are appointed by Member States and interact with their respective specialized ministries. Thus the emphasis is on technical competence rather than political compromise, although judicial review may be pushing back against this predominant policy stance (Donnelly, chapter 21).

Independent regulatory agencies are a relatively new phenomena outside of the US and have often been created in the aftermath of the privatization of public utilities. Although there is a history of such bodies in France since at least the 1970s, Dominque Custos (chapter 17) shows that France has recently enhanced agency independence by borrowing extensively from US and EU models while retaining some distinctive features. In some cases, the EU has acted as a conduit for an indirect Americanization of French regulatory practice. However, both EU and American influences have been filtered through a process of reception ('Gallicization') that has heightened the acceptability, both structurally and procedurally, of the legal transplants.

To complement the contrasts between the US and Europe, several chapters consider the creation and operations of agencies in polities that have been influenced by both American and European legal models. For example, in Brazil with its strong president, the legal status of agencies is clear, as Mariana Prado shows (chapter 14). The independent agency model was borrowed from the United States but operates quite differently. The theory of congressional dominance that comports with US reality does not describe Brazilian agencies that are clearly subordinate to the executive whatever their nominal form. Hence, they have struggled to provide credible commitments to investors both domestic and foreign.

Similarly, as Jiunn-rong Yeh (chapter 15) reports, an effort in Taiwan to create an independent regulatory agency for telecommunications ran up against a Constitutional Court that struck down an appointments process that it argued gave too large a role to the legislature. The agency is now functioning under a revised mandate. Taiwan has a semi-presidential system and an administrative law structure that has been heavily influenced by German public law. Hence the creation of new regulatory agencies brings to the fore unresolved issues about the relative status of the various parts of government. It will be important to monitor the performance of this agency as a case study of the tensions that can arise in an emerging democracy riven by competing legal traditions and political forces.

John M. Ackerman (chapter 16) discusses agencies that police the accountability of the government itself, especially in countries making a transition to democracy. The case for independence is particularly strong for such agencies, but so is the need for oversight to prevent either their capture by regime opponents or their lapse into inaction. Ackerman recognizes that the political coalitions that created these bodies, especially in the constitutions of emerging democracies, may not be able to maintain their efficacy over time. He argues for public participation and transparency requirements to ameliorate the downside risks. Oversight agencies should be independent of the state but should also be subject to the scrutiny of ordinary citizens and civil society groups.

Legal transplants are a feature of independent agencies worldwide. Yet, as illustrated by Custos, Prado and Yeh, legal transplants often operate quite differently in new situations. Perhaps emerging democracies are mistaken in looking mostly to the experience of established democracies. As John Ackerman suggests, the rich variety of oversight and accountability bodies that are proliferating outside of the wealthy, established democracies can provide models for other emerging democracies as well as some cautionary tales. The same may be true for agencies that regulate industries such as broadcasting, electricity, and telecoms.

4. Process and policy

Public agencies promulgate regulations for many different purposes. They seek to correct market failures, protect rights, and distribute the benefits of state actions to particular groups – ranging from the poor or disadvantaged minorities to politically powerful industries, such as agriculture or oil and gas. Executive policymaking in democracies raises issues of public legitimacy, and this is a central focus of administrative law in the United States where the notice and comment provisions of the Administrative Procedures Act (most importantly §§ 553 and 706) guide the process. These provisions require agencies to provide notice, hold hearings, and give reasons when they issue a rule. The final rule can then be subject to judicial review, which reaches beyond compliance with the procedural demands of the APA both to the rational underpinnings of the rule and to its consistency with the implementing statute.

Discussions of 'good' policy by social scientists, risk analysts, and other specialists sometimes clash with the focus of American administrative law on the democratic accountability of agency policymaking. This tension between technical competence and democratic legitimacy may be less evident in other legal systems where the law does little to constrain policymaking processes compared with the adjudication of individual administrative acts (Rose-Ackerman 1995, 2005). Judicial review, except where human rights or other constitutional prescriptions are at stake, does not usually extend to policy choices.

However, even if the tension is not so obvious elsewhere, it is still present, and the US model is not the only way to deal with the issue. Under a second model, the decisions of corporatist bodies, which include stakeholder representatives, have legal force. The difficulty is that this model may freeze in place a particular pattern of interest representation in spite of changes in the underlying distribution of affected interests (Rose-Ackerman 2005: 126–62). Furthermore, some of those around the table may be good representatives but poor bargainers. Nevertheless, this model is a distinct alternative that is widely applied and that departs from the quasi-judicial model underlying the US APA.

A third model is an explicitly elite process under which a professional or elite body reviews general norms and regulations with legal force. The most developed system is found in the sections of the French *Conseil d'Etat* that review and comment on government drafts and also prepare background material on policy issues.

The role of administrative law in mediating the potential tension between technocratic expertise and public accountability is the subject of the contributions to this part. We begin with the way the executive itself may seek to monitor and influence agency policymaking absent external legal control by the courts.

Jonathan Wiener and Alberto Alemanno (chapter 19) review the contrasting experience of the US and the EU. In the United States an executive order mandates White House review of major regulations produced in the core executive branch. Such oversight extends beyond the implications of a policy for the public budget and measures the costs and benefits for society at large. Thus the economist's notion of opportunity cost is central; the analyses seek to measure the value of economic activities that are foregone because resources, both public and private, are used to carry out a particular regulatory policy. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has a staff of policy analysts who carry out this task and can return rules to the agencies for revision. They have no legal authority to stop

the issuance of final rules, but their position gives them influence over regulators. OIRA review does not cover the independent agencies, but many of them have also introduced policy analytic methods to support their rulemaking activity.[3]

The cost-benefit approach has been particularly influential in the United States, but, as Wiener and Alemanno document, a similar technique, called Impact Assessment (IA), is becoming increasingly common in Europe. There is a lively debate in Europe both on substantive review of policy based on economic principles and on the expansion of public participation and transparency requirements to cover rulemaking. However, this debate has had relatively little impact on EU administrative law, which has been largely silent concerning the policymaking process as opposed to decisions in individual cases. In part, this is because in Europe these techniques are often used, not in policymaking under existing statutes, but rather as backup support for draft legislation. In that case, courts in the US and Europe concur in leaving the drafting process free of judicial oversight.

Those urging greater reliance on economic criteria need to recognize that these approaches can themselves be tools to obtain political advantage. Thus, in the United States, OIRA review of regulations under cost-benefit criteria can help the White House control the content of major regulations produced by executive branch agencies (E. Kagan 2001). A tool, which appears neutral on its face, can be manipulated for political ends. This is possible because any cost-benefit analysis involves many judgment calls. Seldom will there be a single 'right' answer that anyone trained in the technique will accept.[4] Thus, in a democratic polity cost-benefit analysis and similar technocratic tools, although useful in focusing policy debates, cannot be the sole criteria for choice.

Hence, as a counterweight to such analytic techniques, Javier Barnes (chapter 20) argues that European states and the EU ought to move toward more accountable rulemaking procedures that would be judicially cognizable. In his view, administrative law should promote efficient and effective outcomes and support procedures that are more open and participatory. Procedural reforms ought to compensate for the greater delegation of policymaking responsibility that executive agencies now enjoy in many policy areas. He urges a move to what he calls 'third generation' procedures that would be more collaborative, non-hierarchical and decentralized. The goal is to provide an effective aid to decision- and policymaking in the new regulatory environment. These procedural reforms would take account of the 'holistic, cross-sectional' nature of many policies. Both integration and collaboration are needed, but, as Barnes realizes, striking the right balance will not be an easy task.

Barnes's recommendations for administrative law reform and third generation procedures also relate to the debate over Regulatory Impact Analysis (RIA) at the EU level, with its emphasis on the criteria for good policymaking and on an integrated approach that assesses the potential impacts of new legislation or policy proposals on economic, social and environmental conditions. However, RIA criteria have no legal force, at

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[3] The current executive order 12866 is at http://www.reginfo.gov/public/jsp/Utilities/EO_Redirect.jsp. Public comments on proposals to revise the order are at http://www/reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp.

[4] For example, the choice of a discount rate and the proper way to monetize morbidity and mortality are both fraught with controversy even among those committed to the method of cost-benefit analysis (Morrison 1998, Sunstein 1994).

present, according to both the European Court of Justice and the Commission itself. Procedural violations relating to the Commission's RIA system will not invalidate an EU rule, and most Member States' courts take a similarly hands-off attitude, pointing to the political nature of the executives' choices when they carry out RIA under their national laws. However, when Member States carry out RIA required by EU law, such as environmental assessments, the procedural rules are binding and judicially enforceable by national courts. In the United States, in contrast, administrative policymaking procedures requiring notice, participation, and reason-giving are judicially enforceable, although, as in Europe, executive orders requiring cost-benefit evaluations are not. The US courts will enforce substantive policy-analytic criteria only if the underlying regulatory statute requires such techniques. In other cases, they permit regulators to use policy analysis only so long as it does not conflict with statutory language.

However one views the debate over policymaking as an administrative law matter, it is a key area of contestation over regulatory policy. Catherine Donnelly (chapter 21) elaborates the traditional tension in administrative law between technical expertise and democratic accountability. Donnelly shows how this tension has played out in the US, the EU, and the UK and how the courts have tried to manage that tension. Courts uphold statutory public participation requirements but seldom impose them on their own initiative. She asks whether this stems from doubts about the value of participation or from a restricted view of the appropriate role of the courts. Against this background, several important differences emerge. In the US and the EU, courts act as a counterweight to the prevailing ethos–upholding expertise in the US, and treating claims of expertise with caution in the EU. The UK courts view both public participation and expertise with caution, and they legitimate administrative action based on a Weberian understanding of a hierarchical, professional, politically neutral civil service.

As suggested by the contribution of Wiener and Alemanno, many participants in the debate over policy analysis privilege a particular type of expertise derived from science and economics. Others, such as Barnes, urge more transparent, participatory decision-making processes. The two approaches are compatible so long as state officials recognize that they may not have all the necessary expertise. Participation and transparency can serve not just as rights but also as means to the end of better policy outcomes. Greater public involvement may not only produce more effective policy but also increase the acceptability of the regulatory process both in representative democracies and in entities, such as the European Union, that also seek public legitimacy. As a practical matter, however, regulatory agencies may not move toward greater participation and stronger standards of transparency and reason-giving absent a massive public outcry. In the United States the APA arguably arose from congressional effort to constrain delegated policymaking under a separation-of-powers system (McCubbins et al. 1987). No such incentives exist in parliamentary systems (Moe and Caldwell 1994; Rose-Ackerman 1995: 7–17).

Paradoxically, however, many new regulatory agencies in Europe have introduced accountable procedures on their own initiative even though they were isolated from electoral politics. Dorit Rubinstein Reiss (chapter 22) provides case studies from the UK, France and Sweden. She argues that the regulators supported greater public involvement because they needed outside support to survive and could imitate established models in the US and elsewhere. More participatory and transparent processes were seen as a

way of increasing their own legitimacy. However, as she demonstrates, these moves did not always have that effect. Sometimes they simply increased the power of the regulated industry. In some cases, however, the agencies reacted to the risk of capture by taking steps to facilitate consumer input.

For policies where a cost-benefit test seems appropriate, one response would be to combine cost-benefit analysis with transparency as a means of blocking agencies from adopting measures that benefit narrow interests. This requirement could have legal force if applied by the courts. As one of us (Rose-Ackerman 1992) argues, a judicial presumption in favor of net benefit maximization increases the political costs for narrow groups, which would have to obtain explicit statutory language in order to have their interests recognized by courts and agencies (see also Sunstein 2002: 191–228). This proposal is, of course, controversial even in the United States and would presumably garner even less support in legal regimes with little court review of rulemaking. Yet it raises an important question that is central to the discussion of administrative litigation to which we now turn. What should be the judiciary's role in reviewing the policymaking activities of modern executive branch bodies and regulatory agencies? Going further, should the courts review the process of statutory drafting, particularly in unitary parliamentary regimes?

5. Administrative litigation

There is a famous adage in French administrative law – *juger l'administration, c'est encore administrer* – 'to judge the administration is still to administer'. It recognizes the difficulty, if not the impossibility, of separating the process of legal control from the underlying process of administration. External legal control, whether exercised by courts or court-like administrative tribunals like the French *Conseil d'Etat*, will always shape regulatory policy in a myriad of ways. Read most strongly, this French adage implies an ideal of a 'self-regulating' administrative sphere that is detached from traditional values of justice and guided by its own sense of policy rationality and its own estimation of the public interest in the construction and regulation of the market (Lindseth 2005: 119). This adage, moreover, underlies the French *dualité de juridiction*, in which administrative judges organically attached to the executive are primarily competent to hear challenges to administrative action.

Historians and jurists, of course, have long understood that this strong reading does not comport well with reality. Jean Massot (chapter 24), a member of the French *Conseil d'Etat* for over four decades, notes how the French system of administrative justice 'progressively became both an extremely powerful judge and an institution at least as independent as its judicial counterparts'. Despite its Napoleonic origins, the *Conseil d'Etat* eventually woke up to the fact that '*juger c'est juger*' – to judge is to judge – as one leading member put it in the mid-nineteenth century (Vivien 1852). In other words, French administrative judges came to realize that, despite the potential impact of their rulings on administrative policymaking in the 'general interest', their office still required independence, procedural fairness, even a willingness to revisit certain aspects of the underlying administrative act in the interest of justice in the particular case.

This tension between administration and justice – between the policy prerogatives of the state pursuing regulatory programs, on the one hand, and the demands of justice in individual disputes, on the other – underlies all the contributions to this part.

Administrative litigation raises a set of questions familiar to any student of administrative law: Under what circumstances should we allow a private party to enlist the aid of an independent judge to rule on a dispute over administrative action? Who may seek that aid (standing)? When (timing)? On what issues (scope of review)? To what end (remedies)?

As with much else in this volume, the approaches that particular polities have taken to these questions are deeply bound up with historical choices in response to functional, political, and cultural demands. Thomas W. Merrill (chapter 23) begins with an analysis of the historical origins of the prevailing model of judicial review in the United States – what Americans call the 'appellate review' model – whose origins date from the early twentieth century. Inspired by the relationship between appellate and trial courts in civil litigation, this model divides the functions of agencies and judges on the basis of the (very rough) distinction between fact and law. The model has endured, Merrill posits, because it 'has proven sufficiently flexible to permit either passive deference or aggressive substitution of judgment, depending on whether courts agree with an agency's policy judgments. It has also proven sufficiently capacious to accommodate significant shifts over time in the conception of the relevant functions of agencies and courts.'

Jean Massot, by contrast, provides an insider's account of the 'office of the administrative judge' in France, focusing on its guarantees of independence as well as its substantive ambition to reconcile the rights of individuals with the 'general interest' represented by the state. Bodies like the French *Conseil d'Etat* exist in several continental European countries, exercising a dual role as both policy advisors to their governments as well as judges of their governments' administrative acts. This amalgam has given rise to a good deal of litigation before the European Court of Human Rights in Strasbourg, although recent, pragmatic adjustments on both sides have greatly reduced tensions. The ultimate acceptability of the dual role flows, Massot suggests, from the genuine independence of the *juridiction administrative* in overseeing the *administrative active*. This is particularly the case with regard to questions of law, where French administrative judges often raise issues on their own motion, even if not pressed by the parties.

The contributions of Peter Cane (chapter 25) and Paul Craig (chapter 26) offer counterpoints to Massot's contribution by examining forms of external review practiced in the broader common law world. Cane focuses on the unique mechanisms in Australia, which incorporate, in addition to judicial review on questions of law, a system of 'merits review'. Built into the administrative process itself – thus reflecting, perhaps, an Australian acknowledgment of the validity of *juger l'administration, c'est encore administrer* – the tribunals charged with merits review examine whether, all things considered, the challenged action is not merely legal but 'correct or preferable'. Cane then compares this system to the American, where forms of agency review are functionally similar to 'merits review', and the British, where there is a distinction between tribunal 'appeal' (on law and fact) and judicial 'review' (on law alone). This last distinction resonates with a contrast drawn by Massot regarding the role of the *Conseil d'Etat* as (sometimes) extending to *appel* on questions of law and fact though more generally being limited to *cassation* on errors of law alone.

Paul Craig examines external control of legal questions, comparing the approaches taken in the UK, US, Canada, and the EU. For American administrative lawyers, of course, judicial review of questions of law implicates the much debated *Chevron* doctrine,

which Craig uses as a pivot in his assessment of the frameworks developed elsewhere. What he uncovers, however, is not a crude civil law/common law divide (with the EU largely representing the former, and the UK, US, and Canada the latter). Rather, US and Canadian judges have developed approaches that favor deference, at least to some extent. UK judges, by contrast, seem to share the inclination of their more civilian colleagues in Europe, where the influence of French and German administrative justice is pervasive. Both UK and EU courts, he finds, unhesitatingly substitute their judgment for that of administrators on questions of law.

Cheng-Yi Huang (chapter 27) and Howard Fenton (chapter 28) consider the question of deference in emerging democracies. Huang's contribution explores recent developments in constitutional courts in Poland, Taiwan, and South Africa, echoing in some respects Kim Scheppele's discussion of Russia and Hungary from earlier in the volume. He notes how the transition to democracy after a period of dictatorship or authoritarianism often can trigger profound hostility to administrative power and unchecked legislative delegation. In Huang's account, this translates into judicial activism for constitutional courts in the early post-transition years. But consistent with Scheppele's insight, Huang's case studies reflect the eventual development of some degree of deference, as part of a convergence toward attitudes that prevail in some established democracies like the US.

This convergence, however, is hardly universal, as Howard Fenton's contribution on post-transition Ukraine shows. Fenton explains how judicial refusals to defer developed as a reaction to the administrative abuses of the Soviet era (though the resulting system might also reflect traces of civilian approaches as well). Nevertheless, the operation of the Ukrainian administrative courts is, in Fenton's telling, ultimately a cautionary tale. The approach to administrative litigation is disproportionate, he argues, to the demands of protecting individual rights in the face of state power. The situation is exacerbated by the lack of a statute governing administrative procedure. The lack of procedural standards and judicial hostility to deference in any form may, perversely, impede the development of an autonomous administrative professionalism that is essential in a modern mixed economy.

6. The boundaries of the state: public and private

Especially in countries with a civil law tradition, the distinction between public law and private law has been central to the development of administrative law. The common law tradition often obscured this boundary, but today all modern states recognize its existence in their efforts to construct a specifically public law. Given the existence of a distinctive public law everywhere, the move over the last several decades to privatize and contract out government services presents a particular challenge. What legal principles should apply to private bodies that carry out formerly public functions or that take on new tasks under contract? Will the trend toward the use of nominally private firms lead to the integration of public and private law, even in states, such as France and Germany, where the public law/private law distinction has deep historical roots? The chapters in this part raise these questions and provide some tentative answers.

As outlined by Daphne Barak-Erez (chapter 29), privatization has many meanings, but we highlight three salient ones derived from her more detailed taxonomy. First, in its strongest form, privatization means that the state exits entirely from a sector or

policy area leaving it governed only by the laws that regulate the actions of all private businesses and that frame private interactions. Second, a public utility may be converted into a private firm, with or without a 'golden share' remaining in state hands, and placed under the supervision of an independent regulatory agency. The agency itself is obviously a public law entity and may hold public hearings, comply with transparency requirements, and so forth. Thus, the private firm is essentially a private law entity that must subject itself to scrutiny by a specialized public law agency. Third, the state may decide that a nominally private firm must comply with some public law strictures in carrying out its business, even in the absence of oversight by a specific agency. Some of the proposals to resolve the financial crisis have taken that form. However, the most common examples occur when a private firm contracts with the government to provide a service – for example, in-patient care for the mentally ill, incarceration of prisoners, health care, security services such as guard duty. Here, the state explicitly requires the contractor to act in accord with public values by, for example, providing due process guarantees to applicants, operating with a level of transparency not usual in the private sector, or, in the national security context, complying with military norms and rules of behavior. This last category raises the most direct challenge to traditional public law/private law distinctions, especially in states with a civil law tradition. It also challenges libertarian presumptions about the inherent value of private enterprise compared to public bureaucracies as service providers.

Jean-Bernard Auby (chapter 30) discusses the way contracts with government can extend public values to private service-delivery firms, but he stresses the risks inherent in programs of private provision for formerly state-supplied services. These concerns have produced legal limits on contracting out in many countries, but they have also generated a range of responses – from careful contract drafting to self-regulatory mechanisms. Laura Dickinson (chapter 31) extends this analysis to the US military, often understood as beyond the scope of administrative law. She grounds her study in organizational theory by examining the relative impact of inside socialization and sanctions versus outside incentives in influencing behavior, a contrast with broader relevance beyond the specific case she examines. Dickinson shows how the existence of 'compliance agents' – in this case, military lawyers embedded with US troops – promote respect for public law values through their direct contact with commanders and troops in the field. In contrast, no such agents constrain the operations carried out by private military contractors. Whereas, in the military, legal norms are communicated by a mixture of persuasion and sanctions, neither occurs inside private organizations that carry out combat-related functions. She recommends that the military require private contractors to copy the regular military by employing lawyers with independent authority who would work to develop a culture supportive of public law values. Arm's-length contract terms are not sufficient to assure compliance with military values and law; actual institutional design matters in promoting the necessary organizational culture.

An important variant on the public/private divide arises if a regulated sector, such as banking and finance, is in private hands, but becomes a serious public policy concern in a crisis. If some of the firms are 'too big to fail', the state may intervene under emergency conditions. Irma E. Sandoval (chapter 32) and Giulio Napolitano (chapter 33) consider the role of the state vis-à-vis the private sector in the recent financial crisis. If past privatization and deregulation of the sector have left the state unable to respond in

a professional manner, the result may be a bailout or other crisis response that favors the politically well-connected. According to Sandoval, this is what occurred in both Mexico and the US. To her, the most dangerous combination is a politically weak government that can wield powerful policy tools. Napolitano makes a similar argument about the financial crisis and predicts that it will serve as a wake-up call to governments to strengthen the regulation and monitoring of key economic sectors.

Beyond appeals to values and norms, the contributions in this part support Barak-Erez's argument for a 'public law of privatization' that starts with a distinction between core government functions that ought not be privatized and those where the private sector can be brought in under some conditions. Debate over this issue should consider institutional competence and risks to human rights. As Dickinson argues, different organizational forms may be more or less equipped to instill public law norms. Administrative law must articulate a set of public law principles that ought to apply to some degree to all entities that carry out public policies.

These principles ought to distinguish among suppliers that provide standardized goods and services to public and private entities (for example, office supplies, asphalt roadways, computer systems); those that supply special-purpose products but do not deliver services (for example, weapons producers, dam builders); and those that supply the public services themselves (for example, incarceration of convicted felons, primary education, garbage collection, review of applicants for government benefits). Drawing the lines between these categories will not be easy, but each raises distinct issues. The first is governed by market pressures, and the law should assure that these pressures apply to government contracts and keep the process free of corruption and favoritism. The second requires greater attention both to the contracting process and to ongoing oversight, but the aim is essentially timely and cost-effective contracting.

Finally, if public/private relationships extend to the third category, the law needs to do more than to assure simple contract compliance and to place limits on waste and corruption. Here, the use of private entities is arguably only justified if they take on some of the characteristics of public agencies and hence are governed by administrative and constitutional law principles that apply to government bodies. This includes making policy in a transparent and participatory way, rather than operating behind closed doors to allocate contracts or other benefits to particular sectors. Furthermore, once private firms are selected to implement a public program, they should be subject to duties that are similar to those facing public bodies. The exact form these should take will depend upon the nature of the service provided and the operation of the overall private sector, but, in general, they should face requirements for transparency and reason-giving that mimic those in wholly public entities.

7. The boundaries of the state: transnational administration in the European Union

Some entities with regulatory authority operate beyond the state – perhaps internationally, like the GATT/WTO, or regionally and supranationally, like the EU. If their decisions affect rights and duties within states, how should we understand that power in legal terms? Should we understand it as a novel kind of 'constitutional' authority, perhaps of an emerging proto-state? Or is it best understood as a denationalized extension of 'administrative governance' on the national level? We do not pretend to answer these complex questions here, though we note that one of us has argued extensively for an

essentially 'administrative, not constitutional' understanding of denationalized regulatory power in the EU (Lindseth 2010; see also Lindseth 1999, 2006). Others have not gone so far. Nevertheless, there is no disputing that scholars are increasingly looking to administrative law as a framework for understanding the exercise of rulemaking and adjudicative power beyond the state (see, for example, Kingsbury et al. 2005; Hofmann and Türk 2006, 2009).

Nowhere is this truer than in the legal literature on the European Union, and it is for that reason that we conclude the volume with an examination of this entity as a case study in forms of denationalized administrative governance. George A. Bermann (chapter 34) opens the discussion, noting both the scope of the EU as a regulatory enterprise and the emergence of a legal literature analyzing it in administrative law terms. He then turns to the recently launched Research Network on EU Administrative Law (or 'ReNEUAL'). This project, designed by a group of leading European administrative law scholars, aims to draft a kind of 'restatement' or 'best practices' for administrative law in the EU. The demand for clarification is particularly acute where the EU and the Member States share competences and thus act as a form of 'integrated' national/supranational administration. Consequently, the ReNEUAL project will not only cover the administrative activities of EU bodies strictly speaking, but also those of national bodies implementing EU law. The project also extends to the EU's participation in a variety of international regulatory and enforcement schemes that can be understood in administrative law terms.

Daniel Kelemen (chapter 35) explores how the process of European integration has not only led to the development of a supranational EU administrative law, but also spurred a movement toward a deeply 'Europeanized' administrative law on the national level as well. This process of Europeanization has had an impact well beyond those domains where Member States explicitly implement EU law. Kelemen argues that European integration relies on a particular mode of governance – 'adversarial legalism' – a term coined by the American political scientist Robert Kagan (2001) to refer to the United States administrative process. Adversarial legalism combines centrally formulated prescriptive rules and a diffuse and fragmented process of enforcement which depends on judicial review to ensure compliance. Breaking from the traditional European regulatory model of 'closed networks of bureaucrats and regulated interests', Kelemen explores how '[t]he EU and the process of European integration have encouraged the spread of a European variant of adversarial legalism designed to harness national courts and private litigants for the decentralized enforcement of European law'. Given its decentralized character, the European Court of Justice (ECJ) has understandably sought to impose some measure of uniformity on national administrative processes in order to ensure effective enforcement of EU rules and standards.

Why might the Member States submit to the discipline of a relatively autonomous supranational body like the ECJ in this way? One response relates to the rationalist logic behind the establishment of supranational bodies in the first place. Generally they are understood both to reduce the costs of cooperation and coordination among multiple national principals, while also providing a mechanism to prevent their defection from treaty commitments. But national acquiescence is not just a consequence of this rationalist logic; rather, it is also accepted because Member States retain significant powers of oversight over the supranational policy process. Johannes Saurer (chapter 36) focuses on

one aspect of this oversight: the operation of 'networked accountability' in the specific case of EU agencies. In tension with interpretations that stress the 'federal' character of the integration phenomenon, Saurer argues that EU agencies are 'the most recent expression of European governance through administrative networks'.

Francesca Bignami (chapter 37) highlights a concern arising from the growth of transnational networks – the challenge of safeguarding individual rights as networks have spread. The network phenomenon, under which decision-making involves 'routine contacts among national civil servants', is increasingly global in its scope. Bignami explores the topic's implications by looking at its most developed example: transnational governance in the EU. 'Networks', Bignami summarizes, 'marry domestic bureaucratic capacity with transnational policy ambitions and thus fall at the intersection of a number of disciplines: administrative, criminal, and constitutional law, international law, public policy studies and international relations theory'. Her primary concern, however, is legal, focusing on the interplay between classic liberal rights (personal freedom, property rights, and other basic interests) and network decision-making that affects those rights. Most importantly, she explores how the dispersion of decisional power in networks means that one of the central concerns of traditional administrative law – the protection of the individual in the face of overreaching public power – becomes vastly more challenging in the transnational administrative context. In confronting this challenge on a more global scale, Bignami argues that the EU example, even with certain admitted complexities and drawbacks, may be still be helpful in developing models elsewhere.

Conclusions

Administrative law cannot avoid confrontations with politics. Perhaps even more than constitutional law, it frames the interaction between law and politics; it provides the conceptual vocabulary for their transformation over time in response to social change. This volume is about comparative public law in the broadest sense, using comparative administrative law as the point of entry.

In the Western tradition, administrative law initially reflected the growing distinction between state and society (public and private), and it mediated between those seemingly distinct realms. Over the course of the twentieth century, it served a similar mediating function as the regulatory state emerged. It flourished in the space opened up by the instability of the classic triad of legislative, executive, and judicial power. It came to define the often murky terrain between the institutions of government (in which those powers were purportedly 'constituted') and the diffuse and fragmented realm of regulation in all of its many manifestations. Today, throughout the world, at the borders between the private and public sectors and between nation states and transnational bodies, administrative law continues to be a realm of legal contestation and redefinition. It is not just about fair and transparent procedures; honest, hard-working officials; and the protection of individual rights, although these are all important. It also concerns the democratic legitimacy of government policymaking. A fair and open policymaking process helps democratic citizens hold modern government to account in the face of demands for delegation and regulation, both within and beyond the state. The contributions to this volume cover this range of topics from private rights as limits on public power, to the competent provision of services, to the fundamental legitimacy of delegated policymaking in a democracy.

In opting for this broad coverage, our aim is to break down boundaries between scholars, not only those from different national or legal traditions, but also from different disciplinary or doctrinal perspectives. One of us has a background in economics and political science (Rose-Ackerman); the other in the legal and social history of the state (Lindseth). We meet on the common ground of comparative administrative law and regulatory practice. The legal scholarship represented here is diverse, drawing from constitutional law, state and local government law, regulated industries, European integration, transnational litigation, public international law, as well as administrative law more traditionally conceived. The contributions range territorially over Europe (both east and west), the three major countries of North America (Canada, Mexico, and the US), several leading East Asian states (China, Japan, South Korea, and Taiwan), as well as major states in Africa and South America (South Africa and Brazil). And though the overall coverage has an undoubted North Atlantic tilt, we hope that the volume provides a usable framework for future comparative research and dialogue, perhaps bringing in developments from parts of the world not represented here, such as South Asia or the Middle East.

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PART 1

HISTORICAL PERSPECTIVES

1 *Révolution*, *Rechtsstaat*, and the Rule of Law: historical reflections on the emergence of administrative law in Europe

*Bernardo Sordi**

The history of administrative law in Europe reflects the emergence and evolution of administrative power within the nation state over the last two and half centuries. Several broad comparative questions arise: In what ways have the various paths to *droit administratif* in France or *Verwaltungsrecht* in Germany converged or diverged from the path to *administrative law* in England (and later America)? Similarly, how have the German or French paths to the *Rechtsstaat* or the *État de droit*, respectively, converged or diverged from the Anglo-American path to the *Rule of Law*?

Providing intelligible answers to these questions is a difficult challenge. The developments under discussion are at once specifically national and, at the same time, so broad and complex as perhaps to elude effective comparison, at least in the minds of some readers. It is therefore advisable to circumscribe both the questions and the possible answers, as well as to establish chronological limits.

The particular routes to *droit administratif*, *Verwaltungsrecht*, or *administrative law* must be understood in light of the various processes of State-formation and the different constitutional histories of the countries concerned. Nevertheless, no State-building process mechanistically translates into a particular system of administrative law. The history of State-formation in Europe proceeded not merely according to its own specific tempos but also on a different factual level from the conceptual and legal representations of those changes. In our analysis of the conceptual and the legal, we perceive the State only in silhouette, through ideal types – the *Rechtsstaat*/*Etat de droit* as well as the *Rule of Law* – which serve as conceptual abstractions and descriptive syntheses of complex institutional orders that are imbued with important ideological implications.

This methodological caveat should caution us against jumping to conclusions. Thus, we must not assume that the use of 'administrative' terminology to represent State power in Germany or France compared to its relative absence in England and America (at least prior to the twentieth century) corresponds to State 'strength' in the former and State 'weakness' in the latter. There is no necessary correlation between hierarchical administrative institutions and a State's capacity to govern a very large territory effectively (see, for example, Novak 2008).

Thus, the divergences and convergences we trace are limited to the States' *legal orders*, and do not extend to the underlying history of State power per se. Our analysis only seeks to explain the way administrative law varies over time and space at the conceptual

* These reflections build on Mannori and Sordi 2009; for further references and discussion, see Mannori and Sordi 2001.

level. We do not deal with the distinct issue of the presence or absence of hierarchical bureaucratic structures along the lines of Weber's famous model. Our aim here is simply to define the different juridical forms within which the institutional enterprises that we call States emerged historically in Europe.

A second, chronological, premise flows from the first. The conscious emergence of powers, tasks, or laws considered as 'administrative' is a relatively recent phenomenon, something reflected in the historical development of languages, lexicons, and concepts. In France, for example, the terms *administration publique* and *bureaucratie* did not become widely used before 1750, and *droit administratif* did not make its first appearance until the early years of the nineteenth century. Moreover, *Verwaltungsrecht* in Germany did not appear until well into the nineteenth century. *Administrative law* in the English-speaking world arguably did not emerge as a distinct conceptual domain until the twentieth. The development of administrative power or administrative law has its own history, which is not necessarily coterminous with history of forms of public authority. Rather, the emergence of a specifically administrative power or law is intrinsically a modern phenomenon, dating back no more than two hundred years or so.

Thus, the questions that this chapter raises only make sense for the past two centuries: for the nineteenth century, in which an identifiably administrative space, as well as corresponding understandings of administrative power and law, emerged; and for the twentieth century, in which the vast expansion of administrative personnel, responsibilities, organizations, and establishments (including, perhaps most importantly, the diffusion of public services and of social administration) became an inescapable feature of modern governance. It is precisely in this time span that the divergences and convergences between the different paths of State-formation become noticeable and measurable.

1. *Révolution*: the fracture line at the origin of administrative modernity in Europe

At least since the publication of Tocqueville's 1856 masterpiece, *L'Ancien Régime et la Révolution*, scholars have raised questions about the continuity or discontinuity across the divide marked by 1789. In one of his most famous passages, Tocqueville himself asked whether Richelieu would have been pleased with 'the new order of things' emerging in the first year of the Revolution (Tocqueville 1969: 96). To what extent did the administrative inheritance of the *ancien régime* continue to condition institutional and legal decisions throughout the Revolutionary decade and after? Even today, the question of continuity still fascinates scholars, reflected in the rich historiography on the slow and seemingly irresistible transformation from the old normative and conceptual universe of *police* and *Polizei* that took place throughout continental Europe over the second half of the eighteenth century. It was during this period that this conceptual universe definitively lost its unitary nature, occupied instead by rigidly differentiated disciplines and distinct institutions: politics, public administration, the police force, etc.

In reflecting on the emergence of 'administrative' power, it would of course be senseless to search for the origins of particular public functions (say, defense of the territory, the guarantee of public safety internally, or the management of public properties). This effort would soon devolve into a *regressum in infinitum* toward primitive political communities, thus preventing an effective distinction between pre-modern and modern. The question we must ask ourselves is of a different sort: at what point do state functions

become broadly perceived as 'administrative', separated from other forms of public power, like defense and public order?

To mark the emergence of administrative power as such, we have nothing comparable to the seemingly precise dates in history (for example, during the American or French Revolutions) when a 'constituent' power – the 'Nation', or the 'people' – purported to abrogate a *constitution ancienne*, proclaiming the principle of legal equality in place of centuries-old hierarchies and corporatist distinctions. We also have nothing comparable to the adoption of a new *code civil* that, in much of continental Europe at least, purported to displace a legal order that was so ancient and complex that it contained elements of Roman law, general and local *coutûmes*, royal *ordonnances*, municipal and corporatist statutes, as well as *arrêts de règlement* issued by the myriad jurisdictional powers that operated in the old order. Administrative power is deeply imbricated, rather, in concrete institutions as well as in their evolution over time; it does not live solely in a legal, conceptual or constitutional dimension. Precisely for this reason, it lends itself to substantial diversity and opens itself up to divergent paths of development.

The emergence of administrative power, which was closely followed by that of administrative law, unfolded over a longer time span, which undoubtedly included the Revolutionary decade and a good portion of the Napoleonic era. However, as compared to notions of legal individualism or citizenship that emerged with the Revolution specifically, administrative power cannot separate itself as sharply from its roots under the *ancien régime*. Indeed, at the end of the seventeenth century, an *ancien régime* jurist like Jean Domat could classify public powers in a triad of *justice, police, finance* (Domat 1756: II, I, I, 15, p. 151), symbolizing the growing complexity of the absolute monarchy and the first significant exercises of sovereignty over corporatist society. Administrative power and law, therefore, undoubtedly have an ancient soul, deeply bound up with the capacity of political absolutism to govern.

And yet, in the legal universe of the *ancien régime*, the power of command generally remained firmly in the hands of ordinary judicial jurisdictions. Governance in old Europe was very much *juridictionnel* – that is, tied to the vast array of adjudicative bodies – even as the bureaucratic apparatus of the emergent absolute monarchies expanded. This situation eventually gave rise to a political and legal dialectic between *justice* and what would, by the mid 1700s, come to be defined as *administration publique*. This dialectical tension intensified as the old regime monarchy and corporate society progressively extended forms of social discipline through an increasingly elaborate regulatory system (Oestreich 1969). New forms of *gouvernamentalité* (Foucault 1994) or *arts de gouverner* (Senellart 1995) emerged in the eighteenth century, marked by an intense and completely new regulatory attention to the population and the territory as a whole. In particular, the use of *arithmétique politique* became more widespread, intended to quantify and measure activity as a necessary precondition to the development of new forms of regulatory intervention.

Thus, insofar as *administration publique* was concerned, the Revolution of 1789 did not so much *invent* as it *catalyzed*. It reformulated institutional and conceptual materials that had sedimented at least since of the middle of the seventeenth century. But in breaking definitively and abruptly with the old corporatist order, the French Revolution also marked a critically important fracture line. The Revolution radically overturned the organization, functions, and conceptual-legal vocabulary of the old regime. In so

doing, it lacerated the old uniformity and gave rise to many of the divergences that are the object of our study.

'The gigantic broom of the French Revolution', as Marx called it (1973: 218) also operated with great intensity on the terrain of administration, marking an irreversible point of no return. Novelties in social and political organization – most importantly the abolition of corporate bodies and the creation of a single class of citizens – loom importantly in our analysis: As Tocqueville put it, 'equality facilitates the exercise of power' (1969: 98). In the place of the old corporate order, an enormous empty space emerged between the State and the individual citizen, artificially conceived as isolated. The *Assemblée Constituante* replaced the old institutional patchwork of gothic overlaps with an ordered, thorough, and hierarchical pyramid of districts and apparatuses, seemingly geometrical in their dimension, organization and function. The old *société de sociétés* (Portalis 1999: 14) disappeared for good. The State as 'political island' (Grossi 2006: 94) conquered the center of power once and for all, and became the exclusive artificer of the legal and institutional order.

It is precisely this 'State island' that would henceforth take on the tasks that had previously been distributed among a multitude of corporate bodies which, together with the prince, had comprised the old institutional order. The composite monarchy of the past, with its heavy reliance on corporatist adjudication, would make way for a machine State with its own institutional capacities, pursuing its own tasks and its own interests. Political obligation became simpler: henceforth, the institutional map encompassed only two 'islands', that of the State, on one hand, and that of the citizen, on the other, which occupied and shared the political space.

It is at this point that one sees the birth of 'administration' in a continental European sense. It contrasted with 'justice', proclaimed generically in article. 16 of the Declaration of Rights of Man, where a first equation of rights and powers appeared (Clavero 2007: 31). It then constructed itself both functionally and organizationally over the course of several years. That construction, in fact, began simultaneously with the disappearance of the *ancien régime*, with the decree concerning the institution of primary assemblies and administrative assemblies of December 22, 1789. It continued throughout the Revolutionary and Imperial periods, by the law of August 16–24, 1790 prohibiting ordinary judicial courts from reviewing administrative acts, the first regulations attributing jurisdiction of the *affaires contentieuses* to the administration and, finally, the law of 28 Pluviôse, Year VIII (February 17, 1800) concerning the division of French territory and the administration. Each of these acts helped to shape the specificity and subjectivity of administration as a separate and distinct form of public power. The functional categories that today define our present way of interpreting public authority, the categories of *legis latio* and *legis executio*, also emerged, extending beyond the simple distinction between law and justice, between normative power and its jurisdictional application. The space for an *administration générale de l'État* thus definitively emerged, which for the first time is understood as autonomous, irreversibly replacing the substantive and institutional distinctions of the *ancien régime*.

Parallel to this new modality in the exercise of sovereign power which the Revolution defined as administrative, a new manner of describing and conceptualizing public power took hold, radically different from the old notions. The French Revolution went beyond a simple constitutional acknowledgement of the subjective rights of an

administrative power that had existed since the formation of the modern State. This traditional nineteenth-century reading of the transformation of the *Polizeistaat* into the *Rechtsstaat* (something we take up in the next section) did not fully grasp how the exercise of sovereignty by the State led to the suppression of corporate society. In particular, this traditional reading did not adequately capture the monopolistic concentration of public tasks in the hands of the new institutional subject. 'Administrative power' and 'administrative law', that is, the new authority and its legal limitation, emerged contemporaneously. Defining in legal terms the contours of this new power became essential to the exercise of sovereignty by the nation. The shift from corporatist society to liberal society required a machine State with the effectiveness and the '*rapidité du fluide électrique*' (Chaptal 1800). It also required the invention of new institutional and legal guarantees, first and foremost, administrative justice. Finally, it entailed a new dialectic between center and periphery, seeking legal uniformity and control, while also allowing for decentralized spaces.

However one chooses to interpret the link between the *ancien régime* inheritance and the Revolutionary novelties, the historiography unanimously acknowledges that administrative law makes its first appearance in the strategic passage out of the late eighteenth century. It then fully unfolds in the nineteenth century, which throughout the European continent becomes 'the century of administration (*Verwaltung*) and the emergence of administrative law (*Verwaltungsrecht*)' (Stolleis 1992: 229). Indeed, even within the common law world, one begins to see 'the origin of an administrative law endowed with autonomy . . . in the ambit of liberal constitutionalism' (Schiera 2009).

But it was in France, in particular, that *le moment napoléonien* would mark the definitive emergence of *droit administratif* (Bigot 2003: 108), with the birth of the *contentieux administratif* and the new regime of administrative acts. Justice and administration were firmly divided, separated. *Juger l'administration c'est encore administrer* ('to judge the administration is still to administer') became the basic principle of this early stage in the development of French administrative law. For the ordinary courts, judicial review of the administrative action was impossible: the ordinary judge could only adjudicate civil and penal cases. A centralized administration, endowed with its own adjudicative capacities, guided and controlled a country that Tocqueville described as an equal surface. The State stood over the society. And in that 'State island' which instituted and regulated the entire social fabric, administrative power became the central axis of the government of the territory. Modernity henceforth had the unmistakable seal of administration.

The epoch-making transformation of the Revolution and the Napoleonic era swept away the many old social and political elements that had become irreconcilable with the new totally equal surface in a Tocquevillean sense, giving rise in particular to a new concept of separation of powers. Montesquieu, in his classical declination of a half-century before, distinguished between 'the executive with respect to things dependent on the law of nations' (peace, war, diplomacy) and 'the executive in regard to matters that depend on the civil law', or rather civil and penal jurisdiction (Montesquieu 1914: XI, 6). But after the Revolution and Napoleonic era, a subject of a new type interposed itself between 'the general order of the State' and jurisdiction, baptized for the first time as *administration générale de l'État*. This new subject assumed the multitude of regulatory tasks that the prince and the corporate bodies of the *ancien régime* had previously divided between them. Administrative power and law now appeared as an irreplaceable

pilaster, on the continent, of the entire liberal society: 'une des formes de l'État nouveau du monde; nous l'appelons le système français; c'est le système moderne qu'il faut dire' (Tocqueville 1866: 73).

2. *Rechtsstaat*: the German conceptual contribution and the legal limits of administrative power

Even in countries like Prussia and Austria, which were seemingly immune from the more radical revolutionary developments taking place in France, there were pressures toward the development of administration and administrative law. Rather than abrupt revolutionary turns, however, Prussia and Austria witnessed the slow advance of reforms. As in France, these reforms began in the mid eighteenth century and gathered momentum in the context of the Napoleonic wars. But unlike France, there were no clear constitutional ruptures, no overthrow of the existing corporate order, at least not immediately. On the level of legal language, the transformation was also less pronounced: indeed, well into the nineteenth century, the new language of administrative law continued to coexist with older conceptual vocabularies and traditions, first and foremost the eighteenth-century notion of *Polizeiwissenschaft* (Police science).

It is precisely over the first half of the nineteenth century that the contradistinction between civil law and common law countries became ever more pronounced on the administrative terrain. Once the idea of administration as a power of the State over society gained widespread acceptance, the European continent witnessed a profound reconsideration of the nature of political obligation, which became centered on the State-citizen relationship and the authority-freedom dialectic. A new theme emerged, that of legal guarantees for society and the individual in the face of the State's claims to pre-eminence. The end of the Revolution indeed left a formidable administrative machine on the institutional landscape, endowed with a vast and unprecedented number of imperative powers to dispose of the properties and freedom of private parties. At the same time, administration emerged as, on the one hand, an irreplaceable support of an atomized and dispersed society suddenly deprived of its centuries-old corporative ties, but, on the other, an equally pressing danger for individual rights. In a word, nineteenth-century administration served as both condition for, and menace to, the freedom of the moderns.

Everything that the Revolution left unsaid slowly acquired centrality: the need to define legal bounds and guarantees within the confines of a system of administrative 'justice' worthy of the name. Most importantly, it became necessary to develop means whereby liberal society could defend itself against the absolutely unprecedented concentration of powers in the State. Political freedom certainly did not exclude administrative despotism. On the contrary, as Tocqueville observed in *Démocratie en Amérique* (with a pinch of regret for the pluralist order displaced by the revolutionary fracture), it is precisely 'those democratic peoples which have introduced freedom in the sphere of politics' who also increased 'despotism in the administrative sphere' (Tocqueville 1994: 694). When he wrote these words in 1840, his real target was the French rather than the American situation. He continued that 'all these various rights which have been successively wrested in our time from classes, corporations, and individuals have not been used to create new secondary powers on a more democratic basis, but have invariably been concentrated in the hands of the government' (Tocqueville 1994: 680). The result was 'a constitution [that was] republican in its head and ultra monarchial in all its parts', which

in Tocqueville's eyes was 'an ephemeral monstrosity' (Tocqueville 1994: 694). Thus, administration – the irreplaceable cornerstone of the democracy of the moderns – took on extensive discretionary powers, endangering the rights of citizens.

Understandably, much of nineteenth-century legal development, at least in the realm of administration, focused on checking powers, functions and offices. Drastic amputations of responsibilities and functions were felt necessary; new balances between center and periphery were understood to be needed to temper the unbearable administrative centralism; and substantial restitutions to the social sphere were urged, mostly in vain, in order to escape the providential crutches of the State. Calls for decentralization were recurrent in liberal European society from the 1830s onward. There was a palpable desire to re-establish relationships between society, territory, and public power that were less artificial and mechanical than in the Napoleonic era, and therefore more solid and profound. Concerns were less about the lack of democratic control than about the administration's seeming separateness from society, most importantly from the influence of local notables. Adding to the atmosphere of liberal anxiety was the rise of the 'social question' – the increasing tensions between the working classes and the bourgeoisie in a period of industrialization and urbanization – which made itself felt both in the revolutions of 1848, and then later in the Paris Commune of 1871, posing a challenge to the precarious liberal hegemony.

The inexorable development of administrative power, as well as its magmatic character due to its very recent emergence, captured the attention of jurists and politicians. Old representations of power were set aside; new typological models emerged. Most importantly, continental jurists developed the idea of the *Rechtsstaat* (Stolleis 1982), a new theoretical lemma which originated in German doctrine but rapidly found equivalent expressions in other continental European legal languages (*Stato di diritto*, *État de droit*, *Estado de derecho*). This typological model sought to reconcile the new 'laws of freedom' (Kant 1991: 129) with the eclipse of the judicial regimes of the old order and the full deployment of State sovereignty via administrative power that emerged in the Revolutionary and Napoleonic eras. In German legal culture, from Kant to Mohl, from Stahl to Gerber, from Bähr to Gneist (see Stolleis 1992) – indeed, in continental legal culture as a whole – the *Rechtsstaat* expressed both the new demand for guarantees as well as the acknowledgment of the irrevocable transformations since the end of the eighteenth century. The goal was to circumscribe the enormous power that executive administrations had conquered with the French Revolution and the Napoleonic era.

The notion of *Rechtsstaat* sought to reconcile the 'freedom of the State' with that of the citizen; it attempted to make the primacy of the administration compatible with the respect for individual guarantees. It reflected the broadly accepted idea that power and freedom developed symbiotically. The *Rechtsstaat* was thus never understood as a spontaneous, natural order, pre-existent to power. The legal order that this notion sought to describe was very much a State order. And the principal guarantee of rights it contemplated would be through positive law, most importantly legislation. The challenge of limiting power was hardly new, but the *Rechtsstaat* implied new methods of mediating between power and freedom, and thus new techniques of limiting authority. The guarantees invoked in the early nineteenth century were very different from the guarantees typical of the old order. Gone were the intrinsic inequality and historical particularism of old-regime rights, pre-existing the State. Henceforth, rights would cohabit with a

sovereignty personified by the centrality of legislation. Indeed, rights were understood to have no existence without recognition by the legislative power, and legislation becomes the principal guarantee of rights. Hence the increasing importance of the principle of legality in *Verwaltungsrecht*: from this moment onward, the prerequisite for every manifestation of authority was the legal source.

The problem of administrative legality was one that the Revolution left substantially open. It was also one that the Napoleonic construction considerably aggravated, particularly with its assertion of the general immunity of administration from judicial control. Definitively separated from justice, administrative power achieved an overall authority and institutional centrality to such an extent that many began to see it as the very 'essence of the State' (see Ranelletti 1912: 279 and the bitter objections of Kelsen 1968: 2, 1647). Administration's claims to freedom and autonomy were subject to few legal checks, resistant to all possibility of codification, or to the control of the ordinary courts. Even in French legal culture, which defined administration as *exécution des lois* (implying, in some sense, a degree of subordination to the legislator), leading commentators stressed the active, vital, and autonomous qualities of administrative power (see, for example, Macarel 1848: 11). As the direct interpreter of the general interest, Vivien argued that 'administration needs air and space; liberty is its lifeblood' (1852: I, 122).

It was therefore the task of nineteenth-century legal doctrine to conceptualize administration both as a power and as a field needing legal bounds. Administrative legality came to be understood as an essential guarantee of freedom. As numerous commentators reiterated in different national contexts over the course of the nineteenth century, from Barthold Georg Niebuhr to Rudolf von Gneist to Silvio Spaventa, up to the American Woodrow Wilson: 'liberty depends incomparably more upon administration than upon constitution' (Wilson 1887: 211). This was a significant affirmation. On the one hand, it pointed to the fact that, in Europe at least, constitutional review of legislation was still a distant goal. On the other hand, it suggested that it was in the administrative context, where the construction of power was strongest and most incisive, that the provision of efficient rights guarantees was perceived as the most urgent task. The legal control of administrative action, by increasingly court-like administrative tribunals, became the banner of the century: in the administrative universe, power and freedom did indeed advance hand in hand.

It was precisely in this search for a kind of judicial review of administrative action that the ideal of the *Rechtsstaat* acted as a force for institutional modernization. Administrative justice stood as a guarantee of legality, as a mechanism to ensure the administration's conformity to the law. But because administrative action was immune from the control of the ordinary courts, administrative justice would not, strictly speaking, entail 'judicial review'. Rather, the continental interpretation of the separation of powers required the establishment of a new, specifically 'administrative' judge, one who was often organically attached to the executive (as with the French *Conseil d'Etat*), or at least separate from the ordinary courts.

In sum, we can say that the continental model of the *Rechtsstaat* entailed three fundamental elements: the supremacy of the legislative power; the existence of a strong administrative power; the existence of a special judge for administrative matters. On the level of the concrete enunciation of public functions, the course taken by continental Europe

therefore presents several conspicuous particularities. We can attempt to measure them with respect to the English evolution, conscious of the fact that distinguishing between civil law countries and common law countries does not exclude important convergences, especially on the level of typological models, where the effects of the shared individualist universe are stronger. There is no doubt that, beneath the marked national individualities, the diverse declensions of liberal constitutionalism reveal important common matrices.

3. Rule of Law: the Anglo-American variant in the law of administration

At first glance, the English path diverged sharply from the continental route, whether measured by the abrupt changes engendered by the French Revolution, or the slow progression of reforms in the Austrian-German context. Rather, the English process of constitutional modernization was much older, the process of displacing corporative pluralism in favor of a more individualist order was slower and arguably less painful, and the primacy of Parliament was more deeply rooted and undisputed. The construction of a modern public authority thus proceeded in parallel rather than in conflict with the expansion of political participation, which conserved and transformed, but did not deny, the old pluralism of freedoms. The pre-eminent vocation of the State could thus still be to mediate between divergent interests rather than express unitary values. 'Justice' associated with the common law courts, rather than absolutist 'administration', arguably remained central.

For its part, 'the importance given to institutional continuity within the common law habit of thinking' was essential to the 'Whig fundamentalism' that was by far the prevailing interpretation of English constitutionalism, in turn expressed in the 'high degree of cohesion within the governing class' (Loughlin 2009: 156, 163). As a consequence, England rejected fracture lines that were taking shape in continental history. The peculiarities of the English State, on one hand, combined with a very resistant way of thinking, on the other, represented an insurmountable barrier to the development of an administrative apparatus on the continental model. The old and traditional judicial model for the exercise of public power did not lend itself to radical transformation; moreover, there was no similar lexical revolution in England as occurred on the continent with the end of the eighteenth century.

And yet, in England too, the nineteenth century saw an administrative space progressively take root, prompted by the demands and problems that exploded with the Industrial Revolution. This space emerged gradually, in perhaps a confused and disorderly manner, in response to specific and concrete problems posed by a rapid urbanization, the emergence of the social question, and the need to regulate the socio-economic relations that broke sharply with the past (reflected on the constitutional level in the increasingly more insistent pressures to extend suffrage). Case-by-case, through a process of learning by experience, an administrative apparatus developed, which focused variously on the regulation of work, railways, health, public education, and poor relief. Thus, in England too, 'administration' – even if not understood in a continental sense – began to flank the traditional judicial apparatus. 'The great body of such changes were natural answers to concrete day-to-day problems, pressed eventually to the surface by the sheer exigencies of the case' (MacDonagh 1958: 65). Built either by statute or regulatory authority shifted to the executive ('delegated legislation'), England saw the creation

of a broader network of administrative authorities having executive prerogatives and discretionary powers.

The appearance of a functionally driven and unplanned administrative centralization, with the institution of the first boards and central departments, as well as the birth of administrative forms of adjudication beyond the purview of the common law courts, increasingly displaced Parliament as the hinge between the central and local government, and complicated the traditional judicial model of exercise of public power. Nevertheless, these developments did not impose an epochal change in the State organization or the adoption of new legal categories comparable to the French *administration publique* or to the *Staatsgewalt* of the German tradition. Instead, they were generally regarded as exceptional, inserted among the consolidated principles of common law governance. Even local government in England, though heavily influenced since the early Victorian Age by the profound functional transformations affecting both State and society more generally, conserved features of strong continuity with the previous territorial constitution. England gradually grafted administrative novelties onto the fabric of common law, updating but not altering the furrow of tradition and the relative conceptual universe.

Most importantly, England did not establish a specifically 'administrative' judge whose constitutional function would be to defend administrative prerogatives. It was thus unnecessary to alter the traditional way of thinking, which regarded the common law courts as the pre-eminent defenders of the 'Rule of Law', to which all litigants, including the executive, must submit. Indeed, in nineteenth-century England, the very idea of the Rule of Law emerged in legal scholarship explicitly to delimit administrative powers analogous to those of the continent. In this, the idea of the Rule of Law ironically shared much with the *Rechtsstaat*: both sought to reconcile State sovereignty with the need for legal guarantees of individual rights, and both acknowledged a general presumption of freedom, as well as the primacy of individual property. Indeed, both the *Rechtsstaat* and the Rule of Law acknowledged the primacy of legislation: in the first case, as the expression of the sovereignty of the State, and in the second as the expression of 'Parliamentary Sovereignty' – 'the sovereign and uncontrollable authority' of Parliament, as Blackstone had long before put it (Blackstone 1884: 159). Finally, both reflected considerable prudence toward what appeared a dangerous democratic drift, certainly in terms of the generalization of political rights, but also in terms of social rights, whose development remained far in the future.

Strong divergences remained, however. The continental concept of *Rechtsstaat* referred to a State that stood above society, instituting and rationalizing the social sphere, privileging the legislative over customary law, entrusting absolute centrality to codification. The *Rechtsstaat* was also a markedly administrative State, as we have seen, manifesting this axiom in continental legal science: 'one can conceive of a despot who governs without laws and without judges, but a State without an administration would be anarchy' (Jellinek 1914: 612). On the continent, the centrality of administration translated into the idea that the administrative sphere expressed the very essence and continuity of the State's sovereignty. It did so on the level of organization, by means of centralized administrative control of the periphery. It did so on the level of law, through the regime of the *acte administratif* and *justice administrative*, which prevailed in the face of contrary claims of common law and judicial authority exercised by the ordinary courts.

The Rule of Law in England, by contrast, confirmed itself as a purely and typically judicial regime in which the omnipotence of Parliament, though formally acknowledged, needed to compromise with the substantial intangibility of the 'common law of the land', in which the execution of the law and respect for common law rights was still essentially the duty of the jurisdictional function. As a consequence, an administrative sphere distinct from the legislative and the judicial powers, one capable of affecting the rights of citizens, encountered a number of legal-conceptual obstacles in its struggle to emerge. It was no coincidence that only in the English milieu did the common law courts succeed in monopolizing (at least well into the twentieth century) the forms of judicial defense before public power, preserving the unity of jurisdiction. On the organizational level, the greater weight of local government, with its separate functionaries, duties, and financial autonomy, along with a persistent non-bureaucratic ideal of self-government, drastically marked the limits of the dimensions and activity of the central administration and impeded the bureaucratization of the civil service. This explains why, from John Stuart Mill to Walter Bagehot, nineteenth-century commentators classified the English system as a non-bureaucratic order, viewing bureaucracy as a typically continental creature.

Even in the late nineteenth century, when the gap between the continental administrative regime and the persistent English judicial regime closed considerably, Dicey 'emphasized, not the state, but the "ordinary law" applied by the "ordinary law courts" as the cornerstone of the English system (Allison 1996: 72). Dicey expressly grounded his understanding of the English constitution in what he discerned as the three founding principles of the Rule of Law: first, 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power', which excludes 'the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government'; second, the 'universal subjection of all classes to one law administered by the ordinary courts'; and finally, the preservation of 'the rights of individuals' via the negation of any *droit administratif* in England (Dicey 1959: part 2, chapters 4 and 12). The historian F.W. Maitland was considerably more cognizant than Dicey of the increasingly administrative character of Victorian governance (Maitland 1908: 505); nevertheless, he too reaffirmed the English divergence from the path of the *Rechtsstaat*, which depended primarily on the absence of a process of bureaucratization comparable to that on the continent. According to Maitland, in England 'we have no practical experience of a *Polizeistaat* or *Beamtenstaat*' (1987: XLIII). Continental jurists, by contrast, unvaryingly conjugated the *Rechtsstaat* with the existence of a system of separate administrative judges, now recognized as the cornerstone of the administrative regime. In the most famous handbook of administrative law of Wilhelmine Germany, Otto Mayer could thus identify the *Rechtsstaat* precisely with the State of 'a well-ordered administrative law' (Mayer 1924, vol. 1, 58).

And yet, in England, too, by the end of the nineteenth century, the progress toward an 'administrative law' worthy of the name was a reality that observers found increasingly hard to ignore as a consequence of intense functional pressures on the State. As Woodrow Wilson put it in 1887, in terms that applied equally well to the English case: 'the functions of government are becoming every day more complex and difficult; they are also vastly multiplying in number' (Wilson 1887: 200). England, like its common law *confrère* across the Atlantic, was quickly filling the 'hole in the U.S. Constitution'

where administration might have been (Mashaw 2006: 1266), as a consequence of nearly a century of institutional and regulatory experimentalism. Like Wilson, Maitland also saw that 'year by year the subordinate government of England was becoming more and more important' (Maitland 1908: 501). To use Dicey's chronology, England had passed from Benthamism or individualism to the age of collectivism. The powers of the government had grown, administrative organization had become more complex, and a stricter discipline of the civil service was needed.

Even if the legal culture still bore traces of Dicey's negationist interpretation (most importantly, the primacy of the ordinary law courts), administrative law began to claim its own academic and scientific visibility, driven by the demands for regulation and public services required by a complex and increasingly more articulated society. Indeed, in 1915, Dicey published 'The Development of Administrative Law in England', acknowledging the emergence of a distinct legal regime, particularly with the launching of social security legislation. At the dawn of the twentieth century, many commentators came to view administrative law less in the old Diceyan terms as an instrument of despotism than as 'a social institution existing for social ends' (Robson 1928: 31), capable of supporting the pressing demands for social progress. At the same time, the old Diceyan orthodoxy gave way to critiques of the common law of property and contract as a means of social regulation (McLean 2009). Interest in administrative law as a distinct legal field became increasingly evident on both sides of the Atlantic, for example in the group of scholars at the London School of Economics directed by William Beveridge, including Harold Laski, William Robson, and Ivor Jennings; or among the first American specialists in administrative law, including Richard Goodnow, Ernst Freund, Bruce Wyman, and Felix Frankfurter.

Nevertheless, particularly in England, the influence of Dicey's interpretation remained immense well through the interwar period, reflected in Lord Hewart's infamous 1929 diatribe, *The New Despotism*, as well as in aspects of the report of the Donoughmore Committee in 1932 (see Lindseth 2005). Perhaps this was due to the fact that, on the English side of the Channel, there had never been any constituent upheaval, never any constitutional repudiation of the jurisdictional State, never a clean separation between justice and administration that was central to the Revolutionary-Napoleonic model. Rather, in England, only the regulatory demands of industrial society progressively forced the supersession of a judicial conception of social governance. In such an environment, the absence of an administrative judge as well as the continued 'generality or universality of the rules of private law' ensured that administrative governance would continue to be seen as 'a series of unfortunate exceptions' (Mitchell 1965: 96), preventing a systematic development of a conception of administrative law on the continental model. It would not be until the emergence of the Welfare State in England after 1945 that an administrative law, clearly designated as such, would definitively emerge.

Conclusion

The English and continental paths to the development of a law of administration reflect different points of departure, paths of development, and conceptions of legitimate governance that can be traced at least to the end of the eighteenth century. And yet, by the outset of the twentieth century, the force of functional change had increasingly led to a kind of convergence in the conceptual framework of administrative law, one that was

hardly complete, but no doubt discernible. In this sense, Dicey's famous 1915 essay on the emergence of administrative law in England was correct: it was no longer possible to deny that 'a body of administrative law *resembling in spirit, though certainly by no means identical* with the administrative law (*droit administratif*) . . . of France' was now apparent in England (1915: 148) (emphasis added). Divergences of course still remained, as this volume will no doubt elaborate, between the postwar *État providence*, *Sozialstaat*, and Welfare State. And once we add into the picture the notion of Regulatory State from across the Atlantic, we understand that, even with significant convergences in the twentieth century, different national experiences, with their divergent institutional paths, would remain of considerable importance.

Only over the last several decades have we witnessed, in the circulation of models of public authority throughout the world, an increasing effort to reconcile continental and common law traditions. In this process, the functional and political demands of increased global trade have played a significant role. *Droit administratif* has narrowed its radius of application, while also rediscovering judicial and procedural outlooks of a seemingly more Anglo-American character. In place of administration grounded in the idea of *service public*, one sees increased privatization and regulation. On the other hand, Anglo-American administrative law increasingly distanced itself from its underpinnings in the common law, focusing instead on the prerogatives of general regulatory power in the face of social change. Globalization and the present economic crisis have further focused the attention of jurists on the still extremely fragmentary answers to global economic, political, and regulatory problems. Today, all administrative law traditions face the same challenge: to offer global answers to problems of the public regulation of markets and society that now often transcend the national borders in which the particular traditions of administrative law had previously developed.

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2 Explaining administrative law: reflections on federal administrative law in nineteenth century America

Jerry L. Mashaw

Historians of administrative law, including several contributors to this volume, address the same general question: What explains the emergence of a 'law of administration' in its various forms across different nation states? While hardly objecting to alternative accounts, scholars emphasize a number of different factors.

Bernardo Sordi's chapter stresses particular constitutional and ideological consequences in the historical development of certain leading nations (notably, France, Germany, and Britain). In Sordi's presentation, these developments do much to explain the emergence of a specifically *public* law governing 'administrative acts' of the state, distinguished from the evolving realm of private law, both ancient and modern. John Ohnesorge, while certainly acknowledging the significance of these national contributions (notably that of Germany, along with that of the United States), also suggests the importance of timing or staging of developments in particular economies and in a nation's political organization and political ideology. Nicholas Parrillo pays particular attention to pragmatic adjustments in administrative forms that ultimately coalesce – or fail to coalesce – into a new paradigm of governance that becomes distinctive to a nation's administrative arrangements. And moving beyond historical perspectives strictly speaking, Elizabeth McGill and Daniel Ortiz focus on constitutional structure and critique positive political theory by showing that it cannot explain the prevalence of active judicial review in Europe's parliamentary systems.

These chapters, plus the discussions at the conference of which they were a part, considered the steady growth of state activity and its proliferation into new domains. As the state grows, administrative law plays its usual role of both constituting state power and providing the means to make it accountable. There are a host of factors that explain the rise of administrative law and its particular national forms – ideas and ideologies; underlying social and economic conditions; general political and constitutional commitments; time and historical contingency; and the actions of self-interested politicians, bureaucrats and private parties.

In this chapter I propose to do two things: First, I will provide examples from my ongoing study of American administrative law in the nineteenth century to demonstrate how each of these approaches can help explain the development of the American administrative state (Mashaw 2006, 2007, 2008, 2010). How administrative institutions form, grow and are constrained by law is indeed a multi-causal phenomenon. The development of administrative law in any state is an extremely complex process; one that is filled with ironies and paradoxes, as well as a few conceptually tidy stories. Indeed, the complexity of the process and the peculiar results that emerge in particular countries make comparison across nations as challenging as it is rewarding. Hence, my second aim is to suggest a

broad conceptual schema within which to conduct studies of comparative administrative law. Appropriately enough for a chapter and a section devoted to historical developments, the schema is borrowed, as we shall see below, from one of the few treatments of American administrative law that was published at the close of the nineteenth century, written by an author whose first book was on comparative administrative law.

1. Explanations and examples

1.1. Constitutional arrangements

The American constitutional system is famously a system of both separated and divided powers: separated horizontally among legislative, executive, and judicial institutions and divided between federal and state jurisdictional domains. From the beginning of the Republic both of these structural features of American constitutionalism have had substantial impact on America's administrative arrangements and administrative law. The First Congress, for example, spent days debating the relationship of administrative departments to the President and the Congress (Short 1923: 87–105; Thach 1969: 140–65). The American Constitution provided that the President would appoint heads of departments, while other officers of the government would be appointed by the President, heads of departments, or the courts as Congress might direct. Yet the Constitution failed to provide any means for removing officers other than the cumbersome process of legislative impeachment. Did this gap mean that Congress could by legislation establish removal procedures for any officer in any fashion that it thought appropriate? Did it mean that the President or the appointing authority chosen by Congress had the implicit power of removal not subject to congressional regulation? Because the Senate was required to assent to presidential appointments, was it also required to assent to presidential removals?

The so-called 'Settlement of 1789' in the First Congress was in fact deeply ambiguous (Bruff 2007), and questions concerning presidential versus congressional control of administration have persisted throughout American history. Although questions concerning the President's removal power did not reach the Supreme Court until the twentieth century,[1] struggles over appointments and removals produced constitutional crises much earlier. Such contentious issues plagued Andrew Jackson's presidency, (Remini 1967) and Andrew Johnson was impeached, but not convicted, in part because of his violation of the congressional Tenure in Office Act, which limited the President's removal power (Calabresi and Yoo 2008). When the Pendleton Act[2] ushered in civil service reform in the late nineteenth century, its structure was influenced significantly by doubts concerning Congress's power to limit presidential discretion. With that statute, Congress created a career civil service based on merit examinations and freedom from arbitrary removal. At the same time, however, it made the coverage of the Act depend largely upon which officials the President chose to include within the Act's protections (White 1958).

Federalism had a double-edged effect on American administrative arrangements in the

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[1] *Myers v. United States*, 272 US 52 (1926).

[2] Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883).

nineteenth century. Ideas of limited federal government jurisdiction strongly influenced the location of regulatory authority. Federal regulation, while hardly non-existent, was extremely modest by comparison with widespread regulation of the market in both state and local legislation (Novak 1996). But federalism was also a tool of federal administration. The federal government relied on states, for example, to provide health and product quality regulations, but enforced those regulations with respect to foreign goods through the federal customs service.[3] The federal government similarly relied upon the states to determine whether immigrants were to be recognized as naturalized citizens of the United States.[4] And, in the draconian commercial regulation of the Jeffersonian Embargo of 1807–09, President Jefferson authorized state governors to provide licenses for the shipment of necessary commodities (Mashaw 2007: 1664–6). Federal funding and oversight of state administration of federal policies remains a distinctive feature of American administrative arrangements.

1.2. The uncertain boundary between private and public law

Private or common law also affected American administrative law in the nineteenth century. Judicial review is now a standard part of American administrative law, and we generally conceptualize review on the public law-oriented 'appellate model' that Tom Merrill describes in his contribution later in this volume. However, nineteenth century American judicial remedies against public officers were conceptually similar to private lawsuits sounding in tort, property, or contract (Lee 1948; Woolhandler 1991). When someone sued a revenue officer for seizing a ship and cargo or entering a warehouse, his defense was simply that a federal statute authorized him to seize the plaintiff's goods or trespass on his property. Moreover, these officers were not given any special treatment in damage actions beyond the defense that they had acted properly within their statutory authority. Save in one or two exceptional cases provided by statute, reasonableness was not a defense if the court determined that the officer had acted erroneously.

Because these private lawsuits were tried before local juries, this private law model of official responsibility made certain federal statutes unenforceable where they were deeply unpopular. Although we often associate resistance to national policies with southern resistance to the abolition of slavery and to the civil rights of African Americans in the sordid history of American race relations from the Civil War to the 1970s, resistance to federal power may have been more pronounced in the North in Antebellum America. Neither Jefferson's Embargo (Jones 1980) nor the Fugitive Slave Acts could be fully enforced in the face of local jury hostility to federal officials who attempted to carry out those statutes.

Indeed, as Nicholas Parrillo's chapter illustrates, there was a certain ambiguity about the nature of federal offices in the nineteenth century Republic. Most people viewed officers much like private citizens who happened also to carry out certain public functions. Like their private counterparts, they were often paid by fees and commissions. Their good conduct was policed not only by common law actions, but by requirements of bonds and sureties which were subject to forfeiture for dereliction of duty, much like

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[3] An Act Relative to Quarantine, ch. 31, 1 Stat. 474 (1796); An Act to Prevent the Exportation of Goods Not Duly Inspected According to the Laws of the Several States, ch. 5, 1 Stat. 106 (1790).

[4] An Act to Establish a Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790).

any debtor who failed to pay his debts. For many years the Supreme Court even maintained that writs of mandamus or injunction against federal officers were 'personal' to the officer and lapsed if the named defendant died or left office.[5] The courts were insistent that federal officials were accountable to the law, but the model of control was essentially a private common law model rather than one of public law remedies. Remnants of this common law heritage persist, particularly in the American administrative law doctrine of 'standing to sue'.

1.3. Ideology

Ideology, as usual, played a heavy part in the early development of American administrative institutions. State-building efforts long associated with the views of Alexander Hamilton and the Federalist Party dominated the Federalist period. The American Constitution, after all, included nothing concerning executive branch organization beyond the offices of the President and Vice-President. Congressional legislation had to provide the rest. The period from 1789 to 1801 thus witnessed a remarkable outpouring of state-building legislation by Federalist Congresses (White 1948).

But Hamilton's ideological adversary, Thomas Jefferson, won the presidential election of 1800, and the Jeffersonian Republicans began what Jefferson himself described as a revolution in the American form of government (Lipscomb and Bergh, 1905). For example, the Jefferson administration allowed the charter of the nation's most important economic regulatory institution, the Bank of the United States, to expire. The Jeffersonian Republicans repealed the late Federalist expansion of the federal judiciary[6] and all excise taxes as a means of limiting the presence of federal officialdom to ports and commercial centers (Crane 2003). Jefferson and his Republican successors were ultimately forced to do substantial state building themselves, but their ideological ambition was to have a government so inconspicuous that the citizenry would hardly notice that it existed.

Jacksonian 'democratic' ideology had an even more far-reaching impact on American administrative arrangements. The Bank of the United States was again a part of the Jacksonian program, or more properly speaking, the destruction of the bank was a basic tenet of Jacksonian Democratic ideology. In the face of serious economic dislocation, the Jeffersonian Republicans had been forced to recharter the Bank. When that charter expired, Jackson and his Democratic successors refused to renew it on the grounds that it was elitist and undemocratic: it meddled in national politics and used its monetary authority to attempt to sway elections (Remini 1967). Although the story is much too long and complicated to be recounted here, this action had far-reaching consequences for the way national banking policy was structured and administered for the remainder of the nineteenth century (Gouge 1833; Kinley 1893; Phillips 1900).

Jacksonian Democratic ideology even more famously affected the structure of the civil service. Jackson believed that most federal officials were elitist representatives of high status Americans and that offices should be open to the common man (Fish 1905; Van Riper 1958). This democratic conception of office, of course, mutated into a

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[5] *United States v. Boutwell*, 84 US (17 Wall) 604 (1873).

[6] An Act to Amend the Judicial System of the United States, ch. 31, 2 Stat. 156 (1802) (repealing An Act to Provide for the More Convenient Organization of the Courts of the United States, ch. 4, 2 Stat. 89 (1801)).

highly corrupt 'spoils system' in which offices were the pawns of political parties and the major coin of political exchange. Nevertheless, the idea of rotation in office had deep ideological roots which were clearly articulated by Jackson's Vice-President and successor, Martin Van Buren (Van Buren 1867). In Van Buren's account, the people could not claim to have a democracy simply because they elected legislative representatives. Elections were simply too remote from the details of government policy and operation. If the people were really to be represented, they needed political parties to represent them that contested elections on the basis of articulated programs and policed official actions on a continuous basis. Party organizations, in turn, depended upon patronage, that is, the awarding of office to party loyalists. From this perspective, rotation in office was not a corrupt scheme to gain political advantage, but, instead, a means by which ordinary citizens were represented in the day-to-day operations of government. Although a career civil service was eventually created, American antipathy to 'bureaucracy' still owes a deep ideological debt to Jacksonian Democratic thought.

1.4. The timing or staging of economic and social development

America was an agrarian nation for much of the nineteenth century. To be sure, foreign commerce was always important, and hence the prominence of the Customs Service and the Treasury Department in nineteenth century American administrative history. But, the Industrial Revolution was a post-Civil War development in the United States that helps to explain the relatively late development of national regulation of the labor, capital, and product markets. In contrast, the importance of land as productive and speculative capital gave rise to some uniquely American administrative systems.

The public lands that the federal government acquired through the Louisiana Purchase, cessions from the original thirteen colonies, and war with and purchase from Spain created a vast national treasure-house that had to be managed and exploited (Dick 1970; Rohrbough 1968; Treat 1910). This vast domain demanded the creation of significant administrative capacity, both to survey and sell or lease the public lands and to adjudicate claims by persons already resident within the acquired territories. America thus created a Land Office with both managerial and adjudicatory responsibilities whose importance in American government was exceeded perhaps only by the Post Office and the Treasury. Public land law, generated primarily by a system of administrative adjudication, became an important part of American jurisprudence at a time when Europeans would doubtless think that the adjudication of land disputes were quintessentially a part of the business of civil courts (Scalia 1970).

Other examples abound. The American patent system, for example, changed radically in the face of the reorganization of American industry into large corporate units in the post-Civil War period. Industrialists demanded the secure protection of technological innovations before providing capital to exploit them. The patent system, thus, mutated from one that required little more than registration of a claim with the Patent Office to one more similar to European models in which administrators made a serious inquiry into the novelty and usefulness of patented articles (White 1958: 221–30).

1.5. The growth of state activity

Although Americans in the nineteenth century virtually uniformly espoused a 'small government' ideology, they only occasionally practiced what they preached. The

country grew rapidly in both territory and population and, after the Civil War, in global economic importance. Moreover, in every period the increase in federal civilian employment grew faster in percentage terms than the increase in the American population. Original arrangements for dealing with routine government business were simply unsustainable. The government quickly abandoned the quaint arrangement of having the Attorney General, the Secretary of War, and the Secretary of State rule jointly on patent applications. Instead, a permanent patent office was created, which, as just recounted, changed radically as industrial growth magnified the importance of protecting property rights in technology. Territorial expansion had similar effects. The rapid acquisition of a vast public domain and the land claims that went with it would have overwhelmed the territorial courts. Hence, the early creation of administrative land commissions to adjudicate cases, followed by a Bureau of Public Lands, and ultimately a General Land Office which became the most significant component of the Department of the Interior.

Administrative solutions also arose to manage demands placed on the public coffers, which reflected the overall increase in state activity. Claims against the United States were originally filed as private bills in Congress. By mid-century Congress was overwhelmed with the burden of this work and farmed it out to America's first free-standing administrative court (Shimomura 1985). In a similar fashion, early attempts to provide pensions or compensation for military personnel injured in American wars quickly developed into a system of administrative adjudication of disability. After the Civil War that system became a true system of mass administrative adjudication, deciding hundreds of thousands of claims per year (Glasson 1918). War demands and creates administrative capacity which extends beyond the cessation of hostitlities.

1.6. Positive political theory

Over the last few decades, Americans have become fond of explanations for government action that borrow heavily from theories of market economics. On this account, public officials, particularly elected ones, are in the business of providing goods and services in return for votes. They build administrative systems and administrative processes to ensure that promises are kept and political support continues (McNollgast 2007).

Finding examples that roughly correspond to this general theory is not difficult. For many years, for example, Congress declined to delegate the determination of where post offices should be located to the postal authorities. The ostensible, and almost surely false, rationale was that this would be an improper, indeed, unconstitutional, delegation of authority to administrators (Currie 1997: 146–9). The story was much simpler. Every hamlet wanted a post office because, for much of the nineteenth century, the mails were virtually the exclusive means for communication and commerce. Representatives gained political capital by providing post offices in their districts. When this observation is considered together with the patronage possibilities of the largest single civil organization in American government, it is hardly surprising that the number of post offices and postal employees grew at a fantastic rate.

A similar explanation can be given for the growth of military pensions and the administrative capacities and processes of the Pension Office after the Civil War. Indeed, the expansion of military pensions after the Civil War fits an almost pure interest group story in which, responding to the lobbying power of the Grand Army of the Republic

and organizations of pension agents and pension attorneys, Congress ultimately found a way to give something to virtually every participant on the Northern side in the Civil War, and to their survivors and dependents as well (Glasson 1918). The one president who sought to restrain pension growth, which critics saw as a plunder of the Treasury for political ends, was denied a second term in office. His successor immediately liberalized benefits by reinterpreting the pension statutes (Blank 2001).

1.7. Pragmatic adjustments to administrative necessity

A close look at virtually any administrative system in the nineteenth century will reveal ways in which the organization, operation, and constraint of administrative decision-making responded to administrative imperatives. The central staff of many agencies in Washington was small in relation to its agents in the field. The administrative history of many nineteenth century American governmental bureaus is, thus, a history of constant organization and reorganization of the center to maintain or gain the control over the periphery (Mashaw 2006: 1304–18; Mashaw 2007: 1660–73, 1719–22; Mashaw 2008: 1691–3). The development of rules, manuals, instructions, oversight, and audit capacities shifted the way that bureaus did business. There grew up almost everywhere what Bruce Wyman, in his treatise on administrative law, termed 'an internal administrative law' that attempted to permit administrators to guide, monitor, and police the actions of subordinates (Wyman 1903).

To take another example, the spoils system was certainly widespread, and rotation in office affected thousands of office holders after each change of administration. Nevertheless, the business of bureaus had to be done, and the political parties, which used the bureaus as a means for political mobilization, would be blamed if these bureaus did not operate reasonably well. Hence, bureaucratic necessity put limits on the spoils system. Administration after administration retained a core of officials with the experience and technical skill to do the government's business – however inept, absent, or corrupt many of their patronage colleagues turned out to be. And, where it really mattered, bureaus began to develop their own means of merit appointment and advancement long before the Pendleton Act's civil service reforms required them to do so (Crenson 1975).

Experiments that did not work were abandoned for administratively competent ones that would. Congress's first attempt at regulating the carnage from the explosion of steamboat boilers[7] involved a few simple legislative rules and a cadre of part-time steamboat inspectors who were appointed by district judges and compensated by fees paid by the steamboat companies whose vessels they inspected. The original legislation relied on criminal and tort law, rather than administrative sanctions, as its chief enforcement mechanism.

This experiment was completely unsuccessful.[8] As a result, a statute created a permanent Board of Supervising Inspectors of Steamboats, with broad authority to make rules concerning navigation and steamboat construction.[9] The country was divided into

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[7] Act of July 7, 1838, ch. 191, 5 Stat. 304.

[8] Report of the Commissioner of Patents to the Senate of the United States on the Subject of Steamboiler Explosions, S. Doc. No. 30-18 (1848).

[9] Act of August 30, 1852, ch. 106, 10 Stat. 61.

districts and each member of the Board of Supervising Inspectors oversaw a new group of specialized inspectors of hulls and boilers. All of these personnel were on salary rather than paid by fees or commissions, and enforcement was mostly through the refusal to grant or the cancellation of certificates and licenses for vessels or for engineers and pilots. Notwithstanding its ideological aversion to federal bureaucratic regulation, when faced with a mounting and very public crisis in public transportation safety, Congress managed to create a quite modern administrative regulatory system with the capacity to act effectively (Burke 1966).

2. The challenge for comparative administrative law

My examples from nineteenth century American experience illustrate the potential explanatory power of alternative perspectives on the development of the administrative state and administrative law. However, these different explanations are hardly mutually exclusive. Indeed, all of them are probably operative to some degree in the development of the structures and processes of administrative governance, not only of nation states but of transnational organizations as well. If one were to trace the administrative development of monetary policy and monetary institutions in the United States in the nineteenth century, for example, one would find change driven by, at the very least, private interest bargaining and party jockeying for political advantage, constitutional considerations, political ideology, the timing of business cycles, the growth of state fiscal responsibilities and, as always, administrative necessity. Hence, when one asks from a comparative point of view, 'Why are the administrative arrangements and administrative legal principals in state A different from or convergent with those in state B', one is asking a very complicated question. All of the explanatory approaches that have been used in the chapters in this part are likely in play, and others besides. At the very least we should beware of unicausal stories that attribute differences in administrative systems to one or another unique explanatory variable.

But, does this caveat imply that comparative investigation of administrative law is virtually impossible? A detailed understanding of macro and micro-institutional factors; political, ideological, economic and social environments; path-dependent commitments and inertias; and technical legal issues across multiple legal systems, seems overwhelming. Must we, therefore, choose between simple theories that are at best partial, and perhaps false, and complex explanations whose information demands are excessive?

This is indeed a dilemma for all comparative studies, not just for the study of comparative administrative law. I do not propose to attempt to resolve that problem here. I would suggest, however, that it might be useful to reframe the question of comparative administrative law or comparative administrative development in schematic terms based on the first book on administrative law published in the United States, Frank Goodnow's *Comparative Administrative Law* of 1897, and elaborated further in his 1905 treatise on the *Principles of the Administrative Law of the United States*. In simplified form, Goodnow argued that any system of administrative law and organization must, if it is to be successful, satisfy three criteria. It must be responsive to the democratic will as expressed through constitutionally legitimate forms of political action. It must be effective and competent in carrying out its assigned tasks. And, it must be respectful of individual rights. To put the matter in slightly different terms, administrative systems should be politically, managerially, and legally accountable. It is the job of administrative

law to construct a regime that effectively satisfies these three different, and sometimes competing, accountability demands.

In comparing two or more administrative systems or regimes, this perspective can, at least, provide a way of starting or organizing comparative study. To reframe the comparative question in Goodnow's terms we might ask: To what extent is this administrative system or aspect of administrative law explained by the relationship of administrators to political or elected officials in the constitutional system under study? To what extent is it explained by the necessities of effective administration, managerial efficiency, and hierarchical or coordinate control as understood in the polity's legal culture? And, finally, to what extent can the feature under study be explained by the nation's conception of citizens' rights and responsibilities vis-à-vis government authority, a conception which is manifest in its political ideology and incorporated in its system of legal remedies? These are hardly simple questions, but, they need not be answered simultaneously. And they can frame a general conversation as we go about the fascinating business of learning what we can learn from each other.

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3 Testing Weber: compensation for public services, bureaucratization, and the development of positive law in the United States

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From the colonial period through much of the nineteenth century and sometimes into the twentieth, public officers in the United States frequently received their pay in the forms of fees-for-service, commissions, rewards, and other types of compensation that varied, in a direct and objective way, with the business of their offices and the way in which they exercised their powers. My larger research project aims to document and explain this lost system of compensation, as well as its gradual replacement – in different offices and jurisdictions at different times over more than a century – by the fixed salaries that have since come to be taken for granted in the public service. Essentially, I am tracing the way in which legislators, by reforming the way officers were paid, made the absence of the profit motive a defining feature of 'government' in the United States.

This kind of transition took place in many countries. There are major historical analyses of profit-seeking government in England, though far less attention has been paid to its demise.[1] And there is no modern scholarly attempt to analyze profit-seeking, or its decline, across American government. Histories of compensation in American government are widely scattered, appearing in monographs focused on a single public function (or occasionally a few related ones), with compensation often treated as an incidental matter.[2]

In the absence of synthetic works focused on the United States, the most familiar framework for understanding the rise of salaries is derived from Max Weber. Weber's interpretation is basically that (1) government in the modern world became bureaucratic and (2) salaries are integral to bureaucracy. This latter claim holds for a couple of reasons. For one thing, bureaucrats are defined and controlled according to their ranks in a hierarchy, and compensation must be fixed so as to accord with those ranks. Also, people are attracted to jobs in the bureaucracy and socialized to work within it because it offers them a secure career, and fixed compensation is necessary to security. In Weber's view, hierarchy, career, and salary combine to establish the agency's promotion ladder.[3]

[1] See Aylmer (1958, 1973: 106–21, 1974: 160–252, 1980: 99–102) on its prevalence and Chester (1981: 14–16, 61–4, 134–7) on its demise.

[2] A review appears in Parrillo (2008: 12–14). A broader discussion of the matter appears in the work of Orren, but only as one point in her much broader theory of 'officers' rights' (1994: 64, 67, 1998: 352–3, 2000: 883–4); and in White (1948: 298–300, 1951: 403–04, 1954: 388–91, 1958: 123–6), though his treatment is brief and covers only a few public functions.

[3] Weber (1978, vol. 1: 217–31, vol. 2: 956–1005, 1031–8). For a more extended analysis of Weber, see Parrillo (2009a). Note that today's foremost scholars of state development typically view the rise of salary just as Weber does, as an incident of bureaucracy. See, for example, Mann (1993: 444–78), Carpenter (2001: 18, 373 n. 11).

The Weberian narrative is inadequate to explain the rise of non-profit government in America. American government – despite overwhelmingly making the transition toward non-profit status – has not 'progressed' nearly as far on other indices of Weberian bureaucratization, such as, centralized appointment and control of officers, and lifelong government careers. Bureaucratic imperatives might be a sufficient explanation for the rise of salaries in the continental European governments that come nearest to Weber's ideal-type and served as his models. But the continental frame is a very imperfect fit for American administrative development generally (Damaška 1986, Novak 2008, Rudolph and Rudolph 1979, Silberman 1993), including the rise of salaries.

In this chapter, I provide an interpretation of the rise of non-profit government in America distinct from that of Weber. First, I offer a richer description of the distinct ways in which government actors sought profit. In particular, I show how the profit motive could be, in some circumstances, an engine of governmental rationalization and modernity. Second, I explain how the ultimate demise of profit-seeking in the key areas of criminal prosecution and tax administration was not coupled with the construction of more fine-tuned bureaucratic agencies. Rather, the shift was intended to legitimatize newly ascendant positive law in ways that were orthogonal or even contrary to bureaucratization. For example, some reforms gave officers the financial independence necessary for the sound exercise of discretion, and others forged non-adversarial relationships between state and citizen that could foster a culture of mass citizen cooperation. Whereas many of the critiques of non-profit government today lump it together with the problem of bureaucracy more broadly (for example, Osborne and Gaebler 1992), I argue that, judging from the American experience, non-profit government springs from normative origins not necessarily linked with bureaucratic structure, but rather with broader concerns for state legitimacy.

To begin, one must first analyze the English foundations of American practice. From the medieval period through the eighteenth century, there were two distinct patterns by which profit-seeking arose in English government. The first we can label *facilitating payments*.[4] Under this heading, the sovereign conferred upon its agent the power to perform services that affected the interests of private persons, for example, to enter a vessel at the custom-house or to process a civil claim through the judicial system. The agent began performing the services and, somewhere along the line, the private persons whose interests were affected started making payments to the agent. We observe this pattern in a wide variety of offices stretching from the 1200s to the 1700s. There are several reasons why private persons rendered such payments: they wished to express their gratitude to the agent for providing a service; they feared the agent might delay or withhold the service; or they needed the service performed in a particular way or with particular speed or with particular favor, and they wanted to ensure, or give thanks for, such special treatment. The payment for a particular service often became stereotyped

[4] My choice of words is inspired by the description of 'grease payments' in developing countries used in the US Foreign Corrupt Practices Act, 15 USC § 78dd–1(b). On reciprocity in citizen-officer relations and the role of money payments in that relationship, see Noonan (1984); Lindgren (1988); Rose-Ackerman (1999: 91–110). The discussion in this paragraph is a condensed version of Parrillo (2007b) and of primary and secondary research that I am now undertaking to revise that paper.

and customary, in which case English law ended up giving the agent a prescriptive right to demand it and sue for it. Payments were sometimes regulated by the agent's supervisor or by the king or parliament, though this did not always stop private persons from paying further 'gratuities' on top of the legally established fees. Eventually, these gratuities might themselves become socially expected and legally established by prescription. English judicial decisions of the 1600s and 1700s further legitimized these exchanges by holding that officers were entitled to *quantum meruit* from the recipients of their services. In the 1730s a leading English law treatise stated that without the payment of a tip or 'premium', 'it would be impossible in many cases to have the laws executed with vigor and success' (Bacon 1736, vol. 2: 453). The cash nexus between state agent and private person, observed a parliamentary committee in the 1780s, 'brings [the two] into a mutual relation', redolent of '[h]abits of pecuniary obligation or exchange of private interest' (*The Reports of the Commissioners* 1787, vol. 3: 187). Agents received payments embodying 'mutual relation' and 'pecuniary obligation' not only when providing what we today might view as a private service – for example, a consul granting a passport, or a court clerk processing a civil claim for a plaintiff – but also in settings that strike us as alien to the buyer-seller relationship. Thus, custom-house officers commonly pocketed fees from merchants, often for expedited processing or for service outside the (brief) official hours. Jail keepers ran their facilities like hotels, charging a few shillings or pence for nicer beds, alcoholic drinks, the privilege of remaining outside one's cell, etc. In several areas, then, the exchange of money 'greased' the relations between public agents and the various persons with whom they interacted. These facilitation payments had some of the advantages that we generally associate with the market: they made service providers more responsive to the individualized preferences of their 'customers' and made official action more adaptive to variation and change in private needs. At the same time, they made the status of the officials ambiguous. Were they agents of the sovereign or of the litigants, taxpayers, prisoners, and other persons from whom they earned (or wrung) payments? Given such a pay scheme, it is hard to imagine 'the state' differentiating itself from society so that the will of the monarch – or of the electorate – could have much independent meaning. Apart from potentially weakening loyalty to the sovereign, facilitative payments also could result in unequal treatment of citizens and allow for state agents to charge monopoly prices.

The second pattern by which profit-seeking germinated in Anglo-American government was through *bounties*. These were offers of reward made by the sovereign in order to encourage the performance of tasks (1) that no particular private person wanted or needed done and (2) the very performance of which was likely to elicit resistance from private persons. In many cases, the sovereign initially made citizens broadly eligible to receive the bounty but later narrowed eligibility to a class of designated state agents. In maritime warfare, for instance, the English monarch since the Middle Ages had licensed private ships (privateers) to capture enemy merchantmen and cargo with the proceeds divided between the privateer and the sovereign. Insofar as the medieval kings purchased or directly employed their own ships (which only happened episodically), they granted the officers and crews similar shares in the plunder.[5] As the royally owned ships gradually

[5] Rodger (1997: 129–30), Loades (1992: 11–35).

coalesced into a permanent navy around the 1500s, privateers continued to operate concurrently, until Britain renounced privateering in 1856 (Stark 1897), and even then, naval officers and crews continued to enjoy shares of captures till the eve of World War I (Parrillo 2007a: 94 n. 576).

Another example of bounties appears in the field of economic regulation. A common pattern, since the 1300s, was for parliament to promulgate regulations by statute, impose monetary penalties for their violation, and permit any person to prosecute and take half the penalty; this was known as a '*qui tam* action'. By the 1600s, the crown was, in several areas, confining the right to bring *qui tam* actions to specially designated royal patentees.[6] Meanwhile, customs enforcement operated under a similar bounty system. Goods on which the owner evaded duties were subject to forfeiture. At common law, any person could seize such goods and, under statutes dating from the Middle Ages, keep a share (known as a 'moiety') of their value (Elton 1954). In 1662, Parliament narrowed eligibility for these moieties to the customs officers (Hoon 1938: 271, 14 Car. II, c. 11 § 16). Hence, these officers were simultaneously eligible for two distinct forms of compensation: (1) bounties for catching merchants who tried to circumvent the custom-house and (2) facilitation payments from merchants who, having been corralled in the custom-house, wanted to get their goods processed as quickly and favorably as possible. Whereas facilitation payments made it ambiguous whether the agent worked to fulfill the preferences of the sovereign or of the private person, bounty offers made the agent and the sovereign co-claimants on the residuum of a single *res*, to be extracted from the private person. In that sense, bounty offers were more promising as instruments for the enforcement of an independent sovereign (or 'state') will. Roughly speaking, facilitation payments encouraged state agents to reach some sort of accommodation with the individuals with whom they dealt, while bounty offers pushed agents to challenge those individuals' preferences.

Under the heading of bounty seekers, we can also include the tax farmers. English kings employed such farmers to collect customs duties off-and-on, starting in the medieval period, as well as excise taxes from their inception in the early 1600s. Farming was discontinued for both types of taxes in the late 1600s. A tax-farming concern would pay a fixed sum to the sovereign for the right to collect a given tax, pocketing the entire difference between the collections and the fixed sum (Kiser and Kane 2001). As with bounties, the profit-seeker's right arose from a positive grant by the sovereign of a residual claim on a revenue stream to be extracted from the public.[7]

Both of the two profit-seeking arrangements – facilitating payments and bounties – suited the concept of office as exploitable property. At the same time, however, the English developed a radically distinct concept of office, which we can label *honorary service*. Under this view, state agents ought to receive no monetary rewards whatever, but instead should do their duty out of a sense of obligation and nothing more. The roots of this tradition went back to the Middle Ages. In the twelfth and thirteenth centuries, the principal officers of English local government were appointed from outside their localities and – motivated by their right to the residuum of a variety of local revenue

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[6] Beck (2000: 565–603), Elton (1954), Beresford (1957).

[7] The difference, of course, was that the tax farmer received the entire residuum, whereas the bounty-seeker shared it with the sovereign.

streams – squeezed their subjects for profit. However, in a series of reforms beginning in 1275, Edward I replaced the outsiders with local gentry, paid them virtually nothing, and forbade them to take any payments for their services. The big landowners of each county, grateful to be relieved of the predations of foreign overlords, now took upon themselves the responsibility of local self-government, out of *noblesse oblige* – or, more accurately, a wish to preserve the autonomy of their locality and their own places at the top of its socio-political hierarchy. Their terms of office were brief, and rotation helped spread the burden of unpaid official labor.[8] In the 1600s and 1700s, the centuries-old tradition of honorary service in the English counties came to be associated with the republican and Whiggish political culture according to which good government depended upon (1) a polity of independent, disinterested, and virtuous citizens and (2) an officialdom of Cincinnatus-like figures drawn from that polity on a short-term, rotating basis, for whom any incentive besides civic virtue stank of corruption (Pocock 1975). Thus the jurist Edward Coke, hero of the Whigs, extolled Edward I's reforms in county government (1797,vol. 2: 209–10), while denouncing both facilitative payments (officers ought 'not to be fettered with golden fees, as fetters to the suppression . . . of truth and justice') (1797,vol. 2: 176) and bounties (*qui tam* plaintiffs were 'viperous vermin') (1797,vol. 3: 194). Montesquieu, the great theorist of republicanism, held the same view. '[P]resents' (that is, offerings by a subject entreating an officer) were 'an odious thing in a republic because virtue has no need of them', and 'rewards given by the sovereign' (that is, bounties) were characteristic of despotic and monarchic states; 'in a republic under the reign of virtue, a motive that suffices in itself and excludes all others, the state rewards only with testimonies to that virtue', not with money (1989: 67–8).

The practical result of unpaid service, at least in local administration (where it was most common), was for official action to be shaped primarily by the norms, expectations, and social hierarchy of the local community. It softened central government fiats in the sphere of administration just as the nullifying jury softened such fiats in the sphere of criminal justice. A good example of this phenomenon is the administration of the land tax, the main royal levy on English landowners in the 1700s: Westminster delegated administration of the tax to each locality, where resident commissioners and assessors, acting without pay, worked out the distribution of the burden through neighborly compromise, such that the tax 'depended not upon force, but upon consent' (Brooks 1974: 284).

Alongside profit-seeking forms of compensation and the alternative of honorary service, there were some English officers in the medieval and early modern periods who received salary-like payments, in the form of fixed annual stipends, but these payments were often quite distinct from 'salaries' in the sense of modern bureaucratic organization. They are better understood as 'annuities', a term that was commonly applied to them. Annuities were promises by the king to pay the recipient a fixed annual amount; the king doled out these promises to his favorites. The recipients might sometimes happen to hold offices, but this was largely a coincidence. Annuities, notes a historian of the 1600s, were paid 'to individuals and not, in theory, *ex officio* to the holders of particular posts' (Aylmer 1974: 160–62). In this way, annuities reflected the patrimonial largesse of kings

[8] The secondary literature on this story is synthesized in Parrillo (2007b: 12–25).

and, in the Stuart era, their aspiration to amass absolute power. The form of compensation most clearly opposed to patrimonial absolutism was honorary service, which fit hand-in-glove with the decentralized rule of local notables and reflected the independence of the gentlemen-officeholders, guaranteed by the income from their landed estates. But if honorary service was the quintessence of the Whigs' official morality, facilitative payments might serve as a second-best alternative and were less suspect than a royal stipend. As one historian writes of Britain in the mid-1700s:

> Those who took the king's shilling became his men and suffered in the general estimation of their independence. It was preferable to serve the king without depending mainly upon his wages, deriving instead an income from fees for services rendered to individual members of the public. A clerk who charged the public for particular services was earning his living by serving it, and was not a kept man of the Crown. (Watson 1960: 61)

As Luca Mannori and Bernardo Sordi have noted with regard to the European continent more generally (Mannori and Sordi 2009), the concept of office as property – of which, I think, facilitative payments are especially indicative – could serve as a shield against royal aggrandizement.

These diverse English approaches to official compensation all made their way to the North American colonies. Facilitative payments flourished, from the colonies' courts to their jails to their custom-houses.[9] So did bounties: colonial customs officers enjoyed shares of forfeitures, and colonial legislatures, in addition to commissioning privateers, extended bounties to land warfare by paying rewards from their treasuries to any persons (often special militiamen known as rangers) who brought in scalps or prisoners during the numerous white–Indian conflicts.[10] The colonists also had their own versions of honorary service: offices at the local level were so low-paid that landed gentlemen tended to fill them, as an extension of their status in the community (Nelson 1976: 191–9). And though some officers received salary-like compensation, these payments, as in the mother country, were mainly to cement the recipient's personalized relationship to his patron. For example, colonial legislatures notoriously granted and withheld stipends from judges on a highly personalized, year-to-year basis (for example, Moore to Shelburne, Feb. 21, 1767, *Documents Relative*, vol. 7: 906).

The late eighteenth and nineteenth centuries saw significant shifts in the theory and practice of official compensation. For one thing, the American Revolution raised the prestige of republicanized Whig ideology and, with it, the tradition of honorary service. George Washington, as commander of the Continental Army, insisted on receiving no pay. At the Philadelphia convention in 1787, Benjamin Franklin invoked the ancient tradition of unpaid service in English county administration and urged his colleagues to adopt it by prohibiting all federal officers from receiving any compensation.[11] But for several reasons – especially the paucity of Americans as rich as Washington and the increasingly prevalent belief that office ought not to be restricted to aristocrats – an unpaid officialdom did not prove feasible for American government as a whole (Wood 1992: 287–94).

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[9] *The Pennsylvania State Trials* (1794), Meranze (1996: 175, 181), Barrow (1967: 189–90).
[10] Barrow (1967: 54–6), Swanson (1991), Grenier (2005).
[11] *The Records* (1911, vol. 1: 84, referring to the county sheriff).

The predominant trend in the new republic was not to abolish compensation, nor even to abolish its profit-seeking forms, but to regulate it strongly. Bounties were already regulated by definition, since they arose from positive grants by the sovereign, so the most noticeable changes occurred with respect to facilitating payments.[12] Whereas parliament and colonial legislatures had long attempted, off-and-on, to regulate these payments, their efforts were often incomplete, leaving open the door for private persons to make 'gifts' and for officers to demand customary fees, or to sue (or bargain) for *quantum meruit*. In the first half of the nineteenth century, however, legislatures increasingly asserted that statutes were the exclusive source of official rights to income, and judges increasingly endorsed that assertion. It became far more difficult for officers to sue citizens for payment, or to defend themselves against accusations of extortion unless the fees they charged were expressly established in a statutory schedule. This change was consistent with many aspects of republican ideology (even if it fell short of the utopian ideal of honorary service) and with the Jacksonian liberalism that came to the fore by the 1830s. It vindicated the supremacy of legislation, weakened the idea of office as a freely exploitable business asset, prevented monopoly exploitation, and required the officer to treat citizens equally, by serving them all at a uniform price. It thereby contributed to the depersonalization of officer-citizen relations that Weber flags as an index of bureaucracy.[13] At the same time, however, tighter regulation of facilitating payments helped legitimate them within a transformed political culture, and they continued to have some decidedly non-Weberian implications. First, they made it easy to calibrate an officer's income to the demand for his services, which – in a developing country where the population of localities was rapidly growing and shifting – made it more viable to keep officials local and part-time. Second, facilitative payments, despite regulation, frequently retained their capacity to put officer and citizen into a mutually accommodating relationship and thereby to make officials a mere instrument or amplifier of 'customer' preferences. For example, examiners in the federal veterans' pension system, paid by the number of applications they received for pensions or increases, favored applicants (*Annual Reports* 1901: 67–76), and criminal magistrates in Philadelphia, paid a fee per case, let private accusers press charges on to trial regardless of their merits (Steinberg 1989).

The eventual replacement of facilitating payments with salaries sometimes reflected an effort by lawmakers to stop officers from catering to private preferences and instead to induce them to follow the directives of a central authority.[14] In many other cases, however, the transition was not mainly about Weberian control of official behavior but instead originated from two other causes. First, the imperative to regulate facilitation payments – which, as noted above, arose from republican and liberal principles – saddled lawmakers with a very difficult task, that is, to enumerate every service that an officer

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[12] This paragraph and the next are drawn from Parrillo (2007a) and from primary and secondary research that I am now conducting to revise that paper.

[13] This lends some support to the argument of Crenson (1975) that the Jacksonian period witnessed significant bureaucratization, *contra* the conventional wisdom, articulated in White (1954), that Jacksonianism was the opposite of administrative rationality.

[14] See, for example, Hickel (1999: 138, 151–2), on the use of salaried pension examiners to prevent generosity at variance with agency guidelines.

might provide and to fix a reasonable price for it. Given the diversity and variability of official tasks, it ultimately proved more practical to pay officers for their time in performing whatever services were needed. (It helped, of course, that salary levels were now in the exclusive control of the legislature, in contrast to the old model of annuities being matters of royal favor.) Second, American political culture retained a populist vestige of republicanism's utopian dream of honorary service: the idea that, if officers, unfortunately, had to have some income, it ought to be small. But with the dramatic increase of population and of labor-saving technology during the nineteenth century, officers' earnings from fees were often very high. Driven by populist outrage, lawmakers solved the problem of high-earning offices by converting them to low-salaried positions. Only through fixed compensation could lawmakers be assured that changes in population, economy, or technology would not push earnings above the limits demanded by populist ideology.

If the story of facilitating payments does not follow a neat Weberian progression, the story of bounties is even less linear: they appear to have *increased* in importance, leading to a crisis and backlash. To understand why this happened, recall that bounties hold out special promise as instruments for the imposition of sovereign will without the accommodation of the regulated parties that characterized facilitating payments or, for that matter, honorary service. Bounties were associated from their inception with services that no particular private person wanted – indeed, services whose performance private persons were likely to resist. It is no accident that the classic case of bounty-hunting occurred in the context of maritime warfare, which essentially consisted of a zero-sum conflict between the sovereign of one nation and the merchants of its enemy. A similar tendency was evident in the domestic arena, where bounties tended to be associated with the enforcement of statutes prohibiting acts where (1) there was no particularized private victim and/or (2) there was no consensus in the community that the act was morally wrong. In short, these proscriptions rested heavily on positive legislative power, with which a substantial portion of the community might not willingly comply. This pattern was evident in the offenses covered by the *qui tam* statutes: transactions in violation of wage and price controls or outside official markets; gambling; practicing a non-established religion; keeping a disorderly house; selling liquor without a license; holding a regulatory office while remaining interested in the regulated industry; neglect of official duty; and (in one case) pollution.[15]

With the gradual transition of the West toward modernity, the importance of centrally enacted positive law increased relative to more localized and consensual forms of law that often bordered on norms or custom. This is a theme emphasized by Weber and more recently by the American legal historian William Novak (1996: 235–48). The

[15] Beck (2000: 567–74, 590–601), see also Beresford (1957). To be sure, not every English bounty scheme fit this pattern. Beck mentions some statutes that might be construed as protecting private victims, the main ones being those against selling products of inferior quality and making unlawful deductions from workers' wages. And from the 1690s to the early 1800s, the government offered rewards for the successful prosecution of property crimes like highway robbery and burglary. Note, however, that this bounty scheme arose from a sense among the victorious revolutionary elites of 1689 that urban disorder might lead to counter-revolution, meaning that the sovereign interest in political stability required the prevention of ordinary crime (Langbein 2003: 148).

process accelerated in the nineteenth century and was helped along, in the US case in particular, by the Revolution, which vested ultimate lawmaking power unambiguously in the representatives of 'the people' and thereby rendered lawmaking more legitimate. Also significant was the contemporaneous emergence of a theory of human beings as rational and self-interested such that their energies might be channeled in the direction of the general good by properly designed institutions and incentives. Positivist policymaking and incentive manipulation started to be self-consciously understood in tandem. This thinking pointed, at least initially, toward greater use of bounties to work the will of positive authority. Whereas Coke, the proto-Whig, had sung the praises of the common law and honorary service, Jeremy Bentham, the great exponent of positive lawmaking, in his essay 'The Rationale of Reward' (composed *circa* 1780), carefully distinguished the forms of official compensation that had good incentive properties from the sovereign's perspective (naval prize money and tax farming) from those with bad properties (facilitative payments) (1843: 239–41, 249–51). This kind of incentive reasoning was adopted by Americans, such as the law reformer Edward Livingston, who, in advocating rewards for discovering and preventing crimes, argued (regretfully) that republicanism's utopian view of human nature had to make concessions to reality (1833: 202–07).

A general turn toward bounty-like incentives is evident in American lawmakers' design of compensation in several key areas of administration. Below, I discuss three such areas on which I am conducting primary research: public criminal prosecution, customs collection, and state and local tax administration.[16] Though distinct in the nature of the official services involved, the jurisdictions concerned, and exact time periods in which compensation was reformed, the three areas exhibit common patterns.

Begin with public prosecutors. When these officers emerged at the state level in the late eighteenth century, they were typically paid by the number of cases that went to trial. They therefore tended to allow private accusations to go to trial indiscriminately, so as to maximize their incomes. This made the public prosecutor largely a ministerial officer, permitting private accusers to work the levers of criminal justice, whether they were seeking redress of genuine wrongs or merely acting from malevolence. But an alternative view of the officer's role arose under which he should not leave the legitimacy of each prosecution to the private accuser, or to the grand jury and petit jury (which were themselves identified more with the community than with the 'state'). Instead, he should judge each case's legitimacy for himself, acting as a gatekeeper by exercising his power to halt prosecutions. Legislatures in about half the states ultimately endorsed this principle, at least with respect to the innocence or guilt of the defendant. They opted to grant public prosecutors a fee only in cases of conviction, or to award a substantially higher fee in such cases. The purpose of such fees was to incentivize the prosecutor to allow into the system only those cases likely to result in conviction. Insofar as legislators trusted the petit jury (which people in the nineteenth century did far more than we do today), this was an incentive to target the guilty and spare the innocent. Only three states had such a scheme in place in 1815, but at

[16] The remainder of this chapter is condensed from Parrillo (2008, on public prosecutors), Parrillo (2009a, on customs officers), and Parrillo (2009b, on state and local tax administration); all these cited papers contain references to relevant secondary literature and to my primary research.

least another nineteen adopted it between that time and the 1860s, not to mention the federal government in 1853. Furthermore, about half the conviction-fee states adopted especially high fees for convictions under statutes in which the proscription depended especially on positive law, particularly against gambling and liquor, though also against concealed weapons and (after the Civil War) membership in the Ku Klux Klan and anti-competitive business practices.

The strengthening of bounties was also evident in the federal custom-houses. To be sure, customs officers had been eligible to receive moieties of forfeited goods going back to medieval England. In the 1860s, however, congressional Republicans, in order to enforce the very high tariffs they imposed (first to finance the Civil War, then as a permanent protectionist measure) intensified the moieties system in three ways. (1) Although the role of facilitating payments had already been weakened by judicial decisions negating officers' right to demand fees without statutory authority, Congress in 1863 went farther by making it a crime for any customs officer to even *receive* a gratuity from a merchant, thus outlawing the last vestige of accommodationism that might have softened the adversarialism of moieties. (2) Originally customs officers had no access to merchants' books and papers, but Congress in 1863 empowered them to search such documents, opening up a vast new universe of evidence from which to derive proof to support a forfeiture. (3) Finally, although the law had originally been somewhat unclear as to whether all customs officers were eligible for moieties or only a select group of managerial officers, Congress in 1867 expressly adopted broad eligibility, and in 1869 the Treasury Department began designating full-time customs detectives.

Apart from these reforms of the 1860s, there had also been a gradual shift in personnel policy over the course of the century. The customs officers of a port were traditionally appointed from the ranks of local notables with social connections to the port's merchants (Rao 2008). However, after the rise of nationally organized political parties in the 1820s and 1830s, these officers were appointed on the basis of their clout within the nationwide machine. In the era of the local notables, moieties had served to balance the tendency of socially connected officers to take a soft attitude toward their merchant-colleagues. But once a customs appointment became the object of machine spoils, social constraints no longer served as a brake on profit-seeking. In light of all the changes described above, it is no surprise that customs forfeitures – and officers' earnings from moieties – increased dramatically in the 1860s.

We also observe the rise of bounties in the administration of state and local taxation, which consisted overwhelmingly of property taxes. Typically, a single local assessor was responsible for assessing both the state and local property tax. The style of this assessor's work followed the pattern of the English land tax, which depended on officers who were drawn from the locality and administered the tax on the basis of neighborly accommodation and compromise. The American assessors and their English counterparts were fundamentally similar in terms of their subjection to local community norms. The English officers were appointed with sensitivity to the locality's wishes, while the American ones were elected by the locality directly. The English officers were unpaid, while the American ones generally received a *per diem* that was notoriously low and gave them little incentive to strain themselves. This consensual pattern of American tax administration worked well, so long as (1) the tax burden was low and (2) most taxable wealth took the form of real estate or livestock, which the assessors could easily discover

and incorporate into the consensualist allocation of the burden. Around the 1860s, however, tax burdens spiked, and wealth was increasingly taking the form of intangible property, such as, bank deposits, stocks and bonds, and other financial assets. Formally, this property was usually subject to taxation just like real estate and livestock, particularly after the Jacksonian tax reform movement of the 1820s to the 1860s, which insisted that *all* property be taxed at an equal rate. Because intangible wealth was both difficult to discover (given its invisibility and mobility) and initially unimportant, assessors did not make a habit of looking for it, which created a social expectation that it would not be taxed. Failing to pay tax on intangibles seemed a trivial offense, like jaywalking. Further, lawmakers tended to assume that real estate would be undervalued (thanks to the glad-handing assessors) and therefore pushed tax rates very high. However, because bank deposits and market-traded securities could not be undervalued, they suffered super-high effective rates in the rare cases when they were discovered, thus rendering their taxation even less legitimate in the eyes of investors. As intangibles became more important in the economy, the traditional assessment machinery was not capable of performing the elaborate and feather-ruffling investigations that would have been necessary to solve the problem: assessors were part-time, low-paid, and deeply enmeshed in the 'hand-shaking politics' of their localities, meaning they did not want to make enemies of any taxpayer-voters.

Governments reacted to this problem by adopting a kind of bounty system. Between the late 1870s and early 1910s, legislatures in ten states – plus localities (often large cities) in ten others – designated agents (either contractors or public officers) with the specific goal of discovering tax liabilities which had escaped the notice of the ordinary assessors. In exchange, these agents earned a percentage of the taxes collected. In selecting these agents (nicknamed 'tax ferrets'), legislators and local governments usually chose persons from outside the localities to be investigated. The idea was to replace neighborly accommodation with impersonal, cold-hearted profit maximization.

In all three of the areas described above, the government sought to use the profit motive to strengthen a positivist state program: to discriminate between private criminal accusations in terms of their merits and especially to prosecute conduct (like gambling and drinking) whose proscription depended heavily on positive law; to enforce high tariffs; and to tax new forms of wealth that were easy for owners to hide. Furthermore, reliance on bounties was often associated with trends and technologies of administration that we typically think of as 'bureaucratic', such as, the marginalization of citizen policing and of the grand jury in prosecutorial decisions; the selection of customs officers from outside the ranks of local notables; the power of such officers to search merchants' books and papers; and use of tax ferrets with no social ties to the persons they investigated. In other words, bounties could be at the cutting edge of positivist rationalization, and we should not view them merely as a pre-modern or 'weak state' instrument. American lawmakers who designed such incentives had a more modern perspective – more like ours – than we might suppose.

It should be of particular interest, then, that bounties were ultimately banished from public criminal prosecution, from customs enforcement, and from state and local tax administration. My research indicates that to a large degree lawmakers who abolished bounties sought to vindicate values quite distinct from fine-tuning the internal mechanics of the bureaucratic machine, as Weber's analysis would suggest. The idea, instead, was to

break a vicious cycle that grew up between the profit motive and the social illegitimacy of positive law.[17]

Let me start with customs enforcement. Merchants were subject to forfeiture only if their underpayment of duties was intentional, not if it was the result of a mistake. The intensification of bounty-seeking in the 1860s motivated officers to construe every doubtful case as one of intentional fraud; this tendency, combined with the high cost of taking a case to trial, pushed merchants to settle cases for large sums even when their underpayments were mere mistakes that arose from the complexity of the customs laws. This resulted in scandal and backlash that caused Congress to abolish moieties in 1874. The profit motive proved incompatible with the case-specific and subjective official judgment necessary to distinguish fraud from mistake. When the merchant's effort to take technical advantage of the law was 'met by a corresponding technical enforcement of the law on the part of its executive officers', declared the Treasury Secretary, 'a feeling of antagonism between the merchant and the government is insensibly developed, the results of which cannot but be demoralizing and injurious' (*Letter from the Secretary* 1874: 4). Non-profit status would allow officers' decisions to be sensitive to subjective and case-specific factors that could never be captured by an incentive contract, thereby enriching official judgments and legitimating the customs system in the eyes of merchants, which would improve compliance. '[D]isregard petty irregularities,' promised one merchant advocate, 'and then, sir, you make every honest importer and merchant a watchman for the Government' (*Evidence* 1874: 100). The 'aid' of the merchants, declared the congressmen who introduced the bill to abolish moieties, 'is better than police. Their support is better than armed men. Against their sense of wrong, against their aroused moral sentiment, laws and officers can do little' (*Congressional Record* 1874, vol. 2: 4029). And although the abolition of the rewards in 1874 was supported by civil service reformers, it would be wrong to reduce the abolition measure to a mere aspect of their program. On the contrary, the Forty-Third Congress, while abolishing moieties by near-unanimous vote, simultaneously killed the first US Civil Service Commission by cutting its appropriations to zero. In the eyes of many lawmakers, then, moiety abolition had importance and meaning independent of civil service reform. Even when the leading custom-houses later began to undergo civil service reform, the officers who had been most active in the fraud cases that led to moiety abolition – the collector and the detectives – remained conspicuously outside the system and remained outside it well into the twentieth century.

The story was similar in the case of public criminal prosecution. My own research concentrates on Congress's debates in the 1880s and 90s on replacing US Attorneys' conviction fees with fixed salaries. In those debates, which ultimately resulted in salarization in 1896, it was clear that, even if conviction fees pushed prosecutors to target defendants who were legally guilty and could be convicted, there still remained the problem that many legally guilty people did not deserve punishment as a matter of policy and morals. This was particularly true because of the advent of permanent federal internal

[17] This is not to say that Weberian bureaucratization never played a role in the abolition of bounties. In the case of the navy, for example, it seems that the termination of prize money coincided with a major increase in centralized coordination among captains of individual ships (Parrillo 2007a: 90–95).

taxes in the 1860s, which required minute and intrusive regulation of the production and possession of taxed commodities (liquor and tobacco), all backed up by criminal penalties. In the 1896 debate, one congressman, in a sentiment echoed by several others, proclaimed that '[o]ne-half of the offenses alleged against [internal revenue defendants], while technically within the statute, could well be ignored without injury to the public welfare' (*Congressional Record* 1896, vol. 28: 2398). Such broad liability for *malum prohibitum* conduct necessitated the softening of enforcement and, therefore, the invention of prosecutorial discretion, which clashed with the conviction-maximizing tendency of the US Attorneys' fee structure.[18] Congressmen expressed hope that placing these officers on salary would increase their legitimacy in the eyes of the population being policed. Notably, when Congress placed the US Attorneys on salary it did not couple the reform with any increases in their accountability to the (still skeletal) Department of Justice in Washington, DC. To this day, the US Attorneys – like chief prosecutors in nearly every American jurisdiction – are not bureaucrats; they enjoy far greater autonomy and discretion than do their counterparts in continental Europe.

The abandonment of profit-seeking in state and local tax administration likewise rested on the assumption that non-profit status would render officers less adversarial and thereby promote compliance. Much like the customs officers and US Attorneys, citizens criticized tax ferrets for over-technical enforcement of tax laws. But this was not the main complaint, for the problem of intangibles taxation was less that the law was overly technical and more that non-compliance, even with the law's clear requirements, was common and socially accepted. Violating social expectations was impossible for ordinary assessors enmeshed in the 'hand-shaking politics' of the localities, which is why lawmakers felt they had to hire profit-seekers to do the dirty work instead. But experience with the tax ferrets increasingly convinced lawmakers that profit-seeking had not substantially improved compliance and might even be making things worse. It became increasingly accepted that intangibles were so easily concealed and moved that their return was inherently voluntary on the part of the taxpayer and could not be induced through coercion or deterrence. Most citizens, it was said, wanted to comply with the law, if only its demands were reasonable. Starting about 1910, in one state after another, lawmakers and taxing authorities repudiated the tax ferrets while simultaneously classifying intangibles as a special category of wealth enjoying a lower rate than other property. Banishing the profit motive was a key part of this program: the pecuniary self-interest of the tax ferrets had altered taxpayers' attitude toward the state, making it impossible for taxpayers to imagine the state as a disinterested and just broker deserving of voluntary cooperation. The adversarial state-citizen relationship implied by the bounty system was counter-productive in a context where voluntary citizen cooperation was essential. Notably, the reformers did not view this voluntaristic program as necessarily connected with the bureaucratic centralization of state agents. In several states, including then-leading ones like Ohio and Iowa, the legislature repudiated tax ferrets and lowered intangibles taxes yet rejected bureaucratic centralization of the assessors, believing that voluntarism alone was sufficient. Even in states that undertook similar

[18] A similar tendency toward prosecution for technicalities was evident in *qui tam* litigation in early modern England and in the present-day US False Claims Act (Beck 2000: 627–33).

reforms and *did* adopt bureaucratic centralization (like Wisconsin), the authorities attributed the resulting increase in compliance as much to voluntarism as to bureaucratic control.

In America, bounties and positive law grew up together. The lack of pre-existing social legitimacy to enforce such laws seemingly required profit-seeking enforcement, and such enforcement further alienated the affections of citizens, making bounties seem all the more necessary. Importantly, the defenders of bounties frequently acknowledged this point, declaring that positive law would *never* achieve widespread legitimacy or voluntary citizen cooperation and that bounties were a necessary (if perhaps regrettable) response to that deficit. The abolition of bounties indicates that most American lawmakers ultimately rejected this view. They came to accept various practices that would soften the sharpness and exactness of positive law but hopefully thereby strengthen its legitimacy so as to achieve a net increase in compliance; these practices included the exercise of subjective judgment and prosecutorial discretion by front-line officers, as well as the lowering of tax rates to lower the 'price of honesty' for taxpayers.

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4 Administrative law and the public regulation of markets in a global age

Marco D'Alberti

The role of public authority in the regulation of the economy has evolved over time. During the twentieth century, the intervention of the State and public administration into economic affairs steadily increased, at least until the 1970s, despite the strong, free-market critiques directed at this approach. However, since the 1980s, the process of globalization (due to the enhanced development of world trade and international communications), along with privatization, liberalization, and deregulation, have modified the scope and method of public intervention. More recently, the global economic and financial crisis that began in 2008 raises the potential of bringing about new forms of (sometimes intense) regulation and administrative interventions. In short, the pendulum may be swinging back, with the evolution of market regulation, as well as its impact on administrative law, continuing apace.

This chapter first tries to assess the principal trends in public regulation of markets since the outset of the twentieth century, emphasizing continuity despite the many changes that have taken place. The chapter then attempts to identify, in legal terms, the essential features of public regulation today, as well as their prospects beyond the present economic crisis. Finally, this contribution then considers the impact of changing forms of public regulation of markets on the substance and procedures of administrative law.

1. Public regulation of markets over the course of the twentieth century

At the end of the nineteenth century the structure of many national States began to change. The progressive enlargement of the right to vote, as well as the emergence of political parties and trade unions, brought about an expansion in the social ambitions of the State. This transformation was quite evident by the beginning of the twentieth century. Those groups that did not belong to the social elite expected public powers to strongly intervene in economic life, in order to increase public control of private property and private enterprise. Moreover, industrialization had in fact required significant support from public authorities, not only in England but perhaps more so in late-industrializing countries like France and Italy, which needed substantial public aid to catch up with more advanced economies. With industrialization of course came urbanization, a further factor in the expansion of public intervention by the dawn of the twentieth century.

As the regulation of markets gradually expanded in both scope and intensity, it also required a continuous commitment as well as a specific technical expertise, which neither parliaments nor governments could alone provide. Public administration became the protagonist in economic regulation, thus contributing to the development and extension of the administrative State. This happened both in countries with a longstanding tradition of public administration and in countries in which a professional civil service had

appeared only at the end of the nineteenth century, such as Great Britain and the United States.

In the very first decade of the twentieth century, one also began to see the emergence of public enterprises, both at national and local level. In Italy, for instance, municipalities took on important local services such as public transport and street lighting, previously in the hands of private entities. The law on municipalization entered into force in 1903, and two years later Italy nationalized the railway service (Piras 1967: 355 ff., Papa 1973, Giannini 1958: 227 ff., and 2004: 361 ff.). The Italian State also intervened to support private enterprises, especially with the aim of encouraging the industrialization of underdeveloped areas. Subsidies were granted, for instance, to many enterprises in the south of Italy, where a real 'Administration for the South' was formed (Melis 1996). In France, where public bodies became responsible for public utility services – such as public education, and transport – legal doctrine and jurisprudence developed the theory of *le service public* to capture this phenomenon (Chevallier 1991: 35 ff, Pisier-Kouchner 1972). In those countries where public utilities remained in private hands (for example in Britain), public controls of various kinds were imposed on railways, gas, electricity, or telephone services (Prosser 1997: 35 ff.).

Administrative procedures for the modernization of urban areas – including procedures governing town planning, compulsory purchases, or the construction of public works – expanded. New regulatory domains concerning such areas as working conditions, social security, or immigration also developed. In countries without a strong administrative tradition, these developments often transformed the institutional landscape. In England, for example, Parliament often assigned the implementation of regulatory programs to administrative tribunals, conceived as semi-independent administrative bodies with regulatory and quasi-judicial powers. English legislation, moreover, often precluded the common-law courts from exercising jurisdiction over the action of these tribunals (Robson 1928). In the United States, Congress began attributing important regulatory functions to independent administrative agencies, such as the Interstate Commerce Commission (1887) or the Federal Trade Commission (1914).[1]

The First World War brought about an astonishing increase in public interventions, not only to supply weapons but also to sustain populations, including the compulsory determination of prices, rationing of commodities, expropriation of private goods, controls on production, financial aid to agriculture and food industry, as well as organization of military and civil transport (Burk 1982). While there were some efforts to scale back these interventions in the 1920s, the onset of the Great Depression in 1929 once again spurred significant public intervention in the economy, particularly directed at banks and financial markets. In the United States, the Wall Street crisis led to the creation of the Securities and Exchange Commission in 1933 as a new independent agency, whereas other countries opted for other forms of public control of private finance. Keynes famously supported greater public intervention as a means of promoting economic growth (Keynes 1926). Hayek, by contrast, interpreted these developments as a dramatic break with the past. Writing in the mid-1940s and thinking mainly of England,

[1] On the similarities and differences between English 'administrative tribunals' and American 'independent agencies', see D'Alberti (1992: 73 ff. and 95 ff.).

he argued for a classical liberalism as conceived during the eighteenth and nineteenth centuries, rooted more deeply, in his view, in the basic individualism of Erasmus, Montaigne, Cicero, Tacitus, Pericles and Thucydides (Von Hayek 1944).

Over the course of the 1930s, public intervention became significant in numerous economic sectors, such as agriculture, iron and steel industry, transport, radio, telephone, telegraph, energy, health, social security, urban planning, and public works. Indeed, the depth of the crisis was so profound that public regulation increased not only in countries like Germany and Italy where longstanding traditions of public and administrative law lapsed eventually into dictatorship, it also strengthened in common-law countries not acquainted with political authoritarianism, such as Great Britain and the United States. Over the course of the 1930s, common-law systems also saw increased roles for legislation and administrative regulation, a trend that emerged at the beginning of the twentieth century but intensified with the economic crisis in the 1930s (Calabresi 1982). American scholars would note the severe stresses placed on the system of common law in the age of Franklin Roosevelt, in which the 'positive State' replaced absolute protection of private property and freedom of contract (Sunstein 1990).

Like the First World War before it, the Second World War demanded exceptional measures of public intervention. But it was in the postwar period, extending up to the advent of the oil crisis in the mid-1970s, that the trend in favor of public regulation found its fulfillment, particularly in Western Europe. While maintaining guarantees for private property and private enterprise, national constitutions generally granted public authority significantly greater regulatory leeway as compared to the end of the nineteenth century.[2] Nationalizations in France and Britain, as well as the State enterprise system in Italy, reflected a significant shift toward forms of public ownership in leading sectors (Brewer-Carias 1968, Durupty 1986, Prosser 1986, Giannini 1958). Economic planning also became more widespread, even in countries whose traditions had previously been hostile, such as Great Britain, where even conservative governments showed a willingness to engage in it (Giannini 1983 and 1995, De Laubadère and Delvolvé 1986, Budd 1978, Shonfield 1978). Finally, in the postwar decades, competition law, and the consequent public control over monopolies, cartels and mergers, eventually crossed the borders of the United States, infiltrating the legal systems of Germany, the EEC, and Japan. Administrative independent agencies, born in England and the United States, began spreading through continental Europe and other countries. They appeared in France and Italy in the 1970s.

Since the mid-1970s, however, the surge of inflation, the economic recession after the energy crisis and the exhaustion of the financial resources of the interventionist State, which took place in several countries, brought about a reaction to the enormous growth of regulatory programs. This led to a first phase of deregulations in some areas, such as financial markets, railroads, and airlines in the United States. This tendency accelerated during the 1980s and 1990s, when the process we now call 'globalization' became a dramatically more important factor in economic life. International trade and communications increased, and many countries, following the lead of Great Britain and the United

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[2] For example, the Italian Constitution of 1948 equally protected freedom of private enterprise as well as public controls on it, when justified by human dignity and social utility (article 41).

States, privatized public goods and enterprises, deregulated crucial economic sectors, worked to simplify administrative procedures, and otherwise abandoned general economic planning. This also happened in countries of communist tradition, such as China with the reforms adopted after 1979. The European Community liberalized several economic sectors, notably financial markets as well as significant public utilities, such as telecommunications, air transport, electricity and gas. Several monopolies collapsed and new operators entered the market. Moreover, a new *lex mercatoria* emerged in the last two decades of the twentieth century. *Lex mercatoria* is a private legal regime mainly built by big multinational companies through their commercial and financial contracts. The aim of these contracts is to regulate the relations between the parties in all their aspects, thus overcoming national laws and exceeding their sphere (Galgano 2001).

In short, the trend in public regulation in the 1980s and 1990s was nearly the opposite of the heavy public regulation that took place from the 1930s to the 1970s. And yet, despite the sense that public intervention was in decline and that a return to a self-regulated market was evident, public regulation of markets continued to play a substantial role. Privatizations occurred in some sectors, but as of today there remains a significant number of public enterprises, both at national and local level, while privatized undertakings continue to be subject to several forms of public control (Letwin 1988, Graham and Prosser 1991, Von Weizsäcker et al. 2005, Megginson 2005). Deregulation has not prevented public intervention and has often been flanked by measures of re-regulation. Simplification has had limited effects on legislation and administrative procedures.[3] Even if general economic planning was abandoned, various sectoral programs and devices continued to develop, such as urban and commercial planning, or energy, transport and health planning. Market liberalization required new rules: for example, 'asymmetric' public measures, limiting the incumbent's role in favour of newcomers, have been adopted to effectively guarantee market access to alternative operators. Most States enacted some form of competition law in the last decade of the twentieth century. Competition law not only served to forbid and punish cartels and abusive practices, but also to impose pro-competitive ends in sectoral regulation. The autonomy of the new *lex mercatoria* via transnational contracts found itself softened by the precedents of international arbitration and by standard clauses elaborated by entities such as *Unidroit* (Bonell 1995: 16). And flanking the *lex mercatoria* was the emergence of significant supranational public regulation, whether regionally (for example, in the European Community) or internationally (in the GATT/WTO).

The responses to the present global economic crisis have again enhanced the role of public regulation and intervention. Recapitalizations and nationalizations of banks, subsidies to industrial sectors, as well as some protectionist measures exemplify the recent trend. Consequently, one can fairly conclude that there has been great continuity in public regulation since the beginning of the twentieth century. Undoubtedly, during the 1980s and 1990s, the process of globalization became much stronger. As a consequence of privatization and deregulation, the State-entrepreneur and the State-regulator seemed to weaken. Nevertheless, as we have seen, public intervention in markets continued to play a crucial role. And the present global economic crisis calls for heavier regulatory

[3] See the special number of *Revue du droit public* (no. 1/2006) devoted to the '*désordre normatif*'.

measures. Thus, the question presents itself: What are the main characteristics of the public regulation of markets today? And what are the prospects beyond the responses to the present crisis?

2. Contemporary features and trends in the public regulation of markets

This section identifies and discusses four main features of contemporary public regulation. In my view, these features are essential consequences of globalization and thus will likely be maintained in the regulatory regime even after the present economic crisis passes. They are: the duty to justify public regulation (impact assessment and regulatory necessity); the reduction of discretionary administrative power; the impact of competition law on sectoral regulation and administrative action; and the emergence of global regulation with the interaction among different legal orders.

2.1. The duty to justify public regulation: impact assessment and regulatory necessity

A substantial achievement of the last twenty years is the demand that regulators justify particular regulatory actions with sound reasons, including often a specific assessment of regulatory impacts. Several countries have adopted procedures to evaluate the impact of regulatory measures on the different markets before they are adopted. The United States, Great Britain, Canada, and the European Union have introduced regulatory impact analysis, which, through consultation with the interested parties, first evaluates the necessity of the regulation and then indicates various options, including the 'zero option', which means that no measure will be adopted. When regulation is considered necessary, the impact analysis evaluates if it suits the purpose and verifies whether there are less restrictive measures that can be applied to the regulated entities or persons (OECD 1997a and 2008, Strauss et al. 2008).

Different criteria of regulatory justification are provided for by several European Community directives. For example, the directive on services in the internal market aims, inter alia, at 'removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings'.[4] The concept of 'authorization scheme' is very wide and includes administrative procedures for granting authorizations, licenses, approvals or concessions. Included in this category is any obligation on the part of a service provider to obtain from a public authority a preliminary decision, either formal or implicit, in order to gain access to service activity. To 'remove overly burdensome authorizations', the directive provides that Member States may only make access subject to an *a priori* authorization if it is justified, in the sense that the authorization does not discriminate against the provider in question; is based on an overriding reason relating to the public interest; and the objective pursued cannot be attained by means of a less restrictive measure, in particular because an *a posteriori* inspection would take place too late to be genuinely effective.[5]

At the international level, world trade agreements provide for similar rules: Member States cannot adopt measures relating to technical standards and licensing requirements if they constitute 'unnecessary barriers to trade in services', are not based on 'objective

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[4] Directive 2006/123/EC.

[5] See article 9 of the same directive.

and transparent criteria', and are 'more burdensome than necessary'.[6] The reasons for such regulatory justification are clear. As economic theory has underlined, regulation intervenes primarily in case of market failures. But there are cases of regulatory failure as well, when for example regulation is cumbersome, too costly for enterprises or substantially restricts competition. To avoid this, any new regulation requires justification in advance and overly burdensome existing regulations require revision. In the context of globalization, free movement of goods, services and capital should not be impaired unless relevant public interests are at stake, such as the protection of public order or human health. Free trade is the rule, while the protection of public interests acts as an exception to it. It is up to domestic regulators to justify the exception. Consequently, justification criteria focus on the necessity and adequacy of public regulation. In effect, earlier judicially formulated proportionality tests governing regulatory measures *ex post* and case-by-case (Rose-Ackerman 2008) have become general preliminary conditions for all public regulation.

2.2. The reduction of discretionary administrative power

Discretionary administrative power is the power to adopt an administrative decision based on a comparative evaluation of the public, private and collective interests emerging from the procedure before the deciding official (Giannini 1939, Galligan 1986). Discretionary power of public administration extended its scope with the growth of the functions attributed to the administrative State, particularly over the first half of the twentieth century. Over the second half of the century, however, legislatures and courts gradually established limits and controls on the exercise of discretionary powers, particularly with regard to the public regulation of markets. These limitations and controls reflect, in significant part, the strength of the economic interests subject to administrative action, implicating legal guarantees of private property, as well as freedom of contract and enterprise.[7] Moreover, supranational legal orders have had a substantial influence on restricting administrative discretion in the interest of free trade. Independent agencies also became a feature of the administrative landscape in many parts of the world in the second half of the twentieth century, often operating with quasi-judicial powers. In this case, their activity consists in applying law to facts more than in exercising the choice among interests on which discretionary power is based. This happens, for example, when an independent competition authority assesses whether undertakings have infringed antitrust rules on monopolies and cartels (Breyer 1982).

Many countries have lessened discretionary power to adopt public measures that impinge on enterprise's access to market. This has often included the elimination of concessions, franchises, authorizations, and licenses which, if maintained, must be

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[6] General Agreement on Trade in Services (GATS), article VI.

[7] At the national level, laws on administrative procedures often grant interested parties the right to be heard before action is taken against their interests. Even if such rules apply to almost all the fields of administrative action, their origins can be generally traced to guarantees of property and enterprise. The first Italian law on administrative procedure was promulgated in 1865, for example, to regulate expropriation: procedural rights were mainly attributed to land owners. The United States Administrative Procedure Act of 1946 arguably reflected similar concerns over protecting private property and enterprise.

justified according to objective, transparent and non-discriminatory criteria. This too means a reduction in discretionary power (D'Alberti 2008: 59). The process of European integration has also had similar effects. Several directives, for example, have introduced requirements of 'objective' assessment.[8] Moreover, a 'general authorization' system is provided for in the sector of telecommunications. Undertakings that are interested in providing electronic communications networks or services 'may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights'. They may just be required to submit a notification which allows them to begin their activity. Therefore, market access is not subject to a previous discretionary decision. Public authority may only exercise an *ex post* control over the undertakings' compliance with the conditions listed in the directive, such as interoperability of service, interconnection of networks, environmental requirements, or consumer protection rules.[9] This is the least onerous authorization system possible, which has been introduced in order 'to stimulate the development of new electronic communications services and pan-European communications networks and services and to allow service providers and consumers to benefit from the economies of scale of the single market'.[10] Another example can be found in the General Agreement on Trade in Services (GATS), which lays down rules to enhance free trade in the delicate area of services. Member States may adopt domestic regulations provided that they respect some limitations: for example, in certain cases, domestic measures of general application, such as laws, byelaws, and rules, are to be 'administered in a reasonable, objective and impartial manner'.[11] Again, this amounts to a reduction of discretionary power in the application of rules.

At the end of the nineteenth century, Albert Venn Dicey wrote that the Rule of Law does not allow the exercise of discretionary power (Dicey 1959, Jowell 1989). Actually, contrary to Dicey's understanding, this sort of power existed widely both in civil law and in common law countries. As we have seen, discretionary power expanded even further during the first half of the twentieth century, followed in the second half of the same century by a progressive reduction in various fields of administrative law. While Dicey was arguably mistaken that the Rule of Law did not tolerate discretionary power even in the nineteenth century, today's market regulation seems to reflect a Diceyan spirit. It is hostile to discretionary power.

2.3. The impact of competition law on sectoral regulation and administrative action

Competition law has always been concerned with business practices, seeking to prohibit and punish infringements such as cartels, monopolizations, and abuses of dominant position. Gradually competition law has expanded its role and today affects the shape of

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[8] For example, the authorization to exercise banking activity is granted if the applicant possesses separate own funds, a minimum initial capital and satisfies precise technical requirements. In any case, Member States may not require the application for authorization to be examined in terms of the economic needs of the market. Directive 2006/48/EC, modified by directive 2007/44/EC.

[9] Directive 2002/20/EC (previous quotation in the text is taken from article 3, para. 2).

[10] Same directive, recital 7.

[11] GATS, article VI, para. 1.

public regulation in many domains. Indeed, one can say that competition law is gaining primacy over sectoral public regulation in several economic sectors, such as financial markets, telecommunications, media, energy, transport, and postal services. In principle these sectoral regulations have to comply with the rules of competition. This is an important change with regard to the past. Competition primacy is based on a variety of legal sources and tools, both at national and supranational level.

Many national antitrust agencies have played a crucial role in the effort to reform public regulation, urging governments and parliaments to modify or repeal laws and other public measures that distort competition, while also recommending the adoption of pro-competitive legislation and regulation. This sort of competition 'advocacy', combined with competition enforcement, has become more and more relevant. Similarly, national courts have enhanced judicial scrutiny of administrative measures that could alter competition. For example, administrative courts in France and Italy have annulled public contracts awarded without respecting the principle of competition, and authorizations granted to incumbent enterprises to the detriment of new entrants.[12]

Under the European Community Treaty (ECT), free competition has become a general principle of law. Legislation, regulation and economic policy of the Member States and the Community are to be 'conducted in accordance with the principle of an open market economy with free competition'.[13] Where undertakings engage in conduct contrary to European competition rules having direct effect (such as articles 81(1), and 82 ECT – now articles 101(1) and 102 TFEU – which deal with restrictive agreements and abuses of dominance), the European Court of Justice states that, to the extent such 'conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority which has been made responsible for ensuring that the competition rules and, in particular, article 81 ECT are observed, is under a duty not to apply the national legislation'.[14] European Community directives have further confirmed competition primacy over sectoral regulation.[15]

At the international level, the Organization for Economic Cooperation and Development (OECD) has vigorously supported competition primacy, stressing that economic regulation should promote and enhance competition. To this end, the OECD has laid down recommendations to Member States based on peer review. Governments have reacted with regulatory reforms (OECD 1997b). In this regard, it is worth noting the establishment, in 2001, of the International Competition Network (ICN), composed of antitrust authorities from all the continents. ICN does not exercise any rulemaking function but rather selects best practices and addresses recommendations to member authorities. One of the first documents produced by the ICN concerned competition

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[12] On this latter point see Consiglio di Stato, sec. VI, decision no. 336/2004, in 'Foro amministrativo C.d.S.', 2004. p. 469.

[13] Article 4, para. 1, ECT (now article 119, para.1, TFEU).

[14] Case C-198/01, *C.I.F.*, 2003 ECR I-8055.

[15] Directive 2002/21/EC, for example, provides that national authorities regulating electronic communication services and networks shall promote competition and carry out market analysis based on antitrust criteria.

advocacy, urging antitrust authorities to support pro-competitive regulatory reforms before their respective governments, parliaments and public opinion (ICN 2002).

As we have seen, competition primacy can take a variety of forms. Sometimes it takes the form of recommendations, such as from the OECD and ICN. Or it can take the form of mandatory measures, like those from European Community legislation and jurisprudence. This primacy is not without difficulties and limits. For example, the United States Supreme Court has recently held that, where a highly specialized sectoral regulation has been adopted (for example, in the financial sector), specific regulation can prevail over antitrust rules.[16] Nevertheless, it is still fair to say that competition primacy over sectoral regulation has become a tendency of our times.

2.4. The emergence of 'global economic law' and the interaction among different legal orders

Economic globalization is not exclusively a product of our age. Rather, historians have seen earlier forms of globalization in, for example, the sixteenth century (Braudel 1982, Wallerstein 1978). Nevertheless, economic integration has experienced astonishing growth only since the beginning of the twentieth century (Osterhammel and Petersson 2005). As to the legal dimension of this growth, moreover, global economic law has strongly emerged primarily since the 1990s. The World Trade Organization was established in 1994. Financial markets have more and more become subject to international regulatory standards. Supranational norms have regulated, inter alia, environment and various public utilities, such as telecommunications, energy, postal services, and transport (Bermann et al. 2000).

The development of global economic law had a variety of sources: international and supranational public bodies; formal and informal networks composed of national regulators; hybrid entities; and national regulators applying supranational rules (Kinsbury et al. 2005).

Several international organizations, such as the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank (WB), perform regulatory functions. World trade regulation is particularly comprehensive and effective, whether derived directly from international agreements, or from the resolution of disputes by quasi-judicial entities (the dispute settlement Panels and Appellate Body of the WTO) (Jackson 1997). The European Union (EU) is a complete legal order, with primary and secondary legislation, a complex institutional organization, and courts of justice. Moreover, EU norms and judicial decisions bind Member States, their undertakings and citizens. Market regulation is in fact the EU's original and primary function: matters such as competition, free movement of goods and services, State aid, public procurement, telecommunications, energy, transport, postal services, financial markets, environment, and health are widely regulated by EU law (Cassese 2007).

Networks of national regulators usually adopt non-binding measures that nonetheless have a highly persuasive force. Among the many networks, the Basel Committee is perhaps the most well known. Composed of central banks and other national authorities

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[16] *Credit Suisse et al. v. Glen Billing et al.*, 551 US 264 (2007).

for prudential regulation, it has adopted standards on banking supervisory matters.[17] Another well-known example is the European Competition Network (ECN), composed of the European Commission and national antitrust authorities, which guarantees forms of coordination among members in the procedures concerning restrictive agreements and abuses of dominant position.[18] There are also a number of hybrid entities, composed of both private and public members. For example, the Codex Alimentarius Commission, established by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO), issues standards for food safety. The Commission's activity, which started in the 1960s, gained more importance in the 1990s, when WTO agreements indirectly granted legal force to its recommendations (Bevilacqua 2006).

Finally, there are instances where a single national or even local regulator applies supranational norms or adopts measures having transnational effects. For example, according to EC Regulation no. 1/2003, a national antitrust authority may rule on a cross-border cartel case having effects in more than one Member State. Similarly, under directive 2004/18/EC on public procurement, a municipality may award a public supply contract to a foreign undertaking. In such cases, regulatory action goes beyond domestic dimension.

So-called 'global economic law' is the whole of all these measures – whether issued by international or supranational public bodies, transnational networks, hybrid entities, national regulators acting in non-domestic spheres – operating together with the new *lex mercatoria*. It is a highly complex body formed by a huge number of regulators and rules, and by different legal orders. One of the main issues of our time concerns whether this global economic law can strike an adequate balance between economic liberties, on the one hand, and social or public values, on the other. Does freedom of contract, enterprise, competition, prevail over the protection of public order, environment or health?

Some argue that global regulation has been unsuccessful in achieving this balance, one that has in fact confronted national democracies over the last two centuries (Stiglitz 2006). Actually, if we look at continental Europe, we see that several States, despite their different traditions, have tried to guarantee both economic liberties and public values such as the general interest, social cohesion and human dignity. Constitutions in France, Spain, Italy are good examples of this effort. In Great Britain, statutory legislation since the end of the nineteenth century has sought to reconsider and limit private property, freedom of contract, liberty of enterprise in the name of social values. The same could be said of the United States since the 1930s.

Can the same effort at balance be translated into global economic law? Since we cannot take into consideration all its components here, I will limit my analysis to some aspects of two legal spheres: European Union and World Trade Organization.

The core of the Treaty of Rome (1957) was of course the so-called four freedoms – free movement of goods, persons, services, capital – along with free competition, and the prohibition of State aid impairing it. Gradually, however, subsequent European treaties have extended legal guarantees to other interests and values as well, such as social cohesion, or the protection of the environment, health and consumers, according to the

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[17] The Basel Committee was established in 1974, but its best-known and most relevant activities on banks' capital adequacy started in the late 1980s.

[18] The ECN was established after EC Regulation no. 1/2003 entered into force.

model of social market economy.[19] The decisions of the European Court of Justice (ECJ) have pursued the objective of balancing economic and social values. The result is a regulatory regime that carves out certain social ends from market relations and subjects them to the principle of solidarity. For example, competition rules on restrictive agreements and abuses of dominant position laid down in articles 81 and 82 ECT (now articles 101 and 102 TFEU) do not apply to the

> management of a scheme providing compulsory insurance against accidents at work and occupational diseases, where the amount of benefits and the amount of contributions are subject to supervision by the State and the compulsory affiliation which characterizes such an insurance scheme is essential for the financial balance of the scheme and for the application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them.[20]

In other words, social functions based on solidarity are not economic activities for the purposes of competition law.

Moreover, antitrust rules may have a limited application in case of public utilities: 'undertakings entrusted with the operation of services of general economic interest . . . shall be subject . . . to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.[21] The European Court of Justice has applied this norm in a case concerning universal postal services, which are to be granted to any person at a reasonable price, irrespective of economic profitability. This means that a restriction on competition may be justified if its purpose is to allow the operator bound by the obligation of universal service to perform its task of general interest and to benefit from economically acceptable conditions. In particular, it is possible to restrict competition where economically profitable sectors are concerned. 'Indeed, to authorize individual undertakings to compete with that operator would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs' than those adopted by the operator burdened with universal services. However, the 'exclusion of competition is not justified as regards specific services dissociable from the service of general interest, such as collection from the senders' address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit'.[22]

As regards the free movement of goods in the internal market, the European Community Treaty provides that free trade and the prohibition of restrictive measures may be subject to derogations. Member States may restrict imports or exports by adopting measures aimed at protecting relevant public interests, such as public order, public security, public health, unless they constitute 'a means of arbitrary discrimination or a disguised restriction on trade between Member States'.[23] These interests are conceived as

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[19] Articles 2 and 3 ECT (now replaced, in substance, by articles 3 and 6 TFEU).

[20] Case C-218/00, *Cisal di Battistello Venanzio & C. Sas v. Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)*, 2002 ECR I-691.

[21] Article 86, para. 2, ECT (now article 106, para. 2, TFEU).

[22] Case C-320/91, *Corbeau*, 1993 ECR I-2533.

[23] Article 30 ECT (now article 36 TFEU).

exceptions to the principle of free trade and have to be strictly interpreted. State measures issued for their protection are subject to a proportionality test: they must be necessary, suitable to the end pursued, and no other less restrictive measure can be applied.

The European Court of Justice, however, has over the years expanded the list of the 'overriding reasons in the general interest' which may justify a restriction, well beyond those provided for in the Treaty. They include, inter alia: the protection of intellectual property; the need to protect recipients of services; social protection of workers; consumer protection; fair trading; the maintenance of a national radio and television system which secures pluralism; the sound administration of justice; the cohesion of a tax system; the good reputation of the national financial sector; conservation of the national historical and artistic heritage; the risk of serious impairment of the financial equilibrium of the social security system.[24]

Moreover, the Court has adopted a quite ample concept of proportionality, provided that national measures are neither discriminatory nor a disguised restriction on trade between Member States. For example, the Court holds that among the grounds which may justify derogations from free movement of goods 'the protection of the health and life of humans ranks foremost and, in so far there are uncertainties at the present state of scientific research, it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they wish to assure and, in particular, the stringency of the checks to be carried out'. In particular, the Court has justified a national regulation prohibiting the placing on the market of fish products containing a low concentration of listeria monocytogenes.[25]

Let us consider now the international trade system. The WTO is a legal order whose main function is to guarantee free trade. However, world trade agreements also provide that the actions aimed at reducing tariffs and other barriers to free trade are to be conducted, inter alia, with a view to raising standards of living, ensuring full employment, sustainable development, and protection of the environment. The General Agreement on Tariffs and Trade (GATT) lays down rules that are quite similar to those contained in the EC Treaty on the free movement of goods. Some exceptions to free trade are listed. Member States may adopt measures on grounds of protecting relevant public interests, such as public morals, human health, national treasures of artistic value, essential security, provided that they are not applied in a manner which would constitute a means of

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[24] Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 18 May 2000, Case C-157/99, *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen*, 2001 ECR, I-5473, para. 51; Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, 1991 ECR I-4007.

[25] Case C-121/00, *Hahn*, 2002 ECR I-9193 (previous citation in the text is taken from para. 38). The Court has underlined that, according to scientific research, incidence of listeria on human health is 'relatively low – from two to fifteen cases per million population', but 'the fatality rate is reported to be between 20% and 40% and might approach 75% in immunocompromised individuals'. Moreover, 'it would seem' that the presence of listeria in food represents 'a very low risk' when its concentration is below certain rates; but there are 'large numbers of uncertainties which remain concerning the issue.' In this context, any scientific certainty being impossible, the Court has justified national regulation that restricts trade of smoked fish products containing 'even low concentrations of listeria', because this bacterial pathogen 'may constitute a risk to the health of particularly susceptible consumers.' Ibid., paras. 42, 43, and 46.

'arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.[26]

But these exceptions have been narrowly interpreted so far. Dispute settlement Panels and the Appellate Body have conceived them as a *numerus clausus*, limited to those listed in articles XX and XXI, and have applied a very stringent proportionality test in order to justify the exceptional national measures aimed at pursuing public interests that may restrict free trade. In particular, the value pursued must be 'both vital and important at the highest degree', as in the case of human life and health protection against the very well-known and extreme risks stemming from asbestos fibers.[27] The WTO approach stands in contrast to the rulings of the European Court of Justice on similar issues.[28] It thus allows us to perceive at once the difference between the EU and WTO as to the effective protection assured to public and social interests vis-à-vis economic liberties. Although recent WTO conferences have tried to enhance the guarantees in favor of public and social interests, their protection has hitherto been recognized in a quite limited fashion.

3. Public regulation of markets and administrative law

Having analyzed the main features and trends of the public regulation of markets in the present age of globalization, we now turn to the question of how these developments have affected administrative law. I would identify four major impacts.

First of all, I would argue that market regulation has become one of the most important aspects of contemporary administrative law. Born in France and continental Europe at the turn of nineteenth century as the set of legal rules for *puissance publique*, administrative law then became the means for regulating various *services publics* as well as the *droit public de la régulation économique* in the twentieth century. The evolution of administrative law from public authority to services of public utility to public regulation of markets is quite evident all over the world.

Secondly, as mentioned, there has been the broad reduction in discretionary administrative power in the adoption of measures concerning market access: the so-called 'entry restrictions', such as authorizations or licenses. This trend, together with the diffusion of independent agencies, may contribute to lessening political influence on administrative action (Mashaw 1983, chapter 5).

Thirdly, the growing importance of the principle of proportionality, as well as regulatory impact assessment, not only reinforce *post hoc* judicial enforcement but serve as *ex ante* criteria for justifying administrative measures.

Finally, the principles and rules of competition law concern not merely the behavior of undertakings, but also the exercise of public power. As we have seen, there are widespread efforts to enhance the pro-competitive elements of legislation and regulation. Similarly, competition law principles are increasingly affecting the award of public contracts and the granting of licenses.

There are obviously many differences among diverse national experiences. States

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[26] Articles XX, XXI.

[27] WTO, Appellate Body, *EC-Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, 12 March 2001, paras. 172 ff.

[28] See the *Hahn* judgment, discussed above n. 25.

having a strong tradition of public administration or economic intervention, such as France or Japan, are more reluctant to reduce 'entry restrictions' and discretionary powers. Political influence on administration is hard to overcome in several contexts: for example, chairpersons and members appointed to boards of independent agencies are not always truly independent of their governments. *Ex ante* proportionality seems to be stronger in countries where regulatory impact analysis procedures are well consolidated, such as in the United States, Great Britain and Canada, while it encounters difficulties in States in which these procedures are at an initial stage, such as Italy. Competition primacy over sectoral regulation has suffered setbacks, notably in the United States, which was the pioneer of competition law. Nevertheless, despite these differences and difficulties, said transformations of public regulation and administrative law appear as a substantial tendency of our time.

The insertion of public regulation and administrative law in higher legal orders still raises a delicate question. As we have seen, global regulation of markets must strike a difficult balance between economic liberties and social values. Sometimes the guarantees granted to economic liberties, such as international free trade, are given greater weight over the protection of public and social interests.

Certain national traditions in administrative law seemed to favor economic interests, such as property and the freedom of contract and enterprise. Nevertheless, there has been an increasing sensitivity to social values as well. The history of administrative law after the Second World War shows a steadily wider interest representation and a progressively stronger protection of an ample sphere of rights. Signs of this evolution can be found in the judicial decisions of French and Italian administrative courts since the 1950s and in American administrative law since the 1960s (Jeanneau 1954, Maillot 2003, Reich 1964, Stewart 1975, Sunstein 1990).[29]

Today, however, some spheres of global economic law, such as within the WTO or international standards governing financial markets, are still marked by imbalances in favor of the stronger interests. It is thus time to translate more explicitly the sensitivity to social values that one finds in certain national traditions of administrative law into the global sphere.

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[29] In particular, the French *théorie administrativiste des principes généraux*, developed since the mid-1940s in the judgments of *Conseil d'Etat* and in scholars' contributions, brought about stronger guarantees in favor of the *droits des administrés*.

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5 Administrative law in East Asia: a comparative-historical analysis

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Comparative law has experienced its share of debate over both purpose and methodology. In fact, there are many things one might hope to accomplish through comparative scholarship, and no need to privilege one purpose over another. So long as the purpose of a particular project is made clear, readers will be able to decide for themselves what is gained from the comparison. The same can be said of method. There are many possible methods for doing comparative work, and so long as the chosen method is clear, readers will be able to judge for themselves whether the materials and the argument support the final conclusions. Self-reflection is important, but it also seems true that at some point debate over purpose and method can be paralyzing, getting in the way of comparative projects that might yield interesting insights. This chapter will spend relatively little time on purpose and method, not because they do not matter, but on the assumption that a classically pragmatic approach to such issues is perhaps the best way to proceed. There is no overarching truth, or authority, that will settle debates about purpose and method in comparative law, so a pragmatic approach asks instead whether a chosen purpose and method succeed in generating useful insights on the part of the researcher, or the reader. The fact that this chapter is also an exercise in comparative legal *history* offers another explanation for such a pragmatic approach. An important contribution of good legal history comes in providing an interpretative framework for understanding the past, and as such should be evaluated, at least in part, separately from the underlying historical research. A pragmatic, pluralist approach to interpretative frameworks in legal history, as in comparative work, means that they are judged on their usefulness in generating insights that might not have been apparent if the same material were viewed through another prism. Combining comparative work with historical work results in a magnification of this kind of uncertainty, and even greater support for a pragmatic sensibility.

In this spirit, the purpose of this chapter will be to present a history of administrative law in East Asia, meaning Japan, South Korea, Taiwan, and to some extent the People's Republic of China. This chapter further seeks to draw connections between the development of East Asian administrative law and the history of administrative law in the West, represented primarily by Germany and the United States. The focus will not be on doctrine, or on the historical details of any one jurisdiction, but on administrative law as a window into relations between state and society, as a barometer for evaluating the changing roles of law and legal institutions in societies over time. In this view, administrative law does not determine state-society relations, but neither is it simply a reflection of underlying power politics. Rather, administrative law exists somewhere in the middle, as both a result of past political battles, and as a framework that helps structure future political battles. A more traditional approach to comparative law might have shied away from comparative administrative law for just this reason, because of the intimate

connection in any society between administrative law and politics. But at least in the Anglo-American and German worlds, administrative law as a discipline has had politics and comparison at its core since the nineteenth century. Germans such as Rudolph von Gneist and Lorenz von Stein looked extensively to the experiences of England, France and elsewhere as they developed their ideas about the proper role for administrative law in Germany. And the proper role they were searching for was an explicitly political role, a role as an interface to help structure state-society relations (Stolleis 2001, Ohnesorge 2002). Much the same could be said of Albert Venn Dicey, Frank Goodnow and Ernst Freund, whose work had enormous consequences for the way administrative law would develop in the Anglo-American world (Ohnesorge 2002). The fact that the politics is hardly even buried beneath the surface of administrative law makes comparative work in this area just that much more interesting to those who care about the role of law in society. Although the more external, political and functional approach adopted here will necessarily draw on broad similarities and tend to overlook specific differences, it is hoped that this approach will allow readers to relate the East Asian experience to the history of administrative law and politics in other societies.

The following offers a division of the history of administrative law in East Asia into four phases. It seeks to provide an interpretative framework for understanding these phases, as well as the transitions between phases, which will link East Asian administrative law to developments observed in elsewhere. The first phase covers the period when traditional, pre-modern East Asian legal structures and ideologies were in place and functioning. While the exact dates vary from country to country, the general legal and ideological framework represented by the law of China's Tang dynasty (Johnson 1979, 1997) provided the basic pattern for law in East Asia until the influx of Western law and legal thought in the nineteenth century (Shaw 1981, Haley 1991). The second phase is the transitional period, when imports from the West gradually displaced traditional legal institutions, as well as corresponding ideologies and political philosophies. The third phase is the period of relative stability under imported legal norms and institutions, and this phase lasted in East Asia until the 1990s. The fourth, and current, phase is again a period of change, as countries in East Asia are actively revising their administrative law regimes. Each of these four phases corresponds to a different alignment of state-society relations, and a different role for administrative law in mediating such relations. The goal of this chapter, applying a comparative-historical approach, is to map those relations, and to draw out insights that may be useful for understanding administrative law in other social, historical, and political contexts.

1. Phase one: 'administrative law' in traditional East Asia

Writing about administrative law in traditional East Asia forces one to confront very directly what one means by the term 'administrative law'. One long-standing Western observation about East Asian traditional law has been that one of its main components was administrative law, the other main component being penal law. From another point of view, however, one of the things that distinguishes traditional East Asian law from modern law is precisely the absence of administrative law.

In what sense could one say that administrative law made up an important part of traditional East Asian law? First, a large part of traditional law took the form of internal commands directed from higher to lower levels of the bureaucracy. Some of those

commands specified the punishments that lower officials were required to impose upon subjects for specified actions, thus drawing the comparison with Western penal law noted above. For example, a typical area of the law might take the form of a command to a lower official to impose penalty X on a person with social rank Y who had committed act Z. Many other commands, however, imposed direct governance obligations on the lower-level officials themselves, such as those parts of the law containing commands concerning how the officials were to carry out tasks such as collecting taxes, maintaining schools, maintaining the granaries, maintaining public shrines, etc. Although to one trained in the Western legal tradition this represents a potentially troubling mix of judicial and executive functions, the East Asian legal and political tradition was not much concerned with that distinction, and therefore did not hesitate to assign those tasks to the same government functionary.

An additional factor linking traditional East Asian law with modern administrative law is the fact that much of that law was directly regulatory, designed to accomplish governmental aims through the direct imposition of regulatory requirements. For example, rather than seeking to ensure the performance of contracts in society by creating privately actuated, judicially enforced rights and remedies for breach of contract, the traditional East Asian approach was to prescribe a penalty for the bureaucracy to impose on one found to have breached a contract. This approach to addressing a matter of social concern is common in administrative regulations issued by regulatory agencies in modern legal systems, and is unlike the indirect use of law to achieve social goals that we associate with private law. This contrast can be seen in the recent debate over whether one can sensibly speak of private law in traditional China. This debate has been closely associated with the work of China historian Philip Huang and several colleagues, whose method has been to examine actual case decisions from late imperial China (Bernhardt and Huang 1994, Huang 1996). Although those case decisions generally take the form of an official applying the appropriate sanction against one or another party to a dispute we would treat under private law, Professor Huang discerns something very much like private law norms, and essentially private rights, operating to drive the decisions of the bureaucrats charged with handling the disputes (Bernhardt and Huang 1994, Huang 1996). In this exercise Huang and others are working within Max Weber's framework for categorizing legal systems based on distinctions between formal and substantive, and rational and non-rational characteristics (Trubek 1972), with the aim of challenging Weber's characterization of traditional Chinese legality. Whether or not Huang's method ultimately convinces, the fact that he and his colleagues need to work backwards, to read private law and claimant-driven private litigation into materials that do not speak in those terms, actually serves to highlight the truly fundamental differences between the East Asian and Western legal traditions. This is so even if one agrees with Huang that traditional China was not as hostile to 'private' law and litigation as earlier believed.

A third factor linking traditional East Asian law with modern administrative law is the fact that specific areas of law were usually associated with specific government bodies with defined areas of competence, such as the Boards of Revenue, War, or Rites in Qing China. As noted above, some legal norms instructed lower officials how to carry out the tasks within a particular Board's jurisdiction, and other rules stipulated the punishments to be imposed upon officials who failed in their duties. And yet still other rules instructed

officials as to what punishments to impose on members of the public who committed specified acts considered relevant to that Board. For example, Article 159 of the Qing Code, which falls within Part Four of the Code relating to the Board of Rites, requires local officials to erect tablets 'with the names of the gods and the dates of their sacrifices', . . . requires that they be hung in a 'clean pure place', and stipulates the punishment that the official or his underling will receive if this is not done properly (Jones 1994: 173). The next article, Article 160, then turns to the task of maintaining the tombs of former kings, emperors, and certain officials, and stipulates the punishment to be imposed on people for tilling, gathering wood, or grazing cattle on such land (Jones 1994: 173). To one trained in modern law this division of law according to the government agency responsible for regulating an area of social life is more reminiscent of the regulations produced by a ministry of finance, or a department of labor, than the common law of contract produced by the American courts, or a generally applicable civil code of a civilian jurisdiction.

A fourth characteristic of East Asian traditional law that brings to mind comparisons with modern administrative law is that it devoted a great deal of attention to the civil service that was charged with carrying out the political center's commands. Thus a great deal of traditional law was devoted to achieving the goal of a professional, disciplined, meritocratic, and rule-bound civil service that would carry out the commands of the center (Watt 1972, Metzger 1973). If one includes within the field of administrative law those rules that create, structure and discipline the civil service, then traditional East Asia would properly be seen as a pioneer and arguably an exporter rather than an importer of Western law and legal culture. The most famous example of this would be the institution of a meritocratic civil service (Têng 1943), which of course had to be created and defined by law. At least in China there was also an elaborate system of norms for disciplining the civil service separate from the penal sanctions contained in the main dynastic codes (Watt 1972, Metzger 1973). The famous Censorate of China, for example, was only one among several mechanisms through which superiors within the bureaucracy could monitor, evaluate and discipline inferiors (Watt 1972, Metzger 1973).

A final institution of traditional East Asian law with resonances in modern administrative law is the centuries-old tradition of commoners petitioning higher levels of government for relief from actions of the lower levels (Roberts 1994, Fang 2009). This system allowed petitioners to appeal for relief both to higher levels of the bureaucracy, and to petition outside the normal bureaucracy to the Censorate, which could then exercise its investigatory powers. The system of 'letters and visits' that exists in China today, while formally a creature of the socialist legal system of the People's Republic, operates in ways similar to the petition system of imperial China (Minzner 2006).

Although earlier Western observers of East Asian law, based upon the sorts of features noted above, commonly said that traditional law was heavily administrative, another view, perhaps more American in orientation, would conclude that administrative law was in fact unknown in traditional East Asia. The lower-level actors in the bureaucracy were certainly expected to follow the rules governing their behavior, including procedural rules governing their actions, as well as the positive law of sanctions imposed upon bureaucrats who were guilty of mistakes or dereliction of duty. These top-down and disciplinary norms were, however, more like a set of specialized penal law used to discipline a bureaucracy in the performance of its tasks than something approaching the judicially enforced procedural requirements we typically find in a modern administrative

procedure statute. Moreover, control over the invocation and enforcement of these norms was left primarily in the relevant higher levels of the bureaucracy itself, in marked contrast to many modern administrative law norms, which empower affected citizens or perhaps civil society groups to raise them before a judge to help ensure the legality of administrative action. Although traditional East Asian law's mechanisms for non-legal petitions and appeals arguably played a similar function (as mechanisms by which higher levels in the government could be alerted to problems at the lower level), the petition system did not create rights to relief on the part of petitioners, only possibilities for discretionary grants of relief.

This absence of a rights orientation raises a final, and very fundamental, sense in which administrative law did not exist in traditional East Asia. Reflected in the preceding sections is the idea that modern administrative law depends to a significant degree on some separation of governmental powers, and on a legal apparatus that operates with some institutional autonomy from the government's regulatory actors. Whether this judicial function is performed by ordinary or by specialized courts, or even by specialized functionaries within the regulatory apparatus itself, administrative law as a system for determining through an adjudicative process whether government regulatory actions have been carried out in compliance with the law is unintelligible without separation and insulation of the adjudicator. Moreover, for such review to constitute an 'administrative law'-type means of enforcing legality (as opposed to simply hierarchical administrative review), implies a separation of law from political or policy concerns, as well as a charge to the adjudicator that its primary role is to interpret and enforce legal constraints. Sophisticated observers of judicial review of administrative action will know that this distinction can be difficult to maintain in practice. For example when federal courts in the United States perform 'hard look' review of agency policy choices it can be difficult to demonstrate convincingly that the reviewing court is performing judicial as opposed to policy or political review. The distinction is nonetheless foundational to the modern idea of administrative law, and will be uncontroversial in many instances of judicial review.

Traditional East Asian political theory recognized a strong role for law in effective governance, but law's role was primarily as a direct instrument of state authority, directed either at the population, or at the bureaucracy. In that role, there was no room for the autonomy of law or legal institutions, and no idea that law should function as a shield against the state, as well as its sword. Of course, law in the West has not always achieved the goals set for it by Western political theory. But highlighting this fundamental difference between the East Asian and Western political traditions is important to show that the successful introduction of administrative law into East Asian societies would require a fundamental reorientation in legal and political theory, as well as in doctrine, and in practice.

2. Phase two: the importation of Western administrative law

The era of Western administrative law in East Asia begins with the Meiji Restoration in Japan in 1868, which set off a decades-long project to construct a Western-style legal system in that country. What was done in Japan with respect to administrative law had profound consequences for the rest of East Asia, as will be discussed below.

Japan's Meiji-era reformers have become famous for searching the Western world for models they thought would be suitable in Japan, even if the ways in which foreign

institutions actually functioned in Japan was heavily determined by local circumstances. With respect to public law, constitutional and administrative, Japan's main influences came from the German-speaking world. The Meiji Constitution, which entered into force in 1889,[1] was not simply a copy of the Prussian or some other nineteenth century German constitution. Rather, careful research has shown that that most of the specific provisions were copied from one or another of the many German constitutions of the nineteenth century, or were at least inspired by provisions found in German constitutions (Nakano 1923: 235–54). It is also generally accepted that this choice to draw on German sources was strategic, driven by the desire of the Meiji Oligarchs, who actually controlled Japan in the name of the 'restored' emperor, for a constitution that would provide the basic forms of modern government without significantly limiting their power (Beckmann 1957, Haley 1991). With the exception of a few minor German states, the Meiji Constitution was 'perhaps the most autocratic constitution in the world' according to a comparative public law scholar of the time (Nakano 1923: 252), containing fewer legal limitations on the powers of the Emperor – and thus the oligarchs who actually ruled – than even the constitutions of Prussia and other undemocratic German jurisdictions. Given the weakness of constitutional law as a check on governmental prerogative, it is not surprising that a vigorous system of administrative law was not high on the agenda of the Meiji law reformers. Article 61 of the Meiji Constitution stated that suits against the government could not be heard by the ordinary courts, but would instead be heard by a specialized administrative court, to be established by law. An Administrative Court was established by statute in 1890, separately from the hierarchy of ordinary courts (Ködderitzsch 2005). And while the ordinary courts at times mustered the will to challenge the government, the Administrative Court and administrative litigation are typically treated as having failed during this period as a mechanism for imposing legal control on the government (Ogawa 1967–8).

The framers of Meiji constitutional and administrative law were not only influenced by doctrinal models from the German-speaking world; they were also attracted by the justificatory theory that accompanied the doctrines and institutions. In particular, the social and public law theories of Lorenz von Stein and Rudolph von Gneist informed the thinking of Meiji law reformers, though to be fair it might be more accurate to say that the ideas of Stein and Gneist concerning the need for the state to maintain autonomy from class domination in order to pursue the public interest helped the Meiji reformers legitimate the unaccountable executive branch they were constructing for their own purposes (Ködderitzsch 2005: 630–31). In looking to the ideas of people like Gneist, however, Meiji reformers were in fact highly selective. For example, there is no doubt that Gneist was an advocate for legal control over government, and had the Meiji reformers stayed closer to his vision, administrative law and the Administrative Court might have been much more important than they proved to be in Meiji Japan.

Meiji Japan's legal reforms, including in administrative law, were important for the rest of East Asia given subsequent historical events. China and Korea both trailed Japan in their law reform efforts, and Japan's influence became important for both, though in

[1] Properly speaking the Meiji Constitution was not adopted by the people of Japan or their political representatives, but was instead 'octroyéd' (in the sense of 'granted' or 'imposed') by the Emperor as an act of self-limitation (Nakano 1923: 5, 37).

different ways. Korea became a colony of Japan in 1910, though Japan's influence had been growing since the 1890s. Korea thus lost the chance to undertake an autonomous reform of its legal institutions, leaving us to speculate what Korea's own path to legal modernization would have been. Even after full sovereignty returned to Korea in 1948, the legal system of the Republic of Korea (South Korea) remained heavily influenced by the colonial experience, as evidenced by Korea's adoption of Western administrative law via Japan (Lee 2006).[2]

Japan exerted nothing like the same level of influence over legal development in China, though in the end China's administrative law reforms resulted in a system that was basically similar to Japan's. Law reform efforts in China took off after the fall of the Qing Dynasty in 1911, though the weakness or absence of a truly national governing authority seriously hindered the reforms. After the Nationalist government established its capital in Nanjing in 1927, that government succeeded in enacting much of the framework of a modern legal system. And as had been the case in Japan, it was Germany that provided much of the basic blueprint. That framework, which has provided the basis for the legal system in Taiwan since the Nationalists fled the mainland in 1949, included an administrative litigation statute providing a basis for suits against the government challenging administrative acts, as well as an administrative court to hear such litigation.

Part of the explanation for Nationalist China's orientation toward German law must be found in the high levels of legal exchange that went on between Japan and China in the first decades of the twentieth century. During this time many young Chinese studied in Japan, and the Chinese government hired many Japanese experts to assist in law reform efforts. Part of the explanation also surely lies in the fact that civil law legal institutions are easier to import than those from the common law tradition, and that in that era German law and legal theory would have appeared especially systematic, scientific, and integrated. One would also want to look at the motivations of the Chinese leadership, who, like their counterparts in Meiji Japan, had incentives to develop a modern legal system without a vigorous machinery for challenging the executive branch. Whatever the exact constellation of causal factors, the result, first on the mainland and then in Taiwan, was an imported system of Western administrative law that, as in Japan, remained very weak as a mechanism for constraining the executive branch.

In comparative and historical perspective, the specific, more authoritarian forms of Western administrative law that East Asia imported during this transitional period should not be surprising. The prevailing legal and political tradition in the region, as discussed earlier, was hardly conducive to more liberal public law forms or to ones that, once imported, might have evolved in a more liberal direction. Put another way, those in East Asia who hoped for modern law of a more democratic nature, with administrative law providing more rigorous checks on the executive branch, or a judicial forum for contesting government policies, had little in their own existing legal culture on which to draw. Moreover, private industry and private capital, which in both Germany and the United States supported more vigorous administrative law in the nineteenth century,

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[2] Law in the Democratic People's Republic of Korea (North Korea) continues to reflect the combination of Stalinist and Maoist totalitarianism that characterizes the country's political system, and there has been no transition to administrative law as the term is used in this chapter.

were not sufficiently developed and autonomous from the state to demand administrative law that would help legalize the boundary between state and society.

A bit of broader comparative perspective, not merely on law but also politics and social change, helps us better contextualize East Asian developments. In the United States, private industry developed prior to the development of the regulatory state in the late nineteenth century (Hurst 1956, Skowronek 1982), and the Anglo-American legal heritage provided a rich tradition of legal checks on government action (Henderson 1963). Thus, in the American case it seems in retrospect almost preordained (or at least deeply comprehensible) why administrative law would become highly politicized, and develop in such a way as to provide substantial checks on government action. Industrialization carried out by private actors tends to force states into detailed regulation in areas ranging from workplace and product safety to environmental and consumer protection. Yet at the same time industrialization results in those private actors becoming more and more powerful. Public pressure for regulation of industry can lead the increasingly powerful industry to seek administrative law as way to check regulators. At the same time, a perceived weakness of regulation, or of regulatory enforcement, can push the public to seek to use administrative law and litigation to try to influence the content of regulation, and to try to force regulators to perform. In the German-speaking world, by contrast, where the regulatory state developed early (Stolleis 2001: 207), and where private industry developed somewhat later, the state played a more important supportive role in the 'late' development of industry (Gerschenkron 1965, Henderson 1975). Not surprisingly, the private sector in the German-speaking world was less important as a driver of administrative law reforms to check the executive than in the United States, even though such an active role for administrative law had been called for by important reform figures such as Gneist.

By comparison, this period in East Asia suggests a third pattern, wherein administrative law emerged in a social context where there was no preexisting tradition favoring a law-governed relationship between state and society, and where the state took on an even more extensive role in the fostering of economic development. The result, discussed in the following section, is that administrative law became even more irrelevant in structuring relations between state and society, as state and industry are even more intertwined in mutual dependency, and as the state faced even less challenge to its authority from private industry, or other elements of civil society.

3. Phase three: administrative law in the East Asian 'developmental states'

The third stage of East Asian administrative law is the one most familiar to modern scholars of comparative administrative law, comparative politics, or law and development. This stage, which could be seen as lasting from the end of the Second World War until the 1990s, coincided with East Asia's economic miracle, and one could say that it constituted the public law component of the East Asian 'developmental state'. As foreign scholars began to study economic development in the region, first in Japan, then somewhat later in Taiwan and South Korea, the dominant view came to be that organs within the executive branch, ones quite autonomous from both civil society and elected politicians, orchestrated economic development in the region, or at least shepherded it to a significant degree (Johnson 1982, Amsden 1989, Woo 1991, Aberbach et al. 1994). The basic political economy argument presented in this literature is that in democratic Japan

the relevant ministries were able to make decisions comparatively free of influence from the legislature, the Prime Minister and the cabinet, as well as the private sector (Johnson 1982). Moreover, in undemocratic Korea and Taiwan, the relevant economic authorities enjoyed a high degree of autonomy from the otherwise autocratic governments in the interests of economic development (Amsden 1989, Wade 1990, Woo 1991).

This interpretation of East Asian development, originally termed 'revisionist' because it challenges a previously dominant free-market account, has now become mainstream. It suggests that East Asia's export-led success built upon interventionist industrial policies that included currency manipulation, strategic protectionism, targeted subsidies, controls over foreign investment, and nationalist drives to acquire foreign technologies. In order for all these interventions to succeed without degenerating into a morass of rent-seeking and corruption, a 'strong' East Asian state was necessary, one insulated from social and political forces and able to make highly discretionary, particularistic industrial policy decisions in the interests of national economic success. Moreover, East Asian governments were able to plan and guide economic development otherwise carried out largely by private firms, thus presenting something of a middle way between planned socialist economies and free-market capitalist economies (Johnson 1982).

Although the political scientists and sociologists who produced most of this literature did not write about administrative law per se, it was often said that these strong states were able to influence private economic actors through the use of 'administrative guidance'. This usually came in the form of informal, oral instructions regarding what the administrators would or would not allow, or suggestions of actions that private actors should take, or not take. This is one of the facets of the developmental state period that has been explored through the lens of comparative administrative law, as a group of scholars in the 1970s and 1980s explored legal issues raised by the use of administrative guidance, particularly the extent to which it was, or was not, susceptible to judicial oversight and control (Yamanouchi 1974, Young 1984, Upham 1987). This burst of scholarly attention outside of East Asia no doubt related to the contemporaneous interest in East Asian industrial policy, as Japanese, South Korean and Taiwanese manufacturers were capturing larger and larger shares of US and global markets in such sectors as auto, electronics, computer and steel. Although scholars disagreed about important aspects of Japanese political economy and the ability of the Japanese courts to review administrative guidance, none of them argued seriously that administrative law functioned in Japan to significantly legalize state-society relations in a way comparable to what had occurred in the United States or Germany. Nor did scholars claim that it provided a significant mechanism by which Japanese economic and social actors could enlist the courts to exert significant control over the regulatory apparatus. No similar debate even occurred with respect to South Korea or Taiwan; rather, authoritarian politics generally made it obvious to scholars why neither the public nor the courts were able to use administrative law to check the governments (see, for example, Kim 2006, Yeh 2009).

How exactly did East Asian administrative law remain of minimal importance, even in democratic Japan, despite the fact that it existed on the books? Doctrinally, there were no generally applicable administrative procedure statutes in East Asia; moreover, the procedural requirements found in particular statutes authorizing regulatory action were not rigorous, and provided little in the way of general public participation. There were also no general information disclosure laws comparable to the Freedom of Information

Act in the United States, leaving government decision-making relatively opaque to the general public, or to civil society groups. What did exist were the extant administrative litigation statutes creating causes of action for those whose rights had been violated by administrative action, albeit subject to highly restrictive standing and other gatekeeper doctrines that greatly limited their practical use (Upham 1987, Kim 2006, Ködderitzsch 2005, Ohnesorge 2002). In theory, the courts could have relaxed such gatekeeper doctrines through judicial interpretation, without the statutes being amended, but to do that they would have had to have been much stronger and ambitious institutions than in fact they were. A debate exists over whether the judiciary in democratic Japan was restrained by political 'masters', the ruling Liberal Democratic Party, or whether the judiciary enforced a restrained posture upon itself (Upham 2005). Nobody, however, presents a picture of the Japanese courts during this period consistent with an expansionist posture towards the gatekeeper doctrines controlling administrative litigation. Once again, the fact that South Korea and Taiwan were authoritarian during this phase offers a clear explanation for the courts' restrained posture.

Another point is also perhaps obvious but is still worth addressing directly: the inherently comparative aspect of these kinds of judgments with regard to the social role of administrative law in this period, or any other. Administrative law existed, as we have seen, and was used to some extent. What administrative law did not do was to evolve into an important site for contestation between state and society, into a mechanism through which the courts, hearing administrative litigation, would become central players in the regulatory process, and in the political and policy battles that accompany regulatory efforts in modern societies. That had been the direction of administrative law in the United States and to some extent Germany over the same decades, and this doubtless affected the background assumptions of at least some of the American observers concerning the ideal role of administrative law in a modern polity that made East Asian administrative law appear especially restrained.

Although most foreign commentary on East Asian administrative law during the developmental state phase has been critical, likely reflecting precisely these background assumptions, there has been a strain in the literature that also sees value in the less litigious relationships between state and society that seemed to pertain in the region. This strain became part of the 'comparative regulatory styles' literature (Ohnesorge 2002), in which Japan is often cited for its healthy regulatory environment compared to the 'adversarial legalism' that characterizes the regulatory environment in the United States (Kagan 2001). Interestingly, one could see this literature as sharing a common sensibility with conservative observers such as Justice Scalia of the US Supreme Court, who has championed doctrines of judicial deference and the narrowing of gatekeeper doctrines such as standing.[3] But one could also see this literature as sharing the sensibilities of the New Dealers and the drafters of the 1946 Administrative Procedure Act, whose restrained vision of judicial review the assertive, interventionist courts of the 1960s eventually abandoned (Merrill 1997).

China, which dropped out of this narrative in the 1940s with the victory of the Communists and the flight of the Nationalist government and its legal system to Taiwan,

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[3] See, for example, *Lujan v. Defenders of Wildlife*, 504 US 555 (1992).

is increasingly and understandably reentering this discussion with its return to a market economy since the 1980s. Whatever administrative law meant in a Soviet-style legal system, for legal purposes China is no longer a part of a world of 'socialist legality' that has practically disappeared. With respect to administrative law specifically, China today much more closely resembles its East Asian neighbors during their developmental state phase described above (Ohnesorge 2006). China has in place the same basic legal framework allowing administrative litigation against the government, which exists despite (or indeed because of) the authoritarian political order. Observers of administrative litigation under this system even complain about a problem pervasive in East Asian law in the developmental state era: the extent to which the German concept of an 'administrative act' can be interpreted in a formalist way to dramatically limit judicial review and maintain a restrained posture for the courts (Ohnesorge 2006).

Given the political leadership's continued control over the courts, which was also the case in pre-democratic South Korea and Taiwan, the tendency by judges to interpret administrative law doctrines to stay out of governance debates should not be surprising. Likewise, the top political authorities seek primarily a legal framework to help them police the activities of lower-level bureaucrats, through statutes governing issues like administrative licensing and administrative sanctions (Ohnesorge 2006). The leadership has even allowed developments in areas such as information disclosure, public participation, and toward a general administrative procedure statute, that failed to get traction in Japan until the 1990s, and in South Korea or Taiwan until after democratization. In this formal sense, at least, China could be said to be 'ahead' of where the framework of this chapter might be expected to place it. But if one looks at state-society relations in China, especially focusing on industry and on civil society, the picture is not encouraging. The state still maintains *de jure* control over major industries through various kinds of state ownership, and through an economic governance and financial system that still vests great power and discretion in the hands of government bureaucrats. The political authorities are also working to maintain *de facto* influence over nominally private industry through such measures as inviting successful entrepreneurs to join the Communist Party. From a foreign or comparative perspective, it appears that state-business relations in China are going to be at least as opaque and mutually interdependent as in South Korea and Taiwan during the developmental phase, which hardly bodes well for the development of Chinese administrative law in the near future. At the same time, non-economic civil society groups remain under severe pressure from the political authorities, and the courts do not appear to be making much progress towards the kind of independence that would free them to expand administrative law.

4. Phase four: East Asian administrative law in the post-developmental state

Since the early 1990s, administrative law in Japan, South Korea, and Taiwan has entered another period of transition (Ginsburg 2001, 2002, Ohnesorge 2002, Ohnesorge 2006, 2007a). Doctrinally, this period has entailed the adoption in all three countries of general administrative procedure statutes, the creation of opportunities for public participation in administrative rulemaking in other decision-making settings, the adoption of information disclosure statutes, and reforms to systems for administrative adjudication (Ohnesorge 2002, Ginsburg 2001, Baum 2005, 2007, Kim 2006, Lee 2006, Ködderitzsch 2005). Arguably, these changes represent a convergence of East Asian administrative law

toward norms and practices that have been developing in the United States, Germany, and elsewhere in the West since the 1960s. Indeed, in all three countries, basic rates of administrative litigation, as well as public participation, have risen (Ginsburg 2002, Ushijima 2009, Yeh 2009). Politically, these developments in Taiwan and South Korea were certainly related to democratization, which began in both societies in the late 1980s. A thorough democratization is hard to imagine without a significant increase in the legality, transparency and public accountability of the state apparatus. Japan's administrative law reforms are a little more difficult to explain because Japan's political alignment did not change substantially, though they did coincide with a broader movement to make Japan a 'Rule of Law' society and to reduce the role of the bureaucracy in the Japanese economy. Commentators also point to pressure from US interests, which had been prodding Japan since at least the Structural Impediments Initiative of the 1980s to adopt a general administrative procedure law to combat discriminatory uses of administrative guidance by Japanese authorities.

Looking at administrative law through the lens of political economy, rather than doctrine, the question seems to be whether business interests, which in other societies have helped drive the development of administrative law as an effective tool for contesting state policy, will play the same role now in East Asia. With democratization and competitive party politics, links between the state and industry in Taiwan and South Korea have changed dramatically, and the evidence suggests that these societies are changing much more quickly than Japan, where less fundamental political change has occurred. Japan's Liberal Democratic Party lost elections in 2009, ending the fifty-plus years of one-party dominance that is often cited as explaining the restrained posture of the Japanese judiciary. Democratization has also unleashed civil society groups, especially in South Korea and Taiwan, which both now have very fractious, contentious domestic political cultures. This latest phase of administrative law in East Asia is still unfolding, and while patterns have definitely changed, it is still hard to say what kind of equilibrium will be established in each society.

5. Conclusion

This comparative, historical narrative suggests two main conclusions. One is that administrative law, as it develops over time, is intertwined with politics and state-society relations in every polity, and that therefore any theory of administrative law requires a theory of state-society relations, acknowledged or not. Scholarly efforts in comparative administrative law should therefore address larger political issues directly, to allow for more meaningful analysis. Moreover, if one embraces and incorporates this political dimension, then contrary to comparative law's traditional avoidance of administrative law, it may turn out that administrative law is an especially fruitful field for comparative work. It may also turn out that administrative law is an especially useful window through which to conduct scholarship in comparative politics.

The second important conclusion one could draw is that when thinking about law reform as a tool to bring about social change, specific legal reforms themselves are likely to be neither necessary nor sufficient to bring about the desired social goal. In China today, for example (and this would also have been true of the East Asian developmental states of the past), the adoption of a US-style Administrative Procedure Act *in toto* would not guarantee any significant change in the social role of administrative law in China.

Law would remain ineffective as a check on governmental power. Likewise, if Chinese courts suddenly became free to develop administrative law outside the control of the Communist Party and the government, they could in fact build that law on the basis of the statutes already on the books. Thus doctrinal administrative law reform would not be sufficient to bring about legally constrained governance in China, nor would it even be necessary, if other reforms were made. This conclusion perhaps simply restates basic insights from Legal Realism and studies of law in relation to politics and society, but it is worth repeating given the amount of legal development work going on in the world today.

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6 Administrative state socialism and its constitutional aftermath

Kim Lane Scheppele

> The temple of bourgeois authority is legislation and its fetish is the law; the temple of the socialist world system is administration and its divine service is work. It is by no accident that the political ideals of the bourgeoisie are embodied in parliamentarism and the *Rechtsstaat*, whereas, the socialist community is, in its very nature, primarily a community of administration. (A.G. Goikhbarg, quoted in Quigley 2007: 55)[1]

The usual narrative about the rise of the administrative state seems universal – and runs as follows. Modern states do a great deal more than did pre-modern states. A great many of these new functions are highly technical in nature. They are so technical, in fact, that generalist parliaments cannot possibly write statutes detailed enough to provide precise and responsive guidance in all of the areas where states now act. To do all of the things that modern states do, therefore, there must be a division of labor among constitutional norms of the most general sort that provide the horizons of principle and procedure, legislative norms of intermediate generality that set general policy in specific fields and regulatory norms that provide the detail necessary for actual day-to-day governance. The administrative state is the result of the growth of norms in this last category. Over time, regulation has increased in scope and complexity, so that the historical sweep of administrative change always moves toward an ever-increasing density of administrative regulation and administrative governance. The challenge for modern administrative law is to keep regulation accountable, transparent, effective and fair through this delegation process. So the usual narrative goes.

That general narrative, however, may not be as universal as it seems. In the Imperial Russian and Soviet space, as perhaps in no other, administration operated largely without parliamentarism before the 20th century. Administration continued as the primary technique of governance during the Soviet period after 1917 and only then responded to the call of liberal legality when the Soviet system was transformed after 1989. Over the course of the 19th and 20th centuries, trends in the Russian Imperial and then Soviet space contrasted sharply with the historical sweep in much of non-communist Europe. In Western Europe, governance moved from parliamentarism to administration (Lindseth, forthcoming 2010), while in Eastern Europe, trends ran in the other direction While the usual narrative (and historical experience) of the rise of the administrative state in Western Europe envisions democratically elected branches gradually delegating their powers to administration, the Imperial Russian, Soviet and post-Soviet experience reveals a world of administration that only later gave up its power to elected bodies and representative legislation.

[1] A.G. Goikhbarg was a law professor charged with drafting the new Soviet family code after 1917. He later became a prominent specialist in the economic law of the Soviet Union.

In parts of the world governed by the Soviet model between 1917 and 1991, regulation occupied nearly the whole space of state action. The functioning of the state in day-to-day matters was often divorced from any legislative framework and was even farther removed from the principles that were announced in national constitutions. There was a veneer of public parliamentarianism, but the real work of the state was done in off-the-books Communist Party committees, whose views were communicated to small administrative state bodies for direct enactment as regulation. The Soviet Union and the countries that came under its influence throughout the twentieth century did not develop regulation as a specification of legislation. Instead, rule by administration operated as free-standing law without constraint or oversight of a legislative or constitutionalist variety. Regulation was envisioned as the direct expression of both the needs and desires of the people in the Soviet state, expressed through the labor of state workers whose tangible effort ensured that the activity of the state would move toward the realization of the new classless society.

Soviet governance used large assemblies and ornamental legislation to mask the fact that real (and different) power was concentrated in small, constitutionally subordinate bodies that had the power to issue binding legal regulations. Administration was considered a form of labor, in which the concrete efforts of state workers brought politics out of the useless legislative talking shops to the real shop floor of direct work. As a result, the Soviet Union created a system of law in which regulation was sharply separated from legislation and constitutionalism. Administration through regulation became the central task of the state.

The political revolutions of 1989–91 ended this Soviet system of governance. Administrative state socialism was rejected and reformulated. First, the space of regulation itself contracted because administrative state socialism gave way to privatization across a large range of former state activity. Liberalization of the economy abolished central planning; privatization of housing and other public systems further reduced the footprint of the state in daily life. But state administration also shrank because the *theory* of the state changed fundamentally as well. Administration became harnessed to legality in a new and different way after the political transformations. Administration was re-envisioned as the delegation of power from constitutionally grounded authority. Constitutions and legislation therefore came to dominate the space once inhabited solely by administrative rules.

These two forces – the shrinking of the state through privatization and the ideological collapse of the theory of Soviet administration – conspired to make administrative governance in the decades after the end of the Soviet experiment a much less prominent feature of public life than it had been at the height of Soviet power. The privatization story is well known; the ideological changes in state administration are less well documented, and will be my task here.

This chapter traces the changes from Imperial Russian to Soviet to post-Soviet theories of administration and, in so doing, shows how the usual story of continual administrative-state expansion through increasing delegation is not as universal as we might have presumed. Instead, the move away from administration after 1989 for Eastern Europe and 1991 for the Soviet Union was not only an unusual constriction of the scope of the administrative state, but also an invigoration of legislation as the primary source of law for the new pluralistic and democratic states that followed. I

will proceed by first tracing the theory of administrative governance under Imperial Russia and then the Soviet Union before focusing on one post-Soviet state, Hungary, to demonstrate how administrative governance contracted and became constrained under constitutionalism after 1989. There is much more to be said about these transformations, of course, because each part of the Soviet space handled these changes somewhat differently, and each of the formerly independent nations that had been integrated into that Soviet space over the course of the 20th century had its own administrative history before being forced into the Soviet model. While the specifics differ from country to country, this outline gives a general sense of these trajectories.

1. The Russian historical trajectory and the model of Soviet governance

The Soviet period – from the Russian Revolution of 1917 through the dismantling of the Soviet Union in 1991 – was associated with a particular strategy of governance. 'State socialism' worked toward the formal realization of equality of all persons through the ownership by the state of the crucial means of production. As a result, the management of the economy and the leveling of the population were accomplished through state administration, leading to a configuration that I call *administrative state socialism*.[2] This political formation took the shape it did in Russia for both historical and ideological reasons.

Historically, the Russian Empire had been quite loosely governed at best. Although the Russian Empire extended across Siberia and into Central Asia over a great expanse of territory, central government was hardly visible on the ground in these remote regions (Slezkine 1994). So faint was the tsar's influence that the relationship between Imperial Russia and its Siberian hinterland has been described as 'passive imperialism' (Mote 1998: 4). Instead, the nobility ruled their estates on the basis of idiosyncratic style rather than national law and the local *mir* or village councils governed locally, weakly and unevenly, largely out of the control of the center (Miliukov 1906).

The historic form of law issued by the Russian imperial government was the tsarist *ukaz* (decree). Drafted by the circle of advisors surrounding the tsar, *ukazy* were edicts that could and did change at the discretion of the tsar. They required no consent from a parliament and could not be reviewed by courts. They also could be changed in an instant. Codification was fitful and incomplete. Law, as a result, was thin, personalistic and largely unprincipled (Berman 1950). No wonder it bore so little relationship to facts on the ground.

Despite periodic demands to entrench principles of governance in a written constitution, most notably in the unsuccessful campaign of the Decembrists in the 1820s, it was not until the substantial legal reforms of 1864 that an independent judiciary, free-standing juries, an independent bar and local councils (*zemstvos)* were created with enough power to limit the tsar's absolute discretion (Eklof et al. 1994). These reforms made a major difference in Russian public life for a short time, but the rise of terrorism in the wake of the reforms and the eventual assassination in 1881 of the reforming tsar, Alexander II, caused his successor to sharply scale back the reform program (Scheppele

[2] This formulation bears a certain resemblance to Gavriil Popov's description of the Soviet Union as an 'administrative command system' (Popov 1987). For a discussion of Popov's account in English, see Lukin (2000: 168–9).

2005). After another period of autocratic rule and another period of unrest, Russia got its first parliament only in 1906.[3] That parliament barely functioned, however, and was not widely considered a success (Weber 1995 [1906]). Absolutism, as a result, persisted nearly unscathed in Russia until the Russian Revolution destroyed the imperial government and all that went with it.

Imperial Russia was long on tsarist discretion and short on formal procedures of constraint and accountability. In fact, before the Revolution, Russia never had a government that operated primarily through legislation.[4] It had never known robust separation of powers or serious mechanisms of political constraint. The imperial government may have had some liberals inside it arguing the case for constitutional rule (Witte 1921 [1912]), but constitutionalism hardly appeared in actual governing. Even without the ideological content of the Bolshevik Revolution, Russia would not have had an easy time creating a strong constitutionalist system because there were essentially no precursors for the separation of powers or the protection of individual rights. Virtually no institutional infrastructure existed in Russia that would have supported such constitutional constraint before the Revolution of 1917.

But this historical trajectory was not the only reason why the nascent Soviet Union rejected constitutional and parliamentary organization. Ideologically, the 1917 Revolution was justified by Vladimir Lenin precisely because the revolutionary state was empowered by popular uprising instead of by constitutional legal enactment. Lenin did not believe that a constitution that came from the tsar and the nobility *could* create a legitimate government; only popular support could accomplish that task. Parliamentarism, to Lenin, was nothing but a mask for elite power:

> To decide once every few years which member of the ruling class is to repress and crush the people through parliament – this is the essence of bourgeois parliamentarism . . . what is the way out of parliamentarism? How can it be dispensed with? The way out of parliamentarism is not, of course, the abolition of representative institutions and the elective principle, but the conversion of the representative institutions from talking shops into 'working' bodies. (Lenin 1975a [1917]: 342)

For Lenin, the mere talk of parliamentarians was therefore to be replaced by the actual work of administrators. The 'working bodies' of which Lenin wrote were to consist of cadres of state workers whose labor in actually running the state would keep them in touch with the needs of working people. The administrative state would ultimately be responsible to direct expressions of the revolutionary popular will rather than to parliaments or even to statutes. According to Lenin,

> The source of power [of the revolutionary government] is not a law previously discussed and enacted by parliament, but the direct initiative of the people from below, in their local areas – direct 'seizure,' to use a current expression . . . [O]fficialdom, the bureaucracy, is either . . .

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[3] The first Russian constitution is given in the Russian Fundamental Law of 23 April 1906 (Russian Fundamental Law 1906). In particular, Chapter IV creates the first State Duma (parliament) and Chapter III, Articles 42–4 required the tsar to obtain the consent of parliament to enact laws. But whatever the system may have looked like on paper, it was disappointing in practice.

[4] In Russia, constitutionalism has been historically more a discourse of opposition than a discourse of state (Scheppele 2005).

> replaced by the direct rule of the people themselves or at least placed under special control; they [the bureaucrats] not only become elected officials, but are *subject to recall* at the people's first demand. (Lenin 1975b [1917]: 302; emphasis in original)

As the Bolsheviks consolidated their gains after the initial phase of the Russian Revolution, Lenin became even more convinced of the centrality of administration for the practical victory of socialism. The task of the successful revolutionaries was to show that the state could actually provide for the basic needs of the people, and this was to be accomplished through skillful administration. According to Lenin,

> We, the Bolshevik Party, have *convinced* Russia. We have *won* Russia from the rich for the poor, from the exploiters for the working people. Now we must *administer* Russia. And the whole peculiarity of the present situation, the whole difficulty, lies in understanding *the specific features of transition* from the principal task of convincing the people and of suppressing the exploiters by armed force to the principal task of *administration.*
>
> For the first time in human history a socialist party has managed to complete in the main the conquest of power and the suppression of the exploiters and managed to *approach directly* the task of *administration*. We must prove worthy executors of this most difficult (and most gratifying) task of the socialist revolution. We must *fully realize* that in order to administer successfully, *besides* being able to convince people, besides being able to win a civil war, we must be able to do *practical organizational work*. This is the most difficult task, because it is a matter of organizing in a new way the most deep-rooted, the economic, foundations of life of scores of millions of people. And it is the most gratifying task, because only *after* it has been fulfilled (in the principal and main outlines) will it be possible to say that Russia *has become* not only a Soviet, but also a socialist republic. (Lenin 1975c [1918]; 441 emphasis in original)

The Soviet state was to be defined by administrative state socialism. For the duration of the Soviet Union, practically speaking, administrative law was the only effective law and state administration the only governance. Administration was not just the practical reality of daily life in the Soviet Union, but it proceeded from a coherent theory about the legitimacy of Soviet governance by and for workers.

Lenin's exhortations about the popular will and the need for administrative power during the revolutionary struggle made their way into the Russian Soviet Federated Socialist Republic (RSFSR) Constitution of 1918.[5] It proclaimed, 'The entire power, within the boundaries of the Russian Socialist Federated Soviet Republic, belongs to all the working people of Russia, united in urban and rural soviets [communal groupings]' (Russian Soviet Federation of Socialist Republics (RSFSR) Constitution 1918, Art. II, Ch. V, Para. 10). This pronouncement rejected the division of legitimate power into separate 'branches'. If all power originated in the people, it could not be divided and diluted.

The first Soviet Constitution officially organized the population into local soviets, which elected representatives to the All-Russian Congress of Soviets (RSFSR Constitution

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[5] The Russian Soviet Federation of Socialist Republic (RSFSR) Constitution (1918) was drafted in a giant rush after the revolutionary government closed down the Constituent Assembly that had formed at the behest of the Kerensky government. The 1918 Constitution as enacted was incomplete, but it provided a basic ideological blueprint that Soviet constitutions were to follow through the 1924, 1936 and 1977 redraftings. Most crucially, it set the pattern of state institutions that was to remain largely unchanged, despite terminological revision, throughout the Soviet period.

1918, Art. III). The All-Russian Congress was an enormous body that met infrequently, only twice per year as the Constitution provided. Instead, the Executive Committee of the All-Russian Congress, itself an organization of 200 people, was considered to be the 'supreme legislative, executive and controlling organ' of the Russian Soviet state (RSFSR Constitution 1918, Art. III, Ch. VII, Para. 31). The Executive Committee was authorized to act on behalf of the Congress of Soviets, when it was not in session, as the Congress usually wasn't (RSFSR Constitution 1918, Art. III, Ch. VII). But the Executive Committee was itself supplemented by the Council of People's Commissars (RSFSR Constitution 1918, Art. III, Ch. VIII). This Council had only seventeen members, and it was given a very broad mandate, being 'entrusted with the general management of the affairs of the Russian Socialist Federated Soviet Republic' (RSFSR Constitution 1918, Art. III, Ch. VIII, Para. 37). The language of the Constitution clearly implied that the Council of People's Commissars was an administrative body, tasked with carrying out the policies that the All-Russian Congress adopted, perhaps through its Executive Committee. But the Constitution also gave the Council the power to initiate policy. As a general rule, the Council was supposed merely to make recommendations to the Executive Committee of the All-Russian Congress for action, but the Constitution also provided that 'Measures requiring immediate execution may be enacted directly by the Council of People's Commissars' (RSFSR Constitution 1918, Art. III, Ch. VIII, Para. 41). As a result, the Council also acquired official lawmaking capacity, especially in persistently turbulent times.

Even in this first Soviet Constitution, then, we can see that operative power was an inversion of the apparent power. If all apparent power originated with the people who, in their soviets, voted for delegates to the All-Russian Congress, then real power surely lay with the Council of People's Commissars, together with the Executive Committee of the All-Russian Congress. Not surprisingly, even this small dispersion of power to a relatively large Executive Committee did not last long, as there were nearly immediate amendments to the 1918 Constitution that created a Presidium of the Executive Committee (Denisvo and Kirichenko 1960: 50–52), an even smaller and more agile group that would wield much of the effective power in post-revolutionary Russia. The 1918 Constitution was replaced by the 1924 Constitution as Russia added new socialist republics and became the Soviet Union (USSR Constitution 1924). Through the 1924 Constitution, Soviet-style governance with the same institutional structure was projected to a much larger geographic space.[6]

The Stalin Constitution, adopted in 1936, appeared to make substantial changes in state organization but in fact left this basic structure largely intact. The process of adoption of the Constitution was a huge and very public national project. According to official figures, fully 623,334 meetings were held to discuss the proposed Constitution and more than 42 million people attended them, producing some 169,739 proposals, comments, and prospective amendments (Siegelman, n.d.). The constitution-making effort

[6] The 1924 Constitution was important for two reasons: (1) It expanded the Soviet system of governance to new territories: Belarus, Ukraine and 'Transcaucasia' which itself consisted of Armenia, Georgia and Azerbaijan. (2) It was enacted almost immediately after Lenin's death and so represents his last influence on the development of the Soviet state.

itself provided an opportunity to reaffirm the ideological basis of Soviet governance, and Stalin himself explained its rationale:

> Bourgeois constitutions tacitly proceed from the premise that society consists of antagonistic classes, of classes which own wealth and classes which do not own wealth; that no matter what party comes into power, the guidance of society by the state (the dictatorship) must be in the hands of the bourgeoisie; that a constitution is needed for the purpose of consolidating a social order desired by and beneficial to the propertied classes. Unlike bourgeois constitutions, the draft of the new Constitution of the U.S.S.R. proceeds from the fact that there are no longer any antagonistic classes in society; that society consists of two friendly classes, of workers and peasants; that it is these classes, these laboring classes, that are in power; that the guidance of society by the state (the dictatorship) is in the hands of the working class, the most advanced class in society; that a constitution is needed for the purpose of consolidating a social order desired by and beneficial to the working people. (Stalin 1942 [1936]: 388)

Revolutionary constitutionalism started from the premise that traditional parliaments and constitutional checks on state power were only necessary in a society of warring classes. Eliminate the war, and there was no further reason to divide or constrain power. But while the structure that emerged in the Stalin Constitution renamed and restructured some key state bodies, the theory of governance reflected in the new structure incorporated the same basic ideas as had the earlier constitutions. The newly restyled and newly bi-cameral Supreme Soviet now had 'exclusive' legislative power (USSR Constitution 1936, Ch. III, Art. 32) but, like its earlier parliamentary counterpart, it was also a huge institution that met rarely. At the same time, the Presidium of the Supreme Soviet had the power to interpret laws, issue decrees and meet continually (USSR Constitution 1936, Ch. III, Art. 49).

The highest 'executive and administrative organ' under the Stalin Constitution was, once again, the Council of People's Commissars (USSR Constitution 1936, Ch. III, Art. 64). This body clearly had extraordinary regulatory powers, expressed in the text as the competence to 'adopt [] measures to carry out the national economic plan and the state budget, and to strengthen the credit and monetary system'; 'adopt [] measures for the maintenance of public order, for the protection of the interests of the state, and for the safeguarding of the rights of citizens', and much more (USSR Constitution 1936, Ch. III, Art. 68). The Council of People's Commissars also directed 'the branches of state administration' by 'issu[ing] within the limits of the jurisdiction of the respective People's Commissariats, orders and instructions on the basis and in pursuance of the laws in operation, and also of decisions and orders of the Council of People's Commissars of the USSR, and supervis[ing] their execution' (USSR Constitution 1936, Ch. III, Arts. 5 72–3). In short, the constitutional description of the Council of People's Commissars made it the central administrative body of the state with the power to issue regulations for virtually any administrative purpose.

Beyond the text, the reality of Soviet governance deviated sharply from its apparent constitutional blueprint. For one thing, operating throughout the formal structures of government was the pervasive influence of the Communist Party. Although the constitutional bodies of state issued official decrees and carried out policies, the brains that went with these bodies, so to speak, were in the Party. The direction of the state was largely determined in the highest reaches of the Party, and then communicated for enactment to the Council of People's Commissars. In fact, Stalin himself never held an official

position in the government of the Soviet Union after 1924; from Lenin's death in that year until his own death in 1953, he was the General Secretary of the Communist Party, a position nowhere defined in Soviet constitutions, not even in the Stalin Constitution itself.[7]

The Stalin Constitution preserved the Soviet theory of governance, in which public institutions were strongly divided between those that were mostly 'for show' and those that wielded real power. These two types of state bodies – the ornamental and the real – were organized like *matrioshki* (Russian nesting dolls). The ornamental pieces consisted of huge legislative assemblies with grand-sounding titles accompanied by constitutions that were full of promises of liberation and rights (the larger and more visible dolls in the set). But the real power was held by smaller groups contained within these larger assemblies, groups that concentrated all important power in a few hands – an executive committee within a congress and a presidium within the executive committee, or a small administrative body that was technically subordinate to the larger ornamental body (like the tiny inner dolls hidden from public view). This concentration of power in a few hands was, however, publicly telegraphed in the text of Soviet constitutions. These smaller and less representative groups were legally empowered to act on behalf of the larger groups when the larger groups were not meeting. And the larger groups met rarely. The extraordinary powers of the small groups were usually found in the constitutional small print, but one would never guess from the constitutional flourishes announcing the large popular assemblies that they were such marginal players.

Perhaps more crucially for our purposes, however, the overt function of these close political circles was primarily administrative. Theoretically, they were supposed to carry out policies enacted by the larger and more representative bodies. But in practice, these smaller groups did not wait for the larger bodies to act. Instead, on order of the Party, they issued regulations without general legislation to provide the guiding principles for state administration. Sometimes, general legislation came long after the administrative regulations went into effect. Often, it simply never came along at all. Just as in tsarist times, *ukasy* (decrees) were the central form of lawmaking in the public sphere, issued in the absence of legislation.

The massive, piecemeal, decree-based, non-statutory legal framework for administration was, in fact, probably the largest body of law in the Soviet Union. But it was not necessarily codified, or even public. As Ioffe and Maggs explained in their comprehensive study of Soviet law,

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[7] The Stalin Constitution's primary reference to the Party says nothing about its role in official governance of the state:

> In conformity with the interests of the working people, and in order to develop the organizational initiative and political activity of the masses of the people, citizens of the USSR are ensured the right to unite in public organizations – trade unions, cooperative associations, youth organizations, sport and defense organizations, cultural, technical and scientific societies; *and the most active and politically most conscious citizens in the ranks of the working class and other sections of the working people unite in the Communist Party of the Soviet Union (Bolsheviks), which is the vanguard of the working people in their struggle to strengthen and develop the socialist system and is the leading core of all organizations of the working people, both public and state.* (USSR Constitution 1936, Art. 126; emphasis added)

> Soviet administrative law has never been codified. . . . The rules of this branch of the law are scattered all over Soviet legislation and can be found in different legislative acts: not so much in laws as in substatutory regulations. . . . A majority of these regulations are kept secret, being unpublished and hence unknown to the citizenry. This is why arbitrariness in administrative law is more widespread than in any other sphere of legal regulation. (Ioffe and Maggs 1983: 54–5)

Although the other branches of Soviet law were more likely to be regulated by statute, administrative law revealed the chaotic and hidden nature of its institutional pedigree. It was directly guided by ideology more than any other field of Soviet law, which is to say that it was directly ordered by that vanguard of the working class, the Communist Party of the Soviet Union. As a result, law regulating the actual operation of the Soviet state was the least principled, least coherent and least public part of Soviet law. It may have been ideologically justifiable as the direct expression of the working class, but it was neither coherent nor transparent.

The Soviet model of administration was not confined to the Soviet Union. At the end of World War II, the part of Europe occupied by the Soviet Army fell under long-term Soviet control. Governments from the Baltics to the Balkans were pushed to adopt the Soviet model of governance.[8] As a result, the peculiar institutional forms that characterized the Soviet political space came to be reproduced almost exactly in very different political environments.

Hungary is a particularly good place to see the rise in 1949 and fall in 1989 of the Soviet model of governance. Although the consolidation of communism in Hungary in the post-war period was typical of the region, the fall of communism brought with it an unusually explicit repudiation of Soviet-style administration in Hungary that radically shrank the size, scope and density of public administration. For this reason, Hungary is worth examining up close.

2. Hungary under Soviet government

Once communists consolidated their control over the Hungarian government after World War II, the Hungarian Constitution of 1949 set up a state structure virtually identical to the one established in the Stalin Constitution of 1936. Ironically, the new Hungarian Constitution was not promulgated in the form of a constitution accompanied by great public debate, as the Stalin Constitution had been, but it was adopted as

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[8] There was quite a bit of variation across this huge space. The Baltic States of Latvia, Lithuania and Estonia were incorporated directly into the Soviet Union; Yugoslavia became a communist state, but the leadership of Yugoslavia and the Soviet Union fell out rather dramatically, leaving Yugoslavia a communist state not directly within the Soviet orbit. Austria had been occupied by the Soviet Army at the end of World War II, but the Soviet Army pulled out in exchange for a promise of Austrian neutrality in the Cold War. That left Poland, Hungary, Czechoslovakia, Bulgaria and Romania as states that were all forced into the Soviet embrace. Despite remaining nominally independent of the Soviet Union, all were forced to adopt the basic institutions of Soviet governance. Before that time, each of these states had followed a course of national development similar to the rest of Western Europe, where parliamentarism had gradually replaced absolutism and had become the basis of a constitutional state structure featuring separation of powers. Much of the region had been part of the Habsburg and Ottoman Empires, but had attempted liberal constitutional government between the world wars of the 20th century.

an ordinary statute: Act XX of 1949 (Hungarian Constitution 1949). Géza Kilényi, who became one of the first judges on the Constitutional Court in 1990, wrote of the post-war Hungarian Constitution:

> That Constitution was a ghost-like copy of the Soviet Constitution of 1936, hallmarked by the name of Stalin, and its adoption set in train a servile copying of the Stalinist model in all spheres of political and social life. . . . All in all, the period of 1949–1953 was the darkest era of Hungary's postwar history. . . The country was overwhelmed with fear and suspicion, with no one feeling really safe. The state party had its power machinery fully evolved, the guiding principle being 'democratic centralism,' of which centralism prevailed in full, with the country's life basically determined by the decisions of the dictator who, possessing full powers, ceded to his liegemen in certain areas . . . The totalitarian dictatorship was functioning to such perfection that even the Soviet leader got tired of it. (Kilényi 1990: 8–9)

Seen as a purely formal structure, the Hungarian government featured the ornamental parliament typical of the Soviet style of governance. In the Constitution of 1949, the National Assembly appeared at the center of the text (Hungarian Constitution 1949, Arts. 19–28). But of course, a smaller presidium served as the real operating body to which parliamentary powers were effectively always delegated (Hungarian Constitution 1949, Arts. 29–30). In place of the Soviet Council of People's Commissars was the Hungarian Council of Ministers, which had all effective power of administration, including the power to issue decrees with legal force, the power to create administrative agencies, and the power to place any branch of state administration under its direct control (Hungarian Constitution 1949, Arts. 30–40). Hungarian public law was largely constituted by decrees issued by this administrative body despite the formal prominence of the National Assembly.

In communist Hungary, as in the Soviet Union, decrees were much more common than legislation. In 1950, for example, the National Assembly passed five new laws, while the Council of Ministers promulgated 48 new general decrees (Kilényi and Lamm 1988: 23). As Géza Kilényi and Wanda Lamm, the director and senior research fellow at the Academy of State and Law of the Hungarian Academy of Sciences, wrote:

> It was then that it became an established practice, which was not prohibited by the Constitution either, that Parliament was convened twice a year for a session lasting one or two days, when it voted unanimously for the tabled budget and appropriations, passed a few bills, and noted the law-decrees which did not require approval by the Parliament but only had to be presented to it. (This is the situation to this day.) Aside from this, however, the plenum of the Parliament hardly did anything else. (Kilényi and Lamm 1988: 23)

With Parliament reduced to decorative status, the Council of Ministers exercised primary lawmaking authority. Although a decree of the Council of Ministers was not constitutionally permitted to conflict with the Constitution itself or with acts of Parliament, this proved to be not much of an obstacle. With a thin document containing barely ten pages of text in 78 articles, the Hungarian Constitution of 1949 set few limits on the content of decrees. And because Parliament passed so few laws, statutes rarely constrained the Council of Ministers. This general absence of higher law meant that decrees could and typically did emerge in the absence of any statutory or higher-law authorization. The Constitution did not require any such thing, and the Council of Ministers did not seek it.

As the institution responsible for directing and coordinating public administration, the Council of Ministers was, in fact, the front operation of the Communist Party, an arrangement by now familiar from the Soviet experience. The leadership of the Party communicated its decisions to the Council of Ministers, which promptly passed decrees making these decisions general commands to the state administration. As a result, the decrees issued by the Council were more reflective of the imperatives of the Party than of the views of the people's representatives in the Parliament. Administrative decrees formed the core of the system of public law in the near absence of both statutes and constitutional law. And these decrees carried out a political program that was driven by the Party.

3. Hungary in transition

When Mikhail Gorbachev's *perestroika* movement started to consider structural changes in the Soviet Union in the mid-1980s, the Hungarians were quick to take advantage of the general liberalization of the atmosphere to take up matters of governance at home. The debates over the future of Hungarian governance were being carried on in parallel conversations within the Hungarian Socialist Workers' Party (MSzMP), the government and the loosely formed democratic opposition. Constitutionalism was in the air from 1987 on.

The democratic opposition went public with the governance debate first. In January 1987, a trio of dissidents published a manifesto called 'New Social Contract' in the *samizdat* publication *Beszélô*. Among other things, they demanded a return to parliamentarism from administration:

> Power to regulate fundamental legal relationships must be restored to the National Assembly. It must be the National Assembly's prerogative to enact regulations that affect civil rights or the interests of larger social groups. Decrees of the executive branch should not substitute for laws enacted by the National Assembly. Laws should not confine themselves to outlining the principles of regulation, leaving actual regulation to the executory instructions of government agencies. The government and its apparatuses must be accountable to the National Assembly. (Kis, Kôszeg and Solt 1991: 246 [1987])

Along with this call for parliamentary change in the organization of government came an extraordinary parade of new opposition figures and organizations. The opposition group of intellectuals that was behind *Beszélô* was already well known. But in September, the 'Lakitelek meeting' of populist opposition figures was held in the village for which the meetings were named (Tôkes 1996: 197–9). They were seduced by a statement from the high-level Party official Károly Grósz to work with the Party to achieve gradual political change. But the meeting itself was a sign that opposition to the regime was growing from some unlikely places and was seeking major changes in the basic structure of governance.

Not everyone was so patient as to wait for the Party to move first. Other oppositionists formed trade unions, because the Hungarian law of the day (creating, after all, a workers' state) glorified and apparently encouraged the formation of unions as the true expression of the popular will. Opposition groups took advantage of this legal opening with some eagerness and, starting in early 1988, a whole raft of groups, ranging from a trade union of scientific workers (that is, academics) to a Hungarian youth organization

(FIDESz) to the Independent Lawyer's Forum, began to mobilize in full public view (Kilényi 1990: 22–3). Many of these organizations were to join together to form the Opposition Roundtable in March 1989, calling for the end of one-party rule. Change of the system of government was on everyone's mind.

Within the Hungarian Socialist Workers' Party (MSzMP) government, a debate was also initiated along similar lines and also along a similar timeline. By May 1988, a Party Congress shook up the Party leadership. They determined that it was time for its long-serving leader, János Kádár, to move from his position as General Secretary to the newly created and largely ornamental post of Party president. At the same time, Kádár's replacement, Károly Grósz, served briefly as both General Secretary and Prime Minister before giving up the position of General Secretary altogether (Kilényi 1990: 19–20). This split, where the state leader was no longer the Party leader, marked a crucial separation between Party and state. No longer was the state to be merely the front operation for the Party. Serious political reform, aimed at making the apparent government the real one, started within the party well before the public revolutions of 1989.

After this May 1988 Party congress meeting, multiple groups within the Party, the government and the National Assembly determined that Hungary should have a new constitution. The Council of Ministers, on order of the Party (which still had some power to direct government action), decided that the Ministry of Justice should draw up a constitutional plan. Typically for that time, however, the order to the Justice Ministry to begin the process of drafting a new constitution did not come from the National Assembly itself, but instead from an administrative decree of the Council of Ministers: MT Resolution 2022/1988 (HT.7) (Rácz 2007: 41).[9] Immediately, Justice Minister Kálmán Kulcsár tasked ten different working groups with preparing various parts of the text. In January 1989, The 'Principles of the Regulation of the Constitution of Hungary' were ready for discussion, laying out the key features of a new constitution. The document was debated and approved by the Central Committee's working group on constitutional legislation and put before the National Assembly in March 1989 (Kilényi 1990: 25).

But the National Assembly had not waited for the Party and the Council of Ministers to start reconsidering the general shape of governance. Instead, the National Assembly had already set up in late 1988 an ad hoc committee consisting solely of MPs to prepare its own draft constitution. Rather than wait for a whole constitutional text to be composed because the moment had to be seized, the National Assembly began legislating bits of what would normally be constitutional laws, starting with the Act on the Right of Assembly and the Act on the Right of Association in January 1989. These laws were followed by an Act on Strikes in March, an Act on a Parliamentary Motion of No Confidence in April, and an Act on Referenda and People's Initiatives in May (Kilényi 1990: 27). The National Assembly clearly wanted to open up the political space to broader participation and wasted no time in legislating with unprecedented energy. The National Assembly was on one track of constitutional development, while the Justice Ministry was on another. This, perhaps more than anything else, clearly signaled either

[9] Among other things, the decree number indicates that it was the 2,022nd decree of that year alone, and the decree was passed only in August!

that the Party was no longer calling all the shots or that the Party itself was no longer so unified.

Opposition groups, wanting a piece of the constitutionalist action and using the newly strengthened rights of assembly and association, formed an Opposition Roundtable in March 1989, which demanded an end to the Party's monopoly on power by urging the creation of National Roundtable on the model that Poland had just adopted to negotiate an end to the one-party state. This National Roundtable started in June 1989 and lasted through the summer months, with the MSzMP on one side of the table, the loosely structured opposition groups on another side, and representatives of 'social organizations' ranging from official trade unions to party-organized groups on the vaguely defined 'third side'.

Originally, wholesale constitutional change was not part of the National Roundtable agenda. The opposition groups initially only sought sufficient change in the Hungarian Constitution of 1949 to accomplish multi-party elections. They believed that a legitimate constitution could only be written by a constituent assembly composed of freely chosen representatives and thought that a legitimate constituent assembly could be formed only after the multiparty elections were held. But the opposition's minimal proposals for constitutional revisions met head-on in a subcommittee of the Roundtable with the Justice Ministry's full constitutional draft, already before the Parliament. After some wrangling in the subcommittee, in which the representatives of the Justice Ministry pushed for a complete constitutional reform while the oppositionists found themselves in the unlikely position of fighting against constitutional liberalization, the Opposition Roundtable decided to go along with much of the Justice Ministry's draft. In fact, these constitutional reforms went a very long way toward what the Opposition Roundtable had wanted all along.[10]

On 23 October 1989, two weeks before the fall of the Berlin Wall, the Hungarian single-party parliament adopted wholesale amendments to the Constitution of 1949, essentially bringing about a new constitutional order. Among other things, the new amendments provided for a multiparty election to be held in May 1990 and created a new Constitutional Court that opened for business on 1 January 1990. Even though the constitutional reform had taken the shape of substantial constitutional amendments rather than the enactment of a wholly new document, these amendments of 1989 left little of the old Stalinist version intact.

Perhaps most radically, the new Constitution provided that 'parties shall not directly exercise public power and accordingly, no party shall direct any state organ' (Hungarian Constitution 1989, Art. 3(3)). Parliament's power was strengthened so that it was the 'supreme organ of state power and popular representation' with the power to 'guarantee the constitutional order of society' and 'determine the organization, direction and conditions of governmental activity' (Hungarian Constitution 1989, Art. 19). As a rejection of the practices of the Soviet period, the Constitution mandated that the Parliament was to meet during nine months of each year (Hungarian Constitution 1989, Art. 22). But

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[10] This account of the constitutional drafting process at the Roundtable came from interviews I conducted in 1995 with two of the key players in the Roundtable subcommittee that dealt with constitutional reform: István Somogyvári from the Justice Ministry and Péter Tölgyessy from the Opposition Roundtable.

the new Constitution left the Council of Ministers largely unchanged, with the power to issue decrees within its sphere of competence and even to 'take action directly or through any of its members within the sphere of public administration' (Hungarian Constitution 1989, Arts. 33–40, quotation from Art. 40(2)). In one new addition to the constitutional framework, however, any minister or even the whole Council could be subject to a vote of no confidence by the Parliament (Hungarian Constitution 1989, Art. 39A), after which a new minister had to be named or a new Council had to be formed. The Council of Ministers was now accountable to the parliament, which was about to change its party composition substantially.

It was not until the comprehensive constitutional reforms of May 1990, after the first multiparty elections were held, that the Council of Ministers was finally abolished and replaced by a Prime Minister and ministerial government on a parliamentarist model (Hungarian Constitution 1989, as amended May 1990, Ch. VII). Most of the functions of the Council of Ministers were transferred to the new government, however. With a strengthened Parliament and a new vote of no confidence, administration began to be brought under legislation and under the Constitution.

4. Post-Soviet administrative governance in Hungary

Although it may seem obvious in retrospect that this was the beginning of the end of the Soviet Union's grip on Eastern Europe, it did not necessarily seem so to those who were involved in the constitutional revisions at the time. Many were worried that their experiments to bring administration under constitutional and legislative control would bring the Soviet Union down on their heads.[11] We all now know that that did not happen, but that was not a foregone conclusion at the time.

The new Constitutional Court, however, wasted no time in dismantling the remnants of the system of Soviet governance. Soviet administrative law was a particular target for the new Court. In particular, the new Constitution established that decrees had to be subordinated to authorizing legislation passed by the full Parliament when the decree in question affected a constitutionally protected right. Even then, parliament could not limit the core elements of any right (Hungarian Constitution 1989, Art. 8(2)). In addition, under the new constitutional amendments that took place after the multiparty election and the seating of a new National Assembly, an individual minister was not permitted to issue decrees without explicit authorization from a statute or prior government-level decree, a move that stopped the proliferation of autonomous ministerial decrees (Hungarian Constitution 1989, amended 1990, Art. 37(3)).

When concrete instances of Soviet-era regulation were brought before the Constitutional Court, the Court quickly deployed these constitutional provisions and required that decrees affecting rights be rewritten as statutes if they were to survive

[11] I lived in Hungary between 1994–98 and conducted interviews with the principal drafters of the constitutional revision of 1989 as well as with the constitutional judges who were the first onto the Constitutional Court. They were all quite insistent that they felt they had very little room for maneuver. After Hungary's experience in 1956, when a Soviet-critical government had in fact been allowed to operate for a short time before being crushed, those who took advantage of the new political opening always worried that they too would be the victims of violent retaliation when Moscow changed its mind.

constitutional review. The most famous example where the Court forced the Parliament to do this occurred in the case of abortion. There, communist-era health ministry regulations permitted abortion without restriction during the first twelve weeks of pregnancy. Because, in the view of the Court, constitutional rights of women and perhaps also of the fetus were at stake, the Court demanded that the Parliament pass a statute on the subject (Hungarian Constitutional Court (HCC) Decision 64/1991: On the Regulation of Abortion, 2000).

Soviet governance had consisted largely of decrees unattached to any legislative mandate, however, and the Constitutional Court understood that requiring *all* regulations to be rewritten as statutes would place an enormous burden on the Parliament. Many legal gaps would be created while such a comprehensive revision was going on. Instead, in its abortion decision, the Court drew a line between those regulations that affected constitutionally protected rights in direct ways (which had to be rewritten) and those whose impact was more remote (which did not):

> [N]ot every kind of relationship calls for statutory regulation. The determination of the content of a certain fundamental right and the establishment of the essential guarantees thereof may only occur in statutory measures; moreover the direct and significant restriction of a fundamental right calls for statutory measures as well. However, where the relationship with fundamental rights is indirect and remote, administrative regulation is sufficient. If it were otherwise, everything would have to be regulated by statute. Thus it follows that whether there is a need for statutory regulation should be determined on the basis of the particular measure depending on the intensity of its relationship to fundamental rights. (HCC Decision 64/1991: On the Regulation of Abortion, 262–3)

Even with these limits, the Court found that Parliament had to legislate in many new areas because the existing law consisted of decrees that seriously affected rights. For example, the Court voided a communist-era ministerial decree that required police officers to get their superiors' permission to marry, pointing out that the right to marry was in the Constitution and could only be restricted by statute (HCC Decision 23/1993: On the Right of Police Officers to Marry). And the Court voided on the same grounds a 1988 ministerial decree that required HIV+ individuals to disclose to health officials the persons with whom they had had sex and further required health officials to order mandatory screening of the people who had been named. Given the intrusiveness of the regulation in the fundamental right to the development of personality, as well as on both liberty and privacy rights, the Court ordered that such screening had to be the subject of a statute (and even then, of course, the statute would be evaluated to ensure that the core of a right was not compromised by the law). A decade later, when the Parliament wanted to set up a commission to examine whether politicians who had served after 1990 had been agents of the secret police in the communist time, the Constitutional Court required the parliament to pass a statute laying out the procedures to be followed in the inquiry. Because the inquiry threatened to infringe on the rights of fair trial and data privacy of the people investigated, a mere resolution of the Parliament was not enough to establish the legality of the commission. Instead, the Parliament needed to address these issues in a statute that made clear the difference between criminal procedure and parliamentary inquiries, and set up equivalently fair procedures in the latter (HCC Decision 50/2003: On the Lustration of Politicians).

To further spur the development of parliamentarism over administration, the Constitutional Court often required the Parliament to legislate to fill legal gaps in the new constitutional order so that administrators would not have room to improvise the more concrete solutions to problems. The new Constitution was too generally worded to provide the detail necessary for governance. In the Soviet period, this vagueness of the constitutions and statutes was precisely what gave so much discretion to those carrying out administration. The Constitutional Court pointed out that the new Constitution explicitly required that the National Assembly provide guidance on the concrete meaning of particular constitutional provisions through statutes. When the National Assembly failed to do so, as it often did in the first years after transition because the Parliament was simply overwhelmed with work, the Court would declare that parliament was acting 'unconstitutionally by omission'. The Court had been given the explicit competence to do this in the Constitutional Court Act (Hungarian Act XXXII of 1989 on the Constitutional Court, Art. 1(e) and Art. 47), and the Court often used this power. As a result, the Constitutional Court set much of the agenda for the Parliament, especially in the early years of transition when the Court declared constitutional omissions nearly once per week.

Many statutes have been enacted as a result of declarations of unconstitutional omissions, though in some cases the process of securing legislative agreement on a new statute took longer than the Court had mandated. One very high-profile decision found the framework for regulation of the media unconstitutional both because a subject impinging on fundamental rights was regulated by decree and also because the Constitution required that the Parliament act to provide a framework statute to ensure the political independence of the media. In that case, the Constitutional Court elaborated not only what the media law had to include in some detail, but also gave the Parliament a deadline for enacting the new law (HCC Decision 37/1992: On the Media). Because this was one of the topics where a two-thirds vote of the Parliament was required to pass a law, the Parliament missed the deadline by years before finally complying with the Court's decision. In another case, where by contrast the Parliament complied almost immediately, the Court required a statute to provide for the institution of civil unions for gay and lesbian couples (HCC Decision 14/1995: On the Legal Equality of Same-Sex Partnerships).

Between declaring Council of Ministers' decrees unconstitutional for being invalid as a matter of form and requiring the Parliament to act to provide frameworks within which more specific regulation could occur, the Hungarian Constitutional Court was unusually explicit about the precise ways in which the new legal order had to provide a constitutional and legislative framework for administration. The National Assembly generally cooperated in this effort to give Hungarian administration a legislative pedigree. Starting in 1990, the new Parliament typically passed more than 100 laws per year (131 in 1996, for example) (Rácz 1998: 25). This was a far cry from the merely occasional legislative activity of the Soviet period.

Once the Court established that Hungary was to be governed principally by legislation and not by ministerial decree, it turned its attention to the quality of lawmaking *procedure* (both legislative and administrative), something that had left much to be desired in the Soviet era. The Court started off being far more deferential to legislative procedure than it had been to other aspects of the constitutional order. This was because a transitional law, the Act on Legislative Procedure (Hungarian Act XI/1987), in fact

required very little by way of parliamentary procedure. Neither did the Constitution. For example, the statute did not require the Parliament to consult other interested bodies, neither other state organs nor interest groups beyond the state, in the process of drafting statutes. The Constitution said nothing about whether the Parliament had to, and the Court did not infer any such duty from its general theory of the text. In one early decision (HCC Decision 7/1993), the Court found that the Parliament did not have to consult in the process of lawmaking unless the lack of consultation violated some explicit provision in the Constitution, for example individual rights. The Court found in that case that there was no obligation to consult in routine legislation.

Administrative procedure was similarly subject to not much scrutiny by the Court at first. Here, oddly enough, Hungary was governed far into the post-communist period by a communist-era statute that regulated both the making and review of administrative decisions: the General Rules of Administrative Procedure, first enacted in 1957 and substantially amended in 1981 (Hungarian Act IV/1957 as amended by Hungarian Act I/1981). In practice, however, this law had never functioned as a general administrative procedure act because each ministry had its own separate rules and, in Hungarian administrative law, specialized norms trumped general ones. As a result, administrative law was widely considered to be 'a jungle' (Küpper 2007: 111). It was not until 2004 that the country got its first new general law on procedural review of administrative decisions (Hungarian Act CXL/2004) and not until 2006 (Hungarian Act LVIII/2006) that decision-making procedures were at least partially standardized across ministries. That said, the Constitutional Court did attempt to impose some constitutional norms on the process before the introduction of these new general framework acts.

The Court began to look more skeptically at lawmaking and administrative procedure in the late 1990s. In a 1997 case (HCC Decision 39/1997: On the Judicial Review of Administrative Decisions), the Court reviewed the procedures of the Hungarian Medical Association (HMA), a state licensing body. Invoking the provision of the Constitution that mandated the 'legality of public administration' (Hungarian Constitution 1989, Art. 50(2)), the Court observed that the HMA could suspend the license of any doctor without giving any reason whatsoever, and the affected persons had no legal right of redress. This created a violation of both the domestic constitutional guarantee of fair procedure and the similar guarantee under Article 6 of the European Convention of Human Rights, the Court held. As a result, the Court required that the decisions of the HMA be subject to judicial review. The standards for this review were not to give the agency any sort of deference:

> Supervising the legality of the decisions of public administration . . . cannot be limited constitutionally to reviewing only the formal legality of decisions of this kind. In an action for review of an administrative decision, the court is not bound by the facts of the case as determined by the public administrative body; further the court can also review the legality of administrative discretion. Deciding on the merits of the case [is permitted even when the court could send the case back to the administrative organ for further review]. (HCC Decision 39/1997: 368)

In addition, the Court found that any rules that restricted judicial review of administrative decisions were unconstitutional.

Emboldened by this case, the Constitutional Court started to develop stronger standards for the legality of lawmaking procedure more generally. A decision in 2000 appeared

to change the earlier decision of the Constitutional Court (HCC Decision 7/1993) that had found that the Parliament did not have to engage in any external consultations in the course of drafting legislation. In the new case, the Court had to decide whether Parliament's failure to consult the National Council of Environmental Protection in developing new standards for trucking regulation was unconstitutional, when a prior decision of the Constitutional Court required that the government engage in environmental impact monitoring to prevent environmental protection from getting worse. Perhaps because the Court's own prior decision was violated by this lack of consultation, the Court broke with its earlier stand-offish analysis of parliamentary procedure and found that the Parliament had breached the constitutional principle of legal certainty by failing to conduct an environmental evaluation (HCC Decision 30/2000, discussed in Halmai 2007: 14–15).

In another case, the Constitutional Court found that it was unconstitutional for the Parliament to pass again, with no debate, a law that the President had sent back to the Parliament for revision because he believed that the law was unconstitutional (HCC Decision 62/2003: On the Constitutionality of Legislative Process). The Standing Rules of the Parliament required time for debate on each new act, and the Court held that the returned law had to be treated as a new act. By failing to follow its own procedures, the Parliament had violated the principle of legal security, according to the Court, and thus had behaved unconstitutionally.[12]

Under the influence of the European Union, which Hungary joined in 2004, a more substantial statutory revision of administrative procedure has occurred in recent years. The Act on Public Administrative Procedures and Services of 2004 (Hungarian Act CXL/2004) explicitly says in its preamble that it aspires to comply with EU norms by creating a uniform set of procedures that allow the 'clients' of the state to participate in decisions affecting them, to receive information from administrative agencies relevant to these decisions, and to have a timely review under legally regulated procedures of all decisions, including judicial review of final agency determinations. In addition, the law outlines strict procedures for regulatory inspections (Hungarian Act CXL/2004, Ch. VI). The act also provides that if the Constitutional Court voids a regulation of an agency, that agency must review all cases that had been decided under that regulation to determine if its decisions should be changed (Hungarian Act CXL/2004, Sec. 117). So tight is the connection between EU regulation and the new administrative procedure act that the Hungarian law explicitly says that Hungarian law shall give way in the face of a contradictory EU or international norm (Hungarian Act CXL/2004, Sec. 13).

With this new law, the focus of the Constitutional Court has shifted to the examination of fair procedure in the review of agency decisions. In a decision of the Constitutional Court on the subject of the required vaccination of children in the public schools (HCC Decision 39/2007: On Compulsory Vaccination), the Court was called upon to rule not only on the constitutionality of compulsory vaccination of children, but also on whether

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[12] This decision has an important back story. The president of the country who returned the law to the parliament was László Solyóm, who had been the first president of the Hungarian Constitutional Court. As a result, when President Solyóm said he believed the law in question was unconstitutional, it was almost as if the Court itself had done the analysis. When the parliament failed to make any changes, then, it was not surprising that the Court stepped in to declare a constitutional violation.

the heath authorities could order a child to be vaccinated before the judicial review of the decision to vaccinate her was completed. First, the vaccination program was regulated by statute, and so the Court no longer had to void regulations like this for failing to have a legislative pedigree. The Court therefore examined whether the state had good reason to believe that a vaccination program was effective for the maintenance of public health and whether the measures that had been proposed to carry out the program were proportional to the infringements of affected rights. The Court, using this proportionality analysis, found that the vaccination program was constitutional. But the Court then went on to find a legislative omission in the remedies section of the law because the parliament had failed to specify what would happen if the parents of a child sought to have the child exempted from this requirement. The law specified that health authorities could order the child vaccinated immediately, but that very act would make it impossible for the parents to ever get what they sought. The Court reasoned that if the parents rejected the vaccination and asked for judicial review of the decision to vaccinate, the remedy of no vaccination would never be available if a health official could order the vaccination before the review of his decision. The procedure, therefore, could not be fair. The Court ordered the Parliament to fill in the gap in the statute that failed to specify just when and how the vaccination could be postponed while an appeal of the decision was pending.

This mandatory and meaningful judicial review of administrative decisions is a long way from the Soviet state model where administration occupied the whole horizon of state action. In Hungary, the dismantling of the model of Soviet governance took place piece by piece. The first task was to rejuvenate parliamentarism by insisting on a system of relatively specific and complete statutes that did not violate the core of constitutionally protected rights. Only then did issues of administrative procedural regularity, transparency and accountability come to the fore.

5. Lessons for the study of comparative administrative law

Soviet theories of administration imagined a pure realm of action in which higher-level law was not necessary for the proper functioning of the state. In fact, higher level law – statutes and constitutions – were suspect precisely because they operated at a more theoretical and, therefore, more ideological level. Even when constitutions and statutes were drafted to reflect the ideology of the working class, it was one thing to have an exhortative constitution that laid out the proper ideology; it was quite another to have a constitution as a serious source of law and constraint. The same was true of statutes, which were long on exhortation and short on serious guidance of state action. Administration, in Soviet practice, was real work. It had to be flexible enough to change instantly in response to changing conditions. Regulation also had to be specific enough to guide state officials in their daily tasks. Soviet administrative law was law by decree, where the decrees sought to accomplish specific goals without going through an elaborate process. And of course, administrative action was largely insulated from review. It was truly regulation of the ends of the state with little attention to the means of getting there.

Bringing administration under the control of the rule of law by linking it to constitutional principle and statutory frameworks has been a challenging task in the post-Soviet world. Much of Western Europe could take for granted that constitutionalism and parliamentarism were already established methods of governance before administrative delegation became commonplace. But in the Soviet world, administration preceded

serious constitutionalism and parliamentarism. As a result, the first and most important task when the Soviet system was being dismantled was the establishment of legislation operating under the constraint of constitutionalism. The review of administrative procedure came later, but only after constitutional and legislative frameworks to govern administration were securely in place.

I focused here on Hungary, where the process of de-Sovietization was accomplished largely as a result of explicit and public constitutional jurisprudence. Perhaps it would have been more straightforward to track the transition from the Soviet period into the present with a discussion of the Russian case. But Russia's move away from Soviet theories of administration has been much more uneven. Boris Yeltsin brought the Soviet distrust of legislation into his post-communist presidency. He had a fractious parliament to work with, but he never really tried to govern through parliamentary mechanisms. Instead, Yeltsin preferred to govern by *ukaz,* by decree rather than by legislation (Scheppele 2006). Only when Vladimir Putin, himself a lawyer with a keen knowledge of comparative law, became president did major framework statutes within which administration could be brought under legal constraint start to appear in the Russian legal space. That process has continued under President Dmitri Medvedev, a lawyer of the younger generation who was a professor of civil law (including private law under the new Russian Civil Code) before entering government. The Russian legal space came to be organized under framework statutes only a decade after Hungary had started the task. Russia's own transition from administration back to parliamentarianism, however, is still incomplete. And the Constitutional Court has not been the key driver of this process, having only a limited jurisdiction to wield in this fight.

Hungary's government has now replaced the system of pure administration with constitutionalization and parliamentarism. The move from parliamentarism to accountable administrative delegation has accelerated as Hungary went through the accession process to join the European Union, which it did in 2004. The European Union has required these former states to pass detailed administrative regulation and a great deal of substantive administrative law. The *acquis communautaire* that the European Union requires aspiring members to adopt may provide a form of 'external accountability' (Rose-Ackerman 2005: 37–54) because the procedural standards of the EU in enacting these regulations are much higher than were the Soviet standards. Ironically, however, this appears to some to be another foreign theory of administration that has been foisted on Hungarian governance. Once again, the idea that Hungarian governance is regulated by foreign ideology has become a political rallying point among the most anti-communist segment of the population, the nationalists. The rejection of European 'bureaucratic' domination forms the basis of their 'Hungary for Hungarians' movement in language reminiscent of the anti-communist campaigns of the 1980s.[13] The struggle for the soul of

[13] The vanguard of the ultranationalist movement in Hungary is a political party called Jobbik, which won fully 17% of the national vote in the European parliamentary elections in spring 2009 and repeated the startling result with a 16% national vote in the Hungarian parlimentary elections in spring 2010. Among their complaints is the anti-democratic and basically Soviet nature of the European Union: 'The Jobbik – Movement for a Better Hungary is a principled, conservative and radically patriotic Christian party. Its fundamental purpose is protecting Hungarian values and interests. . . . It is the conviction of the Jobbik . . . that our joining the European Union does not

the administrative state is an ongoing project, even in Hungary. Seeing parallels between the Soviet mandates and the European ones, both portrayed as equally foreign, the Hungarian far right has been gaining traction in elections and public approval.

Seen in broader perspective, however, the rejection of regulation in favor of legislation tends to make states like Hungary appear to be bucking the trends of history. If the usual narrative of administrative law says that there is an ever-increasing sphere of regulation, then the post-Soviet experiments in government seem to go the other way. Since 1990, the Constitutional Court of Hungary has been nullifying regulations simply because they are regulations detached from a broader legislative framework. That has produced a net decline in the number and density of administrative rules. In addition, the state simply got out of the regulation business in whole areas of public life (abolishing central planning, privatizing housing, shrinking the state generally). As a result, the administrative state in post-communist places is a much leaner operation than its Soviet predecessor.

But as our deeper exploration of this phenomenon shows, the decrease in the space of regulation in post-Soviet states is not necessarily a rejection of the administrative state proper. It is a rejection of *administrative state socialism*, which sprang from a particular and now discredited theory of the legal basis of the administrative state. Instead of representing a major move away from the international trend toward increasing administrative power, post-Soviet countries are rather in the position of drivers who got lost, had to backtrack to find where they went off course, and only then could proceed to the same destination as others. Countries like Hungary are now on the road toward the sort of parliamentarianism from which legitimate delegation can be made.

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provide a solution. We accepted disadvantageous competitive conditions and gave up national autonomy in crucial areas in favor to an anti-democratic, bureaucratic, central authority. This rendered the country defenseless and in duress.' The English language (and therefore relatively sanitized) program of Jobbik can be found at http://www.jobbik.com/about_jobbik.html.

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PART 2

CONSTITUTIONAL STRUCTURE AND ADMINISTRATIVE LAW

7 Written constitutions and the administrative state: on the constitutional character of administrative law

Tom Ginsburg

Administrative law is the poor relation of public law; the hard-working, unglamorous cousin laboring in the shadow of constitutional law. Constitutional law, it is generally believed, resolves the great issues of state and society, while administrative law, in its best moments, merely refines those principles for dealing with the administrative state. Law students flock to constitutional law classes, of which most law schools have three or four in the curriculum. The same students enroll in administrative law with a sense of obligation, as if the subject is a chore one has to manage.

The two fields are, of course, intimately related, and share an overarching purpose of managing the relationship between state and citizen, with an emphasis on protection of the latter in democratic states. On the other hand, the fields reflect different legal sources and modalities. In some countries, they are adjudicated by entirely different courts. While constitutional law is becoming ever more comparative, with judges regularly citing each other's opinions, administrative law remains bound to the nation state.

This chapter makes three arguments. First, it argues that the conceptual division between administrative and constitutional law is quite porous, and that along many dimensions, administrative law can be considered more constitutional in character than constitutions. Second, it shows that written constitutions do relatively little to legally constrain the administrative state. Rather, their role is to establish the broader structural apparatus of governance and accountability, in which the bureaucracy is the great unspoken. This leaves administrative law as a relatively free-standing field characterized by great flexibility and endurance, features that are usually thought to be more embodied in constitutions. Third, the chapter concludes that the exercise of comparison helps to expose the limits of written constitutions, and to call for greater attention to comparative administrative law as a feature of the unwritten constitution of nation states.

1. On the constitutional character of administrative law

The conventional understanding is that the fields of constitutional and administrative law share similar purposes of protection of rights, control of agency costs, and limitation of government. The primary difference, in this view, concerns their place in the hierarchy of public law: constitutional law regulates the highest norms of the state, while administrative law governs sub-legislative action, somewhat lower in the hierarchy of sources, and hence in importance.

In contrast, I argue that along several dimensions, administrative law should be understood as more 'constitutional' than constitutional law. Consider the widely ascribed functions attributed to constitutions (Breslin 2009). Many would place the function of

constitutionalism itself or limitation of government by law, at the fore. With regard to this limiting function, it is quite obvious that administrative law overlaps a good deal with constitutional law, and has a wider scope in the sense that it touches far more behavior. The average citizen is not a dissident who is concerned with the state limiting her political speech; nor is the average citizen a criminal concerned with criminal procedure provisions in constitutions. Rather the average citizen encounters the state in myriad petty interactions, involving drivers' licenses, small business permits, social security payments, and taxes. It is here that the rubber meets the road for constitutionalism, where predictability and curbs on arbitrariness are least likely to be noticed but most likely to affect a large number of citizens. So it seems clear that administrative law is constitutionalist in orientation and arguably more important to more people than the grand issues of constitutional law.

Constitutionalism, though, is hardly the only function of constitutions. Indeed, constitutions exist in a wide variety of states that cannot be called limited in any real sense. Nor are these 'paper' constitutions to be characterized as useless (Brown 2008). Even in dictatorships, constitutions can provide accurate maps of what institutions matter. Autocrats and oligarchies need to coordinate their own internal expectations about the mechanisms of rule, and constitutions can play an important role in aligning such expectations. In some cases, constitutional rules provide useful frameworks for resolving intra-elite disputes (Barros 2002). This function of constitutions is not limitation but definition, constituting government by empowering it and establishing organizations to carry out its tasks. The administrative law analogue to this function of setting up government agencies is captured by organic statutes. These are rarely the subject of legal dispute except in terms of scope of delegation by the legislature.[1]

Another set of functions widely ascribed to constitutions are symbolic or expressive. In some polities, constitutions reflect and sometimes even create a shared consciousness, and so overcome regional and ethnic divisions. In South Africa, for example, the 1996 Constitution became a symbol of participation and reconciliation, and retains popularity notwithstanding major social problems and disaffection from government. The Mexican Constitution of 1917 is widely attributed to have had great symbolic value even though it took many decades before it was effectively enforced. The symbolic or expressive function of constitutions emphasizes the particularity of constitution-making. It is We the People that come together, and so the constitution embodies our nation in a distinct and local way different from other polities.

So constitutions limit government, establish institutions, and serve as important symbols for the polity. The mode by which constitutions carry out these functions is familiar. Constitutions work through entrenchment, providing an enduring set of foundational rules, structuring and facilitating normal politics in a particularistic way that reflects local values.

Administrative law accomplishes some but not all of these functions, and does so in a less grand manner. Very little writing on administrative law discusses the symbolic dimensions of articulation of state-society relations. Organic statutes for particular agencies are not always entrenched, and the major instruments governing administrative

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[1] For a broader perspective on coordination in administrative law, see Ahdieh (forthcoming).

procedure and adjudication are typically statutory in character, in principle amendable as conditions change.

My first argument is that administrative law is often a better reflection of the local and that it is administrative law which provides for more endurance in many polities. Only at a symbolic level, then, can constitutions claim distinct functions that administrative law does not accomplish: only constitutions can be said to constitute the nation or bind the people together through common understandings. But this symbolism is in turn based on an illusion and a misunderstanding of the crucial constitutional characteristics of endurance and localism. Constitutions serve as important symbols because people believe they do things that they do not. Administrative law systems, in turn, are more localized and more enduring, and hence worthy of greater attention in trying to understand the effective legal regulation of government.

1.1. Localism: constitutions converge more than do administrative law systems

The classic image of constitution-making is of a discrete group of citizens coming together to empower a government. This social contract imagery is temporally and geographically bounded. We the People produce the constitution as a distinctive reflection of our local values. But this imagery is wrong on several scores. First, international actors increasingly have a stake in constitution-making and take substantive positions in the drafting process (Lollini and Palermo 2009). Second, and somewhat related, constitutions have converged in substance over time. A substantial body of research has demonstrated that provisions of national constitutions have come to reflect a kind of script of national modernism in which the local is subordinate to global norms (Go 2003, Boli 1987, Boli-Bennett and Meyer 1978, 1980). The basic forms of governance, too, seem to divide into fairly predictable variants.

Why might this be the case? Because constitutions are the highest legal norms of a state, they have expressive elements, and these are often addressed *outside* the nation state at an international community. Constitutions are signals of modernity and sovereignty, designed not only to empower a government but to secure recognition of that act on the international plane. The result is that there has been a significant amount of constitutional convergence.

Consider menus of human rights, for example. Constitutional collections of rights have tended to converge over time, particularly following the passage of the major international human rights instruments (Elkins and Ginsburg 2009). The international covenants and regional charters of rights serve as menus for constitution-makers, and so it is hardly surprising that constitutions have become more similar to each other over time. There are many possible explanations for this phenomenon. Convergence may in part result from mimicry, in which countries need to signal their modernity and so adopt institutions most reflective of the international. It might alternatively reflect collective learning, as countries learn from each other and from international institutions about the quality of different institutional configurations. Whatever the explanation, the result is that constitutions can no longer be viewed, if they ever could, as exclusively local affairs.

Contrast the situation in administrative law. Surveying global developments, the overarching impression must be one of continued stickiness of national institutional configurations. Taking four major jurisdictions, France, Germany, the US and the

UK, it is clear that great institutional and ideational divergence remains. France retains its tradition of oversight by expert administrators in the Conseil d'Etat, with the *droit administratif* considered a separate and autonomous body of law (Brown and Bell 1998). Germany too retains specialized administrative courts, but unlike the French tradition centers its practice around an administrative procedure code that embodies the principles to be overseen by judges. In scope, too, the traditions differ in that tort liability and government contract law are seen to be outside the realm of German administrative law.[2] While it can also include general policy directions, German administrative law focuses more on individual rights-type issues than on public participation in rule-making, which is where much of the action is in American administrative law.

In the UK, administrative law has long labored under Dicey's suspicion of the very concept (Lindseth 2005, Williams 1994). Dicey saw virtue in control by the common law courts rather than a distinctive set of institutions, but as the modern state expanded, it became clear that the sheer volume of appeals would overwhelm the traditionally small English judiciary. The result was the creation of independent 'tribunals', distinct from the common law courts, to hear appeals from initial decisions by administrators. These are specific and specialized, tied to individual bureaucracies such as the Health Service, Immigration, and Social Welfare bureaucracies, although recent reforms under the Tribunals, Courts and Enforcement Act 2007 promise to consolidate the structure (Carnworth 2009). The tribunals have a statutory obligation to deliver independent justice, and they rely on notions of 'natural justice' in developing constraints on administrative discretion and procedure. In the United States, in contrast, the Administrative Procedures Act focuses a good deal of its energy on the practice of rule-making, and it is here that the largest battles in the administrative state are conducted.

To be sure, there has been some convergence across jurisdictions in the norms of administrative law. Most major systems involve questions of balancing, proportionality and procedural transparency. One can generalize that in all four jurisdictions one can describe administrative law as largely judge-made (counting the Conseil d'Etat as a judicial organ), in which courts apply a set of open-ended standards to myriad factual situations. But each system remains its own distinctive animal. Furthermore, there is little of the transnational judicial borrowing that has drawn such attention in comparative constitutional interpretation.

One of the reasons that administrative law may have converged less than constitutional law is the lack of agreement over the scope of the field. Constitutions, for nearly all modern states today, are defined in relation to (even if not exclusively bounded by) authoritative texts called constitutions. There is less conceptual agreement on the boundaries of administrative law: while all the administrative law schemes rely heavily on a notion of internal and external boundaries of the system, the precise lines differ (for example, with regard to where government contracts fall), as does the precise mix of tort liability, judicial remedies and other mechanisms of control. Administrative procedure calibrates the rigidity of the boundaries and reflects different conceptions of public and private. For example, continental and Japanese systems draw on a strong conceptual

[2] The scope of government liability is in fact less extensive in Germany than in France. In Germany, it is covered by principles of negligence, whereas in France, no-fault liability for regulations is allowed (Singh 2001:257).

distinction between public and private law. In the United States, the public-private distinction is less rigid, with private law regularly utilized to accomplish regulatory ends, and hence the proper boundaries of administrative law as a field may be somewhat more open. The relative mix of natural law principles and positivistic focus on proper delegations also varies across systems.

Institutional structures differ, too, with distinctive administrative courts in France and Germany, while the Anglo-American systems rely on the generalized notion of the Rule of Law to subject the state to ordinary courts, on an equal footing as citizens. The systems also exhibit divergence on the extent to which administrative law has been developed primarily through case-by-case judicial decision-making or through legislative exercises in codification; though again it must be said that judicial development has played a prominent role nearly everywhere.

In short, there may be less convergence in administrative law than in constitutional law, where judges regularly look to decisions of other courts, and constitutional drafters draw on foreign models. Forces against convergence in administrative law include institutional inertia, entrenched political interests, path dependencies, and cultural preferences that render some solutions unattractive in particular polities. Many scholars have argued that public law should see less convergence than corporate or private law because it reflects values rather than interests, and hence is less likely to be shaped by short-term economic factors. Professor Schwarze (2004, see also Lindseth 2005), for example, catalogues the traditional arguments that administrative law expresses 'national particularities' and therefore is relatively impermeable to change.

Administrative law concerns the control of regulatory institutions, and regulatory institutions are difficult to establish. Once established, they are even harder to get rid of. An alternative to eliminating agencies is to seek to exercise greater control over them, and administrative law becomes a natural solution. It is perhaps no surprise that all industrialized countries have developed extensive bodies of administrative law in the past century. But administrative procedures, like primary regulatory rules, also have the quality of establishing their own communities around them. The much-criticized Administrative Procedures Act in the United States has never been changed despite numerous proposals to that effect. Nor is it likely that specialized administrative courts can be disbanded without a major constitutional revolution. While we have seen the establishment of *new* administrative courts and specialized benches (for example, in Korea, with similar proposals currently circulating in Japan), it is rare to see an administrative court merged into the ordinary court system. Indeed, in the French case, the Conseil Constitutionnel has even held that one has the right to recourse to an administrative judge. In short, then, inertia can make switching costs of change prohibitive and the disbanding of institutions difficult. Thus we see substantial divergence in the *structures* of administrative law. A corollary of this continued divergence is that administrative law systems reflect localism more than constitutional law, which is now embedded in open and vigorous transnational dialogues about particular issues (Jackson 2009).

1.2. Endurance: administrative law institutions endure, while constitutions do not

Constitutions are defined by entrenchment, and their authors and audiences presuppose that they provide a set of relatively enduring norms. To be sure, constitutions are subject

to amendment procedures, but these are assumed to be exercised relatively infrequently and only for issues of sufficient importance. Constitutions are higher law and hence to be protected against frequent change. Indeed, the very notion of constitutionalism presupposes a certain level of endurance.

Yet written constitutions do not endure in most countries (Elkins et al. 2009). Even among industrial democracies, France (with its 11 constitutions since 1791) is more typical than the United States, with its venerable 220-year old document. In Western Europe, the region of the world where constitutions are most enduring, the average document will last only about 30 years, and the figure for countries in other parts of the world is much lower. Constitutional change is sometimes associated with drastic changes in the character of the regime, in the design of political institutions, and the mechanisms of ensuring political accountability.

Contrast administrative law institutions. The venerable Conseil d'Etat has survived episodic swings between monarchy and republic, presidentialism and parliamentarism, dictatorship and democracy. It has maintained a relatively autonomous system of monitoring bureaucratic behavior and ensuring legality in administration. (Indeed, one might argue that the formal constitution matters less in the French tradition *precisely because* the autonomous state endures.) Nor is France alone. The Swedish ombudsman institution dates to 1809 and has survived major transformations of the political structure. And distinct administrative courts in the German tradition have been enduring.[3] The Soviet procuracy survived myriad constitutional changes, and indeed has retained its role of general supervision in some post-Soviet constitutions notwithstanding complete regime transformation. When one moves beyond Western Europe, constitutions become more ephemeral but administrative law structures may be relatively stable. Thailand, with its 18 constitutions since 1932, may be an extreme case, but bureaucratic autonomy centered around a Council of State has been an enduring feature.[4] Similarly, the institution of *amparo* in Latin America has enjoyed widespread and continuous usage, notwithstanding constitutional instability (Brewer-Carias 2008).

Institutional structures are distinct from legal norms. The norms of administrative law *do* change with developments in technology, with ideas about rights, and with the emergence of communities of accountability, all of which may reflect changes embodied in constitutional texts. Nevertheless, this discussion suggests that administrative law structures are relatively enduring, in many cases more so than constitutional regimes. Indeed, endurance at the administrative level may ameliorate the negative effects of instability at the constitutional level: whatever the machinations over political institutions, citizens may enjoy relative predictability in relations with the state bureaucracy.

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[3] Japan did change its structure of administrative law with the 1946 Constitution, shifting away from the German tradition of distinct administrative courts toward the American model of unified jurisdiction. Some attribute Japanese judges' reluctance to challenge administrative action to the institutional residue associated with this shift – ordinary judges do not have confidence in their ability to second guess administration (Haley 1991).

[4] The 1997 Constitution corresponded with the introduction of an administrative court that did have important ramifications for Thai administrative law. But this was the exception that proved the rule (Leyland 2008).

1.3. Symbolism: the inferiority of administrative law systems

To summarize the argument so far, administrative law is enduring and it retains a local quality even in an era of globalization. Constitutional law, in contrast, is increasingly transnational as well as, too frequently, transitional. One might then view administrative law regimes as better embodying constitutional values than constitutions themselves.

One distinct feature of national constitutions, however, is their ability to bind the polity together through symbolic expression. Not all constitutions effectively play this role, but it is an aspiration of many. In contrast, administrative law is rarely ascribed symbolic resonance. Few are willing to die for the principle that expert regulators ought to hold a public hearing before deciding how many parts per million of a pollutant can be released by a smokestack, or that an individual has a right to pre-deprivation hearing regarding loss of social security eligibility. Here, then, we expose what is truly distinctive about constitutional law, and the one sense in which constitutions can be said to be more constitutional than administrative law regimes. Constitutions *express* ideas about the polity, and do so largely on an international stage. We the People are signifying that we are *not* those other people, and so adopt statements of our distinct national character embodied in constitutional institutions. And because the statements are directed, to some degree, outside the state, they require a common language to be understood. Convergence in constitutional vocabulary in some sense facilitates the distinct communicative quality of written constitutions.

Perhaps it is too much to say that administrative law systems lack symbolic value. Some scholars have talked about the communicative and legitimating virtues of administrative process. But one would be hard-pressed to argue that the degree of symbolic importance attached to administrative law systems approaches that of constitutions. Written constitutions embody moments of great struggle and high stakes, and hence mark the great junctures of national history.

2. Written constitutions and the administrative state

This part of the chapter examines the constitutional treatment of administrative law. In general, written constitutions tend to say relatively little about the administrative state, though the establishment of a government structure is a core function of constitutions. While the rules governing selection and activities of executives and parliaments are described in great detail, the sub-political institutions of government are not consistently or thoroughly regulated. Written constitutions tend to focus on providing chains of accountability and democratic legitimacy for the decisions of administrators, rather than detailed rules regulating the administration. In other words, constitutions tend to regulate administration structurally rather than legally.

A search of several hundred contemporary and constitutional texts reveals that only a handful mention the bureaucracy at all, and often use bureaucracy as an epithet.[5] In terms of legal constraint on the state, general due process-type considerations may apply particularly to administrative agencies.[6] But provisions such as South Africa's Art. 33,

[5] For example, the Constitution of Vietnam (1992), Art. 112 (power of government to 'fight against bureaucracy' in state administration). The sample is from the Comparative Constitutions Project, www.comparativeconstitutionsproject.org.

[6] For example, the Constitution of Dominican Republic (1966), Art. 8.2.j (no sentence without

constitutionalizing rights to 'lawful, reasonable and procedurally fair' administrative action and a right to receive reasons for adverse actions, are truly exceptional.[7] General due process requirements, which are found more broadly (roughly 10% of national constitutions) are on their face frequently restricted to criminal proceedings, and hence may not automatically facilitate judicial oversight of administration.

What one does see is that written constitutions reflect developments in the technology of governance. Thus, the creation of the independent regulatory agency is reflected in constitutional texts: the US Constitution of 1789 of course does not mention any independent agencies (it barely mentions 'departments'), while the average constitution drafted in the 1990s mentions more than three such bodies. And certain administrative law institutions, like the ombudsman or human rights commissions, have become more popular: roughly 20% of constitutions currently in force provide for an ombudsman, for example. A smaller number, less than 10%, provide for a counter corruption commission. Historically, the regulatory body most relevant to checking the administrative state is a council or court of audit, and these institutions are relatively frequently observed: nearly 20% of all constitutional texts coded to date in our project (700 total) include some agency designed to supervise accounts or audit.[8]

Another way in which constitutions may affect the administrative state is through the establishment of a public service commission or other device to guarantee meritocratic employment practices. In many societies, state jobs are highly desirable and so the temptation to utilize them as a form of patronage is great. A pre-commitment to meritocracy is a constitutional function. As early as 1824, Brazil's Constitution felt the need to say that 'all individuals are equal to occupy public offices; talent and virtues will determine if a person can occupy a public office'.[9] The Republic of China went so far as to establish an entire branch of government, the Examination Yuan, just to administer state exams. This body still functions on Taiwan today, and as a formal matter has equal status with the Legislative and Executive branches of government. Its head is equivalent to the Premier. The Republic of China also established a 'Control' branch of government, set up to audit and fight corruption. Though these innovations have not been borrowed elsewhere, their motivation is widespread.

Finally, constitutions engage with administrative law through the designation of administrative court systems. These are found in countries from Mexico to Mongolia, though they are not always constitutionalized (only about 2% of cases in our sample include them). Even the French Constitution makes only incidental reference to the Conseil d'Etat, which is not properly speaking a creature of the political constitution.

But the designation of an administrative jurisdiction can have very important consequences on the ground. In some transitioning democracies, it is the administrative courts rather than the higher profile constitutional court that have actually served to constrain the state. Two examples here are Indonesia (Bedner 2001) and Thailand (Leyland 2008).

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procedure established by law); Constitution of Ireland 1937, Art. 38 (no person shall be tried on any criminal charge save in due course of law).

[7] See also Draft Constitution of Kenya (1999), Art 70.

[8] For details, see www.constitutionmaking.org and www.comparativeconstitutionsproject.org or contact author.

[9] Art. 179.14.

In each case, a constitutional court created as part of a transition to democracy was set up alongside a new or recently created administrative court. In each case, the constitutional court was called on to adjudicate high-profile political issues that led to a political backlash against the court. In contrast, the administrative law systems worked at a lower level of government and served to provide, for the first time in many areas, genuine legality in administration. This is an example of how a lower-profile administrative court may have more impact in furthering constitutionalist values than a higher-profile constitutional court.

In short, written constitutions are short on detail about legal control of administration. Administrative action is regulated through structural provisions on the design of government and accountability chains, through the creation of specialized monitors such as ombudsmen and administrative courts, and through provisions requiring merit-based selection of agents. To understand the functioning of administrative law in various countries, written constitutions turn out not to be very helpful, notwithstanding the constitutional character of many of the norms and purposes of administrative law.

3. Administrative law systems as an element of the uncodified constitution

In recent years, scholars have renewed their attention to the so-called unwritten constitution (Grey 1978, Ackerman 2007, Young 2008, Tribe 2008). It has, of course, long been recognized that, in any constitutional system, the language of constitutional text is modified and interpreted by political actors and courts. In the United States, judges of the Supreme Court have filled in the details of the vague 18th century document to make it suitable for modern life, notwithstanding the lack of explicit textual basis for constitutional review. More broadly, extraconstitutional mechanisms of constitutional change have in some sense involved or relied on unwritten constitutional conventions (Ackerman 1993, Munro 1928, Tiedeman 1890).

Constitutional functions are also performed by written texts beyond the constitution itself. Some statutes have been considered to be 'super-statutes' that are practically entrenched, even if not formally so (Eskridge and Ferejohn 2005). Although the writers on super-statutes focus on particular regulatory instruments, such as the Sherman Antitrust Act and the Civil Rights Act of 1964, procedural laws surely fit into the category in the sense of meeting criteria of de facto entrenchment and substantive reach. Administrative procedures laws are meta-regulations, designed to govern the way in which substantive regulations are generated and operate. It seems difficult to exclude the US Administrative Procedures Act, for example, from the scope of the 'constitution outside the constitution'. Perhaps, then, the analysis here suggests the need to keep our eyes wide in looking for legal instruments that embody constitutionalism.

The core critique of the uncodified constitution is, unsurprisingly, rooted in the lack of a rule of recognition. Without a clear rule that helps to identify particular norms as constitutional or not-constitutional, the boundaries of the category become fuzzy. But the discussion at the outset of this chapter seems potentially helpful for articulating constitutional boundary criteria. Constitutions, we have seen, focus on regulating interactions between the state and the people, and are at least imagined to be relatively enduring. In considering what norms outside the constitution might be considered uncodified constitutional norms, it seems clear that those rules that are relatively enduring, and purport to regulate the relationship between the state and society, should be within the definition.

What are the normative consequences of treating administrative law systems as essentially constitutional in character? First, such constitutional realism helps us to focus on those areas where constitutionalist values are most frequently encountered, even if not always the matters of the highest stakes. Routine matters like drivers' licenses and building permits make a difference to more people than the high principles of constitutional text, even if they do not always carry great symbolic weight. Second, this focus on the micro-level interactions of citizen and state draws needed attention away from the constitutional courts, heretofore considered central actors in upholding the rule of law. Constitutional courts, by the very nature of their exclusive and high jurisdiction, frequently become embroiled in high profile politics that can undermine rather than enhance their ability to constrain the state. Administrative courts may in such circumstances be more important on a number of levels. Finally, such an approach helps to highlight the importance of the discipline of comparative administrative law. While the field is still nascent, the various contributions in this volume help to draw out the rich array of possibilities for the discipline.

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8 Good-bye, Montesquieu

Bruce Ackerman

If the field of comparative administrative law is to have a future, we must build a new framework for analysis. The traditional contrast between common and civil law systems is a non-starter: Whatever its value in the private sector, it was never built to highlight the distinctive characteristics of administrative law. The same holds true for familiar models focusing on comparative criminal procedure (Damaska 1986).

Models built on particular national experiences have their uses. The French Conseil d'Etat has had an influence in some other nations; as has the German system of administrative courts. But in the twenty-first century, we need a much broader framework that invites disciplined comparisons on a world-wide basis, and informed normative reflection on the evolving lessons of experience.

This requires us to move decisively beyond Montesquieu's reflections on the separation of powers (Montesquieu 1989). No other field of academic inquiry is so dominated by a single thinker, let alone an eighteenth-century thinker. However great he may have been, Montesquieu did not have the slightest inkling of political parties, democratic politics, modern constitutional designs, contemporary bureaucratic techniques, and the distinctive ambitions of the modern regulatory state. And yet we mindlessly follow him in supposing that all this complexity is best captured by a trinitarian separation of power into the legislative, judicial, and executive – with comparative administrative law somehow captured in the last branch of the trinity.

Give Montesquieu his due. His theory represented a fundamental advance over traditional Aristotelian understandings of mixed government. Within this earlier framework, different branches represented different social classes – for example, the British House of Commons represented the class of commoners; the Lords, the lords; and the Crown, the biggest honcho of them all (Vile 1967).

Montesquieu rejected this class-based understanding. His different branches corresponded to different functions of government. In taking this functionalist turn, he followed Locke, who had also separated out three government functions for separation-of-powers treatment. But Locke's trinity was different: He placed the judiciary in the 'executive' box, filling the void with a 'federative power' dealing with foreign relations, yielding legislative-executive-federative as his trio (Locke 1987). Because Montesquieu was himself a judge,[1] he believed it especially important to emphasize the independence of the judiciary in the French monarchy, but he did so at the cost of suppressing Locke's insights into the distinctive functioning of the state in foreign affairs. And so he derived the now-classic trinity: legislative, executive, judicial. Apparently, trinitarian thinking

[1] Technically, Montesquieu was President of the Parliament of Bordeaux, and it is an oversimplification to describe this body as a court. But its judicial function provided an important check on the absolutist ambitions of the French monarchy.

was so overwhelming in the eighteenth century that Montesquieu could not tolerate four boxes in his conceptual scheme.

Almost three centuries later, it is past time to rethink Montesquieu's holy trinity. Despite its canonical status, it is blinding us to the world-wide rise of new institutional forms that cannot be neatly categorized as legislative, judicial, or executive. Although the traditional tripartite formula fails to capture their distinctive modes of operation, these new and functionally independent units are playing an increasingly important role in modern government. A 'new separation of powers' is emerging in the twenty-first century. To grasp its distinctive features will require us to develop a conceptual framework containing five or six boxes – or maybe more. And so we must say a fond farewell to Montesquieu, and create a new foundation for comparative administrative law that is equal to the challenges of modern government.

To see my point, look at what is actually happening in the twenty-first century: Can we observe world-wide tendencies to insulate certain functions from the legislative, executive *and* judicial branches of government? If so, what are they?

For starters, consider the world-wide rise of independent election commissions. In which of the three boxes do they belong? Occasionally, courts do function to check the integrity of elections, as in the case of the French Conseil Constitutionnel (Turpin 1986: 265–82). But more frequently, these special electoral institutions are entirely separate from the regular judiciary as well as from the political branches. For good reason. On the one hand, it makes sense for the independent electoral commission to run the ballot process from start to finish, and not only to act like a court, intervening afterwards to determine whether there was cheating going on. At the same time, it is essential to insulate its operation from the political branches – because it is precisely the sitting politicians in charge of the 'executive branch' who have the incentive and the power to manipulate the vote-count to insure their reelection. As a consequence, modern constitutions increasingly treat election commissions as a distinct branch of government, taking special steps to protect their integrity. And even if a country's constitution does not formally guarantee the independence of the electoral commission, statutory law frequently insulates it from political interference in a host of unconventional ways (Ackerman 2000: 716–21).

Using the electoral commission as an example, consider the four-stage analysis that permits an assessment of an institution's legitimate position in the new separation of powers. The first step involves the identification of a fundamental governmental value: in this case, the proponents of electoral commissions invoke the value of *democracy* in making their case for institutional independence. The next step requires proponents to explain why their favored value requires the institution to receive special constitutional protection from outside forces. In this case, proponents of independent commissions point to the obvious danger of the 'fox guarding the henhouse' – political incumbents awarding themselves another term in office by manipulating the vote-count. The third step identifies techniques of institutional insulation that will give the 'newly separated power' an incentive to do a better job. This emphasis on institutional design, in turn, leads to the fourth and final step: comparative empirical analysis. For example, why does the Indian Electoral Commission do a relatively good job insuring an accurate vote count in a bureaucratic system otherwise scarred by massive corruption and inefficiency (Ackerman 2000: 718–21)? What lessons can be learned from the recent unsatisfactory

performance by the Mexican commission in handling the contested presidential election of 2006 (Ackerman 2010)? And so forth.

On the basis of these comparative inquiries, scholars may contribute to the design of better institutions and provoke critical inquiry into the distinctive weaknesses of different constitutional systems. Consider, for example, the infamous election contest between Bush and Gore in 2000. Montesquieu must take part of the blame for the spectacularly poor performance of American institutions in resolving the dispute. Given the country's traditional commitment to Montesquieu's trinity, it seemed obvious to the leading participants that the administration of elections is just-another-ordinary-part of the executive branch. After all, it certainly is neither legislative nor judicial – and the only other box that remains is executive. Therefore, voting administration must be executive – it's positively un-American to think that there is a fourth category, isn't it?

This unthinking trichotomy allowed the Florida executive to engage in political shenanigans as she supervised the administrative process through which Bush was finally declared the 'winner'. America badly needs an independent electoral commission, but it will not get one until it awakes from its Montesquieuan slumbers and joins the movement toward a new separation of powers sweeping the world today. There are, as we have seen, compelling reasons for independent electoral commissions; compelling enough for most countries to put the idea into practice. Why shouldn't the USA take notice?

Another world-wide trend suggests the potential scope of the four-stage analytic framework that I have sketched. Consider the massive shift toward independent central banks during the past half-century (Kleineman 2001). Substantively, central banks look very different from electoral commissions. But analytically, they raise the same questions. Begin by defining the fundamental values at stake. Here the governing value certainly is not democracy. It is instead neo-liberal economic theories that emphasize the importance of insulating the money-supply from short-term political manipulations, and insist that economic science has provided technocrats with superior analytic tools for regulating key macro-variables. As before, the first task is to evaluate the relevant value judgments underlying neo-liberal economic philosophy; the second task is to assess claims about political incentives – is it really true that political incumbents have counterproductive incentives to manipulate the money-supply to win reelection? The third task explores different institutional designs for independence – how does the design of the Federal Reserve differ from that of the Bank of England? Finally, we need extensive empirical work to figure out how different designs work out in practice.

I have explored other aspects of the new separation of powers elsewhere (Ackerman 2000). But for now, it is enough to note a couple of obvious issues. First, the question of coordination: the more power-centers we insulate from the classic political and judicial institutions, the greater the problem we have in coordinating the proliferating number of separated powers into a coherent whole. Second, the question of democratic legitimacy: if we go too far in insulating too many branches from direct political control, we may deprive the democratic process of its central significance – leaving elected representatives of the people at the mercy of independent central bankers, and others, who are insulated from their direct control.

These two problems suggest care in creating new independent power-centers. But they do not suggest that it never makes sense to create a new separation of power. Instead, they suggest a cautious approach: we should reserve this strategy for the protection of

especially fundamental governmental values, in contexts where normal political incentives are especially pernicious, and with institutional designs that are well-conceived, and if at all possible, empirically tested. The construction of new power-centers, in short, requires a host of complex and context sensitive judgments.

Only one thing is clear: We will get nowhere in making these judgments if we content ourselves with repeating Montesquieu's mantra. Instead, we must modify the mantra to take account of an institutional world in which independent institutions play increasingly important functions – even though they cannot be classified as legislative or judicial or executive.

The holy trinity has a second defect; it encourages us to ignore the different dynamics governing administrative operations in parliamentary and presidential regimes. Formally speaking, it is easy for Montesquieuans to disregard this difference when describing the separation of powers in legal terms. On the standard account, both presidents and prime ministers are the head of the executive branch, and, therefore, the head of public administration.

But serious comparative studies must go beyond this formal parallelism. The prime minister and his cabinet really can exercise monopoly control over the bureaucracy; but presidents must compete for control with an independently elected Congress. Legislative leaders have their own weapons for pushing the bureaucracy in their direction – most importantly, they can threaten the agency with reduced funds if it does not follow their priorities. To parry these threats, presidents appoint political loyalists to the upper reaches of the administration. President Obama, for example, has to fill 3000 positions before his government can become fully operational (Lewis 2008: 56).

By putting loyalists in charge, the president hopes to guarantee that the ministries and agencies will use their discretion to follow his priorities, not those of his political rivals in the legislature. But this technique by no means assures that he will exercise the same degree of administrative control as that asserted by a prime minister. By assuming, with Montesquieu, that presidents are chief executives, comparatists run the risk of ignoring this key point.

The conflict between presidents and legislatures is mediated by the particular rules and structures put in place by different constitutional regimes. If presidents must gain Congressional approval for their appointments, it will be tougher for them to colonize the bureaucracy with super-loyalists. At the same time, Congressional control over the budget varies from system to system. This opens up a rich field for comparative study, as we consider the impact of different constitutional regimes on the on-going competition between president and Congress for bureaucratic influence.

These fascinating variations should not drown out a common theme: Presidential systems encourage the politicization of the bureaucracy, leading to the demotion of career civil servants to second-tier positions as presidents keep pushing political loyalists into key administrative positions in their on-going struggles with Congress.

This basic dynamic raises a fundamental normative issue. Quite simply, the politicization of bureaucratic leadership raises a fundamental challenge to the Rule of Law. Presidential loyalists will be sorely tempted to ignore the law if this furthers their leader's political interests. Administrative law in presidential systems should be especially attuned to this threat. This rule-of-law strategy can be pursued in different ways in different places, and may well rely on special administrative structures, and not only courts.

Comparative law has a key role to play in gaining perspective on the merits of competing institutional strategies.

Beyond these important questions of institutional design lurks a larger question: Are the participants in one-or-another presidential system even aware that they have an especially acute rule-of-law problem? In the United States, for example, the answer is No. The prevailing *Chevron* doctrine legitimates massive judicial deference to administrative legal determinations, opening up a wide space for the political abuse of agency discretion.[2]

Bureaucratic dynamics in parliamentary systems lead to very different abuses. The prime minister and his cabinet are themselves the leaders of the parliamentary majority, and their direct control over the legislature eliminates the inter-branch competition that politicizes presidential bureaucracies. Because the prime minister's political monopoly over the bureaucracy is assured, he can take a very different view of the professional civil service. He need not worry that bureaucrats will succumb to pressure from Congressional barons. Instead, he can view them as a key resource in his struggle for political survival. After all, the professionals have a deep understanding of the basic issues, as well as a sense of bureaucratic realities and possibilities. If the prime minister manages to harness their energies, they can help him deliver on his political promises, and increase his chances of victory at the next election. From this perspective, it makes good sense for the top politicians to support a highly professional civil service. The better it is, the better their chances of victory.

This political dynamic is not inevitable. Prime ministers may choose to populate the bureaucracy with their cronies, and use their control over parliament to silence criticism. Cronyism may maximize short-term political support, despite professionalism's long-run political attractions. But once a strong civil service has been established, the political logic of parliamentarianism is likely to sustain the professional tradition – as the examples of the UK, Germany, Italy, and France (in the Third and Fourth Republics) suggest.

This means that parliamentary systems generate distinctive administrative pathologies. Although the civil service in presidential systems tends to be too weak, it now risks becoming too powerful. Prime ministers will come and go, but professionals will stick around for decades, and they can use their monopoly of expertise to manipulate their titular political bosses. A strong civil service may also insulate itself from broader currents of public opinion, and fail to appreciate when its actions seem autocratic or silly or worse. Indeed, it may also insulate itself from on-going currents of scholarly research, and persist with bureaucratic practices and policies that have long since been discredited in serious academic circles. A culture of secrecy is likely to exacerbate all of these bureaucratic rigidities.

This leads to a different set of normative challenges. Administrative law reform in parliamentary systems should emphasize bureaucratic responsiveness to the larger political and social environment. Begin with politics. When a new leadership wins a parliamentary majority, it often confronts a relatively unified team of high civil servants, who may present them with a very limited set of policy options. Special structures are needed to

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[2] See *Chevron, Inc. v. Natural Resources Defense Council,* 467 US 837 (1984). It is one thing for courts to say that they will defer; quite another, for them to act deferentially in concrete cases. The extent of this gap is explored by Eskridge and Baer (2008).

enable a newly elected political majority to gain a broader understanding of their realistic opportunities. One option is a mechanism to facilitate the creation of different teams of top bureaucrats to present rival plans for implementation – with special incentives for Team B to think out of the box.

In the same spirit, top bureaucrats should keep in touch with evolving social realities. Statutes should require administrators to hold broad-based public hearings before promulgating administrative regulations with large-scale impact. And agencies should be required to defend these rules in appeals before courts or other neutral review bodies.

I have pursued such proposals in greater detail elsewhere (Ackerman 2000). For the moment, it is more important to ask the same question we raised in connection with presidential systems. Is one or another national legal culture prepared to do something serious to control the distinctive pathologies characteristic of their parliamentary system?

Quite often, the answer is No. For example, parliamentary systems in Europe have generally been very reluctant to require public hearings, and appellate procedures, of the kind envisioned by the American Administrative Procedure Act – even though bureaucratic responsiveness to civil society is even more important in these systems than in the presidential regime of the United States (Rose-Ackerman 1995).

Comparative administrative law can become an intellectual force for constructive critique. Just as it exposes the American failure to recognize the distinctive need for the rule of law in presidential systems, it also exposes the European failure to recognize the distinctive need for bureaucratic responsiveness in parliamentary regimes.

In conclusion: Good-bye Montesquieu; hello, the twenty-first century and its promise of a new agenda for the comparative study of administrative law.

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9 Comparative positive political theory

M. Elizabeth Magill and Daniel R. Ortiz

Little in the last thirty years has so changed thinking about American administrative law as Positive Political Theory (PPT). Before PPT emerged, American administrative law scholarship largely focused on how doctrine fit together, how we should reform it to promote particular normative aims, how it expressed the commitments of larger political theory, and how it furthered or frustrated effective administration. At its apotheosis in Richard Stewart's 'The Reformation of American Law' (1975), it did all these things – and more – in aid of tracing American administrative law's development.

Soon, however, political scientists encroached on the field. They brought a set of tools to the study of administration that they had designed to analyze how political institutions function. The PPTers, in particular, 'focused on how political institutions and the career objectives of elected officials shape political decisions' (McNollgast 1999: 182). They sought to explain, among other things, why Congress imposed particular procedures on agency decisionmaking, how formalizing decisionmaking empowered various groups, and how agencies and courts could play their own interests off against the interests of the political masters they were supposed to serve. Their insights complicated 'faithful agent' models of administration and highlighted how agencies and courts could and, to some degree, did follow their own interests. Their arguments swept broadly and offered provocative, often cynical, interpretations of administrative rulemaking, judicial review, and effective separation of powers. PPT not only challenged much conventional thinking but also cast some long-accepted features of American administrative law into normative doubt.

McNollgast, a shorthand for co-authors, Matthew McCubbins, Roger Noll, and Barry Weingast, argued, for example, that the traditional understanding of why Congress had enacted the Administrative Procedure Act (APA) got things almost exactly backwards. Far from 'codify[ing] and rationaliz[ing the] existing practice of procedural due process that had percolated in a haphazard manner through the courts in the 1930s' (McNollgast 1999: 181), McNollgast argued that it represented an effort by progressive New Dealers to consolidate their political achievements in the face of a likely Republican president. (McNollgast 1999: 182–3, 189–215). In their account, New Dealers believed it better to give federal judges – who had mostly been appointed by Roosevelt – the power to superintend agency action rather than to allow a possible Republican president to roll back the New Deal itself. The fact that the Democrats bought off Republican opposition by giving business interests heightened procedural protections only shows how deeply they feared a change of President. The McNollgast story explains the APA not as public interest legislation designed to require agencies to meet evolving standards of due process but rather as a political compromise that promoted the private interests of both the Democrats' and Republicans' core constituencies. PPT claims like these engaged, surprised, and thrilled all at once.

So far, PPT has largely had domestic bite inside the United States. Although many

have employed it to analyze features of the American administrative process, few have applied it to administrative law elsewhere. Our aim is not to extend its reach but is much more modest – to test it comparatively. How well does it explain the administrative law regimes of very different political cultures? If it fits well, we would not only learn more about the administrative law of other jurisdictions but also gain confidence in its domestic application. If it fails to fit, we might question the methodology itself and ask whether its explanations of American administrative law are anything more than sophisticated 'just so' stories.

To answer this question authoritatively, one would need to apply PPT comparatively to many features of many different democracies' administrative law. That would be impossible within the scope of a single chapter. Instead, we explore how well PPT explains one central feature of many administrative law systems – judicial review of agency action – along one primary constitutional dimension – whether the government is presidential or parliamentary. One would think that, under PPT, such a large structural difference might matter to judicial review. We discuss in particular judicial review for administrative reasonableness. In the United States, this consists primarily of so-called 'arbitrary and capricious' review under §706 of the APA. In many other countries, it is known as 'proportionality' or 'irrationality' review. We admit that this choice may reflect an American bias. 'Arbitrary and capricious' review takes up much, perhaps too much, of the basic American law school course in Administrative Law and appears to obsess American legal academics. It is perhaps a less critical feature elsewhere. Still, PPT should be able to predict where judicial review generally and reasonableness review, in particular, would be more or less important and offer reasons why it would be so. Does PPT pass this simple comparative test?

1. PPT predictions about judicial reasonableness review in presidential and parliamentary systems

1.1. The difference a structural alignment of interests can make

Perhaps the most important structural difference among advanced democracies is whether they adopt a presidential or a parliamentary system. In a strong presidential system, like the United States, the executive and the legislature are elected independently, from different constituencies, and often at different times. If only because of this, PPT would predict that these two 'political institutions and the career objectives of [their] elected officials [would] shape political decisions' differently (McNollgast 1999: 182). At the extreme, different parties control these two different branches of government. Because each party seeks support from different groups, each branch would then pursue very different policies. One branch will try to reward some groups; the other, quite different ones. Only in that way can they count on continued financial and political support from their different constituencies.

Even when the same party controls both branches, however, strong differences can emerge. To a PPTer, the President and members of Congress alike will be primarily interested in reelection – unless the Constitution's term limits make that impossible for the President or an elected official has chosen to retire rather than face reelection. They may also be interested in carrying out their own or their party's favored policies and perhaps establishing a legacy. When it applies, however, the reelection interest is paramount. To

increase his chances of reelection, each elected official will try to further policies that his particular constituency favors, whether it be the nation, a state, or some smaller geographical district. The interests of these constituencies vary greatly. Many congressional districts have interests more homogeneous and idiosyncratic than those of the state they are in – witness the political geography of California or New York – and many states, in turn, have interests more homogeneous and idiosyncratic than those of the nation as a whole – witness Alaska and Hawaii, or even Iowa and Michigan.

Elected officials will also seek to increase their chances of reelection through campaign financing. They will try to appeal to interests that will give them money for their campaign war chests. Because the President has ultimate authority over nearly all federal programs, she can appeal to many different well-funded interests for campaign contributions by dangling the carrot of policies they prefer. Legislators, except perhaps for those in charge of each chamber, can make only more limited appeals. Because, as individuals, they have most power in their committees, they will appeal mostly to any well-funded interests that care about the policies handled by those committees. Thus, members of a banking committee will make appeals to banks, whereas members of a communications committee will make appeals to broadcasting and telecommunications interests. Broader-based political party campaign committees will, of course, make wider appeals and try to persuade their members to toe the party line in return for campaign contributions, but because party discipline is only partially effective and members can usually raise money more successfully themselves, these wider, party fundraising efforts only partially distract party members from supporting the interests of their narrower fundraising targets.

In a strong parliamentary system, like the United Kingdom, by contrast, the legislature chooses the executive, either formally or informally, and hence the executive has few independent interests. The same party or group of parties controls both branches and voters elect representatives less because of what they individually represent and more because of what their party and its leaders stand for. If one wanted Tony Blair to be Prime Minister, one simply had no choice but to vote for the local Labour Party candidate for Parliament. Parliamentary members of the majority party who are not members of the executive branch realize that their own individual fortunes will rise and fall with the government. Hence, their interests largely merge with the party's. A Labour member, in other words, would have understood that his own fortunes, to a very large degree, depended on the party leader rather than on anything he himself could do. Not only is government not divided, but also individual parliamentarians will largely support or oppose the government according to the party they represent. Except in a few uncontroversial matters or matters of conscience, members of the majority party will support that party and those in the minority party will oppose it. In a real sense, the interests of individual parliamentarians lie with their party, and the interests of the executive, the legislature, and the majority party are one. This is also true of fundraising. Parties rather than individuals tend to harvest interest groups, and thus the financial interests of individual elected officials largely follow those of their party.

These differences make changes in statutory law more difficult in a presidential system. In order to change a law without resort to difficult-to-achieve supermajorities, the President and both houses of Congress must support the change. Even when a single party controls all three institutions, this can be difficult. Committees and subcommittees,

which can represent very different interests than the house as a whole, can serve as veto points and frustrate majorities in each house. And the chairs of these subunits, who may have somewhat different interests still, wield disproportionate power in setting their agendas. In short, to change a law, not only must the President and majorities of both houses agree, but also key individuals, like committee chairs, and groups of individuals, like the relevant substantive committees, must usually support the change as well. Potential vetoes lie in several different directions at once. And as the number of players who must assent increases, so too does the difficulty of making change. In a strong parliamentary system, by contrast, once the controlling party or parties agree, change can easily occur. Of course, in a multi-party coalition under a system of proportional representation, the governing coalition itself may disagree on policy priorities, but if the party leaders can negotiate a deal, they can expect support from the rank and file. All the necessary players will have largely the same interests, and they will have the necessary numbers to overcome opposition. In both presidential and parliamentary systems, of course, limited legislative 'budgets' will constrain how much change any government can achieve, but in the parliamentary system the unified government can within that budget at least achieve its leaders' most sought objectives and the cost of passing each individual piece of legislation is likely to be less.

At the administrative level, the situation is very different. In a presidential system, agency officials may have more opportunity to change policy. They recognize that they can change policy without fear of statutory roll-back so long as just one of the people or bodies who hold veto power over potential legislation prefers the new policy to the earlier one. This gives agency officials much room to maneuver policy. The different preferences of those who hold a veto over possible corrective legislation open up a 'gridlock' space within which the agency can move in order to maximize its own interests (Ferejohn and Shipan 1989: 393).

In a parliamentary system, such gridlocking is not possible. The alignment of the executive and legislature through single-party or single-coalition control squeezes out any space for the agency to move independently. An agency that moves away from the preferences of the controlling party will quickly find itself corrected through legislation – although that will usually not be necessary. As Bruce Ackerman has noted, this difference between presidential and parliamentary systems leads to agency officials behaving quite differently (Ackerman 2000: 698–9). In presidential systems, they will try to exploit differences among their political masters to create support for their own initiatives. In parliamentary systems, they will seek to faithfully serve those in power – whatever their own interests.

1.2. Any value to judicial review?

What do these differences portend for administrative judicial review? PPT holds that judicial review serves three primary functions. First, it serves to check executive hijacking of agency policymaking. Under this view, the legislature in a presidential system will fear that the executive, which has more direct and meaningful control over agency activities through its budgeting, appointment, removal, and general supervisory powers, not to mention its greater ability to monitor, will lead agencies to serve its own interests rather than those of the legislature. In a parliamentary system, however, the legislature will little fear that the executive will thwart the majority's interests. Because the majority

party or coalition controls both branches, those interests will be the same. Review by an independent judiciary could only frustrate the executive's pursuit of joint executive and legislative interests.

Second, judicial review can serve as a check against rogue agencies, ones that follow their own interests at the expense of those of both the executive and the legislative masters that they should serve. Here too there is much less need for judicial review in a parliamentary system. Because the absence of a 'gridlock' space gives agencies less incentive and ability to follow their own interests and because statutory corrections are easier to impose if they do, independent superintending agents like courts are less desirable. Simply put, the more unified the principal, the shorter the leash on which the agent can roam and the more difficult it will be for the agent to follow its own preferences. There will thus be less need for judicial review.

Third, judicial review can serve to entrench the preferred policies of an enacting legislature or enacting legislature and President against future changes in government. This may well be true in a presidential system. Knowing that agencies in the future may be tempted to exploit the 'gridlock' space, the enacting players may want other agents, like independent courts, to monitor and discipline agencies in order for the original policies to stick. This is true even if these additional agents create new agency costs, so long as these new costs are balanced by the benefits of better control over the administrative process.

In a parliamentary system, however, judicial review of this kind makes much less sense. Because it knows that future governments will be controlled by a single party or coalition which can easily change the law to reflect its own views of good policy, there is little an enacting legislature can do to protect its favored interests against that possibility. Without the possibility of a future 'gridlock' region created by multiple veto points, much less entrenchment can occur. In any event, the enacting legislature would have little incentive to exploit such a possibility even if it existed. As Bruce Ackerman has noted, in a parliamentary system, a majority or minority party member's reelection rests largely on the success of the government and its programs. If voters believe that a government is acting effectively, they will reelect it by reelecting its members to parliament. If they do not believe it is acting effectively, they will throw it out by voting against its individual members or its party list, depending upon the voting rule. Both parliamentarians in and out of power, then, will want to be able to change policy when voters believe it is ineffective (Ackerman 2000: 698). Neither side will wish policy to be 'sticky'. Giving courts the power to encourage agencies to follow the policies of the enacting parliament against those of later ones – or even against later views of the enacting parliament itself – is thus not something anyone in either the majority or minority party in the enacting parliament itself wants. For all three possible reasons, then, PPT would predict that judicial review would be much more limited in domain and less searching in application in a parliamentary than in a presidential system.

2. Comparative perspectives

Positive political theory tells a story about judicial review of administrative action in the US, and in this section we start the task of evaluating whether its predictions are validated comparatively. A complete comparative analysis would consider every aspect of judicial review of administrative action, and other features of the administrative state as

well, across presidential and parliamentary systems. That task is well beyond the reach of this short chapter. Instead we start the comparative task by examining four national approaches to just one important feature – judicial review of administrative action. We focus on the review that courts conduct when they evaluate agency exercises of discretion. In the US, that review goes under different names, but we will call it 'reasonableness review'. After outlining such review in the US we will look for analogous features in the systems of judicial review of administrative action in the UK, France, and Germany. The results of this preliminary investigation cast doubt on the PPT explanations for US administrative law.

2.1. Reasonableness review in the US

We start with a brief primer on US reasonableness review. Before describing its content, it is important to observe when such review is available. If reasonableness review is quite searching, but almost never available because of justiciability doctrines like standing or ripeness, it would have a different meaning than if it were both searching and widely available. It is safe to say that, today, judicial review of administrative action, including reasonableness review, is widely available to challenge final agency action that has an effect on parties outside of the government.[1] There are, to be sure, cases in which review will not be available because the parties interested in challenging government action do not have standing,[2] Congress has chosen to preclude or channel review (and the courts have accepted those limitations),[3] or the action is 'committed to agency discretion by law'.[4] These exceptions are important, but they do not come close to swallowing the general principle that a proper party can challenge final administrative action in court.

Once a court turns to evaluating agency action, the standard it will apply depends on the nature of the agency's action. Courts will assess agency findings of fact, legal interpretations, and exercises of discretion. This section focuses only on the last of these. In such cases courts will determine whether the exercise of discretion was 'arbitrary and capricious', a standard supplied by the APA.[5] Courts often state that 'arbitrary and capricious' review is deferential to agencies. This is sometimes true, but its intensity varies with context. If an agency has exercised its discretion on an important matter, reasonableness review under the arbitrary and capricious test can be rather searching.

Consider a foundational case, *Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance* Co.[6] There, the US auto safety agency decided to rescind its prior 'passive restraint' requirement. Under that pre-existing requirement, auto manufacturers were required to install passive restraints – either airbags or automatic seat belts – in newly manufactured cars. Before that obligation became effective

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[1] See, for example, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US 402 (1971); *Abbott Laboratories v. Gardner*, 387 US 136 (1967).

[2] See, for example, *Lujan v. Defenders of Wildlife*, 504 US 555 (1992); *Sierra Club v. Morton*, 405 US 727 (1972).

[3] See, for example, *INS v. St. Cyr*, 533 US 289 (2001); *Weinberger v. Salfi*, 422 US 749 (1975); Johnson v. Robinson, 415 US 361 (1974); *Schilling v. Rogers*, 363 US 666 (1960); *Work v. United States ex Rel. Rives*, 267 US 175 (1925).

[4] See, for example, *Webster v. Doe*, 486 US 592 (1988); *Heckler v. Chaney*, 470 US 821 (1985).

[5] 5 USC §706(2)(A).

[6] 463 US 28 (1983).

(and after a new president was elected), however, the agency, revoked the requirement. It was clear that this was a result that the agency could have reached under the statute because the statute did not require passive restraints. Thus, the question was whether the agency had appropriately exercised the discretion granted to it under the statute.

The Supreme Court set aside the agency's action because the agency had failed to engage in reasoned decisionmaking as it exercised its discretion. The agency had explained that it planned to revoke the requirement because it would not achieve the safety benefits that the agency had originally anticipated. That was because the agency now predicted that, given a choice between airbags and automatic seat belts, most auto manufacturers would choose to install automatic seat belts, and automatic seat belts did not provide sufficient safety benefits to justify the requirement. To the Supreme Court, this reasoning failed on two counts. The Court observed that the agency had failed to consider an obvious alternative policy choice – namely, a mandatory airbag requirement. More than that, although the Court confessed this was a closer question, the agency had too quickly dismissed the safety benefits of automatic seat belts. On both grounds, the agency failed to justify its policy choice and therefore its revocation of the rule was set aside by the Supreme Court.

This brief excursion into reasonableness review in US administrative law cannot adequately capture all of its contours. But it is not necessary perfectly to measure the real meaning of reasonableness review in order to conduct a comparative analysis. All that one needs to know is that reasonableness review sometimes results in the invalidation of important agency action and that the threat of this occurring is real enough that agencies and those who follow what they do consider it as they conduct their business.

2.2. Judicial review in the United Kingdom

We start with the UK where, if the PPT explanation of judicial review of administrative action (and in particular reasonableness review) is correct, we would expect to see different patterns than those observed in the US. To the extent that reasonableness review in the US is a product of a constitutional design that separates lawmaking power between a Congress and an independently elected president, as the PPT story would have it, one would expect to see a different approach in the UK. There, the party in power controls all lawmaking, a stark contrast with the US system of separated powers. In such a system, although the parliamentary majority may have much to fear from the bureaucracy, it need not worry that it is being supervised by a rival political principal elected by a national constituency.

Although the PPT story would suggest very limited judicial review of administrative action, that is not what one finds in the UK. Commentators there have observed that administrative law is relatively 'activist' as the result of developments in the last four decades or so (Wade and Forsyth 2004: 17–18, Tompkins 2003: 63, Jones and Thompson 2002: 250). There are two questions that are relevant to the US-UK comparison: Is review often available? And, if so, how do courts evaluate exercises of discretion?

Judicial review is widely available. The Administrative Court, a branch of the High Court, now possesses jurisdiction over public bodies' compliance with the law and from that court there may be appeals to the Court of Appeal or to the the newly established Supreme Court for the United Kingdom (which took over the judicial functions of the House of Lords in October 2009) (Jones and Thompson 2002: §5.1). Standing is limited

to those who have 'sufficient interest' in the matter. This could narrow the class of challengers considerably, and it is true that a 'mere busybody' does not have standing. But the term 'sufficient interest' has fairly broad meaning, and includes a 'pressure group' or a 'public spirited taxpayer' (Jones and Thompson 2002: §5.3, Wade and Forsyth 2004: 690–91). As a leading treatise explains: 'In effect . . . a citizen's action, or *action popularis*, is in principle allowable in suitable cases' (Wade and Forsyth 2004: 694). Likewise, in the modern period at least, justiciability is not a powerful barrier to judicial review. As Brian Jones and Katharine Thompson put it: 'The courts today are quite reluctant to say that a matter is not justiciable' (2002: 236).

Not only is judicial review fairly widely available in the UK, it can have real bite. In the UK, like the US, there are a variety of grounds for setting aside administrative action. In a classic case, Lord Diplock identified three broad grounds for setting aside administrative action: illegality, irrationality, and procedural impropriety.[7] Under the first two, courts evaluate discretionary choices and both have features that resemble reasonableness review in the US.

Assessment of the first ground, whether the body operated illegally, or *ultra vires,* includes an assessment of whether the body considered the proper factors when it made its decision. A public body must only consider matters that are 'relevant' (and not consider matters that are 'not relevant') when exercising its lawfully conferred powers (Jones and Thompson 2002: 239–240, Sunkin 2004: 754–69). In order for a court to assess whether a public body took account of only relevant factors and disregarded irrelevant factors, the court must know what factors a public body considered. Thus the relevancy principle presupposes that courts will both elicit and assess the factors that formed the basis of the public body's decision. That bears more than a passing resemblance to US reasonableness review, which is built around judicial evaluation of the soundness of the reasons that the government offers for its action.

It is difficult to assess concretely how much this relevancy principle limits public action in the UK and, in turn, compare it to the constraints that US reasonableness review imposes on government action. What is clear, however, is that the obligation to only consider relevant factors is not one that the courts only invoke when the government has passed the test. The principle has been used to set aside a wide variety of public actions. A local government's consideration of non-economic matters in setting wage rates has been held unlawful, as has the Home Secretary's consideration of the public's reaction when setting a punishment for juveniles convicted of a crime.[8]

The second ground for setting aside administrative action overlaps with the first, and even more obviously resembles US reasonableness review. A public body's action can be set aside as 'irrational' or 'unreasonable'. These terms are remarkably similar to the verbal formulation central to US reasonableness review. Indeed, a leading treatise notes that the terms 'arbitrary and capricious' (the precise terms of US reasonableness review) are sometimes used interchangeably with 'unreasonable' (Wade and Forsyth 2004:

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[7] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at 408.

[8] *Roberts v. Hopwood* [1925] AC 578 (non-economic considerations in the setting of wage rates); *R. v. Secretary of State for the Home Department, ex parte Venables* [1997] 3 All ER 97 (considering public reaction in setting punishment for juvenile).

354). The reasonableness principle applies to administrative acts as well as delegated legislation (Wade and Forsyth 2004: 880–83).[9]

The invocation of similar words, especially when those words are as open-ended as 'reasonable' or 'arbitrary', does not necessarily mean that the standards are in fact similar. Whether they are similar depends on the real meaning of such open-ended standards in decided cases. Unsurprisingly, the real, on-the-ground meaning of these terms is difficult to pin down. Some commentators describe these principles as highly deferential (Stone Sweet and Mathews 2008: 146, Law 2005: 147), while others appear to differ on that matter (Wade and Forsyth 2004: 353). But there does seem to be agreement on a few matters, and they suggest a degree of similarity between the US and the UK systems. Reasonableness review in the UK can include an assessment, not simply of whether the discretionary choice was consistent with the statute, but (even if consistent with the statute) whether it was reasonable, that is, whether the discretion was soundly exercised (Craig 2004: 833). And, courts assessing the reasonableness of government action have become more skeptical of government action over time. As Wade and Forsyth put it, 'The principle of reasonableness has become one of the most active and conspicuous among the doctrines which have vitalized administrative law in recent years' (Wade and Forsyth 2004: 353).

Review for 'reasonableness' has also generated an ongoing debate in the UK about whether proportionality, a well-established principle in continental Europe and a general principle of the European Community, should become a ground for setting aside action in the UK. Proportionality, which has German origins, is an analytic framework that requires judges to engage in a balancing determination aimed at assuring that the government's action intrudes no more than is necessary to achieve acceptable state ends (Stone Sweet and Mathews 2008: 74–76). In the UK proportionality review is more skeptical of government actions than reasonableness review (Law 2005: 714). Some of the debate over proportionality in the UK has revolved around the concern that proportionality review would amount to review of the merits (Craig 2004: § 15.A.(5)).[10] That controversy aside, UK courts have applied principles of proportionality in a variety of cases. Because it is a principle of EC law, UK courts must consider it in cases with an EC dimension. The adoption in the UK of the Human Rights Act of 1998, which incorporates the European Convention on Human Rights and Fundamental Freedoms into UK domestic law, has also required UK courts to consider proportionality on a more regular basis. Some even predict that it will spread further through UK law, even when the Human Rights Act of 1998 does not require it (Stone Sweet and Mathews 2008: 145–152, Law 2005: 713–17).

This brief survey should be sufficient to suggest that, as in the US, courts in the UK will inquire into the 'reasonableness' (or proportionality) of public bodies' exercises of discretion. Sometimes that review may be rather deferential to the public body and sometimes it may not be so deferential. But judicial review of administrative action in the UK is much more than a rubber stamp. That, by itself, is inconsistent with what PPT would predict.

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[9] *R. v. Customs and Excise Commissioner ex parte Hedges and Butler Ltd.* [1986] 2 All ER 164.

[10] See *R. v. Secretary of State for the Home Dept., ex parte Brind* [1991] 1 AC 696 HL.

2.3. Judicial review of administrative action in Germany and France

Consider now judicial review of administrative action in two regimes on the European continent, Germany and France. The contrasts between those two regimes and the US are more complex than the comparison with the UK.

Both the constitutional design and the inherited legal traditions underlying these comparisons are complicated. Start with constitutional design. Neither country has *either* a US-style system of strong separated powers or a Westminster-style system of strong party parliamentary government. The French system exhibits some US-style separation because it has an independently elected President, but in a weaker form because the President must appoint a Premier supported by a majority in the National Assembly, although the President is free to call for elections in the National Assembly (Ackerman 2000: 648–50). (There is also no equivalent to the US Supreme Court, although a constitutional amendment in 2008 did increase the jurisdiction of the Constitutional Council.) Germany is closer to a classic parliamentary system, but it is much less likely to produce one-party rule than the Westminster system (Sartori 2006: 105). This is so because its modified proportional representation electoral system produces a number of viable parties that often operate in a coalition in the Bundestag. Although the Chancellor exercises broad governmental powers, she is selected by the Bundestag coalition. Furthermore, bicameralism is more of a check in Germany than in the UK because of the independent authority of the upper house (Sartori 2006: §12.1). The inherited traditions of the legal systems also diverge. Both Germany and France are civil law, not common law, systems and, also in contrast to both the US and the UK, both countries have long had a separate system of specialized courts that deal exclusively with administrative law cases.[11]

These complications aside, recall that the McNollgast thesis explains judicial review in the US as the product of the US system of separated powers. If that claim is correct, it would imply that the closer a constitutional design is to a presidential system, the more pervasive judicial review of administrative action will be. Thus, one would expect there to be the *least* pervasive judicial review in the UK and perhaps Germany (although that is a much less centralized parliamentary system) and the *most* pervasive judicial review in the US and France. As we have already seen, there appears to be more convergence between the US and the UK systems in term of reasonableness review than one would have predicted. Adding France and Germany to the mix complicates the picture, but not in a way that lends support to the PPT thesis.

In France, the starting point is the jurisdiction of the court that might review the administrative bodies' action. The jurisdiction of the administrative courts is a complicated issue, and there are so many disputes about jurisdiction that a special court exists to settle disputes over whether a case should be sent to the administrative or the ordinary courts (Auby 2002: §5.2). But if a case is properly within the administrative courts, the most frequent action is the *recours pour exces de pouvoir*. In this action, a party claims that the public body has acted unlawfully, and the remedy is to set the action aside.

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[11] The UK has long had specialist tribunals, staffed by lawyers and non-lawyers, that developed on an ad hoc basis. Pursuant to the Tribunals, Courts and Enforcement Act of 2007, the UK is re-organizing and re-rationalizing this tribunal system and, in the process, is effectively creating administrative courts. See Sir Robert Camworth, 'Tribunal Justice – A New Start', *Public Law*, Jan. 2009, 48–69.

Even where there is jurisdiction, there are some limits on the availability of this action. Parties can challenge only administrative 'decisions'. That category does not include a variety of things like contracts, circulars and interpretative documents as well as certain highly discretionary decisions, but it *does* include regulatory decisions as well as individual decisions with consequences for the parties involved. To bring the action, the party must have standing, which requires an 'interest'. The administrative courts have interpreted that requirement broadly in the past decades to include ideological and collective interests – an approach to standing that goes beyond US law on this matter (Auby 2002: §5.3). Finally, as to the timing of challenges, regulatory 'decisions' can be challenged both before they have been applied in a particular context (at what a US administrative lawyer would call the pre-enforcement stage), and later, 'indirectly', when they are applied (Auby 2002: §5.3). Based on this brief excursion into the French system, it is difficult to confidently characterize the availability of review and compare it to the availability of review in the US. As a first cut, however, it appears that judicial review of administrative action is not obviously restricted in a way that significantly departs from the US system.

The grounds for review in the French system are complicated, but they bear some resemblance to reasonableness review in the US system. Judicial review of administrative action can, on occasion, be searching. A decision can be set aside because an incorrect person or body made the decision; officials failed to follow the required procedure; the decision violated the law; or the underlying motivation was incorrect (a category which includes errors of fact, law, or the weighing of facts). Akin to US reasonableness review, French administrative law requires administrative decisions to be supported by reasons, and failure to provide them can result in the invalidation of the action (Brown and Bell 1998: 239–50). As for review of discretionary decisions, treatise writers note that the courts frequently hear such cases, and, when they do, the courts go beyond a straightforward assessment of whether the agency observed the relevant legal limits (Brown and Bell 1998: 256–61). Proportionality is also a key feature of French administrative law (Brown and Bell 1998: 233–35). If proportionality applies, a court must weigh the intrusion by the government against the objective the government seeks to achieve, which involves a fairly intrusive examination of government decision making.

Thus it appears that judicial review of administrative action in France is often available, and that the grounds for setting aside action are broad and include judicial evaluation of discretionary choices by government bodies. There are stark institutional differences between the French and US system, of course, most prominently in the existence and long tradition of entirely separate administrative courts. Nonetheless, at least at first blush, there appears to be some similarity in the availability and scope of review of administrative action. At the least, it does not appear, as PPT would suggest, that reasonableness review in France is weaker than in the US.

Finally, consider a (very brief discussion of) judicial review of administrative action in Germany. It presents the strongest contrast with the other systems of judicial review of administrative action examined here, whether presidential or parliamentary. Review is statutorily authorized, encompasses a wide variety of grounds, can be quite searching, and can result in the invalidation of significant administrative action (Schroder 2002: §5). But this sort of review applies only to a particular type of case, namely, those

covering individual rights. It is not available to challenge federal administrative rules and guidelines generally (Rose-Ackerman 1995: 72–3). Rules governing standing and private enforcement foreclose it. Outside individuals and groups cannot directly challenge government policies. Some commentators claim that the domain of judicial review of administrative action may (or should) expand with new developments in the 'normative authorization doctrine', which in certain circumstances allows challenges to market regulation (Oster 2008: 1295–6). Barring some significant change, however, judicial review of administrative action in Germany is starkly different than the other countries considered because it is simply not available in a broad range of cases (Rose-Ackerman 1995: 72–3, von Oertzen 1983: 269).

Germany presents a somewhat difficult case from the perspective of the McNollgast thesis. Judicial review is available, and it can be intrusive, but it operates in a narrower range of cases than it does in other regimes. Whether this undermines the PPT thesis is not entirely clear, but it doesn't clearly support it. The German tradition that orients judicial review around the protection of individual rights would seem to be related more to political history and judicial culture than to the political incentives of actors dictated by the constitutional design.

3. Lessons

Positive Political Theory sought to explain judicial review of administrative action as a product of a constitutional design that separates lawmaking authority between rival political principals. Our review of several European cases casts doubt on this claim. The clearest case is the UK where the constitutional design unifies lawmaking authority and yet judicial review of administrative action is alive and well. This suggests that perhaps something other than constitutional design best explains the existence and shape of judicial review of administrative action. An obvious rival to the PPT explanation is the traditional explanation that administrative law scholars give for the existence and shape of judicial review of administrative action: judicial culture.

Interestingly, PPT itself seems to recognize the limits of its method. In a recent comment, the McNollgast collective and Daniel Rodriguez have argued that the traditional judicial culture explanation of American administrative law has much force – so much, in fact, that they try to incorporate it within PPT itself (2008: 15). In attempting to explain 'the apparent puzzle . . . [w]hy would courts use administrative law doctrine to maintain constitutional balance and ensure administrative legitimacy when courts are [, in PPT's view,] so concerned with implementing legislative strategies' (2008: 18), they speculate 'that courts might cherish hegemony – or at least priority – in matters of individual rights and fairness, rather than in administrative performance' (2008: 19–20). In other words, they believe that judges have strong preferences about rights and fairness and bring those preferences to bear in deciding on administrative law issues. Or, as they put it, American administrative law reflects not only a 'desire of courts to assist legislators [in implementing their preferred policies but also] an interest in judicial concerns with their own institutional prerogatives and preferences' (2008: 20).

They claim, in fact, that viewed through a PPT lens judicial culture can powerfully explain the development in America of exactly what we have considered in this chapter: review for reasonableness (here under the arbitrary and capricious standard). They are convinced that the one explains the other:

> [C]ourts determined to require heightened rationality and procedural protection from agencies in the wake of the due process revolution's demise (consider *Matthews v. Eldridge* and its progeny) sought to transform the rather incrementalist approaches of *Overton Park, Inc. v. Volpe* and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automotive Insurance, Co*. into the sort of synoptic rationality requirements that one would have thought untenable or at least thinly supported by existing legal doctrine. In short, judges are both shrewd and resourceful in developing strategies to ensure that constitutional values – or, more precisely, fairness values – are protected. (2008: 20–21)

We do not disagree with this description but are surprised that it represents a PPT account of the development of arbitrary and capricious review. After all, it deviates not a bit from the most traditional explanation: that judges developed American administrative law to ensure a certain level of regularity and fairness in administrative decisionmaking. It twists the traditional story only insofar as it identifies the judges as self-interested actors. But does that make any difference?

We think not. What matters to both accounts is that judges develop law in the way that they think right. Under the traditional view, institutional acculturation largely determined what they thought 'right'; under PPT, 'institutional prerogatives and preferences' do. The latter sounds snarkier perhaps, but has no different payoff. In both cases, the judges are expressing norms or, if you will, 'preferences' of the professional culture they inhabit.

What, then, should we make of PPT's appropriation of traditional legal explanations for the development of American administrative law? On the one hand, PPT's appropriation of these traditional stories recognizes their explanatory force. Without them, PPT cannot explain some central features of the American terrain, like arbitrary and capricious review and some judicially created procedural requirements. On the other hand, however, PPT's perhaps necessary appropriation of traditional reasoning represents a loss. To the extent PPT now convinces by incorporating the types of analysis it earlier sought to supplant, it loses much of its edge and becomes indeterminate. Now it offers less a novel, stark alternative to traditional legal explanations than a messy supplement to them. A similar eclecticism might rescue PPT in the comparative context. PPT might invoke the norms of traditional legal culture to explain the similarity we see in judicial review across very different presidential and parliamentary systems, perhaps even Germany's exceptionalism. But by doing so, it would have lost its soul and any real claim to interest. Traditional legal culture, not private incentives, seems to be doing all the work.

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10 Overseeing the executive: Is the legislature reclaiming lost territory from the courts?

*Tom Zwart**

In parliamentary systems the legislature is supposed to hold the executive accountable. And yet there has long been concern that this legislative supervision is ineffective because of the political bond between the government of the day and the majority in Parliament. There are indications that courts have taken on a compensatory role, by acting as substitutes for this failing legislative oversight (Flinders 2001: 54–71).

This chapter explores these developments. Section 1 contrasts two models of judicial review – the 'private rights model' and the 'institutional model' – as well as the constitutional justification for this new judicial role put forward by a senior member of the English judiciary, Lord Woolf. Section 2 highlights recent attempts by Parliament to reassert its role as overseer of executive action. Section 3 concludes with observations regarding the consequences of the enhanced role of the courts and the apparent come-back of the legislature, for their mutual relationship.

1. Courts as overseers of executive action

In 1993 the then British Home Secretary, Michael Howard, announced that he would not bring part of the Criminal Justice Act 1988 into force, although the Act required him to do so 'on such day as the Secretary of State may appoint'. His statement was a clear blow to the separation of powers, which does not allow a minister to single-handedly deny legal effect to legislation duly enacted by Parliament. However, his actions were not challenged by the majority in the House of Commons.

A number of trade unions, including the Fire Brigades Union, were concerned by the apparent lack of accountability and parliamentary oversight, and decided to challenge the Minister's refusal in court. They won their case, because the majority of the Court felt that by flatly refusing to bring the legislation into force, the Secretary of State had fettered the discretion accorded to him by the Act.[1] The *Fire Brigades Union* case offers two important lessons.

First of all, it demonstrates how the political fusion of the executive and the legislature in a parliamentary system has the potential to distort the checks and balances. The essence of a parliamentary system is that Parliament has the final say, because it is the only authority with a direct electoral mandate. The Government is allowed to rule the country as long as it enjoys the confidence of a majority in Parliament. Ministers, in turn, are supposed to be accountable to Parliament, which oversees their actions. Parliament

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[1] *R v. Home Secretary ex p. Fire Brigades Union* [1995] 2 AC 513.

is empowered with the vote of no-confidence, which allows it to vote the government out of power.

This theoretical model often works out differently in practice. There is an inherent tension between the need to keep a Government in power, on the one hand, and the obligation to hold the executive accountable, on the other. In those systems where coalitions rather than absolute majorities are common, governments are formed on the basis of an extensive coalition agreement. In exchange for the willingness of the government to implement their manifestos, the Members of Parliament (hereafter: MPs) who belong to the Government's majority are expected to remain loyal to it. This diminishes the eagerness of those MPs to turn the heat up on ministers. Parliamentary oversight usually will have to give way to the desire to keep the government in place.

The second lesson is that courts, as a consequence, are increasingly demonstrating a willingness to take it upon themselves to scrutinize executive action in the absence of effective legislative oversight. But in doing so, the courts have been developing a new conception of judicial review, breaking from what might be termed 'the private rights model' of the judicial role, articulating instead an 'institutional model' of review.

Traditionally, courts have restricted their review to the legality of administrative acts in suits initiated by private individuals. The gravamen of these claims is usually that administrative action has violated their rights or interests. In order to be successful, the plaintiffs must convince the court that the allegedly illegal act had caused damage to their body, property, or reputation. This approach can be referred to as the 'private rights model'. Within the framework of this type of review, courts focus on whether the agency had committed an unlawful act. Therefore, one could argue that even in the private rights model, courts were holding the administration accountable for their actions. However, this supervision was an incidental outcome of addressing the claim of the affected individual, rather than part of a more systematic and structural assessment of the conduct or the agency.

Alongside this private right model, a new 'institutional model' has developed, which accords a new role to the courts. Underlying this model is the idea that courts have an institutional obligation, mandated by the separation of powers, to see to it that the other branches remain within their constitutionally designated spheres. To ensure effective supervision, the institutional model requires the courts to closely monitor the performance of the agencies and to provide them with guidance for future cases. In other words, no potential unlawful act should go unchallenged.

From the institutional model's perspective, courts need to be able to take on more cases rather than less. Cases are the fuel that keeps the engine of supervision running. Requiring the plaintiff to show a violation of a private interest could keep cases from reaching the court, cases which judges need as vehicles to exercise supervision. The institutional model, therefore, necessarily relies on a lowering of the standing barrier and a reduction of the ambit of the political question doctrine. This new model reflects a growing fervor for judicial review of administrative actions.

1.1 The development of the institutional model

In the area of standing, courts in many jurisdictions have replaced the private rights approach with a public interest model. For example, the Indian Supreme Court in their 1981 decision in *S.P. Gupta v. President of India* substantially lowered the standing

barrier to allow public interest litigation.[2] The Government of India, led by Prime Minister Indira Ghandi, decided to start rotating judges between the different High Courts to prevent them from becoming hotbeds of opposition. This measure was challenged, not by the judges themselves, but by several practicing lawyers who often appeared before them. The Government in turn challenged their standing.

Under the traditional standing rules, judicial redress was available only to a person who had suffered a legal injury by reason of violation of his legal right or legally protected interest by the impugned action of the public authority. The traditional basis of entitlement to judicial redress was personal injury to property, body, mind or reputation arising from actual or threatened violation of the legal right or legally protected interest of the person seeking such redress. However, in the case at hand, the petitioners did not claim private injuries, rather a public injury. Therefore, the question before the Court was, whether the petitioners had the necessary standing to maintain an action for redress of this public wrong. The Court felt that standing was present, because by dealing with the merits of the case it could further the separation of powers. Although adopting an approach which was reminiscent of that of Chief Justice Marshall in *Marbury v. Madison*, 5 US 137 (1803), the Court made clear that a low standing barrier would allow it to consider any potential illegality, and therefore any trespass by the executive on the constitutional terrritory of the other branches.

The Court felt that standing was present, rooting its reasoning primarily in the separation of powers. The Court emphasized that it is an essential element of the rule of law that every organ of the State must act within the limits of its power. Moreover, it is the function of the judiciary to confine the legislative and executive organs within their powers. To fulfill that function, courts must be able to review acts performed by the legislative and executive branches beyond the scope of their powers. If an act is unlawful and causes injury to the public interest rather than to private individuals, there must be a mechanism of redress.

On the other hand, if courts were limited to claims seeking redress for private wrongs, this would be disastrous for the Rule of Law. Courts would not be able to intervene, and consequently it would be open to the organs of the State to act with impunity beyond the scope of their powers. In the words of Justice Bhagwati: 'the observance of the law is left to the sweet will of the authority bound by it'. According to his Honour, in order to prevent such a lacuna from happening, courts must allow any member of the public acting bona fide and having sufficient interest to maintain an action for redress of public wrongs or injuries.

Another potential obstacle to judicial review on the institutional model is the political question doctrine or 'non-justiciability' concept, which allows courts to avoid deciding sensitive cases. Some issues belong so clearly to the core activities of the executive that the courts feel that it would not be appropriate for them to look into them, and the court will therefore declare them to be non-justiciable. These issues are mainly in the area of foreign relations, financial and economic policy, and national security. The courts feel that these issues are sensitive, because they involve making policy choices and require expertise, which the courts may lack themselves. Over the past few decades this zone of

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[2] AIR 1982 SC 149.

non-justiciability has diminished considerably. Issues which many judges deemed too sensitive for judicial consideration twenty years ago,[3] like granting mercy or decisions involving national security, have by now become a normal part of judicial business.[4]

However, the reduction in the number of non-justiciable issues is not the only recent development of relevance in this regard. Judges have also developed a way to at least partially review matters of high policy. This development began in France, where judges have traditionally refused to look into matters related to foreign relations and relations between the Government and Parliament. A 1993 case, concerning a UK request to the French Government to extradite a person accused of certain financial offences, reflected the clear change in judicial attitude.[5] When France refused to hand the person over, the UK contested the denied extradition request before the French Council of State. The French Government argued that the refusal was immune from review because it related to French foreign relations. The *Commissaire de Gouvernement*, the judicial advisor to the Council of State analogous to the Advocate General at the European Court of Justice, argued to the contrary that the decision not to extradite a person was circumscribed in detail by treaty and was therefore justiciable. The Council of State agreed, and held that a decision rejecting a request for extradition was 'detachable' from the conduct of diplomatic activity between the two states concerned. The Council made clear that it is prepared to consider elements of a decision, when those elements are *détachable* from the policy aspects, that is, can be reviewed independently thereof.

Since World War II, courts have also been introducing more rigorous standards to review administrative action. The deferential tests applied by the courts to review the lawfulness of discretionary acts, exemplified by the *Wednesbury* unreasonableness standard,[6] have gradually been replaced by grounds which subject administrative acts to a more probing review, like proportionality.

This has happened first and foremost in human rights cases.[7] The German *Multiple Choice Exam* decision is a case in point.[8] A medical student, who had failed a multiple-choice exam, challenged some of the questions before the administrative courts. These courts pointed out that, on the basis of existing case law, they were supposed to accord great deference to the experts that had composed the exam. The courts would only intervene if a question was manifestly wrong or had no foundation in science. Since neither could be said of the contested questions, review was denied.

The student subsequently filed a constitutional complaint with the Federal Constitutional Court, challenging the limited review exercised by the administrative courts. She claimed that her right laid down in Article 19, Section 4 of the German Constitution had been infringed. Under this provision, any person whose rights have been violated ought to have recourse to a court. The Constitutional Court felt that

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[3] See the so-called 'negative list' presented by Lord Roskill in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

[4] As *R. v. Home Secretary ex p. Bentley* [1994] QB 349 and *A. and others v. Secretary of State for the Home Department* [2005] 2 AC 68, the so-called *Belmarsh* case, demonstrate.

[5] *Royaume-Uni de Grande Bretagne et d'Irlande du Nord* CE 15 October 1993.

[6] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[7] As exemplified by Lord Bridge's speech in *R v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696.

[8] BVerfGE 84, 59 (1991).

the applicant's complaint was well founded. Since the administrative courts had been unwilling to look into her objections to the contested exam, they had denied her right to an effective remedy. According to the Court, Article 19 (4) does not only confer a right of access to a court, but it also implies that one is entitled to an effective review by that court. As a consequence, courts should undertake a thorough examination both of the law and the facts concerning the challenged decisions, and not simply rely upon the determinations made by the administrative authorities.

Consequently, according to the Court, the margin of discretion to be accorded to the authorities with regard to exams should be very limited, since otherwise it would be impossible to guarantee an effective review by the courts. The courts are expected to review whether the exam authorities have adhered to the prescribed standards. As far as medical exams were concerned, the courts should ascertain whether the questions were understandable, clear and not open to debate. A question which does not meet these standards is unlawful. It is the task of administrative courts to exercise this kind of review, with the help of experts if necessary.[9]

1.2. Justifying more anxious judicial scrutiny: Lord Woolf's theory

During the 1990s a Conservative Government, led first by Prime Minister Margaret Thatcher and then her successor John Major, enjoyed a very comfortable majority in the British House of Commons. The Labour opposition was not only small in numbers, but was also ineffective in holding ministers accountable. At the same time, the relationship between the Government and the courts was very tense. The most senior judges, who were also members of the House of Lords, frequently voiced their criticism of Government proposals. On the other side, ministers felt that judges were scrutinizing their decisions too strictly, quashing too many decisions for the wrong reasons. Consequently, Conservative politicians and parts of the media felt that the judges, many of whom they suspected were Labour sympathizers, were making life difficult for the Government as a substitute for the ineffective opposition in the Commons (Rozenberg 1997: 79–115).

In 1997, Lord Woolf, one of the most senior members of the English judiciary,[10] felt that the time had come to intervene to prevent irreparable damage to the relations between the Government and the judiciary. Invited to give the annual Neill lecture in Oxford, he used this opportunity to put things into perspective (Lord Woolf 1998). He admitted that the courts were indeed extra-critical of Government decisions, but he denied that this attitude was politically motivated, as some Conservatives had argued. In Lord Woolf's view, the judiciary scrutinized the Government's actions for constitutional reasons.

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[9] The German administrative courts are not altogether happy with this approach, because they feel caught between a rock and a hard place. While the Constitutional Court pushes for exacting review, administrative authorities complain about government by the judiciary, see Niehues (1997): 557.

[10] At the time Lord Woolf of Barnes was the Master of the Rolls, the leading judge dealing administrative law cases. He went on to become the Lord Chief Justice of England and Wales, the head of the judiciary in England and Wales. He currently serves as a member of the House of Lords.

According to Lord Woolf, checks and balances define the British constitutional system. These checks and balances were not working properly at the time in Britain, because the Government effectively exploited its majority in Parliament. Consequently, Parliament failed to exercise meaningful oversight of executive action, which is the backbone of any parliamentary system. In addition, local government was under pressure from increasing centralization, which meant that there was no meaningful vertical division of powers either. Finally, the Government had taken a number of measures which had negative implications for the justice system and vulnerable groups, like prisoners and asylum seekers, who rely on the courts for their protection. To restore the balance within the British constitutional system, Lord Woolf asserted that the only remaining branch, the judiciary, had started to compensate for the shortcomings of Parliament. This led to a more rigorous examination of executive action by the courts.

Although Lord Woolf's thesis related to the British constitutional system, it lends itself well for application to any other system based on checks and balances or the separation of powers.[11] The view that there are circumstances under which courts should no longer feel restrained by the boundaries of their constitutional territory has an impressive pedigree. A similar sentiment has been expressed before, by US Supreme Court Chief Justice Stone in footnote 4 in the *Carolene Products* case, although it related to the review of legislation rather than executive acts.[12]

2. Is Parliament striking back?

Parliaments have been making attempts lately to regain territory by increasing their grip on the executive (Hansard Society 2001). This section will discuss a few of those attempts. The examples have been taken from two jurisdictions which, at least on paper, accord a leading role to Parliament within their constitutional order. The UK in theory bases its constitution on the Sovereignty of Parliament, while in The Netherlands, Parliament is the ultimate arbiter of the constitutionality of its Acts. The following examples are related to delegated legislation, the power to wage war and the treaty power.

2.1. Delegated legislation

In many systems, Parliament is allowed to delegate rulemaking authority to ministers or other executive agencies. The executive rules made under these grants of power are supposed to fill in the technical details, but sometimes they also serve as vehicles for policy changes.[13] For this reason, legislatures have developed mechanisms that allow them to review and oversee delegated rulemaking, before the rules become effective.

In the UK, most executive rules, which are called statutory instruments, are subject to parliamentary control. This control can take either of two forms as laid out in the Statutory Instruments Act 1946. Most instruments are subject to the *negative resolution* procedure, which means that the executive submits the instrument to Parliament in draft form, which cannot become law if Parliament objects to its contents within 40

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[11] See for a critical assessment of this kind of approach: Rehnquist (1975–6: 695, 700 and 706).

[12] *U.S. v. Carolene Products Co*. 304 U.S. 144 (1938).

[13] Thus, access to Britain for asylum seekers was limited through a statutory instrument rather than an Act of Parliament, see *R v. Secretary of State for Social Security ex p. Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

days. Some 10 per cent of statutory instruments, however, are subject to the *affirmative resolution* procedure, which means that the executive must place the instrument before Parliament for affirmative approval in order for it become to become law. The parent act determines which procedure applies.[14]

In 2006, Parliament introduced the *super-affirmative* procedure. This procedure requires endorsement of the statutory instrument by both Houses, and obliges the Minister to regard all of the comments submitted by both Houses within 60 days of submission. Although this is a very demanding procedure, it only applies to a small category of statutory instruments, namely, the so-called regulatory reform orders issued under the Legislative and Regulatory Reform Act 2006. Within certain boundaries the regulatory reform orders allow Ministers to amend, replace or repeal primary legislation adopted by Parliament (Davis 2007). The enhanced scrutiny therefore comes at the price of delegating far-reaching powers, not unlike in the case of the legislative veto in the US.

An important question, of course, is how much of an impact this parliamentary scrutiny has on the conduct of the executive. According to Page, the review exercised by Parliament with regard to the policy aspects of the statutory instruments is rather weak. Debates on these policy issues are rare and policy considerations have never directly prevented a statutory instrument from becoming law (Page 2001: 168). However, the review exercised regarding the legality of the instruments clearly has a bite. Although the responsible Joint Committee on Statutory Instruments (hereafter: JCSI) only succeeds in scrutinizing about 14 per cent of all statutory instruments, its comments carry considerable weight (Page 2001: 159). The impact of the JCSI in this area is mainly preventive through the anticipation of its actions; the officials who draft the statutory instruments do not like to be rebuked by the Committee and they therefore try to make their rules JCSI-proof (Page 2001: 161–7 and 172).

In the Netherlands, the Government takes the view that parliamentary review of delegated legislation should be the exception rather than the rule.[15] The legislature should decide whether or not to delegate rulemaking power to the executive, and if it decides to do so, it should allow the executive the necessary room. However, despite this call for the exercise of restraint, several formal and informal ways of parliamentary involvement have been developed.

The most frequently applied formal procedure is called the 'prior attachment procedure' and it requires a draft of the statutory instrument to be put before Parliament.[16] The instrument will enter into force after four weeks from the date of submission, unless comments have been received from members of Parliament, which may lead to amendment of the draft. Sometimes consultation on the draft is widened to the public at large, which then assumes a notice and comment character.[17]

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[14] See generally the 'Statutory Instruments Factsheet' provided by the House of Commons Information office, available at http://www.parliament.uk/documents/commons-information-office/107.pdf.

[15] 'Aanwijzingen voor de Regelgeving' (Instructions on Rulemaking), Circular letter issued by the Prime Minister on 18 November 1992, no. 35, available at: http://wetten.overheid.nl

[16] *Ibid.* no. 36.

[17] *Ibid.* no. 37 (b).

The most demanding formal procedure is called 'conditional delegation'.[18] It requires a draft of the statutory instrument to be put before Parliament, which will enter into force after four weeks from the date of submission. However, if either House or one fifth of the membership of either House so demands, the draft will be withdrawn and put for consideration before Parliament as a bill. This will of course allow Parliament a complete say regarding the contents of the instrument.

As in the UK, the parent act determines whether the statutory instrument will be submitted to formal consultation of Parliament at all, and if so, which format will apply.[19] However, over the years several informal practices have been developed which allow the Dutch Parliament a considerable say in the contents of delegated legislation. While a bill is being considered by Parliament, members often request the responsible minister to share with them the text of the delegated legislation which will be issued under the Act. Usually ministers are forthcoming with this information and open to any suggestions made, because they realize that not handing over the texts might result in a delay or even the suspension of consideration of the bill. Sometimes ministers submit memos containing highlights of the statutory instrument, but some of them are also willing to share complete drafts with the members concerned. Thus, when the Upper House was considering a bill to change legislation regarding pensions, one of the parties insisted on receiving the draft text of a statutory instrument. When the minister responsible offered to submit the text to formal consultation, the party objected. It pointed out that such a consultation could only take place after the bill had been adopted, while it would like to study the instrument prior to determining its position on the bill. The minister decided to avoid a conflict by sending the text of the statutory instrument to the Upper House, which in his view also triggered the formal consultation procedure.[20]

These informal consultation practices show a growing assertiveness on the part of Parliament, which is further mirrored in the use that Parliament makes of the formal procedures. Research conducted by the Department of Housing and Urban Development revealed that comments are received from Members of Parliament with regard to 50 per cent of the statutory instruments submitted to it as part of the prior attachment procedure.[21]

This new found assertiveness has even led to a constitutional battle between the Dutch Parliament and the Government which resulted in a resounding Parliamentary victory. Over the years, the Government had developed a practice whereby it sometimes amended Acts of Parliament through delegated legislation. The justification given for

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[18] *Ibid.* no. 43.

[19] *Ibid.* no. 35.

[20] 'Enige wijzigingen in de Pensioenwet, de wet beroepspensioenregeling en enige andere wetten, Voorlopig Verslag en Memorie van Antwoord' (Preliminary Assessment of and Government Reply to the Bill amending the Pensions Act, the Act regarding mandatory pensions in certain occupations and other legislation), Kamerstukken I, 2007-08, 31 226, C, p. 2, and Kamerstukken I, 2007-08, 31 226, D, pp. 3–4.

[21] 'Wijziging van diverse wetten in verband met vereenvoudiging en harmonisatie van de totstandkomingsprocedures voor algemene maatregelen van bestuur op het gebeid van wonen, ruimte en milieu, Memorie van Toelichting', (Explanatory memorandum to the Bill amending several Acts regarding the simplification and harmonization of procedures aimed at issuing rules on housing, planning and the environment), Kamerstukken II, 2006–07, 30 930, 3, p. 8.

this practice was that occasionally circumstances require a speedy change in the law, without having to go through a lengthy formal legislative procedure. Parliament consistently opposed the use of this rulemaking shortcut, because it undermined its constitutionally guaranteed legislative primacy. After a concerted campaign led by the Upper House of the Dutch Parliament, the Government agreed to abolish the practice, save in emergency situations.[22]

2.2. Waging war

Since lawmaking traditionally has been their core business, it is not surprising that Parliaments have tried to put the activities of the executive in this area under their control. However, Parliaments have also tried to exert influence on the exercise of powers which are widely understood as belonging to the executive domain. This has been the case in particular in relation to the power to make war, or to be more exact, the power to deploy troops abroad. In a way reminiscent of the adoption of the War Powers Resolution by the US Congress, both the British and the Dutch Parliaments have tried to rein in the discretion the executive traditionally enjoys in this area.

In the UK, an important step on this road was taken in 2003, when the Blair Government requested and received approval from Parliament to deploy troops to invade Iraq (House of Lords 2006: 9–10). Some have argued that this decision to give Parliament a say in the deployment of troops that will engage in warfare may grow into a practice or even customary law, which is called a convention (House of Lords 2006: 34–8).

The Select Committee on the Constitution of the House of Lords has specifically called for the establishment of such a convention (House of Lords 2006: 42). In the view of the Select Committee, the convention would require the Government to seek parliamentary approval if it is proposing the deployment of British forces outside the UK into actual or potential armed conflict. In seeking this approval, the Government would need to indicate the deployment's objectives, its legal basis, its likely duration and in general terms, an estimate of its size. If for reasons of emergency and security, such prior application were impossible, the Government should provide retrospective information within seven days of its commencement or as soon as it is feasible. The Government would also need to keep Parliament informed of the progress of such deployments. If their nature or objectives alter significantly, the Government would also need to seek a renewal of the approval (House of Lords 2006: 43).

Interestingly, the Select Committee did not argue for a statutory approval requirement. The Committee may have agreed with the witnesses appearing before it that such a statutory requirement could open the door to judicial review, appeal and challenge in a way that might have adverse operational consequences (House of Lords 2006: 33). A statutory authorization requirement could also lead to a prolonged process of achieving parliamentary support, whereby the Netherlands was given as an example (House of Lords 2006: 34). Strictly speaking there is no authorization requirement in The Netherlands, as will be discussed below, but Parliament does try to create that impression and, considering the observation made by the Select Committee, it is rather successful in doing so.

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[22] 'Aanwijzingen voor de Regelgeving' (Instructions on Rulemaking), no. 33a.

The question as to whether the overseas deployment of troops should be subject to parliamentary approval was also addressed by the House of Commons Public Administration Select Committee. The Committee followed the advice of its Specialist Adviser, Professor Rodney Brazier. It took the view that legislation should be adopted requiring any decision to engage in armed conflict to be approved by Parliament, if not before military action, then as soon as possible afterwards (House of Commons 2004: 16). According to the Committee, a mere convention would not suffice when lives were at stake.

As far as the power to deploy troops is concerned, the Dutch Parliament has displayed the same kind of assertiveness that it demonstrated in the area of statutory instruments. Until 1922, it was the sole responsibility of the Government to decide whether or not to declare war on any given country. However, in that year such declarations of war were made subject to prior parliamentary approval through an amendment of the Constitution. During the following decades, the declaration of war gradually lost most of its significance. Today, only rarely does a formal declaration of war precede hostilities, while troops are frequently being deployed as part of international peace-keeping missions.

The dwindling away of the declaration of war coincided with a decreasing role for Parliament regarding deployment decisions. During the 1990s, however, many members of the Dutch Parliament felt that pre-1922 power relations had returned and they engaged in a battle to reclaim their position. A motion tabled by the MP Eimert van Middelkoop, which called for prior parliamentary approval of deployment decisions, passed the Lower House. The Government reacted by submitting a policy document which contained a framework which it would apply to deployment decisions. The Government, however, did not favor a draft constitutional amendment establishing parliamentary co-decision, because it felt that under the constitution 'it was up to the Government to govern and up to Parliament to hold it to account'.[23]

Since Parliament felt that the Government had failed to faithfully execute the van Middelkoop motion, it put pressure on it to come up with a constitutional amendment. The Government eventually acceded, submitting a constitutional amendment containing a duty for the Government to inform Parliament prior to deploying troops. Although this amendment fell short of the right of co-decision, Parliament accepted the compromise. Consequently, in 2000, the duty of the Government to inform Parliament about its decisions to deploy troops became part of the national Constitution.[24]

Confident that the issue had finally and conclusively been settled in its favor, the Government started to narrow the width of its constitutional obligation with the help of legal technicalities. Thus, in 2006, the Government refused to inform Parliament about the deployment of troops as part of the International Security Assistance Force in Afghanistan, since there was only an intention to involve the Dutch armed forces, but not a decision to actually do so. By engaging in this behavior the Government clearly overplayed its hand, resulting in a determined parliamentary campaign to reclaim lost territory. Parliament has declared at every available opportunity that although the

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[23] Kamerstukken II, 1996-97, 25 367, 5.
[24] Staatsblad 2000, 294.

new constitutional provision adopted in 2000 may not expressly grant Parliament a co-decision right, it does so by implication. The intention of Parliament clearly is to establish this 'material right of approval' by convention, and, considering the impression of the Select Committee of the House of Lords discussed above, it is succeeding. Through an interesting twist of fate, the Defense Secretary who has to face this parliamentary ambition is Eimert van Middelkoop, the very man who set Parliament on this more assertive course during the 1990s.

2.3. Concluding treaties

With regard to the ratification of treaties, Parliaments are often involved in a variety of ways. Nevertheless, parliamentary influence in this area has often waned. In part this is a consequence of the fact that in past decades the courts have started to side-step the need for treaties to be incorporated by Parliament for them to have legal force within the national legal order. A leading example comes from Australia.

In the Australian *Teoh* case, petitioner had applied for resident status.[25] The Minister for Immigration rejected Teoh's application because he was not of good character, as a result of the fact that he had been convicted for the importation of heroin. According to testimonials produced by Teoh, his deportation would have disastrous effects on his family. Because his wife was a drug addict, he was not only the breadwinner but he also took care of the children.

The main question before the High Court of Australia was whether Teoh could strengthen his case by relying on the United Nations Convention on the Rights of the Child. According to Article 3.1 of this Convention, in all actions concerning children, the best interest of the child shall be a primary consideration. The Australian system regarding international law is dualist, which means that the ratification of a treaty is a prerogative power of the executive, while the provisions of an international treaty can become part of Australian law only if and when an Act of Parliament incorporates them. Unfortunately for Teoh, although the executive had ratified the Convention, Parliament thus far had failed to incorporate its provisions.

The majority of the Court, however, was of the view that Teoh could still rely on the Convention. According to the Court, the ratification of a treaty has significance for Australian law, even if it has not been followed by incorporation. The Court emphasized that the ratification by Australia of an international convention should not be taken too lightly. This is particularly true when the international instrument contains internationally accepted human rights standards affecting the family and children. Ratification of such a convention is a positive statement by the executive that it and its agencies will act in accordance with international obligations. Such a statement, therefore, is an adequate foundation for a legitimate expectation that administrative authorities will act in accordance with the international instrument. In the present case, the migration officer should have treated the best interest of the children as a primary consideration.[26]

This case is reminiscent of the decision of the US Court in *Roper v. Simmons*, in which the majority, led by Justice Kennedy, relied on the same Convention while interpreting

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[25] *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273.

[26] A similar approach was adopted by the Supreme Court of Canada in *Baker v. Canada* [1999] 2 SCR 817.

the 'cruel and unusual punishment' clause of the Eight Amendment.[27] The Justice decided to refer to the Convention despite the fact that it has not yet been ratified by the US. In his dissent, Justice Scalia therefore accuses the majority of usurping the constitutional powers of Congress.

Parliaments have nonetheless tried to increase their footprint in this area. In the UK, under the so-called Ponsbury Rule, the Government is required to lay before Parliament any treating requiring ratification at least 21 days before ratification is effected (Harrington 2006: 127–9). However, with the exception of treaties which are likely to change UK law, like EU treaties, the rule does not require that either House should debate the measure. In addition, since the rule is not statutory, it can be waived if speedy ratification is necessary, as Professor Brazier noted in his advice to the Select Committee (House of Commons 2004: 27).

In view of these limitations, the House of Commons Public Administration Select Committee called for legislation involving Parliament in decisions on treaties (House of Commons 2004: 16). The Select Committee pointed out that treaties are no longer limited to high diplomacy and security (House of Commons 2004: 10). They can involve, for example, vital economic matters with profound effects on Britain and the world, including agreements between the United Kingdom and organizations such as the World Trade Organization and the IMF. In his advice to the Select Committee, Professor Brazier noted that treaties affect many areas of ordinary life, like financial transactions, transport, police powers and social security, but parliamentary procedures have not been adjusted to this new reality (House of Commons 2004: 26–7).

Parliament in The Netherlands enjoys a rather comfortable position, since according to Article 91 of the Constitution the country cannot be bound by treaties, nor can such treaties be denounced, without its prior approval. Consequently, the Dutch Parliament does not only decide on the incorporation of treaties, like most other Parliaments, but it also enjoys a veto power on such treaties becoming binding on The Netherlands.

3. Will the judges return to their barracks?

The examples provided in Section 2 seem to demonstrate that Parliaments are becoming increasingly assertive as far as oversight over the executive is concerned. However, especially in the case of the UK, many of these efforts remain preliminary. In addition, these developments do not necessarily constitute a representative sample and thus can only serve as anecdotal evidence. They nevertheless raise an important question. If Parliaments are indeed reclaiming lost territory, should the courts give up their compensatory role and return to the private rights model?

The theory put forward by Lord Woolf suggests that they should, but the question is whether they will. The limited space available does not allow an in-depth discussion of this issue, but some tentative observations can be made. For two reasons it is unlikely that judges will give up their compensatory role.

First, as a result of the supposed failure of the legislatures to exercise their oversight responsibilities, the courts have become their competitors rather than their agents. For example, in *INS v. Chadha*, the US Supreme Court struck down the legislative veto

[27] 543 US 551 (2005).

mechanism, thereby depriving Congress of one of its most important oversight instruments. At the same time, under the Woolf model, this reduction of Congressional oversight was supposed to lead to a more rigorous examination of administrative acts by the courts. Consequently, by limiting the role of Congress, the Court extended its own constitutional mandate. One might argue that in this way, the courts are becoming the judges in their own cause.

Second, in order to enhance their oversight role, legislatures will be tempted to reduce by statute the discretion that the executive enjoys. However, by introducing such legal standards, the legislatures will also make the exercise of the power more easily reviewable by courts. In other words, when a legislature tries to get more of a grip on the executive it also strengthens the position of the competition, that is, the courts.

The British Parliament seemed to be aware of this when it enacted the Legislative and Regulatory Reform Act. It refused to include a ban on making orders on controversial issues, because that would hand a standard to the courts with the help of which they could intervene in this political area (Davis 2007: 684). The House of Lords made essentially the same point, when it considered the advantages and disadvantages of laying down in legislation the right of prior Parliamentary authorization for the deployment of troops. According to the House of Lords, such legislation could open the door to judicial review, appeal and challenge in a way that might have adverse operational consequences (House of Lords 2006: 33).

It looks as though the courts are here to stay.

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11 'Creatures of the state': regulatory federalism, local immunities, and EU waste regulation in comparative perspective

Fernanda G. Nicola

The European Union (EU) has committed itself to strengthening local power in a variety of ways. Since the 1980s, Brussels has aimed to increase the legitimacy of EU law and policy by enhancing the number of subnational actors and participants in its decision-making processes. In reaching out to individuals, associations and especially to local actors, the EU could potentially undermine the power of its Member States. However, EU law continues to privilege the relation between Brussels and its Member States rather than its developing relationship with subnational actors. Thus, when aiming to increase the power of local governments, EU law often encounters a problem: such empowerment either does not take place, or it backfires in ways often disruptive of the EU's supranational aims.

This situation resonates with what US local government law scholars have called the 'creature of the state' problem. In the name of decentralization, federal courts allow states to structure local power in any way they see fit; the federal courts cannot mandate particular local power structures in furtherance of federal goals without violating the constitutional commitment to federalism. Likewise, when EU law regulates local matters such as waste management, it cannot create new legal powers for subnational actors. Rather, decentralization through EU law relies on the existing national-local structure, which differs in each Member State and creates two different types of problems.

A first problem is present in both the EU and the US and concerns the challenge of regulatory federalism, that is, the extent to which supranational and federal background rules promote either cooperation or resistance to the implementation of EU and US regulatory programs by subnational actors. Rather than encouraging state-local cooperation in the implementation of federal and supranational law, existing local immunities in the US and the EU arguably encourage the resistance of subnational actors. Local immunities can therefore backfire when, in cases like *Printz* in the US or *Kouropitos* in Europe,[1] the success of federal and supranational legislation depends on state-local cooperation rather than on local autonomy.

A second problem stems from the requirement of state-local cooperation in administrative matters, a particular concern in the troubling implementation of EU waste legislation, which is the focus of this chapter. The requirement of administrative cooperation has created a disparity in the enforcement of EU waste legislation by privileging those Member States that have effective local-central administrative capacities over

[1] *See Printz v. United States*, 521 US 898 (1997); Case C-387/97, *Commission v. Greece*, 2000 ECR I-5047 [hereinafter *Kouropitos*].

those which lack them. This chapter focuses on the implementation of the EU waste legislation in Greece and Italy, two Member States whose central governments still retain a predominant role, at the expense of effective cooperation by local authorities in implementing EU law. Rather than enhancing central-local cooperation, these countries have been unable to implement the EU waste legislation without encountering numerous difficulties.

In Greece, the lack of local autonomy has encouraged resistance to EU waste directives, instead of fostering state-local cooperation to administer waste management plans. In Italy, by contrast, recent decentralization reforms have resulted in new forms of autonomy for regional, provincial, and municipal actors. However, rather than enhancing central-local cooperation, the need to implement EU waste directives has empowered the Italian government to recentralize its control over European policies. In both Greece and Italy, a local government perspective offers new insights into understanding the troubled enforcement of EU waste legislation, as well as the challenges of implementing regulatory policy in a multilevel system of governance more generally.

US federal and EU supranational regulation can empower or disempower local governments to act independently or in concert with their states. Section 1 shows that strategies to empower local governments through federal and supranational rules encounter strong judicial limits both in the EU and the US. Section 2 shows that the success of federal and supranational legislation is highly dependent on state-local cooperation rather than on local autonomy, and that such cooperation is discouraged by the local immunities created by US and EU courts. Finally, Section 3 offers a textured account of the implementation of EU waste regulations in Greece and Italy. These two case studies show that weak local-state cooperation in domestic administrative structures is highly problematic for the enforcement of federal or supranational regulation. In both Greece and Italy, in contrast to other European Member States, the enforcement of EU waste directives has heightened, rather than solved multilevel tensions over waste policies among provinces, regions, states and the EU.

1. Strategies to decentralize power in the EU and the US, and their limits

This section focuses on the way in which the European Union has empowered local governments with the aim of both strengthening its constituencies as well as rendering more effective the implementation of EU regulations and directives. The approach taken is comparative, looking at analogous issues of regulatory federalism in the US. Even though supranational regulations and other EU Treaty-based provisions have empowered local actors, the European Court of Justice (ECJ), like the US Supreme Court, has constructed local power very narrowly by depicting subnational entities as, in effect, 'creatures of the state'. Consequently, EU implementation strategies that rely on local power run up against a set of problems that, as we shall see below, are deeply familiar to American scholars of local government and regulatory federalism in the US.

1.1. EU decentralization strategies

Since the mid-1980s, the European Community (EC) has sought to decentralize power and embrace local diversity. During this time the principal policy aim has been to complete the creation of the single market through the adoption of numerous EC

directives.[2] To ensure the enforcement of the directives harmonizing the single market, the European Union (the EC's successor) has sought to involve subnational actors.[3] The European Commission understood that, without the support of local administrations, it would be difficult to achieve effective implementation of those directives that necessarily entailed a local dimension. On multiple occasions, during the creation of the single market, subnational actors had resisted national initiatives implementing EU directives. To address this local resistance, the Maastricht Treaty (1992) set up some safeguards for local power by introducing the subsidiarity principle in EU law and by strengthening the role of the so-called Committee of the Regions (CoR).

When it was first introduced into the Treaty, the principle of subsidiarity was intended to protect those state powers in areas where the EU (at that time, the EC) shared its competence with Member States.[4] Subsidiarity means that in the realm of shared or non-exclusive competences, the supranational level can regulate only those matters that it is better equipped than its Member States to handle. Thus, the principle of subsidiarity serves as the main political safeguard of state power in the EU (Bermann 2008). As reframed by the Lisbon Treaty and its new Subsidiarity Protocol, this principle is an increasingly important legal tool not only for states, but also for subnational actors (Barber 2005).[5]

For the first time, the Lisbon Treaty explicitly mentions regional and local levels of government in the subsidiarity principle (de Búrca 2000, Kombos 2006, Poto 2007). Moreover, it has introduced two new subsidiarity checks. An early monitoring system empowers national parliaments to send the European Commission a reasoned opinion on the compliance of EU legislative proposals with the subsidiarity principle (Barrett 2008, Craig 2008). An ex-post control of subsidiarity allows privileged applicants to ask for judicial review of EU legislation before the European Court of Justice (ECJ).[6] The

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[2] These are a form of legislation distinct from federal bills in that Member States have some flexibility in choosing which type of national instrument to use to transpose them in order to achieve the prescribed goal. While Member States are legally bound to attain the goal set up by the directives, they maintain discretion over implementing measures (Craig and de Búrca 2003).

[3] In 1993 after the adoption of the Treaty of Maastricht, the European Community officially changed its name to the European Union (EU).

[4] The EU shares its competences with the Member States in a variety of areas such as food and environmental policy. The principle of subsidiarity, first inserted in the Single European Act (1986) and then the Maastricht Treaty (1992), applies to areas of shared competences between the EU and its Member States. The Treaty Establishing the European Community, November 10, 1997, 1997 OJ (C340), Article 5 [hereinafter TEC] (as amended by Maastricht in 1992) (' [i]n areas which do not fall within its exclusive Competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community').

[5] The Lisbon Treaty (2007) has introduced a new Protocol on Subsidiarity and Proportionality. Local and regional governments can bring subsidiarity claims before the ECJ to challenge Community acts that impinge upon a sphere of exclusive national power, but only if the subnational governments are supported by its national government (Barber 2005). See also Case C-97/95, *Wallonian Region v. Commission*, 1997 ECR. I-1789 (limiting both standing and responsibility in regions); Case C-180/97, *Regione Toscana v. Commission of the European Communities*, 1997 ECR I-5245 (same).

[6] *See* Protocol on the Application of the Principles of Subsidiarity and Proportionality,

Lisbon Treaty also allows the Committee of the Regions (CoR) to be a privileged applicant in bringing subsidiarity actions challenging EU law. The aim is to transform the CoR into the guardian of subsidiarity.

The creation of the CoR was the EU's response to local resistance to implementing European directives and, more generally, to a perceived democratic deficit in the EU (Roht-Arriaza 1997). It was a landmark event because it represented Brussels' commitment to, and recognition of, subnational interests. The CoR is intended to give voice to local communities by representing a plethora of different local actors in their demands for greater autonomy at the supranational level.

Today, the CoR has 344 members, elected in their own states for a term of four years, who are charged with representing their regional and local governments in Brussels.[7] Each Member State is entitled to a certain number of representatives, regardless of the varied institutional forms in which local power is organized at the domestic level. The Member States decide which of the various possible subnational actors should be represented in the Assembly of the CoR. Predictably, the governments tend to choose those local actors that support the political coalition or party currently in power (Cole 2005).

Since 2000, the Commission has taken a new governance approach towards decentralization (Schepel 2005). It has relied on bottom-up and soft law measures in response to the failures of command-and-control regulation in the EU (Scott and Trubek 2002). The Open Method of Co-ordination (OMC) is an example of the new governance approach to social policy (Craig and de Búrca 2008). The OMC relies on wide consultation processes to share information among local and private stakeholders. It creates non-binding and flexible guidelines to foster the creation of transnational networks among central and peripheral actors.

This new governance approach to regulation has influenced the EU waste policy insofar as national and local actors, together with public and private stakeholders, are involved in a consultation process leading to the drawing up of waste management plans. While some scholars have shown the effectiveness of this approach in implementing the water framework directive (Scott and Holder 2006), this chapter shows that the lack of effective local-central cooperation in administering EU waste policy in Greece and Italy has led to troubling outcomes in the implementation of the EU waste directives.

1.2. The limits of decentralization in the EU and the US

While EU policies are increasingly involving subnational actors in both supranational decision-making processes and in their implementation, Member States ultimately

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Article. 8 ('The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 230 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof. In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.').

[7] On the CoR membership, see Article 263 of the EC Treaty (now Article 305 TFEU) (determining that the number of members allowed by each country is based on GDP, population, and their political weight).

possess control over local decision-making power. The ECJ has made clear that EU law privileges the relationship of the EU to the Member States over any purported relationship with subnational actors.[8] The Court conveys the message that supranational institutions should not intervene in national-local relations. Therefore, Member States have complete discretion *vis-à-vis* local power under EU law.

The privileged position the ECJ grants to the Member States parallels the US Supreme Court's reluctance to impose any limitation on how states allocate or restrict the powers of local governments. In *Hunter v. City of Pittsburgh*, the Supreme Court defined cities as 'political subdivisions of the state, created as convenient agencies for exercising such of the governmental power of the state as may be entrusted to them'.[9] Since then, US courts have tended to define cities as mere creatures of the state. As a result, cities are unable to challenge state legislation in many different situations. Almost a century after *Hunter*, in *City of New York v. State of New York,*[10] the Court of Appeals (the highest court in New York State) held that 'the municipal plaintiffs lack the legal capacity to bring this suit against the State' because cities are 'merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents'.

The 'creature of the state' idea plays out in both the US and the EU by making it difficult for the US federal government and for EU supranational institutions to intervene in state-local relations. When they do intervene in local activities – by redistributing money or power to subnational actors – they have the potential to reallocate power between these actors and the states in the name of decentralization (Davidson 2007). However, because of the 'creature of the state' idea, the EU and the US federal government do not intervene directly in empowering local governments at the expense of state power. Even though the implementation of US and EU legislation has the potential to reallocate power between states and local governments, this relies on the existing local-central relationship, which differs greatly in accordance with the national-local structure already in place in each state (Frug and Barron 2008).

2. Comparing local immunities in the EU and the US

The EU waste regulation is a good example of local empowerment through supranational law that requires cooperation between state and local authorities for a successful implementation. This section addresses what I have identified as a first problem in this type of cooperation: that is, the existence in both the EU and the US of local immunities as interpreted by the ECJ and the US Supreme Court. This section shows that local immunities can encourage the resistance of subnational actors, thus undermining the success of federal and supranational legislation dependent on state-local cooperation to achieve its goals.

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[8] For cases limiting the privileged standing of local governments, *see, for example*, Case C-180/97, *Regione Toscana v. Commission*, 1997 ECR I-5245; see also Case C-15/06, *Regione Siciliana v. Commission*, 2007 ECR I-02591; *Regione Siciliana v. Commission*, 2006 ECR I-3881; Case T-81/97, *Regione Toscana v. Commission*, 1998 ECR II-2889.

[9] *Hunter v. Pittsburg*, 207 US 161, 179 (1907).

[10] *See City of New York v. State of New York*, 655 NE2d 649, 651 (1995); see also Frug et al. (2006: 274).

2.1. The local dimension of the EU waste legislation framework

The EU has promoted Member State-controlled policies to manage the disposal of waste in each state since the early 1970s. In the mid-1970s, to ensure a high level of human and environmental protection, a Waste Framework Directive encouraged the prevention and recovery of waste over its safe disposal (Reese 2006).[11] The primary aim of this early Community waste policy was to regulate thousands of scattered and dangerous waste dumps run by municipalities and private companies managing waste disposal all over Europe. Its implementation has not proceeded smoothly because of the changing definition of 'waste' and the unknown risks of certain types of waste to human health (Tromans 2001).

Two central aims of EU waste legislation were the principles of self-sufficiency and proximity. These enabled each Member State to dispose of waste safely in landfills in its own territory. As a consequence, the EU waste policy limited the transboundary trading of waste (Reese 2006). These principles have also become relevant for treating hazardous waste in Europe. It became clear that a Community approach to hazardous waste was needed when, in the late 1970s, forty-one barrels of toxic waste disappeared from Seveso in Italy and were incinerated somewhere in Europe (Krämer 2007).

The EU created a legally harmonized framework to ensure the environmentally sound collection, transportation, and recycling of waste across Europe. The Waste Framework Directive required the Member States to collaborate with their subnational actors (municipalities, provinces and regions) to ensure that disposal activities took place only in legal and controlled sites. This collaboration became increasingly important for the disposal of hazardous waste, which was to be strictly monitored at the different levels of government pursuant to the Directive on Toxic and Dangerous Waste.[12] To tackle the problem of proliferating waste, the EU adopted a directive to harmonize packaging legislation with the aim of recycling and recovering waste rather than using alternative methods such as incineration or dumping. This legislation requires Member States to draw up plans with public or private actors for packaging heavy metals and other recyclable materials.[13]

To implement its legislative framework for waste, the EU relies on various means (Macrory 2006). First of all, the Commission has broad power to carry out inspections, as well as recourse to administrative and ultimately judicial procedures against the Member States. National courts can also ensure the adequate domestic implementation of the directives by referring cases to the ECJ. EU law doctrines of direct effect and state liability have empowered national courts to carry out this task to protect individual rights and to offer effective remedies to European citizens (Craig and de Búrca 2008).

There are additional ways, however, to ensure the enforcement of EU directives that do not involve courts but instead involve administrative agencies. For instance, general

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[11] *See also* Articles 3–4 of Council Directive EC 1975/442 on waste (1975) OJ L194/39 [hereinafter Waste Framework Directive] at p. 23, as amended by Council Directive 2006/12/EC (2006) OJ L114/9 and Council Directive EC 2008/98 on waste and repealing certain directives (2008) OJ L312/3.

[12] *See* Directive on Toxic and Dangerous Waste 78/319 subsequently amended by Directive on Hazardous Waste 91/689/EEC (1991) OJ L377, p. 20.

[13] *See* article 6 of Directive 94/62 on Packaging and Packaging Waste (1994) OJ L365, p. 3.

disclosure requirements oblige national authorities to provide Brussels with an annotated version of each state's transposition measures, the national legislation implementing the directive. These reports indicate which provisions of their legislation correspond with the provisions of each directive (Craig and de Búrca 2008).

The Waste Framework Directive is an example of this disclosure requirement. Every three years the Commission issues a report on implementation of the Waste Framework Directive that is based on the information that Member States must periodically provide regarding their progress in complying with the waste legislative framework. In a sign of continuing difficulties, however, Greece, Italy, Spain, and Portugal are not mentioned in the initial Commission's report, because they failed to submit their reports in time (Commission Report on the Implementation of Community Waste Legislation 1995–1997, Davies 2004).

2.2. State-local structure and complications in enforcing EU waste directives

The Waste Framework Directive requires that Member States and their subnational actors cooperate in the process of creating waste management plans.[14] The Commission has drafted some guidelines to help national and local administrations prepare these plans, which must be periodically submitted to Brussels by the competent national authorities.[15] Although the Commission's guidelines recognize the relevance of the subnational level in managing waste, local governments bear an obligation to their central governments, rather than to the EU. Therefore Member States remain the only entities that are directly accountable to the EU for failing to implement the waste management plans. This chapter demonstrates how the EU legal framework discourages cooperation of local governments with their central authorities to implement European waste legislation.

The process of drawing up waste management plans has been highly influenced by the new governance approach to EU regulation, which seeks to increase participation and the sharing of information among different actors. The planning process includes a broad range of stakeholders, from local administrative authorities to representatives of the private sector, waste experts, consumer associations and NGOs (European Commission, European Topic Centre on Waste and Material Flows 2003). While the Waste Framework Directive aims to include subnational actors in the process of drawing up waste management plans, the openness of the planning process itself does not impose compliance accountability to the EU on local governments. Instead, local governments must answer only to their Member States.

In addressing the troubling implementation of the EU waste legislation, scholars have focused on the tensions over competences arising between the EU and its Member States

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[14] *See* articles 9 to 14 of Waste Framework Directive replaced by Article 7 in Directive 2006/12 by the European Parliament and the Council of 5 April 2006 on waste, OJ L114, 27.4.06.

[15] Waste management plans should identify the origin, type and quantity of the waste that has to be recovered or disposed of in each region. They should also describe the methods and the disposal sites chosen by each national or local authority. National plans can be of a strategic nature, whereas regional or municipal plans are more 'action-oriented-operational plans with detailed descriptions of current collection systems, treatment plants etc.' (European Commission, European Topic Centre on Waste and Material Flows 2003:7).

in imposing a harmonized European standard versus maintaining different national standards in the definition of 'waste' (Kramer 2007). Despite the EU preference for recycling over incineration with energy recovery, several Member States, such as France, the Netherlands and the Scandinavian countries, have promoted the incineration of municipal waste (Kramer 2007).

While national policy choices often conflict with the specifics of EU waste legislation, another important cause of conflict arises from the varied administrative regimes of Member States. As an example of the divergent responses created by differing administrative systems, consider the responses elicited to the Commission's mid-1990s proposal to amend the Hazardous Waste Directive.[16] The proposed draft required a separate collection system for hazardous municipal waste, which would be managed by professional collectors. Detailed information on compliance was to be sent to the Commission. The individual responses by Member States to this proposal reflected each nation's own administrative capacities. Some Member States, such as Austria, Denmark, Finland, Germany, the Netherlands, Sweden and the Flemish Region of Belgium, supported this initiative because they already had a similar system for municipal waste. Others opposed it because local authorities would incur high costs developing the administrative capacity to comply with the Commission's proposal (Van Calster 2006).

This finding shows that when the administrative framework presupposed by EU directives does not align with the framework already in place in each Member State, opposition is likely to arise. EU waste directives attempt to overcome differences among national administrative regimes by seeking the input of subnational actors. Because EU law relies on national administrative structures, however, it cannot intervene in national-local relations. While the EU Waste Framework Directive requires cooperation between national and local administrations, the lack of this effective cooperation hinders the enforcement of supranational legislation in some Member States.

2.3. Unintended consequences of EU and US local immunities

The United States Supreme Court and the ECJ have created local immunities to foster local autonomy. These local immunities are background norms that create a shield for local power in implementing federal and supranational laws. This section describes the unintended administrative and regulatory consequences which local immunities created at the EU and the US federal level have *vis-à-vis* subnational actors. In both contexts, local immunities create forms of local empowerment that effectively discourage cooperation with other levels of government.

EU law creates local immunities that shield subnational governments from direct accountability to the EU. In cases of recurring non-compliance with EU directives, the Commission can initiate an infringement procedure only against a state. If, despite the Commission's reasoned opinion, a Member State remains in non-compliance, the Commission can start an action before the ECJ. The Court can deliver a judgment condemning the State for failing to implement the directive correctly. In addition to these measures, in 1992 the Maastricht Treaty introduced a new provision in Article 228(2) of

[16] *See* Council Directive 91/689/EEC of 12 December 1991 on hazardous waste, OJ L377, 31/12/1991 pp. 0020–0027.

the Treaty establishing the European Community (TEC) (now Article 260 of the Treaty on the Functioning of the European Union (TFEU)) that enables the ECJ to impose financial sanctions against Member States for their repeated non-compliance (Craig and de Búrca 2008). The ECJ can impose monetary penalties for the failure to implement a previous judgment that condemned a Member State for incorrectly transposing a directive.[17] These penalties shield subnational governments from EU liability, as only the Member States are responsible for paying the penalty. Of course, if local governments do take advantage of this situation and resist the enforcement of EU directives, they must nevertheless comply with the national measure transposing EU law.[18]

The US anti-commandeering doctrine as articulated by the United States Supreme Court touches on some of the same tensions that Article 228(2) TEC raises by implicitly creating a local immunity for subnational governments *vis-à-vis* Brussels. The anti-commandeering doctrine bars the federal government from compelling states or local governments to implement federal regulatory programs (Chemerinsky 2007).[19] The US Supreme Court articulated the anti-commandeering doctrine as a shield for local and state authority against federal power during the New Federalism revival of the Rehnquist Court (Barron 2001, Fallon 2002).[20] For instance, the Supreme Court's decision in *New York v. United States* mandates that the federal government may not intrude upon the State's legislative function. In this case, a 'take title' provision of the Federal Low-level Radioactive Waste Policy Amendments Act of 1985 meant that New York could be held liable for even privately generated waste if the state did not dispose of it by a certain date. Writing for the Court, Justice O'Connor held that the federal provision was invalid because the federal government could not commandeer states or their subdivisions to legislate or take administrative action to implement the federal statute.[21]

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[17] When Member States fail to implement EU directives within two years under Articles 227 and 228 of TEC (now 259 and 260 TFEU), the European Commission is authorized to commence infringement actions against them. See TEC, at Article 228(2), para. 2 (stating 'If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it').

[18] This is the scenario of the *Kouropitos* case in Greece addressed later on in this chapter.

[19] 'For example, in New York v. United States, and Printz v. United States, the Supreme Court held that Congress violates the Tenth Amendment if it compels state legislative or regulatory activity.' (Chemerinsky 2007: 409).

[20] The Supreme Court has attempted in a number of cases to limit the power of Congress in regulating states' and local governments' activities with respect to specific subjects such as the disposal of waste and gun regulation. *See National League of Cities v. Usery*, 426 US 833 (1976) (holding that Congress overstepped its Commerce Clause power in passing the 1974 Fair Labor Standards Act, which sought to extend minimum wage and maximum hour requirements to state employees), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 US 528 (1985) (holding that the San Antonio Metropolitan Transit Authority was not immune from the Fair Labor Standards Act and requiring the Transit Authority to adhere to minimum wage and maximum hours laws imposed by the federal government); *New York v. United States*, 505 US 144 (1992) (finding that Congress lacked the authority to require states to regulate waste in accordance with the Low-level Radioactive Waste Policy Act, but that Congress could permissibly withhold federal funds from states that chose not to comply with the Act).

[21] 505 US at 183. Moreover, Justice O'Connor held that the federal statute, by commandeering the states, confused the bright line of accountability, thus making it difficult for citizens to recognize which level of government should be responsible for which type of action.

While the anti-commandeering doctrine may act as a shield for US local authorities, federal-local interaction can also be considered a sword for local power rather than something local power needs to be shielded from. This sword-like function is triggered by cooperation between local and federal authorities that serves to undermine state control of local decision-making power (Rose-Ackerman 1983, Sarnoff 1997, Weiser 2001). Scholars have termed this interaction between national and local power in the realm of federal regulatory policies 'cooperative localism'. This interaction often creates pockets of local autonomy that may undermine states' power. For instance, some federal spending programs that are directly allocated to counties or municipalities have spurred opposition at the state level against local control of federal funding (Davidson 2007, Resnick 2007).

US anti-commandeering jurisprudence shields both the states and their subnational governments from the implementation of federal legislation. In contrast, the EU Treaty requires the Member States to comply with its directives, while subnational actors have to comply only with the national legislation transposing EU law. Thus, unlike the proscribed power of the federal government of the United States, the ECJ can penalize the Member States for failing to enforce EU directives (Halberstam 2002).[22] There is an important functional similarity at the local level, however. The US anti-commandeering doctrine and the EU financial sanction of Article 228(2) of the Treaty of European Union (TEU) create similar immunities for local power. In both cases, subnational governments are shielded from being accountable to the US federal government and the EU supranational institutions. Local governments benefit from a local immunity from both US federal legislation and EU law.

The US Supreme Court case of *New York v. United States* is an eloquent example of how local immunities may trigger unintended effects for state or local power. By focusing on the shielding function of the anti-commandeering doctrine, the state of New York gained in autonomy at the expense of the federal government. Not all states benefited from this Supreme Court decision. The Radioactive Waste statute was not adopted in a vacuum, rather it was the result of a collectively reached compromise to overcome a 'looming crisis' whereby a few states had become the dumping ground for the entire nation and threatened to close down their disposal sites (Barron 2001). As a consequence, a number of states which feared becoming a national dumping ground filed an amicus brief explaining why they supported the federal initiative.[23] State immunity in this case might have not enhanced the power of those states that favored federal radioactive waste regulation.

In a subsequent case, the municipal level was directly involved and the relevance of local immunities for municipalities as well as states was reinstated. In *Printz v. United*

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[22] Although Daniel Halberstam (2002) has suggested that the EU and the US models of commandeering appear 'diametrically opposite', I highlight the functional similarities arising at the local level in both the EU and the US.

[23] *Id.* at 417–18 (explaining that the 'supposedly coercive provisions had been critical to the success of the entire, state-friendly federal framework. [. . .] Indeed, a prior state-proposed federal framework that did not include the "take title" provisions had failed to induce enough states to enter into regional compacts to ensure that sufficient waste disposal sites would be available for waste-generators').

States (1997) the Rehnquist Court reviewed the Brady Act, which amended the Gun Control Act of 1993. Petitioner Printz filed an action alleging that the Act was commandeering local police officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. The Supreme Court held that a reasonable application of the Brady Act should not require local officers to enact or administer a federal regulatory program.[24] According to the Court, the federal government had no power to issue directives requiring the states to address particular problems, nor to command the state's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Yet it is not clear whether local power was enhanced or not in this case solely because the outcome of *Printz* imposed limitations on federal governmental power. As David Barron pointed out, an amicus brief by the United States Conference of Mayors supported the Brady Act (Barron 2001). Thus, the effects of the federal revival of local immunities against federal power remain unclear for subnational actors. The Supreme Court's localist narrative may ultimately curtail, rather than enhance, local power by limiting the ability of cities to cooperate with the federal government (Breyer 2005).

In a similar dynamic to the one David Barron has pointed out in the US, local immunities from the EU Treaty do not necessarily favor the interests of those subnational actors that want to enforce federal legislation. Rather, local immunities privilege those subnational actors that are more active in defending their local powers by resisting, rather than by cooperating with, state authorities to implement federal regulation. Local immunities might not automatically empower local governments which support US federal and EU supranational regulation. On the contrary, local immunities have a shielding function that ends up privileging those subnational actors which resist, rather than cooperate with, central authorities to implement federal and supranational law.

3. The troubled enforcement of waste directives in Greece and Italy

This section addresses a second problem in federal or supranational regulations requiring state-local cooperation in administrative matters. A textured account of domestic administrative structures shows that the requirement of administrative cooperation has created a disparity in the enforcement of EU waste legislation by privileging those Member States that have effective central-local cooperation capacities over those which lack them. For different reasons, in both Greece and Italy the central governments retain a predominant role, at the expense of effective cooperation with their local authorities, in implementing EU waste directives.

3.1. The Kouropitos *Case in Greece*

3.1.1. Greek constitutional background The Greek Constitution establishes a highly centralized parliamentary republic.[25] The central government's power is exercised

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[24] *See Printz*, 521 US at 933.

[25] Philippos C. Spyropoulos and Theodore P. Fortsakis describe how the Constitution of 1975 used the 'peculiar' term 'presidential parliamentary democracy' in order to emphasize that the constitution did not embrace a hereditary king. The official English translation of this term in the Constitution is 'parliamentary Republic'. Parliament is the main organ of legislative power and

through thirteen regional authorities called peripheries. Additionally, two levels of local government – town municipalities and village communities at the first level, and regional self-governed corporations at the second level – manage the administration of local affairs (Dagtoglou 2008).[26] While Article 102 of the Greek Constitution states that the central state government may not frustrate the initiative and free activity of local government, the central government provides funding to achieve local objectives. Municipalities have no independent power to impose taxes; in cases when they do have this authority, they have been reticent to impose taxes that may risk alienating voters. According to a commentator, taxes imposed by parliament for the benefit of local governments are often insufficient (Dryllerakis 2008). This administrative model resembles the French model, a unitary state in which subnational actors have little autonomy compared to other administrative law models in the EU (Schmidt 2006).

Indeed, Greece remains one of the more unitary states of the EU. Its prefectures and municipalities have limited power and inadequate resources to engage in innovative metropolitan and urban policies. While local authorities lack the financial and administrative autonomy to fully implement EU policies, the so-called 'cohesion policy' represents a crucial resource for the national economy. EU cohesion policy is a strategy for economic development aimed at the creation of a 'stable and harmonious growth' in the common market.[27] The main instrument of this policy are the structural funds, which have a vast application in financing social and economic projects and include the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Agricultural Fund.[28] In order to attract more structural funds, Greece's devolution

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is the representative of the people (Spyropoulos and Fortsakis 2009). While the Prime Minister, as the leader of the party with a majority of the Members of Parliament, ensures the unity of the government and directs the actions of the public services in general for the purpose of the implementation of governmental policy, the President is the Head of State and exercises certain limited legislative and executive powers (Speliotopoulos 2004).

[26] Town municipalities administer and regulate all local affairs, and operate under an enumerated yet non-exhaustive list of competences. Self-governed corporations administer local affairs at the district level. Unlike municipalities, the self-governed corporations do not have an enumerated set of competences. However, self-governed corporations generally assumed the competences related to local matters of the former prefects of the pre-1994 first-level central government decentralization plan (Spyropoulos and Fortsakis 2009: §§ 424–439 and 440–51).

[27] According to the EU Treaty, the Community is committed to eliminating disparities and offering incentives to poorer economies to become more competitive in the market through various instruments addressing socio-economic disparities among regions. *See* TEU at Article 158 ('In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions or islands, including rural areas.').

[28] There is also a Cohesion Fund, which targets infrastructure and other environmental projects but it is not based on regional or local policies, and it is redistributed among specific Member states. In contrast, the Structural Funds target regions and more consistently subnational entities in addressing six different objectives that since 1993 have been broadening EC development strategies, such as adaptation of workers to industrial change or economic adjustment of underdeveloped areas. *See* Regional Policy – Inforegio, http://ec.europa.eu/regional_policy/consultation/index_en.htm at 3. The revision of the Objectives of the Structural Funds was modified in 1993 through Council Regulation (EC) 2081/93 of 20 July 1993, Amending Regulation 2952/88, 1993 OJ L193/5, Article 1. Objective n. 1 was the promotion of the development and structural adjustment

reforms in the 1990s created thirteen Regional Administrations that 'did not transform the centralized nature of the state and the institutional relationships between center and periphery' (Koutalakis 2003: 23). Although this process reorganized local authorities, merging numerous municipalities and establishing the direct election of prefects as second-tier local authorities, the central government maintained control over urban policies (Koutalakis 2003). Thus, EU policies have only partially contributed to a process of decentralization in Greece.

In fact, the process of decentralization, such as it was, began in Greece well before the introduction of the EU structural funds, as part of a broader effort to signal that Greece was worthy of joining the Community (Koutalakis 2003, Featherstone and Ifantis 1996). The peripheral position of Greece *vis-à-vis* the EU has made Europeanization a synonym for modernization – what scholars have called 'hegemonic cultural imposition' (Featherstone and Ifantis 1996). Nevertheless, this process has always been partial; in fact, EU law often encounters significant implementation constraints as a consequence of Greece's enduring peculiarly centralized administrative structure. Specifically, as we shall see below, the lack of administrative capability at the local level has inhibited the implementation of the EU waste directives in Greece.

THE EFFECT OF *KOUROPITOS* In the early 2000s, after more than a decade of judicial struggles, the ECJ imposed its first monetary penalty of 554,000 Euros against Greece for failing to comply with two directives, the Waste Framework and the Hazardous Waste directive.[29] Despite these environmental provisions, the prefecture of Chania, on the tourist island of Crete, continued to dump industrial, medical and chemical waste into the nearby Kouropitos River. In July 2000, in what became known as the *Kouropitos* case, the ECJ ordered Greece to develop an implementation plan to address problems at this site according to the requirements stipulated in the applicable directives.[30] Despite the court order, Greece continued to fall short of its obligations. As a consequence, the ECJ found Greece liable a second time in 2001. Pursuant to Article 228 TEC, it levied a heavy fine and an additional penalty for every day the prefecture failed to comply with the conditions of the directives and the previous order of the Court.[31]

Since the 1980s, the Greek central government had in fact imposed a waste management plan for the prefecture of Chania as a whole. It closed the landfill at Kouropitos and planned the creation of a new permanent waste structure near the city of Akrokitiri.[32]

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of the regions, Objective n. 2 was the conversion of regions seriously affected by industrial decline, Objective n. 3 was the fight against long-term unemployment, Object n. 4 facilitated the adaptation of workers to industrial change, Objective n. 5 created a new fund addressing problems related to fisheries and Objective no. 6 addressed development in low-density population Nordic areas. *Id.*

[29] *See* Case C-387/97, *Commission v. Greece*, 2000 ECR I-5047 [hereinafter *Kouropitos*]. As to the directive, see Council Directive 75/442/EEC, 1975 OJ L194; Council Directive 91/689/EEC, 1991 OJ L377 (formerly 78/319/EEC).

[30] *See* Case C-45/91, *Commission v. Greece,* 1992 ECR I-2509.

[31] *See* Case C-387/97, *Commission v. Greece*, 2000 ECR I-5047.

[32] *See Kouropitos*, 2000 ECR I-5047, at para. 6; Council Directive, Article 5, 75/442/EEC 1975 OJ L194 (EC) (requiring Member States to establish or designate the authority or authorities to be responsible, in a given zone, for the planning, organization, authorization and supervision of waste disposal operations).

However, the residents of Akrokitiri, a city near the new dump site, strongly objected to the new plan. The city resisted implementing the plan because of possible health problems created by the new structure. The local population opposed the studies and projects proposed by the Greek government to local authorities (Botetzagias 2003).[33] In addition, the prefecture of Chania was split between those cities wanting to implement the national plan and others that refused to accept Akrokitiri as an alternative dump site. In 1992, the ECJ issued a judgment against Greece, leading the Chania prefecture to try, with little success, to find a solution to the Kouroupitos affair. Finally in 2001, the solution came from the central government rather than from the prefecture or its municipalities.

Given the unitary administrative structure of the Greek Republic, the implicit immunity for subnational actors *vis-à-vis* EU law did not create any incentive for local governments to enforce the waste directives. On the contrary, some of the municipalities within the Chania prefecture had an incentive to disregard the enforcement of the EU directive and resist the national law and the administrative measures to transpose them. While the central government was under a threat of financial penalty by the ECJ, municipal resistance to the implementation of the national plan for an alternative dump site carried no similar direct consequence under EU law.

Greece today still struggles to enforce the waste management directives. On top of divisive internal politics (between the right-wing Nea Demokratia government and the left-wing Pasok local authorities), the central government lacked effective means to pressure the local government to implement the waste legislation. After 2000, it continued to disregard additional orders by the ECJ, and the nation may well be heading for another Article 228(2) penalty (Europa Rapid Press Release 2007). The Commission opened a new procedure by sending Greece a first warning letter regarding the sites in April 2004 (Europa Rapid Press Release 2005a). In this proceeding, the Commission accused Greece of not properly cleaning up the illegal landfill sites in Chania because the buried waste had been washed away by the rain. The Greek authorities did not contest the findings. Rather than addressing the local resistance, they informed the Commission that the central government approved a new plan and half of the open-air waste had already been transferred to the new landfill (Europa Rapid Press Release 2007).

In the meantime, the possibility of another judgment by the ECJ and another financial sanction has created disagreements between the various Greek Ministers of Environment, Finance, and Interior over which authority is liable for the non-compliant local governments, and which Ministry should pay the two million Euros necessary to clean up the Kouropitos River (*Crete Gazette* 2006).

This case exemplifies the difficulty facing Greece in implementing localized EU waste directives. The EU directives require that local administrative entities collaborate with the central government effectively and that the central government has the means to put pressure on local administrations. Because of its centralized administrative structure,

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[33] Botetzagias demonstrates that top-down implementation of politically sensitive public policies are not always well received, especially when no real effort to actively involve people on the local level is made (Botetzagias 2003: 127). Although directives from the top are of course important, the case highlights how critical local involvement is. The article discusses increasingly violent local opposition to various attempts by the Greek government to create modern waste facilities in three areas on the outskirts of Athens.

Greece finds itself at odds with supranational regulations requiring central-local cooperation. Rather than taking into account the administrative structure of the Greek state or encouraging further cooperation, the EU sanction has heightened internal tensions among the different levels of government.

3.1.2. Italian non-compliance with EU waste directives The Italian case illuminates issues in part similar to, and in part different from, the Greek case. Just as with Greece, EU law overlooks the significance of the domestic administrative structures in which cities and regions are embedded in Italy. However, rather than being a unitary state like Greece, Italy is characterized by a decentralized structure that has empowered regions and provinces to implement EU law (Schmidt 2006). Nevertheless, the ECJ judgments on the non-implementation of EU waste directives have offered an opportunity to the government to recentralize its control of the regions rather than cooperate with them on implementing EU policy.

ITALIAN CONSTITUTIONAL BACKGROUND The Italian Constitution of 1948 has been modified over time to increase devolution and strengthen the principle of subsidiarity between the central government and its regions.[34] There are twenty regions in Italy, five of which have received special autonomous powers (Groppi and Scattone 2006, Tubertini 2006).[35] Since the mid-1970s, all the regions have become fully operative and Italian laws have increased their competences (Putman 1993). More recently, the constitutional reform of 2001 led to further decentralization by defining the Italian Republic as consisting of local autonomies that include for the first time municipalities, provinces, metropolitan cities, regions and the state (Poto n.d.).[36]

The Italian Constitution establishes that the legislative power belongs to the state and to the regions in accordance with the limits set by the Constitution, by EU law, and other international principles (Cassese 2006).[37] The delegation of legislative power is achieved through a list of matters that fall under the exclusive competence of the state or the regions and a long list of subjects that fall under the shared competences of the state, the regions, and the EU.[38] The Italian government, however, maintains the power to list the fundamental goals of the concurrent policy matters between itself and the regions.

While the EU maintains formal connections with the central government and its ministerial organization, since the mid-1990s it has developed very strong ties to Italian regions (Cassese 2006). Today the country's regions actively participate in EU decision-making processes in areas where they enjoy concurrent competences, and they have the

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[34] *See* Constitutional Law no. 3/2001 (October 18, 2001); Legge Bassanini (Parliamentary law) no. 59/1997 (March 15, 1997); Decreto Legislativo (Legislative Decree) no. 267/2000 (August 18, 2000).

[35] Italian regions that have a special autonomy are small ones that are geographically either islands or on the Italian border: Valle d'Aosta, Friuli-Venezia Giulia, Trentino Alto-Adige, Sicilia and Sardegna. The two autonomous provinces situated on the Austrian-Italian border are Trento and Bolzano.

[36] *See* Costituzione [Constitution] Article 114 (Italy).

[37] *Id.* at Article 117.

[38] *Id.* at Article 117(2), 117(4).

power to implement EU directives (Cassese 2006). These processes have transformed the regions into a direct interlocutor of the EU (Caciagli 2003).

In contrast to Greece, Italy seems to have more administrative capabilities (via its regions); nevertheless, the Italian central government still plays a predominant role. The fear that the regions – rather than Rome – would become the main interlocutors of Brussels has led the Italian government to try to recentralize EU policies under its control. In the 1990s, the central government created a Department for the Coordination of EU policies within the cabinet of the Italian Prime Minister (Caciagli 2003). Empirical studies have shown that, despite an increase in regional legislation transposing EU directives, national legislation remains the predominant vehicle for implementing EU law (Montanari 2006). Even though Italian regions, provinces, and municipalities have demonstrated their activism on the European front, the central government continues to play a key role *vis-à-vis* the EU.

STATE OR LOCAL NON-COMPLIANCE? Despite the increasing power of the regions, provinces, and municipalities to implement EU waste directives under Italian environmental legislation, the infringement proceedings set up by the Commission have focused mostly on the central government's failure to transpose EU law.[39] The Commission is continuously bringing infringement procedures against the Italian government because its regions and provinces did not implement – or incorrectly implemented – various EU waste directives.[40] Although the Italian government has not yet been subjected to a financial penalty under Article 228(2),[41] Italy has a long history of non-compliance with EU waste legislation and has been condemned many times without the imposition of a fine (Börzel 2001).

A case in point is the ongoing crisis over the disposal of waste in the Campania region. In 2007, this crisis reached the global public with images of people surrounded by waste in the streets of Naples. The crisis ended when the newly elected Berlusconi government solved the waste emergency in the summer of 2008 (*La Repubblica* n.d., Bufi 2008). In less than two months, the prime minister was walking the streets of Naples declaring that a plan was already in place for the construction of new incinerators.[42] In addition to the striking case of the Campania region (Chiariello 2008, Montalto 2007), the difficulty of

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[39] The Italian legislation implementing the EU waste directive has given regions, provinces and municipalities different tasks in management or waste disposal policies. *See* Legislative Decree no. 22/1997 (Decreto Ronchi) and the more recent Codice dell'Ambiente, Legislative Decree no. 152/2006.

[40] From the Commission website, Italy in both 2006 and 2007 was prosecuted by the Commission for the highest number of infringements of environmental directives, especially in cases relating to waste. *See* European Commission, Environment: Infringements, http://ec.europa.eu/environment/legal/law/statistics.htm [hereinafter Environment: Infringements].

[41] The Commission states that, '[t]o date, there have been two judgments of the Court of Justice under Article 228 of the EC Treaty imposing financial penalties in cases handled by the Environment Directorate General (*Commission v. Greece*, Case C-387/97 and *Commission v. Spain*, Case C-278/01).' *See id.*

[42] This Berlusconi intervention created much legitimacy and support for the new government. Meanwhile the police had already found seventeen suspects and they were indicted with criminal association, environmental damage and illegal waste-trafficking See http://www.france24.com/en/20080719-berlusconi-declares-naples-waste-crisis-over-italy-garbage-crisis.

implementing EU waste directives has produced a long record of non-compliance all over Italy, with some minor regional variations (Givone 2009).

The waste management crisis in Italy goes back at least a decade, with the European Commission monitoring Italy since the 1990s. During this time the ECJ condemned Italy for non-compliance with several EU waste directives. In 1999, the ECJ condemned Italy for dumping waste into the river in the San Rocco valley near Naples.[43] Despite the central government's response that the territorial dimensions of the San Rocco valley were not sufficient to warrant proceedings against Italy, the Commission found that the hospitals nearby were discharging liquids into the river and creating high levels of risk for human and environmental health.

The transposition of the EU framework and hazardous waste directives into Italian law occurred through a national provision that attempted to restrict the definition of waste in the application of EU law (Europa Rapid Press Release 2005b).[44] After Italy was condemned in October 2004, it adopted new legislation in December in which a number of types of waste were no longer considered as such, even though they fell under the definition of 'waste' under the EU's Waste Framework Directive.[45] Despite a second written warning from the Commission, Italy did not bring its legislation into conformity with the EU directive and instead adopted a legislative decree that reconfirmed its legislation (Europa Rapid Press Release 2005b).

In 2005, the Commission decided to pursue judicial action before the ECJ in nine different cases (Europa Rapid Press Release 2005b).[46] The issue was that several Italian regions and provinces did not submit their waste management plans to the Commission or that they did not comply with the criteria adopted by EU directives defining hazardous waste.[47] In particular, the provinces of Modena and Rimini and the regions of Lazio, Friuli Venezia-Giulia, Puglia and the autonomous province of Bolzano did not present compliant waste management plans to the Commission. Even though in these cases the responsibility resides with the regions and the provinces, the Commission has, according to the Treaty, the power to take legal action only against the Member States for an infringement of EU law.[48]

In 2007, the ECJ condemned Italy for the lack of three regional waste management plans (Lazio, Friuli Venezia-Giulia and Puglia) and two provincial ones (Rimini and Bolzano).[49] The Court held that the regional and provincial plans were either missing

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[43] *See* Case C-365/97, *Commission v. Italy* 1999 ECR I-7773, at paras. 57 and 111.

[44] *See* Case C-119/04, *Commission v. Italy*, 2004 ECR I-6885. Italy was already condemned in November 2004.

[45] These types of waste were scrap metal, other waste used in the steel and metallurgical industry and high-quality 'refuse-derived fuel' (fuel made from waste). As a result of the law, for example, urban waste burned as fuel in cement kilns or energy power plants escapes the provisions of EU legislation governing both waste and waste incineration. This creates a potential risk for the environment and human health through uncontrolled emissions of toxic substances such as dioxins. *See id.*

[46] Italy was monitored for the non-compliance with Council Directive 75/442/EEC, 1975 OJ L 194, amended by Council Directive 91/156/EEC, 1991 OJ L 28 (waste management) and by Council Directive 91/689/EEC 1991 OJ L377 (hazardous waste) [hereinafter EU Waste Directives].

[47] *See* EU Waste Directives.

[48] *See* TEU, at Article 226.

[49] Case C-82/06, *Commission v. Italy*, 2007.

or that they did not conform to the EU waste directives, which require them to describe the geographical sites and modalities for waste disposal.[50] Nevertheless, the Court recognized that the structural problem lay in the general juridical framework in which the transposition of EU waste directives took place. According to the Court, such transposition was not complete, and the Italian legislative framework did not satisfy all the obligations deriving from the EU environmental standards.[51]

The Italian legislative reforms in the late 1990s played an important role in strengthening local autonomy for the regions, provinces, and municipalities, while attempting to connect them to the EU. Nevertheless, the cases that were brought by the Commission before the ECJ pursuant to Italy's failure to implement waste directives demonstrate that the central government still maintains the paramount responsibility for ensuring compliance as well as for failing to comply with EU waste legislation. In fact, when the national transposition of EU waste directives is non-congruent, it enhances the potential for groups and subnational actors that do not favor a supranational waste policy to inhibit its local implementation.

Conclusion

This chapter highlights problems of multilevel governance and administrative structures that are often heightened by federal or supranational regulation in both the US and the EU. Despite efforts to empower local actors through federal and supranational regulations, the ECJ and the US Supreme Court have interpreted local power in a way that continues to privilege the relation between Washington or Brussels and the states rather than with subnational actors. EU law allows Member States to structure state-local relations in a way that resembles what US local government scholars have called the 'creature of the state' problem in a federal regime (Frug and Barron 2008). This means that the EU waste directives cannot directly empower local actors but they have an impact on national-local relations by creating disparate effects that depend on the constitutional and administrative structure of each Member State.

The case study on waste management in Italy and Greece shows that the problems arising from the enforcement of EU waste directives are connected directly to their domestic administrative structures. While the waste directives do not create new legal powers for subnational actors *vis-à-vis* the states, they nevertheless require strong cooperation between local and central administrations. Therefore, the lack of local-central cooperation in national administrative structures leads to inadequate enforcement of EU waste legislation.

While the EU attempts to decentralize power through its waste legislation in Greece and Italy, it has strengthened the role of central governments at the expense of local power. The challenge of realizing ambitious regulatory programs at the US federal and EU supranational levels that rely on central-local coordination lies in the fact that different national constitutional and administrative structures are likely to determine radically different outcomes. Therefore federal and supranational regulatory strategies in multilevel governance ought to take into account more seriously their impact on domestic

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[50] *Id.* at para. 47.
[51] *Id.* at para. 36.

administrative structures and the way they are likely to support or limit the possibilities of achieving local cooperation with other levels of government.

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PART 3

ADMINISTRATIVE INDEPENDENCE

12 The promise of comparative administrative law: a constitutional perspective on independent agencies

*Daniel Halberstam**

The role of so-called 'independent administrative agencies' in democratic governance, and the study of their practical importance and normative significance, are on the rise in many jurisdictions. In the United States, the administrative state never ceases to be the object of fresh critical scholarly discussion as well as practical efforts at reform. Within European states, such as England, France, and Germany, renewed attention is being given to the role of independent agencies (sometimes termed QUANGOS) in law enforcement, adjudication, and rulemaking – often in connection with European mandates of administration. At the supranational level of governance, the European Union itself has witnessed a dramatic explosion of agencies over the past decade as well. And at the international level writ large, the creation, migration, and enforcement of norms has increasingly taken place within an ever expanding network of agencies that challenge us to understand (or, better, question whether we should understand) global governance within the paradigm of administrative law as well.

The United States, with its long tradition of independent agencies often serves as a point of reference in these discussions (for example, Geradin 2004). Although there is no general authoritative definition, such agencies are understood to operate somewhat separately from the executive branch structure and to be somewhat insulated from the executive branch hierarchy, often taking the form of a bipartisan body of Commissioners whom the President can remove only 'for cause' (Breger and Edles 2000: 1135–6). A foreign scholar should be warned, however, that there is continued debate in the United States not only about the precise extent of the President's control over so-called 'independent agencies' but also about the extent of the President's control over their more ordinary 'executive branch agency' counterparts.

This chapter reflects on the emergence of independent agencies as an institutional form of governance in the United States, Germany and France. Especially when compared with the United States, there are only a few such institutions in Germany. Aside from the *Bundesbank*, which is specifically authorized in the *Grundgesetz* (GG), there is the somewhat independent *Bundeskartellamt* (competition authority) and the recently added *Bundesnetzagentur* (Federal Network Agency) for the regulation of electricity, gas, telecommunications, postal services, and railroads. France, by contrast, has long had an abundance of independent agencies. Apart from the special case of the *Banque de France*,

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which has lost much of its independent national regulatory power since the creation of the European Central Bank, there are over a dozen agencies expressly designated as independent by the legislature and many others that operate outside the hierarchy of the executive branch.[1] Important for present purposes, however, are not the precise parallels – or lack thereof – between these various agencies, but the constitutional understanding of the role of these various institutions across these three systems.

The case of independent regulatory agencies serves to illustrate what might be called a constitutional perspective of comparative administrative law. In this vein, the aim of this chapter is ultimately threefold. First, it seeks to ground the comparative administrative inquiry in an understanding of comparative constitutional law and, in particular, in an understanding of the constitutional values of public governance. Second, this chapter suggests that the turn to independent administrative agencies in the United States, Germany, and France reflects system-specific inter-institutional dynamics and system-specific reactions to perceived constitutional pathologies of the generally constituted branches of government. Finally, and as a consequence, the chapter concludes that the promise of comparative administrative law may, at times, lie less in finding universally applicable best practices among what appear to be functionally equivalent administrative agencies than in revealing each system's particular anxieties and hopes about vindicating the values of constitutionalism.

The remainder of this chapter proceeds in four sections. Section 1 explores the constitutional foundations of administrative law. Sections 2 sketches out the foundational values of constitutionalism. Section 3 links the project of administrative governance in the United States, Germany, and France with that of vindicating the values of constitutionalism within the institutional constraints of each of these systems. Section 4 draws some (unconventional) lessons from the comparison. Section 5 concludes.

1. Constitutionalism in administrative law

Discussing the role of independent administrative agencies already entails a choice of understanding these institutions as being, in an important sense, 'administrative' and therefore belonging to the realm of 'administrative law'. Although the choice may seem rather innocuous – and to many, indeed, obvious – there is more to this practice than initially meets the eye. The conceptual and institutional paradigm of administrative law, as opposed to, say, that of constitutional (or private) law carries with it consequences that may not be fully justified by a proper appraisal of the role of these institutions within the architecture of governance.

1.1. Institutional implications of 'administrative' law

The choice between administrative or constitutional law (or administrative and ordinary civil law) as the paradigm for understanding what an institution of governance does can have tremendous practical consequences. This can be seen best when comparing continental and Anglo-American jurisdictions regarding the special jurisdiction of administrative versus ordinary tribunals or the justiciability of constitutional principles.

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[1] For a list of the nearly 40 independent agencies in France, see http://www.legifrance.gouv.fr/html/sites/sites_autorites.htm, last visited on August 31, 2009.

Common law systems usually accord their ordinary courts jurisdiction over all kinds of legal questions (including administrative and constitutional matters), whereas civil law systems often distribute jurisdiction according to subject matter among ordinary courts, administrative courts, and constitutional courts. This difference contributed to Dicey's proud remark that all legal disputes in the United Kingdom are resolved before ordinary courts, whereas the special administrative tribunals in France could not be trusted to give citizens their due in disputes with public authorities about legal rights (Dicey 1885: 215–16).

Dicey was reacting against the legacy of French administrative law dating back to the *ancien régime* and the Bonapartist tradition in which the special apparatus of administrative justice seemed, from an English perspective, to protect the prerogatives of administrative hierarchy instead of the rights of citizens. Historians have recognized for some time, however, that this insight was deeply questionable even when Dicey first advanced it (Brown and Bell 1998: 45–50, Lindseth 2005). Whatever its original validity, certainly after the proliferation of constitutional courts with judicial review throughout Europe after World War II, continental jurisdictions have generally come to provide solid fundamental rights protection despite their continued distinction – both conceptually and institutionally – between constitutional, administrative, and private law (Nolte 2005).

And yet, the choice between administrative, constitutional, or ordinary private law as a framework for understanding a given legal problem still has bearing today. In France and Germany, it will still often determine the assignment of jurisdiction as well as the available causes of action and remedies. Whether a dispute is framed as constitutional, administrative, or one of ordinary law still has important legal ramifications, even if not the devastating consequences that Dicey conjured up long ago.

On this latter score, Anglo-Saxon jurisdictions, in turn, have come closer to the civil law counterparts. Already in the decades preceding the outbreak of World War I, Dicey himself was forced to recognize the development of a system of autonomous administrative justice even in Britain (Dicey 1915). This development has deepened over time (Lindseth 2005). In the postwar years the United States famously codified a distinct view of administrative justice in the Administrative Procedure Act (APA) of 1946.[2] Although the APA does not establish a separate judicial infrastructure, it provides distinctive rules for judicial review of administrative action. As a practical matter, the APA effectively creates a special form of jurisdiction that governs the review of agency decisions in ordinary courts. Especially to continental jurists, then, it is often worth emphasizing that the US legal system, in some sense, also distinguishes between administrative law questions and other legal disputes.

As every American law student knows, the United States has also created a *de facto* 'special tribunal' for administrative law in the Court of Appeals for the District of Columbia (DC) Circuit (Bloch and Ginsburg 2002). Given its location at the seat of government, this 'ordinary' court of appeals (to take Dicey's term) has come to specialize – as no other court in the United States has – in matters of administrative law. Other courts have recognized the DC Circuit's jurisprudential leadership in these matters.

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[2] 5 USC §§ 551 et seq.

Moreover, in light of the US Supreme Court's miniscule docket, the Court of Appeals for the DC Circuit is often the final court for administrative complaints.

Apart from these primary institutional and jurisdictional consequences, the embrace of administrative as opposed to constitutional law as the lens through which legal problems are analyzed may also have secondary institutional consequences in terms of the legal communities involved in shaping the law. In particular, the development of the law may be driven by different segments of the legal bar specializing in one or the other kind of legal dispute. Epistemic communities that work on legal development in practice and in the academy – especially on the European continent – may differ from one 'field' to another and can have enormous influence on the development of doctrine (for example, Lasser 2004). Finally, a variety of less well-defined methodological expectations may coincide with conceiving of government action as taking place within the realm of administrative, constitutional, or private law (Möllers 2006: 128, Auby 2006: 14).

In sum, choosing the paradigm of administrative as opposed to constitutional law (or private law), may determine the forum in which complaints will be heard, the process and the remedies that a litigant may hope to receive, as well as the conceptual tools and legal personnel involved in shaping the dispute. Whether any of this is ultimately justified depends on the understanding of administrative governance and on whether that understanding properly reflects the actual function of (independent) administrative agencies within any given system of governance.

1.2. Theory versus practice of 'administrative' law

The concept of 'administrative' law has two central connotations. The first is the idea of instrumental rationality, that is, the rational effectuation of pre-determined policies. The second, related, idea is that of a principal/agent relationship between the administrative agency and the entity on whose behalf the agency is thought to act. Especially as applied to independent agencies, however, both of these connotations of 'administrative' law are deeply problematic in that they suggest an understanding of institutional mission, hierarchy, and control that does not properly represent the role that independent agencies play in the architecture of modern governance. Although much of this critique (along with a good deal of the original misconception) is a staple of American teaching on administrative law, it is worth briefly reviewing here to lay the foundation for the comparison that follows.

1.2.1. Independent agencies and the implementation of policy Let us take first the idea of instrumental rationality. The task that independent agencies are charged with carrying out is frequently so broad as to strain any understanding of the agency as carrying out a 'pre-determined' policy. What Bertrand du Marais, a member of the French *Conseil d'Etat*, has remarked with regard to the French *Conseil de la Concurrence* (Competition Authority) is equally applicable to dozens of agencies in France and elsewhere: 'The imprecision of the essential elements of the infraction constitute, without a doubt, an implicit delegation of interpretive power to the [administrative agency]' (2008: 13). Here, as so frequently elsewhere, 'the terms of the law are . . . so open-ended as to carry with them no precise limitations' (du Marais 2008: 13). For a parallel elsewhere, one need only think of the 'public interest' standards that govern certain activities of the Federal Trade Commission, Federal Communications Commission, and other US

agencies. Noting the breadth of this conferral of authority, Justice Scalia once famously remarked: 'What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a "public interest" standard?'[3] Where agency activity is predicated on such vague legislative commands, independent agencies are as much creators of policy as the implementing agent of a policy substantively determined elsewhere.

Of course, a whole host of control mechanisms may be brought to bear with more or less vigor in an attempt to rein in an agency's exercise of discretion – from judicial review to executive and legislative substantive and budgetary oversight, report-and-wait provisions, and even required ratification of rulemaking (for example, so-called '*homologation'* in France or analogous ratification of German administrative rules by the relevant Ministry or by the *Bundesrat*) (for example, Halberstam 2005: 795–6). In extreme cases, an agency can always be disbanded and recreated afresh with new personnel, as has happened in France (Demarigny 1996: 164–5).

Often, however, an independent agency's freedom persists, whether by express political choice or due to the political difficulty of effective control. Among the most autonomous of such institutions, perhaps, are the national and European central bank systems, which by virtue of constitutional provision or parliamentary authorization exercise enormous authority over matters that go to the core of economic policy. Even where the individual decisions by these or other agencies can legally be overturned by executive or legislative bodies, the costs of such control are often sufficiently high as to allow for a great deal of discretion on the part of the agency. Moreover, agencies, often with the help of bureaucratic and professional interest groups, can even help set legislative agendas and significantly shape legislative policy decisions (Derthick 1976).

Administrative agencies with this kind of power turn the idea of 'administration' – understood as the implementation of policies set by others – upside down. Here, adding 'independence' from the executive to the independence that administrative agencies generally enjoy from the legislature may take on much larger significance than the marginal diminution of immediate interference on the part of an overly partisan chief executive. To the extent that agencies are truly 'independent', that is, to the extent they enjoy discretion that in one form or another eludes the strict controls of the more generally constituted institutions of governance, such agencies are an independent locus of policy 'creation' not 'administration'.

1.2.2. Identifying the agent's principal The idea of a principal/agent relationship that is intended to capture the role of administrative agencies is equally problematic. Let us assume for the moment that the agency is indeed an agent within this paradigm (Bishop 1990). Who is the principal?

In the United States, this question is hard to answer even with regard to wholly dependent agencies – that is, agencies within the executive branch and without any special claim to independence from the political control of the chief executive. In the United States,

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[3] *Mistretta v. United States*, 488 US 361, 416 (1989) (Scalia, J., dissenting). Writing more recently for the majority, Justice Scalia reiterated the constitutionality of such broad authority on the part of agencies to make policy judgments. See *Whitman v. American Trucking Assns*, 531 US 457, 473–6 (2001).

the question whether and to what extent executive officers and federal agencies serve the President has been the subject of significant debate since the early days of the Republic (Corwin 1957: 80–85). Scholars who have and still argue in favor of a 'unitary' vision of the executive and see agencies as serving the President as their principal (for example, Yoo et al. 2005, Calabresi and Prakash 1994) face consistent opposition from those maintaining that there are limits to seeing even pure executive agencies as mere 'alter egos' of the President (for example, Strauss 2007, Lessig and Sunstein 1994). As one US scholar recently put it: '[A]dministrative independence remains a powerful value even with respect to those agencies that do not enjoy formal insulation from the President's removal authority' (Barron 2008: 1101).

But a measure of independence from the chief executive – whether on the part of executive or formally independent agencies – does not simply mean more freedom for agencies in the United States to do the bidding of Congress. To be sure, building on a Supreme Court dictum, legislators sometimes like to think of (independent) agencies as 'an arm of Congress' (Miller 1986: 63–4, Cushman 1941: 60–61 and 450–51). But the role of agencies and independent agencies within the American institutional constellation has long been exposed as rather more complex than either this idea or that of the unitary executive would suggest. Instead, as Peter Strauss has observed, whether formally independent or not, '[e]ach . . . agency is to some extent "independent" of each of the named branches and to some extent in relationship with each' (1984: 579). This does not mean that agencies – even those that are formally independent – are beyond control. But they are not subject to the control of any single (or joint) institutional principal. Instead, they have sufficient autonomy to become an additional participant in the dynamic institutional web of governance (Moe 1987).

In Germany and France, we also find discussions that complicate the identification of the proper principal. To be sure, there is no question that here, as in the United States, the legislature usually has created whatever agency is at issue. Thus, all legislatively (as opposed to, say, constitutionally) created agencies can be seen as 'serving' the legislature in some sense. But this tends to be a rather thin understanding of administration in the constitutional scheme of separation of powers and, perhaps more important, an unhelpful view of the agency relationship in the scheme of ongoing politics (Verkuil 1988: 259). For example, it says nothing about whose present political preferences the various agencies do, or ought to, serve. Even Otto Mayer (a scholar of French administrative law and founding figure of German positivist administrative law) remarked with regard to the relationship between parliament and administration, that the law can well give an agency the task to 'complete the act in a creative way, not to say what the [law or legislature] itself had wanted in this case, but [to say] what it, the agency, deems proper' (1924: 99).

Taking this idea further, German scholars have focused for some time on the 'emancipation' (Verselbständigung) (Mayntz 1978) and 'autonomy' ('Eigenständigkeit') (Schmidt-Aßmann 1998) of administration. The chief focus in Germany is not on independent agencies as such, but on the freedom of the executive branch and the various elements of its bureaucracy from the complete substantive control on the part of the legislature and the judiciary. But part of this argument also concerns the autonomy of individual administrative agencies and jurisdictions – and the question of their rightful principal – as well.

In a strict parliamentary system with strong judicial review such as Germany's, the

search for administrative autonomy might initially seem fanciful. And yet, several elements complicating a simple vision of hierarchy in administration exist here as well. German constitutional federalism, for example, creates a multitude of administrative units by placing much execution of federal law in the hands of the *Länder*, who administer a good deal of federal law 'on their own behalf' as opposed to 'on behalf of the federation' (Article 83–5 *Grundgesetz*) (Halberstam 2001). In addition, separation of powers principles protect the executive branch at large, and the *Grundgesetz* even further protects the division of labor within the executive branch by mandating that each individual minister within the cabinet conduct the affairs within her designated area 'independently and on her own responsibility' (Article 65 *Grundgesetz*). Finally, in many areas, the constitution or a law of parliament insulates certain functionally or geographically designated administrative jurisdictions from direct instruction on the part of superiors within the executive hierarchy (Groß 1999: 63–105). Drawing on these legal features of administrative insulation, some authors rather plausibly maintain that in Germany, too, the executive branch and (independent) administrative agencies do not merely implement the policy program determined by the legislature under judicial supervision. Instead, the executive bureaucracy in general and various agencies within that bureaucracy are partially autonomous sources of policies and norms (Hoffmann-Riem 2006).

In France, this question is discussed most explicitly in the context of 'independent administrative agencies', which are not generally conceived of as agents of either parliament or the executive. Perhaps because of the semi-presidential consolidation of power within the executive branch on the one hand, and the strong parliament on the other, independent agencies are thought of as operating on an almost apolitical terrain. A *Conseil d'Etat* study, for example, claims that unlike independent agencies in the United States, independent agencies in France emerge from 'a more neutral context', not as a result of a 'power play among the government and the parliament' (2001: 370). What the study means by this is that the French parliament does not try to employ independent agencies as a way to control the administration of the laws itself. In this vein, the study even laments the lack of political control exercised over these agencies, attributing this problem to a kind of negative conflict: '[T]he executive shows vigilance in respecting the independence of independent agencies, and the parliament maintains an attitude of distance' (370). Others confirm the latter point (for example, Auby 2006: 20). The general understanding in France is that the independence of such agencies is directed toward all political powers, that is, the executive as well as Parliament (for example, Marcou 2008: 6). As another scholar puts it, the quest is for a completely neutral agency, which, apart from being subject to judicial control, is independent of 'economic as well as political powers' (Autin 1997: 3).

It may be useful, then, to distinguish between two kinds of independence. The first, *independence from above*, is independence from political direction by the constituted political branches, as well as from detailed judicial review. The second, *independence from below*, is independence from the political influence of the regulated entities. Both forms of independence are central to the functioning of independent agencies and figure prominently in the debates.

Scholars have long noted that by granting an agency independence from above, it may become bound to the forces from below and thus beholden to the industry it is supposed to regulate. For example, if an agency is given budgetary independence from the

government by drawing on the financial support of the regulated industry, an inappropriate sense of loyalty to the donors may arise. This may work more subtly than simple bribery or corruption. As Gérard Marcou, for example, has explained in warning against the creation of new French 'independent *public authorities*':

> The direct financial support of an agency by the companies of a given sector cannot help but create a certain state of mind within the management of the companies as well as among the staff of the regulatory agency that regulation is viewed as servicing the regulated sector, even though the regulation, as an exercise of public power, can only be in the service of the general interest of the entire society. (2008: 11)

Some might say that, in certain situations, an attitude of serving a particular sector may not be entirely misplaced, as in the case of policing the basic rules of competition in a highly competitive industry. But this dependence, whether material or cultural, suggests a spurious connection between the agency and the wrong principal. Whether an agency's mission is to deliver welfare checks, hospital services, food safety, or competition in the market place, the proper principal is not the immediate population served but the general citizenry that stands behind the political decision to provide such services. After all, every provision of services and every economic intervention – even one that ensures competition – involves distributive consequences that demand democratic authorization.

If we ask more carefully about what is meant by an independent administrative agency's 'independence', then, we see that independence from above and below calls into question the very label of 'administration' itself. The language of administration can obscure the institutionally independent role of agencies by presuming both the pre-existence of a policy that is to be 'administered' as well as the existence of a neatly defined 'principal' in either the constituted branches of government or the sector or population that the agency most immediately serves or regulates. If we understand independent agencies more properly, however, as a partially independent institutional trustee shaping policy determination as well as policy delivery in the interests of the general public, we are deep in the realm of primary constitutional law.

In summary, to the extent that agencies have any independence from their supervising branches, such agencies have become separate arenas of governance. We may not agree that they are a 'headless fourth branch' or 'miniature independent governments', as the Brownlow Commission once charged (The President's Committee 1937: 345–6). Nonetheless, the authority of such agencies – to the extent it exhibits any independence from the general branches of government – must be justified by reference to the primary values of constitutionalism. In so doing, we must turn directly to the constitutional justifications that underpin the authority of the generally constituted branches of government (cf. Bressman 2003). We cannot pretend that agencies – at least not independent agencies – are simply an appendage of the principal branches of government we have come to know, like, and trust, or at least tolerate.

2. The values of constitutionalism

To the extent administrative agencies possess a significant degree of independence, they do not fit the simple paradigm of serving as the agent of a general branch of government (that is, parliament, the executive, or the judiciary). Designing such independent agencies is therefore not a matter of devising a system by which a designated principal can control

a designated agent to achieve a pre-determined goal. This makes the law and practice of independent administrative agencies 'constitutional' in the sense that agency legitimacy cannot be entirely derivative of the generally constituted branches of government. To the extent that such agencies are independent, we must go back to first principles justifying the exercise of public authority.

For present purposes, these foundational values can be kept very brief. As I have suggested elsewhere (Halberstam 2009), we can discern three primary values of constitutional authority, which can be captured in the ideas of 'voice', 'expertise', and 'rights'. Very roughly, the first and last can be seen as corresponding to what Benjamin Constant referred to as the liberty of the ancients and the liberty of the moderns (Constant 1988, Holmes 1984). What I am calling voice, then, is, roughly, the idea of participation in governance decisions that affect one's life. What I am calling 'rights' is the protection of certain substantive interests we deem to be fundamental against majoritarian decisionmaking. Going beyond Constant, however, these may be rights against government or private interference and also rights to certain basic forms of government protection. Constitutionalism serves these two basic forms of liberty by, on the one hand, creating and vindicating the expression of political voice and, on the other, defining and protecting individual rights. In addition to serving these two classically recognized values of liberalism, however, constitutionalism also serves a seemingly more mundane value: expertise. As Fritz Scharpf, for example, has suggested, the legitimacy of public power also depends on the 'output' of governance (1999), which we can take here to mean governance that responds with effective action to our shared knowledge and experience of the world.

Important for present purposes is that no single branch of government holds a monopoly on the vindication of any one of these values. The traditional separation of powers according to Montesquieu would have us equate voice with the parliament, expertise with the executive, and rights with the judiciary. Although there may be some truth to such an association as a prima-facie matter, each branch ultimately can lay claim to vindicating any one or more of these three values. As I have suggested elsewhere, the parliament can vindicate rights, much as the courts can vindicate voice, and the executive can lay claim to vindicating any one or all of these values as well (Halberstam 2009).

On this view, independent agencies may (and, in one way or another, must) draw on these foundational principles of legitimacy as well. To be sure, administrative agencies, including independent agencies, derive a good deal of legitimacy from the generally constituted branches within whose sphere of influence and supervision they operate. And yet, the extent to which they are indeed independent demands a commensurate justification in the primary values of constitutionalism. It would be all too easy to equate (independent) administrative agencies with expertise-based governance or as a simple aid or resource for the generally constituted branches of government. The ways in which (independent) administrative agencies tap into the values of constitutionalism is more complicated – and more interesting – than that.

3. (Independent) agencies as constitutional reaction

The thesis I want to explore briefly is that the various approaches to what is generically termed 'administrative law' often reflect the anxieties and preconceptions within each system about constitutional authority itself. To be sure, certain qualities of

administrative law and the creation of independent agencies across various jurisdictions may to some extent reflect convergence in the machinery of governance and in the policies of market regulation across systems. And, as in all matters of governance, the emergence of certain institutional features may, in part, simply be the product of ad hoc political deals. But the creation of administrative agencies and of independent administrative agencies, in particular, can also be seen in a different light: as compensation for the perceived shortcomings of the generally constituted branches of government. Indeed, at times, the comparative investigation of the role of administrative agencies within the structure of governance may reveal less about the objective role of such agencies in governance generally and more about the specific institutional dynamics and constitutional worries of the system in which such agencies operate. In particular, a comparative investigation can reveal the rather different hopes and fears in the various systems about constitutionalism and, hence, about the substantive balance and institutional vindication of voice, expertise, and rights.

First, take the United States, where a generally pluralist view prevails of politics as horse-trading and bargaining without much need for reasoned justification. On the most cynical view, reasoned deliberation is only a mask for interest group politics anyway. And so, the basic rule is to let the most powerful political actors win (as long as fundamental rights and certain basics of 'procedural' fairness are observed). We see this attitude in many places, but perhaps nowhere is it confirmed more authoritatively than in the deferential judicial stance in reviewing general economic legislation for conformity with the US Constitution. As a general rule, Congress's burden of justification for a piece of ordinary economic legislation is minimal.[4]

Accordingly, we turn to administrative agencies in the United States principally for two reasons. First, we use administrative agencies, as do all other systems, simply for help in addressing the immense magnitude of getting the job of governance done. The law as passed by a legislature is rarely ever self-executing and therefore inevitably raises questions about how to organize the machinery of implementation (Mashaw 2006). In this vein, the expanded functions of the state, especially since the mid to late 19th century, have almost universally led to the felt need for growth in the machinery of governance. But we have turned to 'independent' agencies in the United States also with a second goal in mind: to inject expertise, professionalism, and bi-partisanship into a system of governance that is otherwise (perceived as being) dominated by the politics of the winning party. Although the roots of this idea reach further back as well (Mashaw 2008), the broad move toward professionalism in the general federal bureaucracy was institutionalized with the creation of the Civil Service Commission that formally put an end to the system of political patronage in federal employment.[5] The creation of the independent Interstate Commerce Commission, the Federal Trade Commission and others soon followed further to shield many regulatory decisions from the immediate influence of the affected industries as well as party politics (Cushman 1941: 668).

By shifting large amounts of norm-generation to the administrative process – and to independent agencies in particular – the hope in the United States may be to escape from

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[4] See, for example, *FCC v. Beach Communications, Inc.*, 508 US 307 (1993).

[5] Civil Service Act (Pendleton Act), 22 Stat. 403 (1883).

the rough and tumble of the largely unfettered politics that are constitutionally allowed to prevail elsewhere in the system. As the 'administrative process theory' of regulation puts it, 'administrative growth [is] a welcome shift of regulatory responsibility away from legislators and towards decisionmakers who are better situated to pursue general interests and thus advance social welfare' (Croley 2008: 72).

One important component of this move away from ordinary politics is that administrative action – and the exercise of administrative discretion – is generally subject to a far greater burden of justification as compared to legislation. For example, legislation is not subject to a general 'giving reasons' requirement in the United States, but administrative rulemaking, in effect, is (Shapiro 2002). Due to the widespread availability of judicial review of agency action, agencies take many of their decisions – even in the area of general economic regulation – under the shadow of review in court for their reasonableness (Miles and Sunstein 2008). Add to this the fact that the independent Commissions are headed by bi-partisan committees, and we have the (sometimes naïve) hope that we are overcoming politics as usual.[6]

With this in mind, the move to independent agencies takes on special significance in a presidential system of governance, in which the legislature's trust of the executive is not a necessary element of the executive's claim to power but a contingent fact at best. In a presidential system, a legislature convinced by the need for more expert governance will not want to leave important questions of regulation to 'the politicians in the executive departments' (Cushman 1941: 669). In this sense, independent agencies are not radically different from executive branch agencies in the American institutional constellation, but they can be seen as the paradigmatic attempt to restore the role of expertise in an institutional environment perceived as being otherwise dominated by the unfettered expression of voice.

Notice, however, what else happens in the United States. The shift of regulation from Congress to (independent) administrative agencies raises skepticism about the objectivity of expertise and concern about the detachment of bureaucratic decisionmaking from the direct influence of voice (Frug 1983). Accordingly, the legitimacy of the American (independent) administrative structure is not grounded solely in judicial review, the professional expertise of bureaucrats, or the limited scope of Executive and Congressional branch oversight. Instead, democratic forces are systematically brought back into the administrative process itself, albeit in a manner that hopes to blunt the force of concentrated well-heeled interest groups (Croley 2008: 134–9). By insisting, in many contexts, on transparency and notice and comment rulemaking, and by numerous other avenues of formal and informal participation, the administrative process is structured to stand in part on its own grounding in voice.

The picture changes as we turn to Germany. A rather prominent theme in German constitutional theory is the idea that the *Grundgesetz* prescribes the grand substantive outlines of administrative law as well as the general objects and goals of the administrative state. In comparison with the United States and France, this has led to a 'relatively strong constitutionalization of German administrative law' in terms of both substance

[6] Scholars have grappled with the problem that even independent agencies cannot be fully shielded from White House politics (Barron 2008).

and procedure (Möllers 2008: 8, cf. Oeter 1998: 167–8). To be sure, these constitutional objectives provide only weak guidance and would rarely suffice for, say, an immediate judicial determination of a particular substantive regulatory measure. And yet, within the German constitutional tradition, ordinary legislation as well as administrative regulations must conform rather closely to constitutional prescriptions.

The judiciary plays a large role in this. As a general matter, judicial review of economic intervention is far stricter in Germany than in the United States (Eberle 2008, Baer 1999, Currie 1989). Consider, for example, the decision in *Finanzausgleich I* (Fiscal Equalization I), in which the German *Bundesverfassungsgericht* (Federal Constitutional Court) put forth an elaborate set of principles replete with specific rules regarding seaport charges to examine the constitutionality of the federal program of fiscal equalization.[7] Even beyond the specific scheme of fiscal equalization enshrined in Article 107 of the *Grundgesetz*, the *Bundesverfassungsgericht* will review ordinary market regulation far more closely than would the US Supreme Court. The general equality clause of Article 3, para. 1, of the *Grundgesetz*, for instance, is considered to apply far more broadly than its Fourteenth Amendment equivalent does in the United States. To be sure, the *Bundesverfassungsgericht* also applies different levels of scrutiny to different situations – ranging from a weak 'evidence review' and 'defensibility review' to the most stringent 'unconstrained review'. And yet even the most minimal of these is more searching than an American-style 'rational basis' review. As David Currie noted long ago, 'whatever formulation is employed, review under the general equality provision is never as toothless as it has become in economic cases in the United States' (369). Similarly, the right to exercise one's profession plays a greater role in Germany than it does in the United States, not least because in Germany that right is specifically enshrined in Article 12 of the *Grundgesetz*. In the United States, by contrast, such a right has been at most implicit in the idea of constitutional protection of liberty and equality and has been virtually nonexistent since the New Deal.[8]

The upshot is that the German *Grundgesetz* is generally taken to provide firmer substantive guidelines than the US Constitution for both the legislature and the executive. And the German Federal Constitutional Court polices these guidelines rather stringently – more strictly than the US Supreme Court does with regard to American constitutional analogues. One might therefore speculate that in Germany there is less of a felt need to remove matters from the rough and tumble of political horse-trading because politics and government action writ large are seen as more closely guided by constitutional principles in the first place.

Two additional important features cut against the trend to formally independent agencies in Germany. First, Germany's parliamentary system and constitutionally grounded executive cabinet ensure a necessary political connection between the broad governing majority (often a coalition) in parliament and the collectivity of ministers in the executive branch. This creates – as a structural constitutional matter – a greater degree of trust in

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[7] 72 BVerfGE 330, 408–17 (1986)

[8] Compare, for example, 7 BVerfGE 377 (1958) (the Pharmacy Decision) with *Williamson v. Lee Optical Co*., 348 US 483 (1955). Even with the relaxation of judicial review under Article 12 GG since the Pharmacy Decision, Article 12 GG continues to play an important role in German constitutional adjudication. See, for example, BVerfGE 98, 365 (1998).

Germany than exists in the United States between the lawmakers and their potentially rival 'politicians' in the executive branch. Second, Germany's system of executive federalism, whereby a vast amount of administration is delegated to the constituent states (*Länder*) already creates a pervasive 'independence' of administration from the great battles of national majority politics. *Länder* agencies are beholden, if at all, to a plurality of political majorities at the constituent state level that may differ from one another and from the political majority at the federal level. In this way, executive federalism can sometimes ensure a certain independence of administration more reliably than even a system of formally independent federal agencies run by a handful of commissioners appointed by the chief executive.

All this means that there may well be very specific and quite narrow functional reasons for the creation of formally 'independent' agencies in banking and journalism and maybe even in reviewing market competition (Masing 2008a). But as a more general matter, there are few calls for independent administrative agencies in Germany to serve as a sober counterpoint to raw politics. It comes as no surprise, then, that the creation of the most recent – and perhaps most extensive – independent agency, the Federal Network Agency, was not simply an indigenous development but was shaped considerably by the European Union (for example, Bulla 2007: 377–9). As public law scholar and German *Bundesverfassungsgericht* Judge Johannes Masing notes, with regard to the bulk of economic regulation, there is little question in Germany that complete executive control provides the proper means to implement 'objectified guidelines' (2008b: 4), as well as 'legislative norms following clear criteria,' subject, of course, to 'judicial . . . review' (6). As Masing further notes, 'for traditional government tasks, the traditional subjection of administration to executive branch control remains undisputed to this day' (5).

As for France, the constitutional framework governing the various institutions initially seems rather opposed to the existence of independent regulatory agencies. Unlike the US Constitution or the German *Grundgesetz*, the French Constitution expressly provides the executive branch with the power to issue regulations. The Fifth Republic's great compromise, reflected in Articles 34 and 37 of the French Constitution, formally grants the executive branch the residual power to issue regulatory decrees in all matters not expressly defined elsewhere under the constitution as 'law(s)'. This places extra-parliamentary norm generation on firmer constitutional footing than exists in either Germany or the United States. At the same time, along with the further provision in Article 20 that the Government 'disposes over the administration' ('*dispose de l'administration*') and Article 21 that the Prime Minister shall 'exercise the power to make regulations' ('*exerce le pouvoir réglementaire*'), the French Constitution would seem to lend support to the argument for strict executive branch control of all regulation.

And yet, the *Conseil d'Etat* and *Conseil Constitutionnel* have had little difficulty making space within the French constitutional constellation for the activities of independent administrative agencies. Administrative and constitutional jurisprudence have cut back on the executive's independent constitutional warrant of 'autonomous' regulatory power. In so doing, the two tribunals have largely turned to a more traditional understanding of executive regulation as a power to implement legislative commands (Favoreu 1987, Lindseth 2004). The power of independent administrative agencies is thus understood as subsidiary to both parliament and the executive. And we ultimately find here, as we do elsewhere, resort to the familiar trope that administrative agencies

are not 'autonomous' regulators at all, but merely in the business of 'applying' the law (*Conseil d'Etat* 2001: 295).

More interesting, however, are the French justifications for turning to independent agencies. France created its first independent administrative agency, formally designated as such, not in an effort to improve the regulation of market actors but in response to a public outcry over civil liberties and the protection of privacy. From 1971 to 1974, the French government ran a program known by its acronym SAFARI,[9] which sought to collect and consolidate information about French citizens from a variety of sources into a central database. After *Le Monde* exposed this venture (Boucher 1974), the Minister for the Interior, Jacques Chirac, canceled the project. Soon thereafter, the parliament established the *Commission nationale de l'informatique et des libertés* (CNIL) (National Commission for Informatics and Liberties). On the insistence of the French Senate, the law expressly designated the new agency an 'autorité administrative indépendante' (Frayssinet 1992: 7–8). But the CNIL did not remain an isolated case. Instead, it began a trend of turning to independent agencies in matters pertaining to civil liberties.[10] At times this use of independent agencies as protectors of individual liberties has even come to serve as the paradigm against which the turn to administrative agencies is examined more broadly.[11]

Perhaps unsurprisingly, the birth of this particular use of independent agencies came at a time when constitutional rights review in France was still in its infancy and fundamental rights protection in the French constitutional system had become a centerpiece of political debate (cf. Sweet 1992: 66–9). To be sure, moving matters outside the executive hierarchy carried dangers of its own in terms of lack of accountability and the protection of rights. At the same time, by placing these decisions with an 'independent' administrative agency, such a move triggered heightened judicial review via the administrative review tribunals (for example, in terms of demanding transparency and a statement of reasons) as compared with that imposed on actors located within the bastion of France's strong executive (Sabourin 1983).

A second reason for the French move toward independent agencies is deeply connected to the substantive politics of market regulation. The French government shifted rather dramatically in the 1980s from a *dirigiste* approach and a strong belief in the virtues of nationalization to the modern European mainstream of a liberal market economy. As one scholar puts it, this was nothing short of a 'vast movement of disengagement of the state from the economy' (Lombard 2006: 2). After briefly trying to address France's

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[9] For 'système automatisé pour les fichiers administratifs et répertoire des individus' ('automated system for administrative files and the directory of individuals').

[10] Another prominent example is the creation of the National Commission on the Control of Security Interceptions or CNCIS, which controls the authorization of national security wiretaps and which was created after the European Court of Human Rights, in *Kruslin v.France*, Judgment 24 April 1990, Series A No. 176-A , condemned France's lack of systematic wiretapping safeguards (cf. *Conseil d'Etat* 2001: 275).

[11] For example, Professor Martine Lombard opens her general introduction to an edited volume on economic regulation and democracy by invoking independent agencies' unquestioned legitimacy in the protection of liberties and by suggesting that the central question is whether independent agencies in the economic sector raise similar or different issues from those protecting individual liberties (Lombard 2006: 1).

economic difficulties in the more traditional French centralist style, François Mitterand, the first socialist President to be elected in France, changed course in 1983 toward denationalization and deregulation. But two constituencies needed to be sold on this shift: investors and voters.

The French government needed to gain credibility, especially with international investors, that the more liberal approach to market regulation was here to stay. The European Union, which might be seen as a rather complicated 'independent agency' of sorts, surely served as part of that pre-commitment strategy. The creation of domestic independent agencies helped signal a commitment to this new approach as well. Putting these two trends together, the creation of domestic independent agencies was often the only way in which France, which had not entirely divested itself of certain functions in energy, telecommunications, and postal services, could follow the open competition policies that were now 'imposed' by the European Union (*Conseil d'Etat* 2001: 272–5).

As far as French voters were concerned, the new market approach had become a matter of French elite consensus. After Mitterand's conversion in 1983, the socialists repeatedly signed on to the new strategy, thereby largely taking this issue out of electoral contention. Perhaps because of this fact or perhaps because the move to a more liberal approach to market regulation did not fully cure France's economic ills, the major parties soon withdrew from any forceful defense of these policies. Extensive periods of co-habitation may also have contributed to this evasion of responsibility. In any event, the government – whether of left or right – increasingly presented the new French approach as an objectively necessary response to the demands of globalization or even as the necessary price for France's membership of the European Union (Hall 2006). A move toward independent agencies as a rather convenient political fix (cf. Tushnet 1999: 1286) seems to fit with this rhetoric of depoliticization as well.

In addition to the reasons behind the French move toward independent agencies, it is also worth highlighting the high degree of comfort in France with this move away from voice and toward the vindication of rights and expertise through independent agencies. Whereas turning to experts proved to be in tension with American sensibilities about democratic voice, France has not yet seen a similar infusion of participatory democracy in the agency context. To be sure, individual scholars have for some time argued in favor of democratizing France's administrative state (for example, Lemasurier 1980). And transparency has gradually improved over what it once was (Lasserre et al. 1987: 187–204). And yet, in France one still searches in vain for a basic requirement to notify the general public or to take, and respond to, comments from the general public in the process of crafting an administrative regulation.

Administrative procedure (apart from that applicable to judicial review of administrative action) has not been codified in a comprehensive manner. To the extent procedural requirements exist, they derive from judicial pronouncements or from the organic or substantive laws governing the various administrative agencies. And what we frequently find here is not a broad invitation to democratic participation, but a requirement to hear an individually affected party before taking an adverse decision, the requirement to consult specific agencies or specific previously identified stakeholders, and the requirement to perform scientific or empirical studies in advance of administrative action (Bermann and Picard 2008: 90–92). Even after France's push for 'administrative democracy' over the past thirty years, and even after the introduction of the constitutional idea

of decentralization and the local referendum in 2003 (Philippe 2004), the participatory element in shaping regulatory proposals in France is rather thin. As far as broad forms of public participation in regulatory policy formation (as they exist in the United States, for example) are concerned, French law 'has not yet integrated such practices to any significant level' (Auby 2006: 25).

4. Some (unconventional) lessons from the comparison

There are not only important continuities, but also striking – and neglected – discontinuities in the various experiences with administrative agencies in the United States, Germany, and France. The relative convergence in economic policies toward market regulation and market competition in all three systems indeed suggests certain potential commonalities in the means of maintaining, or bringing about, a liberal market economy. In this sense, the increased move toward independent agencies in Europe in recent years may well reflect a certain transatlantic institutional rapprochement, which scholars have begun to explore with good reason.

But the various constitutional dynamics, histories and (perceived) pathologies nevertheless cast this turn to independent agencies in a distinctly national light. Most important from this perspective are the distinct inter-institutional dynamics resulting from constitutional structure, that is separation of powers, federalism, and judicial review. Whereas in the United States and France, the legislature faces an independently politicized executive branch, Germany's *Bundestag* does not. And whereas Germany maintains a constitutionally guaranteed system of executive federalism, we still find (despite recent reforms in France and the longstanding tradition of cooperative federalism in the United States) the constitutionally embedded centralization of political control over national executive functions in France and the United States. To be sure, political parties and bureaucratic structures mediate among the branches and between the levels of government. And yet, when it comes to administering national laws and policies, the legislatures in the United States and France confront a powerful and independently politicized executive in the way that Germany's legislature does not.

Consider in this regard also the different traditions of judicial review. Juxtaposed against a tradition of relatively constrained constitutional review in France, we find the availability of constitutional review in the United States for fundamental rights violations but not for the reasonableness of economic legislation, and a tradition of rather pervasive judicial review in Germany. Considering the various national traditions of separation of powers, federalism, and judicial review, then, we can see how the perception of constitutional pathology in the various systems and the inter-institutional dynamics track prominent features of constitutional design. It should no longer come as a surprise that (1) France and the United States would react to their constitutional structure by turning away from executive branch hierarchy toward independent agencies in the search for expertise to a greater degree than Germany and that (2) in France, more so than in the other two systems, a prominent element in the move toward administrative agencies would also be a concern about the protection of rights.

Second, consider the opposite political starting points of France and the United States in terms of their fundamental approach to regulation and the political dynamics in moving toward regulation. Whereas in the United States (independent) administrative agencies were largely deployed as a way to improve the effectiveness of government

regulation, in France turning to independent administrative agencies constituted a significant retreat of the state. The French move toward independent agencies as a means of enlisting the support of the public for a new politics of elite consensus is therefore relatively absent in the United States. Accordingly, it may in some sense be true that the United States and France can be seen as converging on a more shared approach to market regulation in which independent administrative agencies serve similar functions with regard to the market. And yet, the political significance attributed to those agencies in the course of justifying regulation to the public differs greatly in the two systems.

Finally, within the administrative process itself we seem to find the relative insistence on voice in the United States juxtaposed against the apparent emphasis on vindicating expertise and rights in France. As compared to the United States, we find in Germany, too, a stronger emphasis on expertise over that of voice when comparing, for instance, high court judgments upholding bureaucratic authority to issue regulatory norms (Möllers 2005: 175). Here, again, then, it is quite possible that the different degrees of public participation in the administrative process may reflect not different stages in some general evolution of universally applicable principles of good administrative governance, but persistent differences in the various national preconceptions about politics, inter-institutional trust, and the vindication of constitutional values.

5. Conclusion

The language of 'administrative' law can at times be deeply misleading. It may suggest a certain principal/agent model that does not match the institutional role of those agencies that have a good measure of autonomy vis-à-vis the regularly constituted branches of government. But it would be mistaken to view such agencies as mere appendages or servants of parliament, the executive, or the judiciary. Instead, we must recognize them for what they are: partially autonomous institutions of public governance demanding independent justification within the constitutional constellation of which they form a part.

Once we consider the justifications for independent agencies in terms of the basic values of constitutionalism, we find important differences in the approaches to such agencies in the various systems. Indeed, as we compare the discussion about independent administrative agencies in one system with that in another, we do not simply find a common quest to address a common problem of effective rational governance of the market. To be sure, supranational and global pressures and various resulting legal obligations may at times push in the direction of adopting functionally similar (independent) administrative agencies in otherwise distinct legal systems. And yet, this focus on commonality ought not to obscure the profound difference in resonance that independent agencies have within these various systems.

On closer examination, we find in the discussion about independent administrative agencies specific hopes and fears about constitutional governance in the particular institutional constellation of each system. Administrative agencies help get the job of governance done. But administrative agencies – and independent agencies in particular – are often sought out to fix perceived problems in the constitutional architecture of the particular system in which they operate. And in the discussions in the United States, Germany, and France of independent agencies, we often find rather different conceptions of what these particular problems are.

In sum, we miss much if we understand the United States, Germany, and France as

simply struggling with a common functional problem of how best to create effective administrative agencies to implement the task of regulation in a liberal market economy. To fulfill the promise of comparative administrative law, we must go further. We must explore the many ways in which each system's struggle with independent agencies is a specific reaction to constitutional architecture, political history, and the basic hopes and fears about the vindication of constitutionalism itself.

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13 The puzzle of administrative independence and parliamentary democracy in the common law world: a Canadian perspective

*Lorne Sossin**

Independent administrative bodies do not fit easily into the political, constitutional or legal landscape of parliamentary democracy as it is practiced in many parts of the common law world (excluding, of course, the United States). These bodies are generally established to fulfill policy mandates but without the usual forms of hierarchical accountability to the government that prevailing conceptions of parliamentary democracy normally demand. Independent administrative bodies are not courts and not government but have significant impact on the rights and interests of both individuals and groups.[1] This hybrid status creates what I term the 'puzzle' of independence.

My focus here is on how this puzzle has manifested itself in the Canadian experience, where independent administrative bodies have risen to national prominence due to several high-profile and high-stakes crises. While these bodies have come to play an integral role in the lives of most people most of the time (in Canada, for example, a landlord tenant tribunal will typically hear far more disputes than all courts combined), we tend to pay attention to independent administrative bodies only in the breach, when there are doubts about their legitimacy, the scope of their reach or the effectiveness of their remedies.

Recent allegations in Canada of political interference by the federal government with the Canadian Military Complaints Commission and the Canadian Nuclear Safety Commission have brought these concerns, as well as the broader puzzle of independence, into stark relief. The recent allegations suggest that the independence of an administrative body may only be respected if the policy aims of the body do not conflict with the government's political priorities. But if such conflicts do in fact arise, however, Canadian governments have shown little hesitation in using the tools at their disposal to achieve their desired policy outcomes. To what extent and in what ways should a government in a parliamentary democracy be constrained from such interference? To what extent and through what mechanisms may the government legitimately seek to influence the direction, approach and decision-making of independent administrative bodies? Does

* This chapter builds on an earlier study (see Sossin 2008). I presented an earlier version of this chapter at the Workshop on Comparative Administrative Law, Yale University, May 2009, where I benefited from constructive and thought-provoking comments on my paper and a lively exploration of comparative administrative law more generally. Finally, I am grateful to Vasuda Sinha and Danny Saposnik for their excellent research assistance with this chapter.

[1] There is no obvious definition of 'independent administrative body'. In Canada, for example, the range of administrative bodies at both the federal and provincial/territorial level that could be fairly characterized as 'independent' would be vast. The term is used here to cover, at a minimum, executive bodies with an adjudicative mandate and bodies (both executive and legislative) with a mandate of oversight over executive decision-making (see generally Ratushny 1990).

independence enhance or limit the accountability of these administrative bodies? Should independence be seen as simply independence from the government or do these bodies similarly need independence from other potential sources of undue influence, from stakeholder groups to political parties, from the courts and Parliament? If these bodies are independent of everyone, to whom are they accountable and in what ways? These are the questions I seek to answer in this chapter.

I view these Canadian case studies in light not only of the law of administrative independence in Canada specifically but also of developments elsewhere in the common law world of parliamentary democracy. I focus in particular on analogous developments in the United Kingdom, Australia and New Zealand. These other common law parliamentary jurisdictions have avoided the kinds of problems that have arisen in Canada, I conclude, because political leadership in those countries has approached administrative justice and oversight systemically and has made clear, as a legislative and policy priority, that independent bodies have the ability to function in the public interest without political interference.

The analysis below is divided into two parts. Section I examines the two Canadian case studies alluded to above, in which allegations have surfaced of excessive political interference with the independence of administrative bodies: the cases of the Military Complaints Commission and the Canadian Nuclear Safety Commission. Section 2 then puts these recent disputes in a broader legal context and attempts to reconcile the status of independent administrative bodies in public law across the common law world where forms of parliamentary democracy prevail.

1. Two Canadian case studies: partisanship, politics, and independence

The greatest threat to the independence of tribunals in parliamentary systems, arguably, is partisanship. Partisanship in politics, of course, is nothing new, nor is it inherently detrimental to the democratic process; indeed it is the lifeblood of elections and parliamentary politics. Partisanship is of course alive and well in Canada, fuelled by minority governments at the federal level and the growing incivility of political life. What appears to be eroding, however, is a shared sense of boundaries of partisanship, as well as a shared respect for certain 'no-go zones' that need to be (at least relatively) non-partisan if democracy is to work. As then Chief Justice Lamer of the Supreme Court of Canada observed with respect to the non-partisan nature of the courts in the *Provincial Judges Remuneration Reference*,

> What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.[2]

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[2] [1997] 3 SCR 3, at para. 140.

While judicial independence is said to require 'depoliticization', courts have recognized that there is little they can do to compel governments to abide by this direction. If a government tries to subvert the impartiality and independence of the courts by appointing party hacks and fellow travelers to the bench, or by underfunding courts, there is little that courts can do to resist politicization, beyond relying on public outrage to constrain political action. Recent headlines from Pakistan to Zimbabwe demonstrate the futility of legal process and the rule of law in the absence of political buy-in (Sharpe 2010).

Although most would agree that democratic politics requires courts to be independent arbiters of social, economic and political disputes, recent events in Canadian politics raise the question of whether or not that same logic applies to bodies like the Canadian Military Complaints Commission or the Canadian Nuclear Safety Commission. Does the public care if the independence of these bodies is preserved? These bodies are expected to be impartial and objective and to act only to advance the legislative purposes for which they were created. Beyond this, where a government acting with a public mandate challenges the decision of an administrative body acting in the public interest, where does the public good lie? Unlike public servants, the members of these independent bodies owe no duty of loyalty to the government, but at the same time they are funded by taxpayers, and bound by a variety of governmental standards. These administrative bodies, as Chief Justice McLachlin put it in *Ocean Port*, 'span the constitutional divide between the judiciary and the executive'.[3]

While they may bridge the worlds of independent decision-making and government policy-making, the Court in *Ocean Port* was clear that administrative tribunals and executive agencies do not enjoy the constitutionally protected status of judicial independence. Unlike judges, who have security of tenure (until the age of 75), appointees to administrative bodies typically serve fixed terms as set out in their governing statutes. *Ocean Port* further stands for the proposition that such statutes may even provide for the appointment of adjudicators 'at pleasure'.

These questions go to the very heart of the Canadian concept of separations of powers. Under the conventional view, the legislature makes laws, the executive applies laws and the judiciary interprets laws. That conventional view, however, misconstrues the executive as a monolithic whole. The executive is more properly understood, at least in Canada, as a web of constitutionally mediated relationships (Sossin 2005). The relationship between the political executive, represented by the Cabinet, and the civil service, for example, is mediated by the constitutional convention of bureaucratic neutrality.[4] Independent administrative bodies are similarly in a complicated relationship, both with the political executive and sometimes also with the civil service. In this sense, independent administrative bodies are neither an integrated part of a single executive whole, nor do they constitute a headless fourth branch of government unaccountable to the executive.[5]

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[3] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781, at para. 32. As discussed below, while these bodies are viewed as part of the executive branch in Canada and Australia, they are part of the judicial framework in the UK. On the significance of *Ocean Port*, see Jacobs (2008).

[4] Ibid.

[5] As Katrina Wyman put it, 'The doctrine of tribunal independence is not concerned with establishing administrative tribunals as a fourth branch of government': (Wyman 2001: 100).

As the case studies below suggest, the very uncertainty of the status of these bodies means that there are no clear mechanisms for resolving disputes with the government when they arise (other than mutual posturing, dueling interviews in the media and threats of litigation). Independence, it turns out, works remarkably well in Canada . . . until it does not.

1.1. The case of the Canadian Nuclear Safety Commission

By far the most contentious and noteworthy incident of the Conservative Government's interference in the decision-making of an independent body occurred in January 2008 when Natural Resources Minister Gary Lunn removed Linda Keen as the head of the Canadian Nuclear Safety Commission (CNSC), Canada's nuclear safety watchdog. Lunn justified Keen's removal on the basis that she had lost the government's confidence over the way she handled the shutdown of the medical isotope-producing nuclear reactor in Chalk River, Ontario, owned and operated by Atomic Energy of Canada Limited, a Crown corporation, in December 2007 (CBC News 2008).

The CNSC ordered the reactor to close on November 18, 2007 over safety concerns about the emergency power system not being connected to cooling pumps, as required to prevent a meltdown during disasters such as earthquakes. The closure of the 50-year-old reactor, which generates two-thirds of the radio-isotopes used around the world in medical procedures and tests, resulted in a worldwide shortage of the crucial medical material.

In December 2007, the Government resolved the medical crisis by using the legitimate instrument always available to government to interfere with independent administrative agencies: Parliament. On December 11, 2007, an emergency measure passed through the House of Commons that ordered the reactor to be restarted for a 120-day run as of December 16.[6]

Keen was removed as President of the CNSC on January 15, 2008, the day before she was scheduled to appear before the House of Commons' Natural Resources Committee to offer her version of the events leading up to the shutdown of the reactor. Critics were quick to condemn the Minister's decision as a blatant political maneuver aimed at silencing a federal employee's criticism of a controversial Government decision. For example, Liberal Member of Parliament David McGuinty accused the Conservatives of 'U.S. Republican-style tactics' by having Keen removed in the 'dark of night', just hours before she was due to testify.[7]

Two weeks after her dismissal Keen proceeded to testify in front of the Committee, stating that the safety risks arising from restarting the nuclear reactor were 1000 times greater than permitted by accepted international standards. She added that while the decision to keep the facility closed may have precipitated a health crisis, such considerations were not the purview of a nuclear regulator to remedy. Keen insisted that public

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I have argued elsewhere that we ought to develop a distinct place for administrative justice in Canada's legal and constitutional system (Sossin 2009).

[6] Bill C-38, An Act to permit the resumption and continuation of the operation of the National Research Universal Reactor at Chalk River, 39th Parl., 2nd Session.

[7] Ibid.

safety was the only consideration the CNSC was legally allowed to consider vis-à-vis its decision to shut down the Chalk River reactor.

The committee, and the country, heard the government's contrary version of the applicable law loud and clear. Gary Lunn maintained that the extended shutdown of the reactor threatened a national and international health crisis. He characterized the issue as, literally, one of life and death: 'Had we not acted, people invariably would have died . . . We could not let that happen. We had to act, and we did' (CBC News 2008). Additionally, comments by Conservative members of the Natural Resources Committee attempted to establish that it was within Keen's mandate to consider the medical fallout of shutting down the reactor and therefore also isotope production. According to Conservative MP Brad Trost, Keen's mandate as President of the CNSC did 'not specifically exclude being concerned about cancer patients and their treatments'.

While Keen remained a CNSC commissioner following her termination as President of the CNSC (she subsequently resigned in September 2008), she challenged the Government's action in court. In April 2009, the Federal Court dismissed her claim, based largely on the *Ocean Port* argument, that the position of President of the CNSC is an 'at pleasure' appointment.[8] The politics of independence, however, is unlikely to be resolved by judicial fiat, no matter who may leave the last courtroom vindicated. While the Court addressed the issue of whether the Government had the *right* to dismiss Keen, it sidestepped the broader and deeper question of whether the Government was *right* to exercise this power, whether or not they possessed it. This case study, like the others, raises the scope of administrative law to shape and govern administrative independence.

There is no inconsistency between the independence of the CNSC and the government using Parliament to trump one of its regulatory decisions based on an overriding public concern (in this case, the shortage of medical isotopes). Because administrative agencies are created by statute, and can be eliminated by statute, it follows that the authors of a statute can also rewrite any of its decisions. Nevertheless, the separate decision to remove Keen in the middle of her second five-year term as President threatened the independence of the CNSC and the integrity of independent administrative agencies and quasi-judicial tribunals generally. The government's decision was not necessary to ensure a steady supply of medical isotopes. This appeared to be payback. Indeed, in a December 27 letter from Lunn to Keen (leaked to the *Ottawa Citizen*), the Minister indicated that he questioned Keen's judgment and was considering having her removed (Reuters 2008). Keen responded by accusing the Minister of improper interference and threatened litigation if she were removed. It was left to the Prime Minister, who noted that Keen was a 'Liberal appointee', to complete the task of political retribution (CBC News 2008). Following Keen's removal, an assistant deputy minister within the Ministry of Industry was named interim president (Natural Resources Canada 2008). While he may be eminently qualified for this role, the fact that the Government had chosen a civil servant who emerged from a culture of loyalty to the government is telling.

In my view, during the Chalk River dispute the legal and political system functioned as it should have, at least until the Minister took steps to terminate Ms. Keen as President for reaching a decision that the Minister did not like and did not believe was in the public

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[8] See *Keen v. Canada* (Attorney General) 2009 FC 353.

interest. In December, 2007, the regulatory body reached a decision it believed was appropriate in light of its expertise in the field of nuclear safety and the non-compliance of the Chalk River facility. The government stepped in to ensure its overriding public health concerns and the global shortage in medical isotopes were addressed by recalling Parliament and winning support for reopening the facility. Parliament's reopening of the facility was not political interference but rather an exercise in Parliamentary sovereignty. The Minister's subsequent attack on Ms. Keen had nothing to do with policy and everything to do with partisanship. The Minister removed Ms. Keen as President both because he wanted to and because he could do so with impunity.

Eventually the Federal Court dismissed Ms. Keen's claim against the Government. And yet, in a final, ironic twist, the Chalk River facility was once again shut down indefinitely in May of 2009 due to safety concerns (CBC News 2009). This time, the decision was not the CNSC's but the operational managers of the facility. Following this development, the Government indicated that perhaps it was time for Canada to move out of the field of medical isotopes altogether.

1.2. The case of the Military Police Complaints Commission

The Canadian Military Police Complaints Commission was created in the wake of a crisis in public confidence in the Canadian military following the torture and murder of a Somali teenager by Canadian soldiers during operations there in 1993. The case which gave rise to the recent controversy occurred in 2008, when the Government applied to the Federal Court for an injunction that would bar the Military Police Complaints Commission (MPCC) from holding public hearings into the allegation that Canada turned prisoners over to Afghan security forces knowing they would likely be tortured. In doing so, the Conservative Government demonstrated how it sought to influence independent administrative bodies not only through the media and the court of public opinion, but also through the Courts.

Established by Parliament in 1998 (partially in response to the aborted Somalia Inquiry into misdeeds by the Canadian military police stationed in Somalia), the role of the MPCC is to provide for greater public accountability by the military police and the chain of command in relation to military police conduct and investigations. The Commission was established as a quasi-judicial, independent civilian agency to examine complaints arising from either the conduct of military police members in the exercise of policing duties or functions, or from interference in or obstruction of their police investigations. To ensure the integrity of the MPCC, it operates outside the authority of the Department of National Defense and is staffed entirely by civilians who report through Parliament.

A joint complaint by Amnesty International Canada and the British Columbia Civil Liberties Association triggered the Afghanistan probe. The complaint alleged that members of the Canadian Forces military police transferred detainees to Afghan authorities, or allowed them to be transferred, notwithstanding evidence that such detainees may be tortured.[9] The MPCC began investigating the allegations in February 2007. At

[9] Decision into the Complaint filed by Amnesty International and the BC Civil Liberties Association, filed June 12, 2008 (File MPCC 2008-024 and File MPCC 2008 042).

that time the Chair reserved on the decision of whether or not to make the investigation public. On March 12, 2008, the Chair, Peter A. Tinsley, exercised his authority to order a public hearing into the complaints, on the grounds that it was necessary to ensure a full and proper investigation. Explaining his decision, Tinsley stated that '[t]he principal difficulty which has given rise to this decision has been the government's refusal to provide the Commission with full access to relevant documents and information' (MPCC News Release 2008a).

Weeks before the Commission was to begin its public hearing into the complaint, the Government raised a formal objection to the investigation. On April 11, 2008, the Government filed a notice of judicial review of the MPCC's decision to hold a hearing into the complaints. The Government alleges that the complaint 'is not a complaint about the conduct of a member of the military police in the performance of any of the "policing duties or functions", as that expression is defined by . . . the *National Defence Act*, and . . . the *Complaints About the Conduct of Members of the Military Police Regulations'*. That is, the government claims that military operational decisions, including detainee handling, are not subject to oversight through the military police complaints process (MPCC News Release 2008b).

On September 30, 2008, the decision of the MPCC in relation to the issue of its jurisdiction over the complaint regarding Afghan detainees was released. Tinsley found that the MPCC does have jurisdiction over the complaints, and ordered the hearing on the matter to proceed.[10] In October 2009, in the midst of the government challenges to the jurisdiction of the MPCC, the Government announced that it would not reappoint Peter Tinsley as Chair of the MPCC when his current term expired (Canadian Press 2009). The final report on the Afghan detainee proceedings could not be completed before the expiration of Tinsley's term in December 2009. Ironically, with the MPCC process suspended pending the outcome of litigation over disclosure issues, the government's dilemmas over the Afghan detainee issue only intensified. Richard Colvin, a Canadian diplomat who had served in Afghanistan, decided to testify before a special Parliamentary Committee investigating the Canadian mission in Afghanistan. Colvin testified that he had sent a number of reports on the detainees being subject to torture when handed over to Afghan authorities, which for months the military and political establishment had ignored (Colvin 2009). The resulting firestorm led first to Government denials that any detainee handed over by Canadians had ever been tortured, and then to admissions that this in fact had occurred (Chase and Clark 2009).

While there may be many reasons that the government has for its decision not to reappoint, the public perception is clearly that the decision signals disapproval of Tinsley's handling of the Afghan detainee matter, particularly when combined with the decision by the government to launch a series of motions in its proceeding with the MPCC which will have the effect of substantially delaying any final determination. As one observer noted: 'This raises a huge, huge systemic issue . . . Is it legal or constitutional to stymie legal and administrative tribunals in this way? Because if it can be done to this commission, it could be done in any administrative tribunal in this country and that calls into

[10] Decision into the Complaint filed by Amnesty International and the BC Civil Liberties Association, filed June 12, 2008 (File MPCC 2008-024 and File MPCC 2008 042).

question the fundamentals of administrative justice' (Chase and Clark 2009, quoting Errol Mendes, a University of Ottawa Law Professor).

While the Courts have not yet pronounced definitively on the scope of the MPCC's jurisdiction, the actions of the Canadian Government in challenging the authority of the MPCC highlight both the strength and the weakness of independence of administrative bodies in Canada. On the one hand, the Government has shown little restraint in challenging the attempt by the MPCC to hold its military accountable for actions taken in Afghanistan; on the other hand, the Government has pursued its challenge through legal channels, arguing that the MPCC lacks jurisdiction rather than attempting to undermine the credibility or impartiality of the MPCC, as occurred at the CNSC, and deciding not to reappoint the Chair of the Commission rather than sacking the Chair in the midst of an appointment.

While these two case studies differ in a number of respects, I suggest they are each symptomatic of a malaise in Canadian administrative justice. That malaise stems first from the ambivalence of Canadian governments, which seek the credibility and accountability that comes from establishing arm's-length adjudicative, regulatory and oversight bodies, but are not prepared to let bodies act in ways which might sabotage the Government's policy and partisan objectives. The second cause of that malaise, I argue, is Canadian administrative law's failure to articulate a systemic vision of administrative justice organized around ideals such as independence which could constrain political interference with tribunal decision-making. It is to the common law backdrop of administrative independence that I now turn.

2. The legal and political context of independence in the common law world

Before addressing these questions, it is necessary to resolve a broader one: what is meant by 'independence' in the context of administrative bodies? These bodies, after all, are created by a legislative act in order to further a policy end. As Chief Justice McLachlin of the Supreme Court of Canada memorably observed, writing for a unanimous court in *Ocean Port*, 'given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it'. In this sense, all administrative bodies are, by definition, dependent for their existence on their legislative mandate. Further, these bodies are not free to adopt the mandate they believe is most appropriate, but must discharge the responsibilities provided to them. These bodies do not choose the people best able to carry out this mandate; rather, the executive makes appointments to these bodies, and in doing so is bound by the criteria set out in the bodies' empowering statutes, and by whatever other criteria the government of the day deems appropriate. Lastly, these bodies do not control free-standing budgets to meet their needs, but rather must make do with the resources that the government of the day (or, in some cases, the legislature) provides.

Notwithstanding the significant ways in which these administrative bodies are dependent on government, they are nonetheless routinely declared by courts to be independent (or more murkily, quasi-independent) bodies, as a matter of law. As the case studies above demonstrate, however, the very idea of independence is under siege in Canada, casting doubt on the efficacy of these arm's-length administrative bodies, which have been delegated statutory authority to do things which would be ineffective or

inappropriate for government to do directly. For example, the MPCC would have little credibility as a complaints body if the government could shut down the complaints which it might deem politically troubling. The nuclear regulatory body would be ineffective if it were guided by political expediency rather than specialized expertise. In each of these administrative bodies, independence is not simply an institutional feature but one of its constitutive elements.

Independence also, of course, is political, and the issue of political interference with administrative bodies has at times been simply more fodder for Opposition attacks against the Government. The Liberal Party has been highly critical of the Government's actions in relation to Ms. Keen and Mr. Tinsley. However, no party that has governed has been immune to controversy regarding the limits of independence. The Liberals, for example, were chastised by the Federal Court when they were last in power for a politically charged termination of Jean Pelletier as Chair of Via Rail Canada Inc. at the height of the Sponsorship Affair, a scandal involving Mr. Pelletier, in 2004.[11]

Although the politics of independence is apparent, the law governing independent (or quasi-independent) administrative bodies is uncertain. Unlike its common law counterparts, Canadian administrative law hints at the nature and scope of independence rather than addressing it expressly. The point of departure for this jurisprudence, as indicated above, is the Supreme Court's decision in *Ocean Port*. There, the Court affirmed that administrative bodies are not subject to the protections of judicial independence as a matter of constitutional law.[12] Or, more accurately, those who are affected by the decisions of these administrative bodies do not have a constitutional right to an independent decision-maker, as the Courts have recognized that judicial independence is a right enjoyed by litigants, not adjudicators.[13] The issue in *Ocean Port*, however, was whether judicial independence applies in the context of administrative bodies. The test for whether the requirements of judicial independence are satisfied by a given dispute-resolution mechanism in Canada is closely related to the test for judicial impartiality – namely, would a reasonable person, who is informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically, conclude that the tribunal or court is independent.[14] The Supreme Court held that the common law principles of procedural fairness, which include a measure of independence for administrative bodies modeled on judicial

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[11] Pelletier had been accused of involvement in the forced resignation of the former Olympic athlete and Via Rail employee Miriam Bedard. A subsequent inquiry had determined that Pelletier had no involvement in Bedard's departure from Via Rail and that his dismissal was unlawful. See *Pelletier v. Canada* (*Attorney General*) 2008 FCA 1.

[12] An exception to the non-constitutional nature of the independence of administrative bodies is where an administrative body is deemed to be making a decision which engages rights under the Canadian Charter of Rights and Freedoms, Canada's constitutionally entrenched bill of rights. For example, where the Immigration and Refugee Board is determining whether a refugee should be deported, the affected party's section 7 rights are engaged and the requirement of independence is elevated to that of a constitutional right. For an application of this principle, see *Singh v. Canada*, [1985] 1 SCR 177.

[13] See *Mackin v. New Brunswick (Minister of Finance)* 2002 SCC 13.

[14] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, at 394 (De Grandpré J).

independence,[15] can be negated by a clearly worded statute and that this is what occurred in the context of appointees to the adjudicator at issue in *Ocean Port*.

The Supreme Court of Canada subsequently made a similar point in *Bell Canada v. Canadian Telephone Employees Assn.*[16] The Court confirmed that '[t]he fact that the Tribunal functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence from the executive branch'. But also that the independence of administrative bodies did not extend to immunity from direction from those bodies given delegated authority by Parliament. Specifically, the Court found that the Canadian Human Rights Tribunal could be bound by guidelines issued by the Canadian Human Rights Commission. Although the Commission was often a party of interest before the Tribunal, the Court found that the Commission's power to issue guidelines to the Tribunal was part of the scheme expressly established by Parliament for elaborating human rights law. In the course of this decision, the Court noted:

> A high degree of independence is also appropriate given the interests that are affected by proceedings before the Tribunal – such as the dignity interests of the complainant, the interest of the public in eradicating discrimination, and the reputation of the party that is alleged to have engaged in discriminatory practices.[17]

These cases, however, do not explore the issue of politically motivated interference with the decision-making of administrative bodies. Much of the appellate case law addressing political interference has concerned the issue of government attempts to remove or not reappoint members or leaders of independent administrative bodies. As in the Keen case, these disputes reflect the tension between the legitimate government direction for administrative tribunals on the one hand and illegitimate political interference on the other. They also reflect the willingness of Courts to intercede on behalf of preserving the integrity of independent administrative bodies.

Perhaps the most notorious example of this genre is *CUPE v. Ontario* (*Ministry of Labour*) (the '*Retired Judges*' case).[18] In the *Retired Judges* case, the Supreme Court of Canada quashed a provincial Labour Minister's politically charged appointment of retired judges to serve as chairs of hospital labour arbitration boards, but for significantly different reasons than the Ontario Court of Appeal. Whereas the Ontario Court of Appeal had viewed the case principally as one about independence (and concluded the retired judges, paid on a per-diem basis, lacked this independence), the Supreme Court viewed the case principally as one about the scope of ministerial discretion. The relevant legislation provided that, where the management and labour nominees to a board of arbitration cannot agree on the appointment of a Chair, then 'the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act'.[19] The Court held that 'qualified to act' in the labour relations context included

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[15] The application of judicial independence to administrative bodies was established in *Canadian Pacific v. Matsqui* (SCC 1995) per Lamer CJ.

[16] [2003] 1 SCR 884.

[17] Ibid., at para. 24.

[18] 2003 SCC 23.

[19] *Hospital Labour Disputes Arbitration Act*, RSO 1990, c. H.14, s. 6(5).

an implicit requirement that the arbitrators be mutually acceptable to labour and the employer. Because the minister had no basis to conclude that the retired judges he wished to appoint met this criterion, the majority of the Supreme Court held that the appointment of the retired judges was 'patently unreasonable'. For the Court, the credibility of the arbitration process trumped political expediency.

The high-water mark for a Canadian court asserting a conceptual framework for the independence of administrative tribunals was the British Columbia Supreme Court's decision in *McKenzie v. British Columbia* (*Minister for Public Safety and Solicitor General*). In *McKenzie*, the Court ruled that the rescinding of the reappointment of a member of a residential tenancy board violated the rule of law, part of Canada's unwritten constitution.[20] The Crown had conceded that the Government's conduct failed to adhere to the requirements of procedural fairness.[21]

Notwithstanding the judicial willingness to affirm the independence of administrative bodies in *McKenzie*, however, the chill created by the very public disputes in the MPCC and CNSC cases persists. Governments in Canada, whether federal or provincial, appear less constrained than ever to exert political influence over such bodies. For example, a dispute has arisen in Saskatchewan regarding the limits of politics in the appointment of that province's labour board, and whether a new government elected on a mandate of change may advance its policy agenda by changing the composition of key tribunals.[22] Conversely, threats to the independence of administrative bodies may also come from overly close relationships between the government and the administrative body. In Alberta, for example, that province's federation of labour has challenged the impartiality of that province's labour board because of its lack of independence from the government after it was learned that the Chair of the Board had been consulted in the development of controversial labour legislation which would have the effect of removing the right to strike from certain health sector workers.[23]

As the discussion above suggests, the law regarding the independence of administrative bodies in Canada remains unsettled. While the courts will protect a measure of independence from executive interference as an element of the duty of fairness, or review the reasonableness of substantive government decisions in areas such as appointments to adjudicative tribunals, the Supreme Court has also emphasized the

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[20] 2006 BCSC 1372.

[21] On appeal, the BC Court of Appeal noted that the statutory provision empowering arbitrators as part of the dispute resolution process for residential tenancy disputes meant that the appeal and the issues it raised were moot. See 2007 BCCA 507.

[22] Shortly after its electoral victory in March of 2008, the Saskatchewan Party Government announced that the chair and two vice-chairs of the board were to be fired and that a new Chair was being appointed. The Government also appointed a new chair of the Workers' Compensation Board. Speaking to reporters, the Minister responsible for labour and employment refused to say why the Saskatchewan Labour Relations Board (LRB) chair and vice-chairs had been fired beyond saying that a new government has a mandate to make changes. The shake-up at the board came just before the start of a legislative session that would see an overhaul of the province's labour laws and the likelihood of high-profile challenges before the labour board. While the Government has stated that its decisions were not 'political', the Saskatchewan Federation of Labour and other unions have launched a legal challenge (Wood 2008, Hall 2008).

[23] See *C.E.P., Local 707 v. Alberta* (Labour Relations Board) 2004 ABQB 63.

role of all administrative bodies, whatever their mandate, as fulfilling a policy objective expressed or implied through their empowering legislation. What is missing from this jurisprudence is any recognition of a *system* of administrative justice or regulatory oversight.

Although administrative justice has occasionally been the subject of study, most notably as part of the Administrative Justice initiative in British Columbia (Administrative Justice Office 2002), the issue of administrative independence has not received sustained political support. Below I explore briefly the systemic approach adopted in peer common law parliamentary jurisdictions such as the UK, Australia and New Zealand. In each case, a major legislative and policy initiative proceeded from a comprehensive review dedicated to systemic concerns with administrative justice generally. In these other countries, in other words, political leadership led to systemic reform which would appear to have the effect in those jurisdictions of insulating tribunals from political interference more effectively than in the Canadian context.

2.1. United Kingdom

Although independence in dispute resolution was recognized in tribunals in the UK as early as the 19th century (Stebbings 2006: 329), the issue first rose to political prominence over the course of the middle third of the twentieth century. The first instance was the 1932 Donoughmore Report, which focused on delegated legislation and judicial or quasi-judicial decision-making made by appointees of the Crown (*Report of the Committee on Ministers' Powers* 1932, Williams 1982). The report arose amid growing concerns regarding the power of government departments and a perception of increasing arbitrariness in executive decision-making (Williams 1982: 278–9). The second in-depth review of the system of administrative justice in England and Wales was the Franks Report of 1957 (Franks 1957). Although it entailed an extensive study of administrative tribunals, its focus was on the process of decision-making in tribunals and the values of openness, fairness, and impartiality. The Franks Committee arose in the aftermath of the Crichel Down Affair, a British political scandal that raised concerns regarding maladministration (Griffith 1955).

Ultimately, however, it was only in the Report of the Leggatt Review of Tribunals in 2001 that the independence of tribunals was finally brought into the limelight in a substantive way (Leggatt 2001, at para. 2.1). Part of the Leggatt Review mandate was to examine '[t]he administrative and practical arrangements for supporting those decision-making procedures that meet the requirements of the European Convention on Human Rights (ECHR) for independence and impartiality'. Thus, the terms of reference for the Leggatt Review itself established that the fate of tribunals in the UK would be tied to the administrative law of Europe. Article 6 of the ECHR states in part:

> (1). In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 6(1) provides that the tribunal must also be 'independent'. Independence requires that decision-making bodies be free to exercise their powers without interference from the state's executive or legislature or from the parties to the dispute. In the seminal case

of *Campbell and Fell*,[24] the European Court of Human Rights (ECtHR) sought to determine whether a prison's Board of Visitors, charged with supervising the administration of a prison and adjudicating prisoners' alleged violations of prison regulations, was independent. In determining whether a tribunal is independent, the ECtHR held that three criteria were relevant: the manner of appointment of the tribunal's members and their term of office, the existence of guarantees against outside pressure, and whether the tribunal presents an appearance of independence. In turning to the facts of the case, the Court observed that the fact that tribunal members are appointed by the executive does not deprive them of independence. The executive can even provide them with guidelines regarding the performance of their functions without imperiling their independence as long as they are not subject to instructions in their adjudicatory role. While the three-year term of members of the Board of Visitors in *Campbell and Fell* was relatively short, the Court made allowance for the fact that they were unpaid, and might refuse longer appointments.[25]

The fact that the executive may not remove judges during their term of office is generally a corollary of independence as it is understood within the meaning of Article 6(1) of the ECHR. Formal recognition in a statute or regulation that tribunal members are not removable is the strongest mark of independence. In the absence of formal guarantees of independence, such as security of tenure, the Court examines whether these guarantees are recognized in practice and whether other guarantees are present. A tribunal may still be regarded as independent provided its members are irremovable in practice.[26] In *Campbell and Fell*, the Board's independence was not threatened by the Home Secretary's power to require Board members to resign because, in practice, he could only exercise it in exceptional circumstances.

The presence of additional guarantees against outside pressure played a crucial role in the European Court's assessment of the independence of military tribunals in the United Kingdom. In *Morris v. United Kingdom*,[27] the permanent president of the Court Martial, appointed for a four-year term to serve on panels with an independent judge advocate and two serving officers, did not enjoy formal security of tenure. However, the European Court found that the permanent president's presence on the Court Martial did not call into question its independence for several reasons: permanent presidents had never been removed from office and thus enjoyed de facto security of tenure; officers accepted the position of permanent president as the last appointment of their careers, which meant that they could not be influenced by any reports and promotions concerns; and permanent presidents worked outside the chain of command.[28] In contrast to the permanent president of the Court Martial, serving officers were appointed on an ad hoc basis for individual proceedings. Relatively junior officers with no legal training, they remained

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[24] *Campbell and Fell v. UK* [1985] 7 EHRR 165 (ECtHR Appeal no. 7819/77; 7878/77) [hereinafter '*Campbell and Fell*'].

[25] *Campbell and Fell*, ibid., at 199, paras. 79–80. But see *Belilos v. Switzerland* (1988), 10 EHRR 466, where the European Court determined that a complainant before a police board could legitimately doubt the board's independence and organizational impartiality because it consisted of a single member, a municipal civil servant likely to return to other departmental duties.

[26] *Campbell and Fell*, ibid., at para. 80.

[27] (2002) 34 EHRR 52 [hereinafter *Morris*].

[28] *Morris*, ibid. at paras. 68–9.

subject to army discipline and reports and were not protected by statute from external army influence while hearing a case. Despite rules governing their selection, the requirement that they swear an oath promising impartiality, the right of the accused to object to any member of the Court Martial, the confidentiality of deliberations, and the rule that the most junior members expressed their view on verdict and sentence first, the Court found that there were insufficient safeguards against outside pressure being brought to bear on serving officers.[29] These officers were exposed to outside pressure that jeopardized their independence because they belonged to the army, which takes its orders from the executive, and more importantly because they were subject to military discipline and assessment reports that impacted on their careers.

The ECtHR revisited this decision in *Cooper v. United Kingdom*,[30] which dealt with the Royal Air Force Court Martial. Considering additional safeguards newly disclosed by the United Kingdom, the Court was satisfied the independence of the ordinary members of the Court Martial (equivalent to the serving officers in *Morris*) was sufficiently protected. The most important safeguard was the distribution by the Court Martial Administration Unit of training material to the members of the Court Martial. Briefing notes provided the ordinary members with a step-by-step guide to Court Martial procedures, their role in the proceedings and those of the Judge Advocate and Permanent President. Most importantly, the briefing notes underlined the importance of independent decision-making. As the Court described:

> [T]he . . . Briefing Notes fully instructed ordinary members of the need to function independently of outside or inappropriate influence or instruction and of the importance of this being seen to be done, providing practical and precise indications of how this could be achieved or undermined in a particular situation. The Court considers that these instructions served not only to bring home to the members the vital importance of independence but also to provide a significant impediment to any inappropriate pressure being brought to bear.[31]

Finally, the Court noted that court martial members were prohibited from disclosing any opinion expressed or vote cast during Court Martial proceedings, a fact which effectively prevented the ordinary officers' superiors from subjecting their performance to assessment reports.[32]

This European case law, drawn from disputes arising in the UK, thus framed the Leggatt Review's mandate on the values of independence, coherence, and accessibility. It was particularly responsive to a general sense that tribunals were not perceived as independent by making recommendations with respect to (a) the appointment process of tribunal members, (b) the role of government departments in providing administrative support and funding to tribunals tasked with reviewing those departments' decisions, and (c) institutional separation (Cane 2009: 109). The thrust of the report was that tribunals should be treated as courts are in terms of their independence. Thus, its recommendations included that the appointment process for tribunal members should be the same

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[29] Ibid., at para. 72.
[30] (2003) 39 EHRR 8.
[31] Ibid., at para. 124.
[32] Ibid., at para. 125. See also *Incal* v. *Turkey* (1998), 29 EHRR 449, at para. 68; *Çiraklar v. Turkey* (2001) 32 EHRR 23, at para. 39.

as for judges, that the array of tribunals be amalgamated into one general tribunal, and that the tribunal be integrated with the court system.

The response to the Leggatt Review's recommendations was a law reform initiative, leading to the Tribunals, Courts and Enforcement Act 2007,[33] which in effect judicialized tribunals in the UK. The Tribunals Act created a First-tier Tribunal and an Upper Tribunal, each divided into various chambers, into which most existing tribunal jurisdictions will be transferred over the course of 2009 and 2010. In addition, a Tribunals Service was created in 2006 as an executive agency of the Ministry of Justice and was mandated with establishing a unified administration for the tribunals system. Finally, the legally qualified members of tribunals were made into judges and other judicial office-holders were made into tribunal members.

2.2. Australia

In Australia, as in Canada, tribunals form part of the executive branch of government. As in Canada, the challenge in Australia is how to stake out meaningful independence when the oversight body is part of the structure of the government it is overseeing (Fleming 2009: 90).

Australia is a federation made up of a Commonwealth government and separate governments in Australia's states and territories. Government at the federal or Commonwealth level is characterized by a strict separation of powers, between the legislature, the executive and the judiciary, imposed by the Constitution, which is less prominent in the context of state governments. At the federal Commonwealth level, executive tribunals cannot exercise judicial power. The distinction leads to a simple, but very important, consequence for tribunals. Not being courts, tribunals cannot exercise the judicial power of the Commonwealth. Courts are bodies that can enforce their judgments and are made up of judges with tenure up to a retirement age imposed by the Constitution. Tribunals do not generally satisfy these tests. Judicial power is the power to determine disputes between parties, both public and private.

Australia's analogue to the UK's Franks study was the report published by the Kerr Committee in 1971 (Kerr 1971). The major features of the Australian system of administrative review derive largely from the Kerr Committee's recommendations (Administrative Review Council 1971: 4.9). These include (a) the framework for judicial review,[34] (b) the Administrative Appeals Tribunal (AAT), which provides independent merits review of administrative decisions,[35] (c) the Ombudsman, which investigates and resolves complaints about Government departments and agencies,[36] and (d) the Administrative Review Council (ARC), which advises the Australian Attorney General on strategic and operational matters relating to administrative law.[37] Unlike the Franks Report in the UK, however, the Kerr Committee took the view that complete independence of the administrative review system was not necessary (Kerr 1971, at para. 321).

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[33] (UK), 2007, c. 15 [Tribunals Act].

[34] As implemented through the Administrative Decisions (Judicial Review) *Act 1977* (Cth.).

[35] See the Administrative Appeals Tribunal Act 1975 (Cth.).

[36] See the Ombusdman Act 1976 (Cth.).

[37] While the ARC remains in existence, it has lost its secretariat and had its functional capacity reduced in recent years.

Thus, for example, it recommended that tribunal panels could include a member of the body whose decision was being reviewed (Kerr 1971, at para. 292).

Australia has taken a generally different approach to tribunal independence relative to the UK. In *Better Decisions*, a 1995 ARC review of Commonwealth merits review tribunals initiated at the behest of the Minister for Justice, the council stressed that tribunals are distinct from courts in both form and function (Administrative Review Council 1971: 4.2). While tribunals were acknowledged as engaging many of the same issues with respect to independence, such as the importance of ensuring that there is no perception – nor reality – of undue influence, the processes of guaranteeing that independence could reasonably differ. Thus, the independence of tribunal members would not require the salary and tenure protections that attach to the judiciary (Administrative Review Council 1971: 4.6). Similarly, the ARC was untroubled by performance monitoring with respect to the quality of reasoning or the timeliness of decision-making, and the involvement of the relevant minister in making appointments to the various specialist divisions.[38]

In line with its variegated approach to independence between tribunals and courts, the Australian system also applies different standards among tribunals. While the AAT enjoys strong independence protections, that is not necessarily the case for specialist tribunals. Peter Cane, in his definitive work on the topic, points to the fact that AAT members can be appointed for longer periods, the AAT operates at a greater distance from the executive, it has its own constitutive legislation, and is administered by the Attorney General rather than whomever the relevant minister happens to be (Cane 2009: 111). Cane finds these double standards puzzling, since a relaxed independence requirement does not naturally follow from a characterization of the tribunals' function as merits review (Cane 2009: 112). If they are meant to provide an external means of vindicating the concerns of individuals, rather than simply a mechanism for internal policy review, it seems unclear why the independence of their members should not always be protected vigorously.

While the Australian approach to the independence of tribunals has resulted in fewer of the CNSC/MPCC types of confrontation, Australia boasts cautionary tales of its own. For example, in December of 1996, the Refugee Review Tribunal held against the arguments of the now-Department of Immigration and Citizenship, and approved the claims of two women seeking asylum on the basis of a claim that their respective home governments had been unwilling or unable to prevent spousal abuse at the hands of their husbands (Legomsky 1998: 248–49). The Minister heading the department responded with public criticism of the tribunal members and later denied reappointment to 16 of 35 members who applied for reappointment in 1997. Arguably as a consequence of a threatening atmosphere, the set-aside rate of department decisions under review fell from around 17 per cent to 2.7 per cent (Legomsky 1998: 249–50).

While Australia locates its tribunals firmly in the executive sphere (as in Canada, but in contrast to the UK), tensions surrounding the independence of adjudicative tribunals appears rare. Is this purely a function of political buy-in from the governments of the day in Australia? The Kerr Report seemed to have set in motion legislative and policy change that reframed the government's approach to administrative tribunals. The Kerr

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[38] It did, however, object to monitoring review outcomes and performance-based pay.

Commission itself was a product of political leadership, and was a response to the perceived inadequacy of judicial review to provide oversight over the machinery of the regulatory state. This is precisely the kind of leadership, I would suggest, that Canada has lacked.

2.3. New Zealand

Developments in New Zealand's administrative tribunal system have largely tracked those in the UK. In 2004, New Zealand's Law Commission published *Delivering Justice for All*, the culmination of a three-stage inquiry into the structure, jurisdiction and processes of New Zealand's system of courts and tribunals. In the report, the commission recommended establishing a judicially led, independent and unified tribunal framework that would exist at the same level as a Primary Court (New Zealand Law Commission 2004: 284). It suggested that this would address concerns regarding standing, competence, authority, and independence.

As had been identified in Australia and the UK, New Zealand had an unnecessarily great diversity of tribunals, many of which were staffed by inexperienced tribunal members meeting infrequently and dependent on the resources of the departments whose decisions they were mandated to review. By rationalizing the roster of tribunals, the Law Commission hoped to build up a core of experienced tribunal members within a unified tribunal system (New Zealand Law Commission 2004: 284–5). This structure would be led by a judge and protected from outside interference by handing over responsibility for all tribunal administration to the Ministry of Justice. Appeals from the tribunal structure would go to an appellate panel and from there to a full bench of the High Court.

The Government of New Zealand presented a response to the Law Commissions report to the House of Representatives where it accepted the need to establish a unified tribunal framework administered by the Ministry of Justice (New Zealand Government 2004). While the government was unwilling to commit to sweeping changes in the administration and operation of tribunals without first developing a set of guidelines to assist in a transition, the factors it directed the Ministry of Justice to take into account were notable in their inclusion of independent decision-making. This process has resulted in the establishment of a Tribunal Reform Program, which released 'Tribunals in New Zealand: The Government's Preferred Approach to Reform Public Consultation Document' in July 2008 in order to seek agreement on the program's scope and direction (New Zealand Government 2008). Key components of the preferred approach include the implementation of a new legislative framework and the establishment of a unified Tribunals Service located within the courts structure, on the same level as a District Court, headed by a Principal Judge, and administered by the Ministry of Justice. Through judicial oversight, separation, and a neutral administration, the new tribunal structure would enjoy significant systemic and structural protections to its independence.

New Zealand's commitment to a systemic approach has not completely removed the specter of political interference from administrative tribunals. In January 2008, New Zealand's Energy Minister was 'in the firing line' following allegations that he had interfered with the decision of the Electricity Commission in order to speed up approvals of new transmission lines to Auckland (Fisher 2008). A residence group alleged bias on the part of the Minister and the matter proceeded to judicial review. In a High Court of New Zealand decision, Justice Wild reached the following conclusion:

> I reiterate that the common denominator in the interactions between the Government and the Commission was Government's concern about the process of assessing the Amended Proposal; not about its substance. The Ministers' anxiety about progress in finding a solution to the problem of supply of electricity to the North Island was apparent in both meetings between the Ministers and the Commission. That was justified: it would be they who were politically accountable should supply fail or be threatened. Accordingly, the Ministers spoke bluntly. But what they said was directed to the process of analysing the Amended Proposal, not about its merits. This is demonstrated by one of the more contentious comments made by Minister Parker to the Commission, recorded in handwritten notes he made for the meeting on 20 June 2006:
>
> > You should, in my opinion, be striving to consider the new proposal, when it arrives, as related to the Original Proposal. I have heard it said that it should be treated as a new proposal in terms that make me and my officials worry that unduly lengthy process will follow. If so, then I would find that surprising given that we already know that it will follow the same or similar lines and most other aspects will have the same or similar outcomes. . .
>
> I accept that a lay observer would interpret this as the Government putting pressure on the Commission not necessarily to protract its consideration of the Amended Proposal. I do not accept that the same observer would go the further step of interpreting this as indicating bias on the part of the Commission. Pressuring the Commission to expedite its process is not the same thing as pressuring the Commission to accept a particular outcome, leading to an apprehension of bias.[39]

This kind of case demonstrates that even progressive measures to protect and promote the independence of tribunals cannot shelter tribunals from the political storm.

What are the common themes linking Canada's peer common law jurisdictions? In my view, there are at least two that together explain why so many of our colleagues elsewhere, when told about the Canadian controversies discussed above, would assert 'that would never happen here!' I have alluded to each of these themes already. First, in the common law jurisdictions outside of Canada, governments have approached administrative justice as a system. Tribunals, for example, enjoy a certain minimum set of appointment standards, among other indicia of independence. Thus, appointments 'at pleasure', as in the CNSC case, likely would not be acceptable in other common law jurisdictions. The second and related trend in these jurisdictions is to treat administrative justice as a policy sphere, and one appropriate for independent review and recommendations, as in the case of the Leggatt Review or the New Zealand Law Commission's Report. In my view, Canada's dismal record of assuring the independence of tribunals may be explained, in part, by the absence of these dynamics.

Conclusions

The discussion above raises the broader question, in Canada and throughout the common law world where parliamentary democracy is practiced, of where the boundary between a government's legitimate policy objectives and the independence of an executive agency lies. One view of the recent disputes is that it is ultimately self-defeating for

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[39] See *New Energy Era Inc. v. The Electricity Commission*, HC WN CIV 2007-485-002774, 4 May 2009, at paras. 88–9.

government to attack independent agencies, or to attack the people appointed by government (or a former government) to run them. Partisanship begets more partisanship. The result is public cynicism, a corrosion of parliamentary democracy, and the undermining of the policy goals that motivated the establishment of independent agencies in the first place. As Gabriel Fleming has observed: 'The power to depart from government policy is central to a discussion of the independence of tribunals' (Fleming 2009). If governments want the longer-term benefits of a system of administrative justice, they must be prepared to live with the short-term costs.

The other view of the recent disputes in Canada is that the government used the power at its disposal to achieve its objectives, and this will embolden other governments to do the same. To the extent that the firing of Keen generated negative press or awkward moments during Question Period, this storm lasted only a few news cycles and may soon be forgotten. To the extent there is a negative court finding about the government's conduct, it occurs years later and often the government receiving the judgment is a different one from the government that made the decision. While legal guarantees of independence raises the political cost and risk of removal, governments appear willing to deal with the costs and risk to achieve their ends.

The recent confrontations show that there is little to compel Canadian governments to respect the independence of administrative agencies if they do not want to do so. These controversies reveal the hard but important truth about independence in administrative decision-making in a parliamentary democracy: while the rule of law and principles of fairness and impartiality may require independence, only political leadership can sustain it. Political leadership created independent agencies in order to ensure that important areas of the public interest (such as regulating nuclear power and overseeing military police activities) are served by people and institutions that are not caught up in partisan politics. As the experience of other common law jurisdictions makes clear, it takes political leadership and a systemic approach to administrative justice to safeguard the boundaries of partisanship and ensure that administrative bodies are free to operate without fear of political repercussions for decisions that do not accord with the policies of particular governments.

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14 Presidential dominance from a comparative perspective: the relationship between the executive branch and regulatory agencies in Brazil

*Mariana Mota Prado**

National legal systems appear increasingly similar, largely due to the wholesale transplantation of legal principles and institutional arrangements across national borders. However, although these transplanted institutions might initially look similar, considerable differences emerge as they operate in practice. By definition, transplanted institutions function within a different political system. Immersed in a new political environment, these institutions will not always mimic their counterparts in the country of origin. The effectiveness of transplanted laws, and, therefore, the institutions created by them, depends on their consistency with or their adaptation to the preexisting legal order in the receiving country (Berkowitz et al. 2003). For comparative law scholars, the different operation of original and transplanted institutions suggests that transplanted academic theories, based on the country of origin, cannot be uncritically applied to analyze these new institutions. To illustrate this, I shall discuss the case of regulatory agencies.

In the last two decades, independent agencies have become the primary means of regulating infrastructure industries worldwide (Gilardi 2008). This is especially true in Latin America (Jordana and Levi Faur 2005). The United States independent agency model served as a blueprint in most cases. Despite these institutional similarities, there is one important difference: Latin American agencies operate within presidential systems that differ significantly from the US system. For example, the Brazilian President is substantially more powerful vis-à-vis the Brazilian Congress than is the White House vis-à-vis the American Congress.

US literature uses the principal-agent framework to analyze regulatory agencies, showing that Congress is the principal. This became the prevailing view of regulatory agencies in the United States and is known as the 'theory of congressional dominance'. I use the same theoretical framework (principal-agent) to analyze Brazilian agencies and support my contention that they are controlled by the President (that is, the President is the principal). I do not attempt to explain why power has been delegated, but rather discuss the interaction between Brazilian regulatory agencies and political institutions once the decision to delegate has been made. I conclude that a 'theory of presidential dominance' is better suited to describing the interaction between the government and the

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regulatory agencies in Brazil. This conclusion raises the question of whether the 'theory of presidential dominance' might also be applicable to other countries. Brazil has one of the strongest presidencies in the world, and it could be an exception. The United States might be an exception at the other extreme. If this is true, the theories of congressional and presidential dominance might be special cases within the principal-agent approach.

In addition to engaging with the descriptive exercises proposed by the theories of congressional and presidential dominance (namely, which branch of the government exerts most control or influence over regulatory agencies), one could also ask the normative question: who *should* control regulatory agencies? In the United States, there is a heated debate about the constitutional legitimacy of the political control of agencies. 'The unitary executive' thesis suggests that, despite the fact that Congress created some agencies independent of the president, these agencies, nevertheless, should be under presidential control. In contrast, other US scholars argue that Congress can choose to delegate powers to the executive branch or to independent agencies. In contrast to the US, the Brazilian Constitution places the entire bureaucracy within the executive branch, under the control of the President. As a consequence, the normative legal-constitutional debate in Brazil is not focused on which branch of the government controls agencies, but is instead concerned with the level of presidential influence over agencies that is constitutionally legitimate.

The chapter proceeds as follows. The first section details the institutional reforms that took place in Brazil in the mid-1990s and indicates the most important institutional features of independent regulatory agencies. The second asks whether principal-agent theory helps us to understand the delegation of powers to independent regulatory agencies. The third demonstrates the application of the principal-agent framework in the US context, and spells out the 'theory of congressional dominance' as formulated by US scholars. The fourth section explores the uniqueness of presidential systems in Latin America, especially Brazil, and suggests that due to the peculiarities of these systems, the 'theory of congressional dominance' does not adequately capture the Brazilian reality. The fifth section asks whether the president *should* control regulatory agencies and assesses the legal-constitutional debates in Brazil and the US regarding presidential control of regulatory agencies.

1. Transplanting independent regulatory agencies (IRAs) to Brazil

Between 1996 and 2002, the Brazilian government established IRAs for electricity, telecommunications, oil and gas, transportation, and other infrastructure sectors.[1] Following the formulas advocated internationally (Smith 1997), Brazilian IRAs were designed to have fixed terms of office for commissioners, congressional approval of presidential nominations, and alternative sources of funds to ensure their financial autonomy.

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[1] In this period, nine regulatory agencies were established: Agência Nacional de Energia Elétrica (ANEEL – electricity); Agência Nacional do Petróleo (ANP – oil and gas); Agência Nacional de Telecomunicações (ANATEL – telecomunications); Agência Nacional de Vigilância Sanitária (ANVISA – sanitary vigilance/health inspectors); Agência Nacional de Saúde Suplementar (ANS – private health care services); Agência Nacional de Águas (ANA – water); Agência Nacional de Transportes Aquaviários (ANTAQ – water transportation); Agência Nacional de Transportes Terrestres (ANTT – ground transportation); Agência Nacional do Cinema (ANCINE – cinema).

These and other institutional features sought to guarantee that these agencies were not subordinated to any branch of government, thereby providing them with a high level of independence. Gesner Oliveira constructed an index to measure the independence of agencies, and he indicates that, at least formally, Brazil has one of the highest levels of independence in the world (Oliveira 2005, Machado et al. 2008).

Lack of removal power (neither the President nor any other executive official has the power to remove these agencies' commissioners at will once they are appointed)[2] is a central institutional guarantee of independence (Miller 1988, Morrison 1988). Many US IRAs protect commissioners against dismissal at will,[3] and Brazilian agencies also adopted this feature.[4] Collegial decisions, as well as staggered and predefined terms of office, are other institutional features that help to enhance agencies' independence. It is easier to influence one commissioner than it is to influence a commission that makes collegial decisions. It is even harder to influence a commission whose members have staggered terms of office because the current President is less likely to have appointed all of its members.

In addition, requiring senatorial approval of presidential nominees constrains the President's choices, giving the Senate veto power over nominations. Following the US design, almost all constitutive statutes in Brazil require this approval.[5] Brazilian IRAs also have alternative sources of funding that are separate from the executive's fiscal accounts. The same mechanism exists in the United States,[6] and was recommended to developing countries by international institutions such as the World Bank (Estache and Martimort 1999). Brazilian agencies' main sources of income are supervising fees and fines paid by regulated companies.[7] These funds are earmarked, meaning that the law forbids their use for purposes other than those related to the sectors in which these companies operate. The alternative funding mechanism has the potential to guarantee

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[2] Normally the expression used in statutes is removal only for 'cause', because the President lacks power to remove commissioners at will, though they can still be removed through an administrative or judicial process for misconduct. In Brazil, there are very few situations under which commissioners can be dismissed before the end of their terms of office. These are: resignation, judicial conviction, or conviction in a disciplinary administrative process. See, for example, Law No. 9,472 of 16 July 1997, art. 26 (provisions applicable to the telecommunications agency in Brazil).

[3] Examples include Federal Communications Commission (FCC), Federal Maritime Commission (FMC), National Labor Relations Board (NLRB), Nuclear Regulatory Commission (NRC), Federal Energy Regulatory Commission (FERC) and Securities and Exchange Commission (SEC) (Breyer et al.1999: 101).

[4] Law No. 9986 of 18 July 2000, art. 9. From 1997 to 2000, the President could remove the Electricity Agencies' (ANEEL) commissioners at will in the first four months of their terms of office. Since 2000, however, this practice is no longer authorized as Law 9,986/00 unified the regulation of removal power in many agencies, including ANEEL.

[5] See Law No. 9,472 of 16 July 1997, art. 23 (ANATEL); Law No. 9,427 of 26 December 1996, art. 5 (sole paragraph (ANEEL)); Law No. 9,478 of 6 August 1997, art. 11, § 2 (ANP); Law No. 9,961 of 29 January 2000, art. 6 (sole paragraph (ANS)); Law No. 9,782 of 26 January 1999, art. 10 (sole paragraph (ANVISA)); Law No. 10,233 of 5 June 2001, art. 53, § 1 (ANTAQ and ANTT); Brazil Provisory Measure No. 2,228-1 of 2001, art. 8, § 1 (ANCINE). The only exception is ANA.

[6] In the United States, for instance, some agencies have alternative sources of funds, which come from fees paid by the regulated industry.

[7] See, for example, Law No. 9,472 of 16 June 1997, art. 47 (ANATEL); Law No. 9,427 of 26 December 1996, arts. 11–13 (ANEEL).

independence if the amount collected is sufficient to cover all of the agency's operational costs.

All aspects of the Brazilian IRA's design described above were inspired by the experience of the country with the longest tradition of independent regulators in the world: the United States. Not only has the United States had IRAs for a long time, but US scholars have also produced a vast academic literature on the topic, which will be analyzed briefly below.

2. Understanding delegation: the principal-agent framework

Delegation is often analyzed using the principal-agent framework, under which one entity (the principal) delegates its authority to another entity (the agent). Delegation normally happens when it benefits the principal. For instance, the agent might be able to perform a certain function better than the principal due to specialized knowledge. But there are costs as well: the principal may not be able to perfectly control the agent to ensure that it acts in the principal's best interest. The delegation decision ends up being, therefore, a complicated cost-benefit analysis: the principal needs to make sure it will enjoy the benefits of delegation, while limiting the costs. If the costs outweigh the benefits, delegation should not take place.

The creation of regulatory agencies is interpreted as an act of delegation,[8] and therefore can be analyzed under the principal-agent framework. The justification of delegation is that specialized regulators are better equipped to govern certain sectors of the economy than elected politicians. But although politicians may be willing to delegate their powers, they also want to create mechanisms of control to ensure that regulatory outcomes are aligned with their interests. Under the principal-agent framework, it would be irrational for a principal to delegate powers completely and permanently, given the risks of uncertain or unwanted outcomes. In addition to the costs associated with delegation, the principal-agent framework also shows that there are benefits. Indeed, according to this framework, politicians may decide to delegate powers to independent regulatory agencies because it could solve at least two problems: credible commitment and political uncertainty.

Broadly speaking, delegation to independent regulatory agencies is one solution to the problem of credible commitment. The agent guarantees to third parties that the principal will not be able to modify its promises *ex post*. The establishment of independent regulatory agencies might provide a higher level of security to investors, increasing the levels of investment. Thus, this concern provides compelling explanation of why delegation takes place. But the credible commitment approach does not explain why regulatory agencies are not completely independent, or at least as independent as courts. In this regard, the principal-agent framework can illuminate the complex cost-benefit analysis involved in obtaining the benefits of credible commitment, while keeping control over relevant

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[8] Delegation, for the purposes of this chapter, can be defined as 'an authoritative decision . . . that transfers policy making authority away from established representative organs (those that are directly elected, or are managed directly by elected politicians) to [governmental entities that possess and exercise some grant of specialized public authority, separate from that of other institutions, but are neither directly elected by the people, nor directly managed by officials]' (Thatcher and Sweet 2002).

public policies. Hence, the principal-agent theory shows that while credible commitment is a plausible hypothesis for creating independent regulatory agencies, this hypothesis does not account for the costs of delegation (that is, the risk of having regulation misaligned with the principal's interests), and the measures that the principal takes to reduce them.

The second reason is political uncertainty. The concern here is to tie up the hands of future majorities, who could be tempted to change the programs and policies of the current majority (Gilardi 2002, 2005). This is especially salient in contexts in which there could be a conflict of interest between regulatory activity and any remaining stakes that the government has in state-owned companies.

However, outside the United States, many authors claim that the principal-agent framework is not useful for explaining the creation of independent regulatory agencies (Majone 2001; Gilardi 2001) or other types of delegation, such as delegation to constitutional courts (Sweet 2002). Instead, in the specific case of IRAs, two international factors seem to have played an important role: deeper economic integration (Majone 1997) and policy diffusion across countries. Many countries adopted reforms because similar reforms were adopted earlier in neighboring countries (Jordana and Levi-Faur 2004).

It remains unclear, however, why IRAs were created in Brazil. We do know that they were created by the President and are strongly influenced by him, despite having institutional guarantees of independence (Prado 2008a). Some suggest that credible commitment could explain the creation of IRAs in Brazil (Mueller 2001). However, it is hard to reconcile the credible commitment hypothesis with the strong presidential control over agencies in Brazil. This presidential control suggests that other factors, such as policy diffusion, may have played a role in the Brazilian case. The reason for the creation of IRAs in Brazil requires further research, but given that IRAs exist, the principal-agent framework is a much better tool for analyzing the consequences of delegation than the credible commitment approach (Gilardi 2001). It can illuminate what instruments of control are available to the Brazilian President, and how they are used to influence independent agencies. I turn to that issue next.

3. The American case: the theory of congressional dominance

Following the principal-agent framework, scholars argue that in the United States the principal for IRAs is Congress. It delegates power and subsequently seeks to control the agencies. Under the assumption that delegation will only take place if the principal can guarantee that the agent will protect its interests, Congress will only delegate its powers if it is able to control the agencies.[9] This idea, that Congress controls its spawn, especially regulatory agencies, is labeled the theory of congressional dominance (TCD).[10]

According to TCD, there are basically two ways in which Congress exercises control over regulatory agencies: *ex post* oversight, and statutory provisions that establish

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[9] I am oversimplifying the cost-benefit analysis involved in the delegation decision. For a more complete account, see Thatcher and Sweet (2002).

[10] TCD is far from being a cohesive body of work. There are a number of different scholars who present different claims to support the idea that Congress controls agencies. All these different versions are grouped under one single label – theory of congressional dominance – for the purposes of this chapter.

ex ante agency structures and processes (Bawn 1997). Regarding *ex post* oversight, Congress can sanction agencies because it controls appointments, budgets, and the legislative agenda. As a result of these potential sanctions, Congress controls the agenda of the agencies after delegating power to them, and is able to influence bureaucratic behavior (Moe 1987a). More specifically, by participating in the appointment process, Congress can screen candidates in order to reduce the risk of approving a bureaucrat whose incentives are insufficiently aligned with congressional preferences. Congress can also reduce or increase the budget of one particular agency from year to year depending on the implemented policies. Finally, it can threaten to amend the law if the agency adopts policies that are not aligned with congressional preferences; Congress can enact legislation modifying personnel, programs, and the structure of the agency itself. Because bureaucrats care about these issues, the threat of change keeps them acting in line with congressional preferences.

Oversight does not imply a constant and close monitoring of every single step of the agencies' decision-making process. Instead, the threats are supposed to keep agencies 'on track' so that Congress needs to intervene only when there is something seriously wrong. To know when there is a problem, Congress uses 'fire alarm mechanisms' that, as the name suggests, 'go off' whenever there are indications that things are seriously amiss (McCubbins and Schwartz 1984).

Another way in which Congress controls agencies is through mandated administrative procedures. These differ from oversight mechanisms because they impose control *ex ante*. In this case, Congress uses administrative procedures in order to control policy outcomes more closely (McCubbins et al. 1987, 1989). For example, administrative procedures can serve as instruments of political control by enfranchising one set of constituents and increasing the likelihood that bureaucrats will favor them in the decision-making process. The Administrative Procedure Act (APA) has been interpreted as a Congressional attempt to influence the decision-making process of regulatory agencies because it reduced administrative discretion, increased transaction costs involved in changing policies, and granted the courts power to interpret agency statutes, limiting the ability of new appointees to announce new interpretations of statutes (McCubbins et al. 1999).

Despite being an influential theory, TCD is not uncontroversial. Against the idea that there are mechanisms of congressional control over the bureaucracy, scholars argue that the *ex post* oversight mechanisms provide limited control over bureaucracy (Moe 1987a) and that administrative procedures are not mechanisms of *ex ante* political control, but instead serve other purposes such as fairness and accountability (Mashaw 1990). Others criticize the theory for its lack of empirical support, and show that in some instances the conclusions of TCD are unwarranted (Moe 1987a, Balla 1998). Some regard the principal-agent framework as an unnecessary oversimplification of the political process (West 1995) and argue that the American administrative process is an arena for competition between President and Congress (West and Cooper 1989: 581). More recently, political scientists have emphasized that the American President is much more powerful than the constitutional text indicates, and this is reinforced by the increasing use of Executive Orders (Mayer 2000, 2002, Howell 2003). Other studies document the growing presidential influence over regulatory agencies in the US concerning procedural and

substantive matters (Kagan 2001, Pildes and Sunstein 1995, Lessig and Sunstein 1994).[11] As Steven Croley puts it 'among the most important developments in administrative law over the past two decades – indeed among developments in domestic policymaking generally – efforts by recent presidents to exert greater control over regulatory agencies rank near the very top' (Croley 2003: 821).

These criticisms and the increased use of Executive Orders show that we should avoid a simplistic use of TCD in the United States. In spite of these caveats, however, the theory continues to be influential in efforts to understand the relationship between political entities and regulatory agencies. In the next section, I use the same framework (principal-agent) to analyze the Brazilian scenario. The purpose of this analysis is to ascertain whether TCD could be fruitfully used to analyze regulatory agencies in Brazil. As we shall see, the answer is 'no'. If I am correct, this is a significant finding, since TCD has been (or was, until recently) one the most influential institutional theories in US scholarship on regulatory agencies.[12] Thus, my analysis complements critical work on the US case by showing that TCD also has limited applicability in another national context.

4. The Brazilian case: a theory of presidential dominance

If political entities respond to incentives, and if these incentives are primarily governed by institutional structure, one could posit that the theory of congressional dominance would apply to any country with a presidential system. Separation of powers, however, does not produce the same incentives for the creation of agencies, let alone lead to the replication of the dynamic of power and control that we observe in the United States (Epstein and O'Halloran 1999: 240). This will happen only when the political system is very similar to the US system, which is rarely the case. Thus, even for those who assume that institutions matter, it is not necessarily the case that all presidential systems will generate congressional dominance over regulatory agencies. One needs to take a closer look at the institutional differences between systems before drawing any conclusions.

The presidential systems in Latin America illustrate these institutional differences. The US system started off with a relatively weak President and with policymaking power centered in the legislature (Epstein and O'Halloran 1999: 241). In contrast, in Latin America, many presidential systems derived directly from autocracies, and legislative policymaking was never firmly established (Epstein and O'Halloran 1999). In addition to historical differences, structural features also diverge significantly. The constitutional powers of Latin American Presidents, which include executive decrees with force of law, significantly shape the relationship between the legislative and the executive branches (Mainwaring and Shugart 1997: 13–14, Carey and Shugart 1998). Thus, in order to understand the relationship between regulatory agencies and political branches in Latin

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[11] See Rose-Ackerman (2007) for a collection of the main articles, a review of the available empirical evidence, and a useful summary of this literature.

[12] Terry Moe shows that in the last 15 years the most influential theory of bureaucratic behavior has been the capture theory, formulated by Stigler and Peltzman in the 1970s. Unlike TCD, however, the capture theory omits institutions from the model. The implicit assumption is that institutions do not matter. If we adopt the opposite assumption, as I do here, TCD is the most influential theory (Moe 1987a: 475).

America, it is necessary to understand the allocation of powers within these political systems.

The relationship between different branches of government and the allocation of power is particularly interesting in the Brazilian case because for a time it was a puzzle for political scientists. The 1988 Constitution granted the President strong proactive and reactive powers, which include legislative decree powers and veto power that cannot be easily overridden by Congress. Indeed, the 1988 Brazilian Constitution was ranked as granting the second most legislative powers to the President, among 43 constitutions (Shugart and Carey 1992: 155). Political scientists assumed that this system's fate was deadlock and breakdown because the President would have very few incentives to negotiate with Congress (Shugart and Carey 1992: 148).

In addition, Brazil had a fragmented party system, and there was a lack of party discipline. Critics assumed that the President was unlikely to have a majority in Congress and that the lack of discipline would make it very difficult to obtain support even if he or she had a majority. As a result, the President would not likely be able to implement major reforms. To overcome the lack of congressional support, the President would have to use his or her legislative powers which would cause conflict with Congress. As a result, paralysis and crisis would prevail. In sum, many commentators viewed the system created in 1988 as nothing but hopeless (Sartori 1997: 95–6, 190–93).

The actual performance of the system, however, proved these predictions wrong. Since 1988 Brazilian presidents have successfully enacted their legislative agendas. Presidents introduced 86 per cent of the bills enacted since 1988 and the rate of approval of the bills introduced by the executive was 78 per cent (Limongi 2005). In addition, Presidents have used their executive decree power extensively. Ultimately, the system has permitted major and sweeping constitutional and legislative reforms.

The predictions of deadlock and paralysis were mistaken for two reasons. First, they overlooked the President's ability to build coalitions, as in parliamentary systems (Abranches 1988: 5). Second, even those who recognized the possibility of coalitions regarded them as loose and unreliable due to the lack of party discipline and loyalty (Mainwaring 1997: 74). However, the organization of Congress, which is highly centralized, and the degree of control of the executive over the legislative agenda create a higher degree of party discipline than initially expected (Figueiredo and Limongi 2000). As a result,

> [Brazilian] Presidents have formed coalitions to govern, and have been able to reliably obtain the support of the parties that belong to the government coalition in approving its legislation: the average discipline of the presidential coalition, defined as the act of voting in accordance with the public recommendation of the government leader in the floor, was 85.6%. (Limongi 2005: 47)

This analysis shows that there are radical differences in structure and functioning between the US and Brazilian presidential systems. It follows, then, that US and Brazilian independent agencies were created in very different contexts (Limongi 2005: 48). Specifically, in the Brazilian presidential system, there is very little room for viable alternatives to executive policymaking. As a consequence, the TCD does not explain how and why policymaking powers were delegated to independent regulatory agencies in Brazil (Epstein and O'Halloran 1999: 241).

In contrast to the United States, agencies in Brazil were a presidential initiative (Pacheco 2003). The executive branch drafted the bills for independent regulatory agencies and submitted them for congressional approval (Prado 2008a: 443–7). The constitutional features of the Brazilian political system also show that most of the control mechanisms that support the TCD are actually allocated to the President. As mentioned earlier, the TCD is largely based on three types of mechanisms of *ex post* control that Congress exercises over agencies: budget, appointments, and new legislation. Each of these is analyzed in more detail below.

4.1. Budgetary control[13]

Brazilian agencies have alternative sources of funding, which are not part of the executive fiscal accounts. Like all the expenditures made by bodies of the executive branch, however, the use of these funds has to be previously authorized by federal budgetary appropriations. As a consequence, the entity that controls these appropriations can influence agencies' policy choices. According to the TCD, in the United States, Congress has the power of the purse (Carpenter 1996). In contrast, the Brazilian President has substantial control over the budget due to his or her power to interfere significantly in the federal appropriations process. One of the most important features in securing presidential dominance is the President's exclusive power to prepare a budget proposal. Independent agencies' budgets are incorporated into the presidential budget that is sent for congressional approval. The preparation of this proposal is the first moment at which the President can influence the appropriations process and hence the agencies' budgets.

In addition, in Brazil, congressional influence over the appropriations process is limited by constitutional and statutory provisions that allow for significant presidential control over the final outcome of the bill approved by Congress. First, the presidential proposal will be used as law if the Congressional statute is not enacted in a timely fashion. Second, the President may veto some of the provisions in the final statute approved by Congress (Figueiredo and Limongi 2002: 303). These unique constitutional provisions put Brazil among the five countries granting the most budgetary power to the President (Mainwaring 1997: 64).

Finally, the President can modify congressional appropriations (or the parts available to the agencies) after their enactment during the budget implementation phase, at his or her own discretion.[14] These reductions are made through presidential decrees,[15] which are unilateral acts of the President not subject to any Congressional control. In Brazil, there is no guarantee that the resources appropriated by Congress and allocated to the agency will necessarily reach the agency in question. In contrast, in the United States, the presidential power to impose delays or to cancel budget resources (that is, impound funds) is subject to congressional control. Indeed, the Congressional Budget and Control

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[13] The analysis presented here was developed in greater detail in Prado (2008a: 490–96).

[14] The budgetary appropriations statute (LOA) defines only the maximum expenditures the President and the Executive branch are authorized to make in a particular fiscal year. Thus, the President cannot surpass the limit approved by Congress (except if the Congress authorizes him to do so).

[15] In Portuguese, these decrees are called *Decretos de Execução Orçamentária*.

Act of 1974 regulates impoundments and establishes procedures that do not allow the American President to abrogate the intention of Congress.

In sum, the Brazilian President controls, determines, or administers the amount of funds the agencies will, in fact, receive, and he or she can significantly affect the financial autonomy of those agencies. These powers might operate as an incentive for agencies to adopt his or her preferences because they raise the threat of budgetary reduction.

All these powers have been used to the detriment of the agencies. In 2003, for instance, the 202 million *reais* requested by the electricity regulator (ANEEL) were reduced to 162 million by a presidential proposal that was later approved by Congress (Abdo 2003). In the same year, ANEEL had its appropriations reduced by 50 per cent in the execution phase: the 162 million *reais* approved by the Congressional budgetary appropriations statute (LOA) were reduced to 70 million by presidential decree.[16] A similar reduction happened in 2002, again by presidential decree.[17] Like ANEEL, the telecommunications agency (ANATEL) also had its budget reduced by the President in 2001, 2002, and 2003,[18] the most recent reduction being 25 per cent. In 2005, six infrastructure agencies received only 16 per cent of their appropriations for that year (Vargas 2003, Pereira 2006).

These reductions show that the President can decrease the amounts allocated to the IRAs by Congress to the amounts originally proposed by the President or even lower. Although the President cannot increase agency budgets once Congress has approved them, the executive branch also has a strong influence in the approval process, as explained earlier (Prado 2008a: 490–96). However, there is no conclusive evidence that the President used his power in these instances to control regulatory outcomes for opportunistic reasons. Indeed, as I have explained elsewhere, the reductions could be explained by other hypotheses, such as macroeconomic concerns and consumer protection (Prado 2008a). This raises a number of questions as to whether or not such control is desirable, which will be addressed in Section 5 below.

4.2. Control over appointments[19]

Most independent regulatory agencies require congressional approval of presidential nominations. This veto power allows Congress to control who is appointed, and therefore, it can function as a mechanism to avoid the appointment of those who will not further congressional interests. Congress will authorize appointments only when the interests of the officials proposed align with congressional political preferences. Some regard this as one of the most effective means of congressional influence over regulatory agencies (Weingast and Moran 1983). Terry Moe (1987a: 489), however, challenges that

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[16] In May 2003, an additional amount of 12 million was added to the 70 million, adding up to 82 million for 2003 (Abdo 2003, stating that in 2002, the 174 millions *reais* approved by the LOA were reduced to 145 million *reais* by a presidential decree and only 137 million were effectively transferred to ANEEL.).

[17] Decree No. 4,120 of 7 February 2002; Decree No. 4,591 of 10 February 2003 and 4,708 of 28 May 2003 (Brazil).

[18] Decree No. 3,746 of 6 February 200l; Decree No. 3,878 of 25 July 2001; Decree No. 4,031 of 23 November 2001; Decree No. 4,120 of 7 February 2002; Decree No. 4,591 of 10 February 2003. Directive No. 301 of 2001 and 333 of 2001 (Brazil).

[19] The analysis presented here was developed in greater detail in Prado (2008a: 470–82).

claim by pointing out that the President retains the power to submit appointees' names to Congress in the first instance.

Even if we assume, however, that this veto power generates some congressional influence over agencies, it is curious to observe that in Brazil the Senate rarely rejects nominees. There have only been two vetoes of presidential nominations by the Senate, for two commissioners of the oil and gas agency (ANP), in 2003 and 2005 (Monteiro 2003, *Folha de São Paulo* 2003, *O Estado de São Paulo* 2005). In the case of ANATEL, senatorial approval of presidential nominations has been almost unanimous (*Folha de São Paulo* 1997, 2004). This lack of rejections can be interpreted in at least two ways: (i) the President controls nominations, and the Senate is not able to oppose appointees on ideological grounds (Moe 1987b: 251); or (ii) the President is forced to anticipate the Senate's preferences in order to avoid vetoes (Nixon 2004). It is difficult to say which of these two hypotheses better explains the Brazilian case, but there are at least two facts that support the first hypothesis.[20] First, President Lula was able to obtain senatorial approval for a number of political appointees, many of them members of the President's Workers' Party.[21] Second, the two vetoes exercised by Congress were not due to the political affiliation, policy preferences, or personal qualifications of the candidates. Instead, the vetoes were ascribed to personal revenge,[22] and political retaliation.[23]

In addition, the Brazilian President is not constrained by any partisan balance requirement common in US independent agencies. All appointees can be affiliated to the same party.[24] Exploiting the lack of a partisan balance requirement, President Cardoso distributed the seats in the Brazilian agencies among the parties in his political coalition. During the Cardoso administration (1995–2002), two parties nominated all the commissioners for ANATEL and ANEEL.[25] The appointments were used as bargaining chips for political support and coalition building in Congress.[26] So, it seems safe to say that the President controls the appointment process in Brazil.

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[20] For facts that could support the opposite hypothesis, see Prado (2008a: 480).

[21] Three of Lula's appointees were politicians defeated in the 2002 elections. In 2003, Lula appointed Haroldo Lima, a former representative of the Communist Party in Congress to the oil and gas agency (ANP). In 2005, José Airton Cirilo, a member of the Worker's Party, was appointed director of the ground transportation agency (ANTT). Also in 2005, José Machado, himself a member of the Workers' Party, was nominated as director of the water agency (ANA), after being defeated in the reelection campaign for mayor of the city of Piracicaba in the state of São Paulo (Leitão 2005, Domingos 2005).

[22] In the first case, the nominee had led an investigation into corruption against one of the parties with a majority in Congress, and the veto (articulated by the leader of this party in Congress) was regarded as revenge for it (Monteiro 2003).

[23] The second veto was seen as retaliation against the Lula administration for refusing to give an important position in the state bureaucracy to one of the parties in the governmental coalition (that is, it was not related to the appointee himself) (*O Estado de São Paulo* 2005).

[24] Some US agencies require that no more than three out of a total of five commissioners belong to the same political party.

[25] The parties were *Partido da Social Democracia Brasileira* (PSDB) and *Partido da Frente Liberal* (PFL). Cardoso granted four out of five seats in ANATEL to PSDB and all seats in ANEEL to PFL (Costa and Figueiró 1997).

[26] This could explain the right rate of senatorial approval of presidential nominations. However, it is not completely clear whether Lula had been using this strategy at all in his

4.3. New legislation

According to TCD, Congress can influence agencies by threatening to approve new legislation. Congress might change personnel, the agency structure, its jurisdiction, or its programs, and the threat of imposing these changes might give agencies an incentive to favor congressional preferences.

In the Brazilian case, however, the President controls the legislative agenda in many ways. First, the President's veto power is not easily overridden by Congress: the party fragmentation in Congress makes it difficult for opposition parties to assemble the required majority to override a veto (Mainwaring 1997: 61). Second, the President has the exclusive right to initiate legislation pertaining to the agencies, such as increasing salaries or creating jobs in the public sector and organizing and structuring public administration; indeed, everything relating to budgetary matters (1988 Brazilian Constitution, art. 61). Thus, presidential initiatives can modify all the matters that directly affect regulatory agencies. In this regard, the Brazilian case is in a category of its own: very few constitutions grant Presidents such sweeping powers to initiate legislation (Mainwaring 1997: 62).

In addition to the veto power and the exclusive power to initiate legislation in certain areas, the Brazilian President can legislate by enacting provisional measures (*medidas provisórias*), which are executive decrees with force of law.[27] Admittedly, there are some formal legal obstacles to the President's ability to limit regulatory agencies' independence by provisional measures (1988 Brazilian Constitution, art. 246; Supreme Court Decision STFJ No. 1,819 of 1999 (ADI 2.005-6)). However, even if there are legal obstacles that do not allow for these executive decrees to be freely used, the government can still change the structure of the agencies by proposing legislation to Congress. As mentioned before, the rate of congressional approval of presidential legislation is particularly high in Brazil.

One episode illustrates the use of such presidential threats against the agencies (Prado 2006). In February 2003, President Lula and other governmental leaders asserted that the agencies' level of independence was problematic. In March 2003, the Brazilian President appointed a commission to discuss a legislative proposal to change the structure of the agencies (Bragon and Medina 2003, *Agência Estado* 2003). After the creation of this commission, the government issued public statements proposing reforms that would limit the regulatory agencies' level of independence from the executive branch (*Folha de São Paulo*, March 24 and May 22, 2003).

During the debate over the independence of regulatory agencies, the President

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administration. By not having a majority in the Senate, it seems harder for Lula than for Cardoso to use these positions as bargaining chips (Santana 2006).

[27] Both President Fernando Henrique Cardoso (1995–2002) and Lula (2003–10) issued many provisional measures that modified the legislation applicable to the electricity sector. Fernando Henrique Cardoso used provisional measures to regulate the electricity sector during the energy crisis in 2001, to create insurance against blackouts (a fee paid by consumers in their electricity bills), to install a Brazilian retailer for emergency electricity, and to create a wholesale market. The provisional measures include the following: No. 1,819 of 31 March 1999; No. 2,141 of 23 March 2001; No. 2,152 of 1 June 2001; No. 2,198 of 27 July 2001; No. 2,209 of 29 August 2001. Lula used the same instrument to modify the rules of commercialization of energy and to create the Company for Research on Energy. See Law No. 10,848 of 15 March 2004; Law No. 10,847 of 15 March 2004.

also began a public debate with the telecommunications and electricity agencies over increases in telecommunications and electricity tariffs, which these agencies regulated. Lula's administration advocated tariff increases for both energy and telecommunications that differed from the agencies' proposals. More specifically, the government's proposals did not follow the strict formulas established by the previous administration in statutes, regulations, and contracts. In the case of electricity tariffs, the agency adopted the government's proposal, but the telecommunications agency did not.[28]

The fact that these two episodes – the bill to restructure the agencies and the battle over tariff increases – happened at the same time suggests that the former could have been a strategy to influence the agencies. Between March and September 2003, the agencies were conducting a negotiation regarding tariff increases under the constant threat of having the restructuring bill sent to Congress and enacted into law. After the agencies made their final decisions regarding tariffs, the threats and complaints publicly addressed to agencies by important governmental officials became less frequent and less intense (Alencar 2003). There are reasons to believe that the regulatory agency for the electricity sector reacted to the threat that at any moment the legislative and regulatory powers of the President could be used to change the structure of the agencies and reduce their independence (Goldman 2003). One possible explanation for the telecommunications agency's ability to resist pressure is that the government itself was divided over the issue: the Minister of Telecommunications wanted to reduce the increase, but the Minister of Finance fiercely opposed the proposal (Prado 2006).

Although the President is powerful vis-à-vis the legislature and the IRAs, Brazilian federalism may constrain the power of the executive branch by adding veto players in the politics of policy reforms (Tsebelis 1995, 2002). Does federalism allow states to constrain the legislative powers of the President? On the one hand, some scholars claim that Brazil is a 'robust federalism', where veto players are strong and significantly constrain the power of the federal executive (Samuels 2003, Samuels and Mainwaring 2004). On the other hand, others claim that the President's discretion to allocate state resources offsets the power of regional minorities and their influence in the legislative process (Armijo et al. 2006). Along the same lines, some argue that the veto players created by the federal system were strong but President Cardoso (1995–2002) managed to neutralize them (Stepan 2004, Almeida 2005). In sum, there are strong arguments to believe that the Brazilian federalist system does not impose severe constraints on the President. And even if robust federalism might offer some obstacles to the implementation of the President's legislative agenda, it does not necessarily offer any protection to IRAs. Even those who perceive Brazilian federalism as strong, also acknowledge that it is predatory (Samuels 2003). Its predatory aspect comes from the fact that state politics in Brazil are still largely dominated by traditional political elites with parochial political concerns (Willis et al., 1999, Armijo et al. 2006). Thus, robust federalism might imply protection of local interests that go against national interests. As a consequence, even if federal veto players are strong in Brazil, this would not necessarily translate into significant obstacles to the presidential control of IRAs.

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[28] For a detailed description of these proposals and the regulation of these sectors see Prado (2008a: 448–56).

In sum, the President has constitutionally entrenched legislative powers to implement structural reforms in the design of the agencies, and these powers can be used to influence agencies' policies. The Lula administration's actions towards independent regulatory agencies illustrate just such a threat. The executive branch seems to be saying that acts contrary to government policy preferences will be punished with severe structural changes even if they cannot be revoked outright by the President.

In conclusion, in contrast to the United States, mechanisms of control *ex post* in Brazil are in the hands of the President and the President actually uses these mechanisms effectively (Prado 2008a). If correct, this conclusion could have policy implications. On the one hand, it might be fruitless to transplant accountability mechanisms that exist in the United States, such as congressional hearings for commissioners. If the Brazilian Congress does not have effective mechanisms to sanction agencies, congressional hearings will not serve a useful purpose. On the other hand, other US institutional arrangements, such as executive oversight of agency rulemaking, might be more constraining than in the US. In the United States, executive oversight balances congressional dominance. In Brazil, however, it would only add to the long list of mechanisms of presidential control over regulatory agencies.

Many scholars criticize the TCD claim that mechanisms of control *ex post* are not effective in influencing regulatory agencies. In response to this criticism, TCD proponents have identified statutory controls over administrative procedures as mechanisms of control *ex ante* (McCubbins and Schwartz 1984, McCubbins et al. 1987). It would be interesting to see what role these procedures play in Brazil, if any. For the purposes of this chapter, however, that step is unnecessary. In Brazil, the mechanisms of control *ex post* are effective for presidential control over regulatory agencies.

5. Assessing the Brazilian case: should the president control IRAs?

The analysis of presidential influence on regulatory agencies and the administrative state has three dimensions: descriptive, normative, and legal-constitutional (Croley 2003). The descriptive dimension analyzes whether there *is* presidential influence over agencies; the other two discuss whether there *should be* such influence. Thus far, I have been primarily concerned with the first aspect of the debate, suggesting that a theory of presidential dominance more appropriately explains the relationship between the government and the regulatory agencies in Brazil than TCD. This section turns to the normative questions, asking whether such presidential control is desirable.

There are two possible answers to the question of whether there should be presidential influence over agencies: one is normative and the other is legal-constitutional. The normative debate focuses on whether greater presidential control over agencies produces sounder regulatory policy, whereas the legal-constitutional debate considers the constitutional legitimacy of these practices. As to the former, there are no empirical studies assessing the impact of presidential control over the quality of regulation in Brazil. There is some evidence that presidential influence seems to be guided by short-term political goals (sometimes populist ones) to the detriment of a long-term sustainable plan for the regulated sectors but, besides being anecdotal, the claim that this influence has impaired the quality of regulation is largely inconclusive (Prado 2008a, 2008b). A normative assessment of presidential control over regulatory agencies in Brazil should be the subject of future work as it remains largely unexplored in the specialized literature.

The second normative issue involves a legal analysis of constitutional provisions. In the United States, the debate raises two sets of questions. Is it legitimate for the President to control regulatory agencies? Is it legitimate for agencies to perform executive functions without being accountable to the President? The 'unitary executive' thesis argues in favor of presidential control of agencies. Despite the fact that agencies are created by Congress (the principal), the unitary executive thesis claims that from a constitutional perspective administrative power cannot exist, except as a subset of the President's executive power (Calabresi and Prakash 1994). Scholars have argued that a unitary executive is supported by an original understanding of the American Constitution and is necessary to maintain the Constitution's separation of powers because the vesting clause of article II placed the totality of executive power under the President's control (Rivkin 1993, Calabresi 1995). In sum, the unitary executive thesis claims that the President should control all executive agencies in order to preserve the political and constitutional legitimacy of the regulatory state.

However, the American legal-constitutional debate is largely inapplicable to the Brazilian case and to some of the other countries that have recently created independent regulatory agencies. As Fernando Limongi argues

> a bureaucratic or administrative state was not part of the original Constitutional design [in the US]. The executive-legislative struggle over the control of the bureaucracy is a consequence of this constitutional silence. Hence, most of the bad characteristics of the American bureaucracy [Bruce] Ackerman attributes to the separation of powers are, in fact, specific to the U.S. They follow from the incompleteness of the American constitution. (Limongi 2005: 42)

In contrast to the US, Brazilian agencies are clearly placed within the executive branch, under the auspices of sectoral ministries.[29] The Brazilian Constitution defines the President as the chief of the executive branch, subordinating to him or her all offices of the public administration (1988 Brazilian Constitution, art. 84, II). Although one can argue about legal consequences of this subordination (Binenbojm 2006: 102, Aragão 2004: 14–17), it is clear that IRAs are constitutionally subordinated to the President in Brazil. There is, therefore, less room for debate as to whether they should be controlled by Congress or by the President from a legal-constitutional perspective.

Despite the fact that from a constitutional point of view IRAs are within the executive branch, there is still a legal-constitutional debate in Brazil. The debate focuses on how much presidential control is legitimate given that the law guarantees IRAs some degree of autonomy. There are specific legislative provisions stating that the regulatory activity should be subordinated to the policies adopted by the executive branch.[30] Thus, although the President should not interfere with the day-to-day functioning of regulatory agencies, agencies should strive to coordinate with public policies implemented by the executive branch. On one hand, agencies should have enough autonomy to make sound regulatory decisions without being influenced by short-term, opportunistic political interests. On the other hand, this autonomy should not become an obstacle to the implementation of the policies of a democratically elected government. In other words, President

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[29] This is not the case for agencies of oversight and monitoring, such as the *Tribunal de Contas da União* and the *Ministério Público* (Public Prosecutor's Office).

[30] For a list of these provisions, see Aragão (2004: 17).

and agencies are supposed to work independently but in a coordinated way to allow the President to pursue his agenda. The Brazilian legal-constitutional debate focuses on the line that divides legitimate policy guidance from undue presidential influence. IRAs' legal mandate is rather vague, and both constitutional provisions and statutes are silent on how the President is supposed to ensure that his or her policy preferences are being followed by the agencies (Nunes 2007: 17, Prado 2008b: 132–3). Moreover, the distinction between public policy and regulatory activity requires a clear separation between political and technical decisions. However, drawing a line that clearly differentiates these two types of decisions is not only challenging but also highly questionable.

Given the vague legal mandate of IRAs, the legal-constitutional debate in Brazil revolves around two questions: (i) are agencies exceeding their constitutional powers by defining policy priorities that should instead be established by the President and (ii) is the President violating the guarantees of autonomy for agencies, by influencing technical decisions that cannot be classified as public policies and general principles? In response to the first question, some claim that agencies formulate public policies only in cases where the executive branch has not done its job and did not provide guidelines and principles to regulators (Coutinho et al. 2004: 30–31). These acts are certainly unconstitutional, but IRAs did not seem to have much of an option in these cases (Rodrigues 2005: 351).

As to the second question, others claim that the President is surpassing his constitutional and legal powers in some of his attempts to control agencies in Brazil.[31] However, as one might expect, these claims are highly controversial, as the line that divides political from technical decisions is quite blurred. IRAs' decisions have an impact on the macroeconomy and other government policies. High rates for telecommunications and electricity services, for instance, may work against efforts to control inflation and may also undermine consumer protections. Should agencies be insulated from political influence when inflation and consumer protection are the reasons for the President to exert influence over IRAs? Should Brazil insulate agencies from all types of political influence or only from opportunistic ones? If the latter, who decides what is opportunistic and what is not? In making this distinction, should we consider the fact that Brazil is coming out of decades of hyperinflation and the President may be justified in being overly cautious about inflationary measures? Should consumer protection be considered more salient in a country, such as Brazil, with high levels of inequality? All these questions remain largely unanswered in Brazil.

Despite the fact that the legal-constitutional debates in the US and in Brazil emphasize different questions, they have something in common. Both rely on 'larger competing views of regulatory politics, and can be fully understood only with reference to those broader visions' (Croley 2003: 833–4). In the US,

> those who see greater presidential control as benign tend to see the outcome of unsupervised agency rulemaking as itself problematic. For example, agency rulemaking in the absence of active White House oversight is undesirable because agencies are too easily captured by the regulated interests they represent. (. . .) Critics of expanded presidential oversight of agency rulemaking imply a more favorable view of agency and possibly even of legislative decisionmaking.

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[31] For a detailed discussion of this debate in light of concrete examples of presidential influence over regulatory issues, see Prado (2008b).

> Their view finds support, for example, from the traditional picture of agencies as experts whose primary function is not to deliver favorable regulation to politically powerful constituencies but rather to exercise their expertise in a rational way that promotes general welfare. (Croley 2003: 834–5)

In Brazil, there are also competing visions of regulatory/democratic politics. On one hand, those who oppose high levels of presidential control of agencies believe that such control can lead to opportunistic political decisions driven by short-term electoral concerns that will be harmful to regulated sectors. Therefore, delegation of powers to independent agencies is often interpreted as a sign of credible commitment. The government is predicting the possibility of acting opportunistically once reforms have been implemented and elects to tie its hands in order to avoid doing so. On the other hand, those in favor of greater presidential control argue that democratically elected Presidents are more likely than agencies to promote the general welfare. The assumption here is that the President is just trying to do his or her job, and that he or she will only be able to successfully govern a country and implement policies if he or she can coordinate the acts and decisions of many different bureaucratic entities.

In both cases, the policy implications depend on the validity of these competing predictions, which in turn need to be assessed by empirical studies (Croley 2003: 838). We need to evaluate what presidential oversight and influence over agencies actually look like before subscribing to one of these views. As I mentioned before, however, there is very little empirical literature on this topic in Brazil. As long as scholars are mindful of the different circumstances and different issues in the Brazilian context vis-à-vis the US, this is an area in which Brazilian scholars could benefit a great deal from the expertise reflected in US scholarship.

Conclusions

Legal transplants make different legal systems appear superficially similar. However, beneath the surface there are often considerable differences. When immersed in a different political system, transplanted institutions diverge from their original models. This chapter illustrates this claim by analyzing independent regulatory agencies in Brazil. American scholarship uses the principal-agent framework to analyze regulatory agencies. Within this framework, the theory of congressional dominance prevails. The basis of the theory of congressional dominance, or TCD, is that Congress delegates its legislative power to independent agencies and is, therefore, the principal. The theory concentrates on three mechanisms used by Congress to influence agencies: budget, appointments, and the threat of new legislation. In the case of Brazil, by contrast, the President is the principal. A careful analysis of the particularities of the Brazilian political system shows that the three mechanisms of control over agencies – budgetary control, control over appointments, and threats of new legislation – are concentrated in the hands of the President, not Congress. Thus, from a descriptive perspective, a theory of presidential dominance is more appropriate in the Brazilian case.

From a normative perspective, the chapter discussed how US and Brazilian scholarship address the legal-constitutional debate on Presidential influence over regulatory agencies. In this regard, I suggest that they are trying to answer different questions. Although the US scholarship questions which branch of the government has legitimacy to control the bureaucracy, the Brazilian Constitution is clear that the President

controls the bureaucracy. As a consequence, in Brazil, the debate shifts to a question of how much presidential interference in regulatory activity is legally acceptable. Despite trying to answer two different questions, the legal-constitutional debates in Brazil and the US have one point in common. Both rely on broad and conflicting views of regulatory activity that are based on different assumptions about how the President and agencies behave and on the expected outcome of interactions between President and agencies. Determining the validity of these conflicting assumptions is an empirical question. This highlights the importance of empirical research and suggests that Brazilian scholarship could benefit from empirical studies such as those carried out by US scholars.

As a general matter, this chapter suggests that legal transplants raise important questions for comparative administrative law scholars. From a descriptive perspective, it is important to analyze administrative law and regulatory institutions within the broader political context in which they operate. A regulatory agency may have the same institutional features in two presidential systems but have completely different levels of independence depending on the relative power of the President vis-à-vis Congress. For instance, the specific claim of this chapter (the theory that the President, not Congress, controls independent regulatory agencies in Brazil) might be applicable to presidential systems outside the United States wherever the Presidents hold strong legislative powers. Depending on the number of these systems, the US case – and the TCD – might prove the exception. Or it might be the case that each political system has its own peculiarities so that no one theory applies.

From a legal-constitutional perspective, comparative administrative law scholars also need to be mindful of constitutional provisions and legal doctrines. As the Brazilian case illustrates, the existence of a constitutional provision or doctrine may change the course of legal scholarship, setting up a different set of questions to be asked. In sum, comparative administrative law scholars need to have an account of the broader context in which administrative institutions and law function. More specifically, they need carefully to consider the legal provisions and the actual functioning of the political and constitutional system of the country they are analyzing in order to make sure they are asking the right questions and identifying the significant differences from an administrative law perspective.

In addition to providing an illustration of methodological issues faced by comparative administrative law scholars, this chapter also tackled a subject that is of considerable importance for this field of study. In an era in which 'one of the most widespread institutions of modern regulatory governance is the so-called independent regulator' (OECD 2002), determining the most appropriate theory to describe and evaluate IRAs outside of the US is of considerable importance. I can only hope this is the first of many studies to come.

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15 Experimenting with independent commissions in a new democracy with a civil law tradition: the case of Taiwan

Jiunn-rong Yeh

In 2005, the Taiwanese government established the National Communication Commission (NCC), the first ministerial-level independent regulatory commission in Taiwan. Not surprisingly, its establishment triggered intense political confrontations, partisan fights and constitutional court rulings against the backdrop of contentious polity in a new democracy.

Independent commissions, primarily based upon the American model, have been introduced and institutionalized in various legal and political contexts.[1] In spite of the growth of the commission form, we know little about their adoption and functioning in different socio-political contexts in emerging democracies. This chapter begins to remedy that lack by using Taiwan as a case study to demonstrate the perils of and prospects for introducing independent commissions into new democracies with civil administrative law systems. First, Section 1 presents some background on the use of commissions in Taiwan and a case history of Taiwan's first independent commission, the National Communication Commission (NCC). Section 2 then places the NCC in the context of an institutional and functional analysis of the many meanings of 'independence' as applied to regulatory commissions. Next Section 3 turns to positive political economy to explore the political dynamics behind the creation of such commissions and the application of these arguments to Taiwan. Finally, Section 4 considers how to match the design of commissions to the disparate reasons why they may seem valuable.

I conclude that independent commissions ought not to be forced into a single template. There are merits to independence when the regulatory agency's functions and operations are strongly linked to the embedded social context, to constitutional structure, and to legal tradition. However, in other contexts, independence is dysfunctional. In a world of increasing regional integration and global governance, some argue that national regulatory structures are converging. In contrast, I conclude that the arguments for and against independent commissions depend, in part, on national context.

1. The road to the National Communication Commission: Taiwan's first independent commission

In Taiwan, quite a number of government agencies are named 'commissions' but very few of them are independent in both the legal and the operational sense. These commissions were created at different times for various reasons, but none of these had to do

[1] On the evolution of independent commissions in the United States, see, for example, Breger and Edles (2000).

with independence. Rather, they were created for representation, foreign intervention, political strategy and even expediency. I first briefly discuss how these commissions were created and what functions they shouldered, and next explain why the idea of creating a real independent commission arose after democratization in 2000 when the Democratic Progressive Party (DPP) won the presidency for the first time after the long-term dominance of the Nationalist Party.

1.1. Creating commissions

The 1947 Constitution of the Republic of China leaves open the organization of the Executive Yuan, which functions as a cabinet, and specifies that the details should be determined by statute (Constitution 1947, art. 61).[2] The resulting Organic Act of the Executive Yuan, however, fixes the cabinet at eight ministries, two commissions and five to seven ministers without portfolio.[3] The last revision to this act was in 1980. In the last two decades, many new ministerial positions and government agencies have been created by organic statutes, and despite several attempts at revising the Organic Act, an agenda for government reforms was not put on the table until the first regime change in 2000.

1.1.1. Creating representation commission: the 1940s The Organic Act of the Executive Yuan creates two commissions besides the eight ministries: the Mongolian and Tibetan Affairs Commission (MTAC) and the Overseas Compatriot Affairs Commission (OCAC).[4] The creation of these commissions represented the KMT government's attempt at representing 'the entire China' despite a persistent gap between what it could control and what it imagined it controlled (Yeh 1997).

The history of the MTAC may be traced back to the Qing dynasty.[5] Its current existence, however, can be understood only as an example of representation reinforcing. In 1912, the newly born Republic of China established an agency regarding Mongolian and Tibetan affairs within the Ministry of Internal Affairs. Ironically, after its relocation to Taiwan, the KMT government elevated the previous agency to the level of ministry to represent – however nominally – de jure control over Mongolia and Tibet.

The OCAC is part of this same representational myth created by the KMT government. An agency that dealt with overseas Chinese affairs was already established and subordinated to the Executive Yuan in the 1930s. It was later elevated to ministerial level to bestow on the KMT government the image that it was the government of all Chinese

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[2] The Republic of China Constitution (hereinafter, ROC Constitution or Constitution) was created in 1947 and brought by the Nationalist (Kuomintang, KMT) government to Taiwan in 1949 after its defeat and retreat (for further details on Taiwan's constitutional change, see Yeh 2002).

[3] There are also two ministerial offices, the Government Information Office and the Directorate-General of Budget, Accounting and Statistics (Organic Act of the Executive Yuan 1947, arts. 3–5).

[4] For the English website of MTAC, see http://www.mtac.gov.tw/pages.php?lang=5 (last visited April 8, 2009). For the English website of OCAC, see http://www.ocac.gov.tw/english/index.asp (last visited April 8, 2009).

[5] The Qing dynasty created the Court of Colonial Affairs to oversee the relationship between the Qing court and its Mongolian and Tibetan dependencies. During the years of Emperor Kuang Hsu, it was reorganized as the Ministry of Minority Affairs. It then evolved in to the current Mongolian and Tibetan Affairs Commission.

people around the globe despite the fact that it could only rule the tiny island of Taiwan. Using the organizational form of a commission also permits the government to invite overseas leaders residing in respective countries and regions to serve on the commission.

1.1.2. Creating commissions for foreign voices: the 1950s and 60s Two very distinctive commissions were established as a way of representing foreign voices in the postwar reconstruction of Taiwan. They were the Council for United States Aid (CUSA) and the Joint Commission on Rural Reconstruction (JCRR). Today, the former has become the Council for Economic Planning and Development (CEPD), while the latter became the Council of Agriculture (COA). Both are still ministerial organs despite largely transformed missions.

The Sino-American Economic Aid Agreement signed between the Republic of China and the United States in 1948 established the CUSA. The agreement aimed to create stable economic conditions in Taiwan. American financial aid was provided to Taiwan, and the CUSA was created to supervise this. Again, its collegial structure made it easier for American advisors to participate in decision-making processes. After several reorganizations,[6] the Council evolved in 1977 into the current CEPD to promote comprehensive national economic development.

Similarly, the JCRR was established in 1948 in Nanjing as part of an economic agreement between the United States and the Republic of China. Several members of the Commission were Americans. It moved with the KMT government to Taiwan in 1949. As its missions ended and the agreement terminated in 1979, it was reorganized as the Council for Agricultural Planning and Development (CAPD) and later became the current COA.

1.1.3. Creating commissions in response to growing social and political demands: since the 1980s Government organization tends to expand in response to growing social and political demands. The 1980s witnessed a dramatic economic boost and related social and political changes. Demands for health care, environmental protection, consumer protection and social security brought about a sharp increase in statutes as well as regulatory agencies. But as indicated earlier, the Organic Act of the Executive Yuan fixes the number of ministries, and thus makes government reorganization difficult. Nevertheless the law permits the Executive Yuan to set up commissions if deemed necessary (The Organic Act of the Executive Yuan, 1947, art. 14). The government saw this as a most expedient way out and quickly created many commissions to expand its structure in response to growing social demands.

As a result, over the last two decades, the executive created nineteen commissions under this particular provision. In Table 15.1, commissions such as the Financial Supervisory Commission, the Mainland Affairs Council, the National Youth Commission, the Veterans Affairs Commission, and the Atomic Energy Council, are all products of this

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[6] In September 1963, CUSA was re-formed as the Council for International Economic Cooperation and Development (CIECD), which in turn became the Economic Planning Council (EPC) in 1973 with the objective of strengthening the Executive Yuan's planning and research functions. In 1977, the EPC was merged with the Executive Yuan's Finance and Economic Committee and reorganized as the CEPD.

Table 15.1 Ministries, commissions and agencies of the Executive Yuan

Core ministries and commissions of the Executive Yuan		Ministerial-level agencies and commissions		Independent Commission
Ministries	Ministry of Interior Ministry of Foreign Affairs Ministry of National defense Ministry of Finance Ministry of Education Ministry of Justice Ministry of Economic affairs Ministry of transportation & Communication	Agency	Central Bank National Palace Museum Central Personnel Administration Governmental Information Office Directorate-General of Budget Accounting and Statistics Department of Health Coast Guard Administration Environmental Protection Agency	National Communications Commission
Commissions	Mongolian & Tibetan Affairs Commission, Overseas Compatriot Affairs Commission	Commissions (regulatory commissions)	Financial Supervisory Commission Mainland Affairs Council National Youth Commission Veterans Affairs Commission Atomic Energy Council Fair Trade Commission Council for Cultural Affairs Council of Agriculture Consumer Protection Commission Council of Labor Affairs Council of Indigenous Peoples Sport Affairs Council Council for Hakka Affairs Public Construction Commission Aviation Safety Council	

Table 15.1 (continued)

Core ministries and commissions of the Executive Yuan	Ministerial-level agencies and commissions		Independent Commission
Five to seven ministers without portfolio	Coordinators	Council for Economic Planning and Development Research, Development and Evaluation Commission National Science Council Coordination Council of North American Affairs	

Source: Yeh.

expedient strategic action despite the rather rigid legal framework. Absent a coherent and consistent organizing principle, the organization of government is evidently confusing and fosters inefficiency.

1.2. Creating independent commissions

As discussed earlier, administrative commissions have become an ordinary means of establishing new governmental organs, but they resemble cabinet ministries, not independent commissions on the American model. The idea of creating a real, independent commission came only after democratization and the first regime change in 2000.

1.2.1. The legal recognition of independent commissions in the government reform package Since the 1990s, Taiwan has undertaken seven rounds of constitutional reform but much of the agenda was focused on the rearrangements regarding constitutional institutions (Yeh 2002). Although much discussed, government reforms were never fully included in the reform agenda (Yeh 2007). The constitutional reform of 1997, however, represented a real opportunity. In streamlining provincial governments, two articles were also added to allow a great deal of flexibility in the organization of the central government and to lessen legal restrictions on establishing administrative agencies (Additional Article of the Constitution 1997, art. 3, secs. 3–4). Despite this constitutional opportunity, not much action was undertaken until the first regime change that came in four years later.

Once in power, the Democratic Progressive Party (DPP), the long-time opposition under the previous authoritarian regime, made government reform an important part of its political agenda. The president established a committee on government reform in November 2001, and the committee was directly chaired by President Shui-bian Chen. In June 2002, another committee on government reform was formed in the Executive Yuan that began to push through major bills for government reform. One of the most important was the Standard Act of Central Executive Agencies and Organizations (hereinafter the Standard Act) that was finally enacted on June 23, 2004. This Standard Act was the realization of the constitutional provisions on the Executive Yuan and was to be a framework guideline for the arrangement of central government agencies. The Standard Act created the legal foundation for creating real independent commission. The definition of independent commission is stipulated as 'a collegial commission that acts independently in accordance with the law and without being subject to supervisions of other organs' (Standard Act 2004, cl. 2, art. 3, sec. 1). Such an independent commission is designed to have five to seven full-time commissioners with fixed terms, appointed by the Premier[7] with legislative approval (Additional Article 1997, art. 3, sec. 1). It is also stipulated that a certain number of commissioners shall not be from the same political party (Standard Act 2004, art. 21).[8] Upon the passage of the Standard Act, the DPP government released

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[7] That is, the President of the Executive Yuan, who is appointed directly by the President but is responsible to the Legislative Yuan, the parliament (Additional Article 1997, art. 3, sec. 1).

[8] This is similar to the conditions of appointment to American independent commissions. The President appoints commissioners subject to senatorial confirmation, but terms are staggered and generally longer than the President's term. The President appoints the Chair. Most statutes require that no more than a majority of the members can be affiliated to the same political party.

its government reform package which proposed to reduce the thirty-seven government agencies to twenty-four and to formally recognize five independent commissions that included a National Communication Commission.[9]

1.2.2. The establishment of the National Communication Commission and controversies The passage of the Standard Act seemed to provide a momentous opportunity for government reform, and the DPP government pressed further to create the National Communication Commission. Party politics, however, worsened as President Chen continued into his second term in 2004. The KMT had not expected to lose the presidential race for a second time, since it has never ceased to be the dominant political party in the Legislative Yuan. Facing this challenge, the KMT decided to assert its legislative dominance, and it boycotted major legislation, policies and budgets proposed by the DPP government.[10] In contrast, aided by its presidential victory, the DPP pushed for further progressive reforms, some of which targeted the KMT with its large pool of party assets and party-controlled enterprises.

The KMT was itself a media tycoon that controlled China Television Company (CTV), Broadcasting Corporation of China (BCC) and Central Motion Pictures Company (CMPC). Pressed upon the issue of party assets and perhaps in financial difficulty as a result of losing the presidential campaigns, the KMT under the chairmanship of Yin-jeou Ma rather quickly sold its majority shares in the three media companies to the China Times Group before the end of 2005. Suspicions abound regarding whether there were any under-the-table deals or whether the Chinese Communist Party was even involved. The Government Information Office (GIO), at the time still in charge of media regulation, vowed to undertake a thorough investigation.[11]

Against this political background, it is easy to understand why, at the time, both the KMT and the DPP welcomed the proposal to establish the National Communication Commission (NCC).[12] The KMT was pleased that the NCC would substitute for the Government Information Office (GIO), thus undermining the DPP government's regulatory control over the media. As for the DPP, media reform had always been on its own agenda, and thus it also endorsed the idea of a neutral regulatory commission. Notwithstanding a thin agreement on creation of the NCC, the two parties faced a

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Under the US two-party system, this generally means a three to two split on a typical five-member commission. In Taiwan, the reason why the Standard Act called for party balance was, not surprisingly, partly the result of a political compromise. It left determination of the precise ratio to subsequent statutory enactments to set up a reasonable ratio. For example, the Organic Act of the National Communication Commission now requires that no political parties shall have more than half of the commissioners.

[9] The five independent commissions are the National Communication Commission (NCC), the Central Bank, the Financial Supervisory Commission, the Fair Trade Commission, and the Central Election Commission.

[10] The gunshot incident that took place one day before the presidential election in 2004 and the subsequent legal disputes also exacerbated the political confrontation between the KMT and the DPP.

[11] The Office was under the Executive Yuan and hence was controlled by the DPP government.

[12] When it became clear that the KMT might take political advantage of the creation of the NCC, some DPP members and government officials began to have second thoughts about its creation, and some even opposed it strongly.

serious political fight as the KMT sought to entrench its political dominance in the composition of the NCC. The KMT – in defiance of the Standard Act (2004, art. 21) – came up with a novel way to appoint commissioners in proportion to the number of seats held by the major political parties, thus leaving the Premier only a ceremonial power of appointment.[13] It should be noted that perhaps in reaction to the KMT's partisan formula, some DPP government officials began defying the Standard Act and arguing that the NCC commissioners should be appointed directly by the Premier, since all ministers must be appointed as such according to in the Constitution (1947, art. 56). As a minority party in the parliament, the DPP found no way of stoping the KMT's partisan formula except by petitioning the Council of Grand Justices, the Constitutional Court. On November 9, 2005, the Organic Act of the National Communication Commission (hereinafter the NCC Organic Act) was passed in spite of a serious political standoff. In the midst of protests and controversies, the commissioners were appointed in accordance with the partisan formula supported by the KMT[14] and the NCC was established on February 22, 2006. Not surprisingly, the NCC quickly renewed the license of the BCC[15] and found neither legal violations nor irregularities in the KMT's sale of its shares to the three media companies.

1.2.3. Constitutional court rulings and political response In July 2007, the Constitutional Court rendered Judicial Yuan (JY) Interpretation No. 613 (2007), ruling that the way commissioners were appointed under the NCC Organic Act was unconstitutional as it deprived the Premier of his powers to appoint commissioners. The Court first discussed whether it was constitutional to establish a so-called independent commission, and if the answer were affirmative, it would then discuss how commissioners were to be appointed and whether the current method of appointment violated the Constitution.[16]

On the first issue, the Court reasoned that 'under the principle of administrative unity,

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[13] The original organic law provided that a total of fifteen members of the NCC would be recommended based on the percentages of the number of seats held by the respective parties (or political groups) in the Legislative Yuan, and, together with the three members to be recommended by the Premier, should be reviewed by the Nominating Committee, which would be composed of eleven scholars and experts as recommended by the political parties (or political groups), again based on the percentages of the number of seats held by the respective parties (groups) in the Legislative Yuan, via a two-round majority review by more than three-fifths and one-half of its total members, respectively. And, upon completion of the review, the Premier shall nominate those who appear on the list as approved by the Nomination and Review Committee within seven days and appoint the same list upon confirmation by the Legislative Yuan (The NCC Organic Act 2005, art. 4, secs. 2–3).

[14] As a gesture of protest, those commissioners who sided with the DPP government resigned their posts immediately after their appointment. They also urged their colleagues who sided with the KMT to resign in order to restore the integrity of this newly established institution.

[15] The NCC renewed the license in 2006. For a statement by the NCC, see http://www.ncc.gov.tw/chinese/news_detail.aspx?sn_f=755 (last visited April 10, 2009).

[16] There was also a minor legal issue, but one with wide political consequences, concerning pending decisions at the GIO that were transferred by the NCC Organic Act to be reviewed by the NCC. The Court, however, did not find these transfers unconstitutional. As a result, the pending decision concerning the media company previously owned by the KMT was constitutionally transferred and reconsidered by the NCC. Not surprisingly, the decision was in favor of the media company.

the Executive Yuan must be held responsible for the overall performance of all the agencies subordinate to it, including the NCC'. Because of the principle of administrative unity, the establishment of an independent agency must be regarded as exceptional and can be justified 'only if the purpose of its establishment is indeed to pursue constitutional public interests (JY Interpretation No. 613, 2007). The Court derived the exceptionality of creating independent commissions from the text of the Constitution, administrative unity, and principles of democracy as well as accountability. The Court reasoned:

> The administration must consider things from all perspectives. No matter how the labor is to be divided, it is up to the highest administrative head . . . to direct and supervise so as to boost efficiency and to enable the state to work effectively as a whole . . . Article 53 of the Constitution clearly provides that the Executive Yuan shall be the highest administrative organ of the state, . . . thus enabling all of the state's administrative affairs, . . . , to be incorporated into a hierarchical administrative system where the Executive Yuan is situated at the top. . . .
>
> Democracy consists essentially in politics of accountability. A modern rule-of-law nation, in organizing its government and implementing its government affairs, should be accountable to its people either directly or indirectly. . . . the Constitution is also intended to hold the Premier responsible for all of the administrative affairs under the control and supervision of the Executive Yuan . . .
>
> Accordingly, where the Legislative Yuan establishes an independent agency through legislation, separating a particular class of administrative affairs from the tasks originally entrusted to the Executive Yuan, removing it from the hierarchical administrative system and transferring it to an independent agency so as to enable the agency to exercise its functions and duties independently and autonomously pursuant to law, the administrative unity and the politics of accountability will inevitably be diminished. (JY Interpretation No. 613, 2007)

With regard to the second issue, the Court found that the method of selecting and appointing NCC commissioners 'deprive[s] the Premier of the power to decide on personnel affairs of the Executive Yuan substantially', and 'thus violating the principles of politics of accountability and separation of powers'. The design of partisan proportional representation was criticized by the Court as against the impartiality and neutrality of the NCC.

> . . . it is very clear that the Executive Yuan, in fact, has mere nominal authority to nominate and appoint . . . members of the NCC. In essence, the Premier is deprived of virtually all of his power to decide on personnel affairs. In addition, the executive is in charge of the enforcement of the laws whereas the enforcement depends on the personnel. There is no administration without the personnel. Accordingly, the aforesaid provisions, . . . , are in conflict with the constitutional principle of politics of accountability, and are contrary to the principle of separation of powers since they lead to apparent imbalance between the executive and legislative powers.
>
> . . . Although the lawmakers have certain legislative discretion to decide how to reduce the political influence on the exercise of the NCC's authorities and to further build up the people's confidence in the NCC's fair enforcement of the law, the design of the system should move in the direction of less partisan interference and more public confidence in the fairness of the said agency. Nevertheless, the aforesaid provisions have accomplished exactly the opposite by inviting active intervention from political parties . . . and, in essence, nominate, members of the NCC based on the percentages of the numbers of their seats, thus affecting the impartiality and reliability of the NCC in the eyes of the people who believe that it shall function above politics. (JY Interpretation No. 613, 2007).

Despite the finding of unconstitutionality, the Court did not immediately void the relevant provisions. It declared that these provisions would remain in effect until December

31, 2008 unless they were revised earlier. It further added that 'the legality of any and all acts performed by the NCC will remain unaffected' before its final nullification (JY Interpretation No. 613, 2007).

With the release of JY Interpretation No. 613, many of the DPP leaders urged that the NCC commissioners should immediately resign in order to facilitate prompt legislative actions. But the chief commissioner refused to do so. Instead, he stated that he and his colleagues would continue to serve till January 2008, when the term of the current legislature would expire, and urged the legislature to complete revisions no later than that date. The revised NCC Organic Act was completed by the end of 2007, and it stipulated that the NCC should be composed of seven members with four-year terms, appointed by the Premier with legislative approval. No party should dominate by constituting more than half of its members (NCC Organic Act 2008, art. 4).

In January 2008, the KMT won a landslide in the legislative election held under a new electoral rule established by constitutional amendment.[17] The KMT, its political dominance assured, was not in a hurry to implement the revised law. In March, the KMT presidential candidate, Ying-jeou Ma, won the election and assumed office in May. In August, the Premier nominated the second-term Commissioners of the NCC with the approval of a legislature where the KMT occupied almost three-quarters of seats.[18]

2. The operation of independent commissions and their legal and institutional predicaments

Independent commissions operate around the globe with different degrees of success (for example, Sajó 2004). The first independent commission in Taiwan – despite all the controversy surrounding its creation – is now well into its third year of operation. It provides a way to ask how the operation of an independent commission may be affected by existing legal and institutional administrative frameworks. What factors dominate the institutional setting and practical operations of independent commissions? For example, is the constitutional government structure – that is, presidential, parliamentary or a mixed system – a dominant factor? Or, does the divide between the common law and civil administrative law traditions matter? The following discussion seeks to analyze the institutional and legal context within which independent commissions must work to achieve their assigned functions in an 'independent' manner.

2.1. Independence from the view of constitutional structure

Presidential and parliamentary democracies assign different functions to presidents and parliaments respectively. In a presidential democracy, executive functions are carried out primarily by a president and his/her departments, with supervision by parliament.

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[17] The 2005 constitutional revision reduced the seats in the parliament from 260 to 113 and adopted a proportional representation system with two votes (one vote for party and the other for candidates).

[18] The NCC continues to operate with seven commissioners, whose professional backgrounds include three in telecom, one in law, two in media, and one in economics. Their respective backgrounds are available at the website of the NCC, http://www.ncc.gov.tw/default.htm (last visited April 10, 2009).

To create an independent commission with regulatory functions in a presidential democracy, the law must separate the commission from the president and block executive control over the chosen regulatory arena. Decisions to create or not to create an independent commission and its level of independence basically amount to a fight between president and parliament.

The scenario is slightly different in a parliamentary democracy, where executive functions are carried out by a cabinet that is subject to the will of parliament. In this case, how can an independent commission actually be independent? If the commission is intended to be independent of the cabinet, which is subject to parliamentary control, is it also intended to be independent from parliament? Here we may contemplate two scenarios: the first is an independent commission that is independent from the cabinet but not from the parliament, and the second is an independent commission that is independent from both the cabinet and the parliament. In the former, creating an independent commission – from the viewpoint of the parliament – is similar to creating any other type of agency except that it is a little detached from the cabinet. In the latter, however, an independent commission is independent of parliament, making it very different from other types of agencies.

Evidently the challenges facing independent commissions vary between presidential and parliamentary systems. In a presidential system, independent commissions must be attentive to their relationship to the president, whereas in a parliamentary structure they need to focus on their degree of distance from the parliament. The role of independent commissions in a mixed system, such as that of Taiwan, is even muddier. In a mixed system, if the president's political party fails to enjoy a parliamentary majority, an independent commission would have a hard time deciding from which branch it should keep its distance. The parliament would certainly demand that it be separated from the president, whereas the president would urge otherwise. This was certainly reflected in the fight between the DPP government and the KMT legislature surrounding the NCC's creation. The KMT insisted on extending its legislative influence over the NCC and separated the NCC from the DPP government. The DPP argued that the NCC, in exercising administrative powers, must still be kept under a degree of control by the DPP executive.

2.2. Independence from the view of administrative functions

In the US context, independent commissions exercise quasi-legislative and quasi-judicial powers in additional to traditional administrative powers (*Humphrey's Executor v. United States*, 1935). Their exercise of these powers suffices to make them distinctive from traditional administrative agencies over which the president exerts full control.

In civil administrative law systems, however, such quasi-legislative and quasi-judicial powers have always been exercised by administrative agencies. For instance, agencies are traditionally able to make administrative dispositions (*Verwaltungsakt*) that have final legal binding effects on the rights and legal interests of individuals (Administrative Procedure Act 2001, art. 92). Individuals may appeal to the courts, but the exercise of quasi-judicial powers has been the same in both independent commissions and traditional agencies. Similarly, both have the power to issue delegated legislative rules or even non-delegated rules.

Having said that, one may wonder what – if anything – makes independent

commissions a salient and novel institution in the civil administrative law tradition. Definitely not their quasi-legislative and quasi-judicial powers. Perhaps in a civil administrative law tradition, collegial deliberation and its related institutional setting are what make independent commissions unique. The heightened level of deliberation in the decision-making processes of independent commissions marks a departure from the traditional decision-making of ministries and agencies.

2.3. Independence from the view of administrative procedures

Suppose an independent commission exercises powers no differently from agencies, what kind of 'independence' does it enjoy in terms of its decisions, decision-making process and even subsequent appeals?

In Taiwan, as in other civil administrative law systems, administrative dispositions may be appealed for review by the supervisory authority (Administrative Appeals Act 1998, art. 3). Before individuals litigate their cases in the administrative courts, however, they must first make administrative appeals to the higher supervisory authority (Administrative Litigation Act 1998, art. 4). For instance, administrative dispositions made by the Environmental Protection Agency must first be appealed to the Executive Yuan before being litigated in the administrative courts (Administrative Appeals Act 1998, art. 3).[19] In the case of the NCC, should their administrative dispositions be appealed to the Executive Yuan? Won't this compromise the NCC's independence?

This issue was debated in the drafting process of the NCC. If one had the American model of independent commissions in mind, one would definitely think that administrative dispositions made by the NCC should not be reviewed by the Executive Yuan and instead should be allowed to be litigated directly in the courts. Interestingly, however, most scholars trained in German administrative law, as well as judges in Taiwan, have contended otherwise. They have argued that administrative appeals against dispositions is a vested individual right, and that the review of administrative appeals is on the lawfulness of decisions rather than on their appropriateness, thus posing no threat to the 'independence' of independent commissions. In the end, the NCC Organic Act left this issue unresolved. Even more interesting, the agency itself does not carry out administrative appeals, but rather assigns the task to an administrative appeals committee. According to the Administrative Appeals Act, every competent administrative authority (including the Executive Yuan, ministries, commissions and agencies) must set up an administrative appeals committee, half of whose members must be scholars, experts and righteous persons with a specialty in law outside such an authority (Administrative Appeals Act 1998, art. 52). In other words, the appeals committee includes a majority of outsiders – mostly law professors and attorneys. This design ensures the independence of the appeals committee within the agency. One can then ask whether such an administrative appeals committee should be created within an independent commission, such as the NCC, and if so, how should such a committee be composed and who should appoint the members? Should administrative dispositions by an independent commission be reviewed – even in terms of law – by another independent appeals committee, either of itself or of the

[19] If administrative dispositions are made by the Executive Yuan, then administrative appeals would be made to itself (Administrative Appeals Act 1998, art. 3).

higher authority, namely the Executive Yuan? This is again an open question in Taiwan. For the time being, the NCC has set up an administrative appeals committee that has a majority of outside experts to review its decisions.[20]

Another open question is the extent to which independent commissions should abide by procedures required in the Administrative Procedural Act (APA). According to the APA, agencies must give individuals the opportunity to be heard before rendering an administrative disposition (2001, art. 102). Agency rule-making is also required to follow a notice and comment procedure (2001, arts. 154–5). These requirements do not exempt decision-making by independent commissions, but should they do so? Similar issues apply to the question of judicial scrutiny. Should the court use a different standard of review for decisions made by independent commissions? In the view of political accountability, one might argue for more exacting scrutiny (May 2006), but, conversely, others point to the commission's collegial mechanisms, deliberative rationality and plural (or nonpartisan) representation as reasons for deferential court review.

2.4. Independence from the view of regulatory policies and budgets

Most of the time, independent commissions exercise regulatory functions, either quasi-legislative or quasi-judicial. The massive amount of regulation in a modern welfare state certainly requires delicate coordination, not to mention accountability (Kagan 2001). Regulatory coordination takes place on at least three levels. First and foremost, it occurs at the level of budgetary planning. Who should be empowered to decide on the level of resources to allocate to any particular area of administration and regulation, for instance to any particular independent commission? To what extent should independent commissions have any say in this budget allocation process? In a presidential democracy, where the president has the power to propose a budget to the legislature, in what sense would independent commissions remain independent?[21] Even in a parliamentary system, where the parliament barely goes into much of the detail of a prime minister's budget, how should independent commissions coordinate budgetary needs with other ministries and agencies?

The second level of coordination occurs in the much more mundane sense of administrative chores. Certain policies such as paper reduction, gender statistics, regulatory impact assessment or eco-friendly offices are often coordinated by the president's administration or the cabinet office. Should these policies apply to independent commissions? Would this affect their 'independence'? In contrast with mundane administrative coordination, the third type involves much more delicate policy concerns. After all, it is difficult – and perhaps even unrealistic – to imagine that a central bank can make policy without coordinating with other economic-related ministries as well as with statistics and accounting bureaus. Nor can any independent communication commission – such as the NCC in Taiwan – ignore the decisions of other equally independent commissions – such as the Fair Trade Commission – and policies of related ministries such as the Ministry

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[20] The organization and decisions of the committee are available at http://www.ncc.gov.tw/chinese/gradation.aspx?site_content_sn=371 (last visited April 10, 2009).

[21] On the delicate budgetary relationship between independent commissions and the president, see Pierce et al. (2004).

of Transportation or the National Science Council. How can independent commissions strike a balance in such sensitive situations while maintaining their 'independence'?

2.5. Independence from the view of the relationship with bureaucrats

There is yet another perspective in which the 'independence' of independent commissions must be assessed: their relationship with bureaucrats. To ensure independence as well as high-quality expertise, commissioners are often sought from outside government, and they often do not serve for a long time due to their own career concerns.[22] As a result, commissioners become very much dependent upon bureaucrats, their knowledge of the field and their assessments of particular issues. They run the risk of being captured by bureaucrats who represent entrenched technical biases and, even worse, business interests (Uga et al. 2009). In this way, independent commissions are not really different from ordinary ministries and agencies. If independent-minded commissioners choose to fight with career bureaucrats, they will soon realize that their institutional advantages (outside expertise, term limits, and independence from the central administration) will turn into grave disadvantages (outsider, short time in office, no internal support) (Uga et al. 2009).

2.6. Independence from the view of state–society relationship

The last perspective on the 'independence' of independent commissions is the state-society relationship. After all, the creation of independent commissions signals a distrust of the state and seeks to bring in societal influence to dismantle and even to democratize the state (Sajó 2004). This presupposes that there is an actual separation between state and society, particularly regarding experts, their training and even, to some extent, their available resources. For many states, especially new democracies, however, such an autonomous society full of experts and resources simply does not exist or is still emerging. In selecting commissioners, it is more often than not public university professors, researchers for state labs or retired senior bureaucrats who are on the list. They do not really represent even slightly different sets of knowledge, backgrounds or entrenched interests from those reflected in traditional ministries and agencies. The same line-up may appear in ministries as in independent commissions. Such entrenched state-society relationships pose perhaps the greatest challenge to the independence of independent regulatory commissions.

3. Theories explaining the establishment of independent commissions

In a modern bureaucratic government, can one find principles to help one decide whether to organize an agency as an independent body rather than as an arm of a cabinet agency? One way to address this issue is subject sensitive. For example, the regulation of telecommunication, one may argue, requires an independent body in order to sustain social pluralism and free speech.[23] No such rationale, however, could reasonably explain, for

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[22] Most of them, for example, are university professors and tend to go back to their universities after serving for one, two or three terms.

[23] Taiwan's Constitutional Court Interpretation No. 613 confirms the constitutionality of setting up the NCC as an independent commission on the ground that it is consistent with the constitutional intent of protecting the freedom of communications and thus further ensuring the

example, why the US National Labor Relations Board was designated as an independent commission while its Food and Drug Administration was not.

An alternative route is based on positive political economy, not normative analysis. Under this view, one examines the institutional dynamics and interest alliances of the actors at the time the law was passed, including Congress, President, Ministries and bureaucrats (Devins and Lewis 2008). One may also investigate the creation of an independent regulatory commission in a particular social context, such as democratic transition or a divided society (Sajó 2004). In this construction, the independence of the regulatory body was to serve a need in a given social context.

3.1. Control, trust and insurance

States set up independent commissions in different contexts and for different reasons. Three models could help explain this diversity.

The first can be called a control model, in which the organizational form of an independent commission prevents political dominance by the sitting executive. Despite variations across independent commissions, United States agencies were established primarily to limit the dominance of the current President (Strauss 1984, Devins and Lewis 2008). At a time when members of the Congress are concerned about the influence of the current President on policy, they tend to create independent agencies to implement policies. In this connection, limiting political control is essential in achieving a commission's 'independence'.

Because independence is meant to limit the President's control, major points of concern are fixed terms for the commissioners and just-cause removal by the President (for example *Myers v. United States*, 1926; *Humphrey's Executor v. United States*, 1935; *Wiener v. United States*, 1958). Operational transparency or level of expertise, while meaningful in constructing an independent commission, is not the essential point of concern under this model of independent commissions.

Secondly, in some societal settings where social distrust prevails, the independent commission form might be able to win social trust in some regulatory areas. A society in profound transition, where large scale reconstruction of the economic and political order was occurring, requires a level of stability to counter the flux of political exchange that generates distrust. The creation of independent commissions in Central and East Europe, where the planned economy was transformed into a market economy, falls into this category. In this trust model, control is not the primary concern; neutrality is. A neutral institution in transitional polities may be able to downplay short-term pressures for redistribution that would harm long-term sustainability. Conversely, however, neutral institutions might simply safeguard vested interests against politically motivated redistributive policies (Sajó 2005). Isolation from day-to-day politics thus generates a sense of security in the flux of transitional democracy. In the trust model, the function of independent commissions goes beyond the non-intervention central to the control model. To avoid capture by vested interests, institutional structures such as plural representation or diversified expertise are needed.

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expression and distribution of diversified opinions of the society and serving the purposes of public supervision.

Thirdly, in a political insurance model, independent commissions might stabilize policy in the face of possible regime change and/or a transitional justice deficit. In new representative democracies, where regime change becomes possible in major national elections, major political factions may opt for mutual insurance to prevent a worst-case scenario arising from a shift of powers. This is particularly true for current power holders who fear future electoral losses, or for the defeated who are not sure about coming back. Studies show that the percentage of new agencies with insulating characteristics correlates with periods of divided government in the United States (Lewis 2003, Devins and Lewis 2008). The establishment of the NCC in Taiwan during the DPP Administration may well be an example of the political insurance model at work.

3.2. Analyzing Taiwan's social context for independent commission establishment

The development of independent commissions in Taiwan took two steps. The establishment of the Chinese Expatriate Commission and the Mongolia and Tibetan Commissions, in lieu of ministerial establishments, was designed to serve plural representational purposes. The aim of including representatives of overseas Chinese from all continents was the underlying consideration for choosing the commission format in both cases. This commission format in the early Republic remained entrenched well into the late twentieth century. It was not until after the first regime change in 2000 that an independent commission, the NCC, was established. Why did the concept of an independent commission develop so late in Taiwan when the organizational concept of a commission had taken shape so early?

The unusually long and continuous authoritarian rule of the Nationalists prevented development of constitutional checks and balances (Yeh 2007). Although in Japan bureaucrats tended to block the establishment of independent commissions because they feared a loss of control, there is no clear indication of this sort of resistance in Taiwan. Democratization has brought about partisan competition in the political arena, resulting in contentious partisan politics. The large-scale government reform proposed by the DPP administration soon after the first regime change in 2000 included a proposal for an independent National Communication Commission, the first of its kind in Taiwan.

On the one hand, the new regime initiated and carried out the NCC proposal, though a minority government in the Legislature, after the first regime change since democratization. On the other hand, communication regulation was of great interest to the prior ruling party (KMT), but its commitment to free speech, a critical foundation for new democracy, was in doubt. The creation of the NCC, the first independent commission, thus has social and institutional underpinnings beyond the control model as set forth above. Designating the NCC as an independent commission was not primarily a way to assure non-intervention by the President, but rather it was a way to make the transition to a more competitive political reality. One can easily link the story to the political insurance model because both the KMT and the DPP wished to insulate the regulation of communications from the impact of sudden political change. But the social underpinnings go even further. At stake was media and telecommunication regulation, a foundation for democratic consolidation in new democracies. In Taiwan, KMT's ownership of radio, television and newspapers presented special difficulties even after regime change. The lack of transitional justice in partisan politics led the public to place great hope in

the NCC. Maybe it was a burden that could not realistically shoulder, but, at least, that was the hope at its establishment.

4. Capacity-building for the 'independence' of independent commissions

Designating a public body as independent is one thing; sustaining independence in day-to-day political dealings is quite another. Institutional capacity-building towards independence has been a critical challenge for modern independent commissions. Institutional capacity-building should proceed in accordance with the explanatory models set out above.

4.1. Analyzing independence: plural representation, neutrality, and independence

Under the control model, non-intervention by the current governing power is the key underpinning the independence of independent commissions. The corresponding institutional arrangement is just-cause removal. This non-intervention/just-cause removal thesis, however, only applies to the control theory. It does not provide a sufficient foundation for the trust model, under which the establishment and operation of an independent commission has to win social trust in the flux of transitional political exchange. Neutrality – an institutionally conscious refusal to take sides, be it on religious, partisan, factional or ideological grounds – is essential to win social trust.

Neutrality can take various forms. Religious neutrality is generally imposed on administrative functions in modern administration. Neutrality of the bureaucracy is a built-in element of democracy that seeks to prevent instability arising from constant regime changes following elections. In the East and Central European context, the institutional interests of the inherited agencies and the shrinking of government activities and large-scale privatization have increased the need for neutral regulatory agencies (Sajó 2004: 32).

Independence as understood in the political insurance model, however, goes beyond neutrality. Being neutral and neutral only, an independent commission may avoid making timely and right decisions. Indeed, in the democratic transitional social context, it is a luxury to expect every decision by an independent commission to be 'neutral' or color blind. Every decision must take sides; there is no way for its decisions to be 'non-partisan'. Accordingly, independence should go beyond neutrality or impartiality. The commission needs to respond to social need with convincing arguments.

By the same token, independence is different from plural representation. Mechanisms regarding partisan or non-partisan representation or interest-group representation are helpful, but not essential.

4.2. Institutional capacity-building towards meaningful independence

If the creation of an independent commission were to succeed, what are the institutional requirements? In a situation where the expectation of independence goes beyond neutrality, what more is required? The spatial gap between neutrality and independence in fact determines the legitimacy of an independent commission. What more is needed? Possible answers could include institutionally built-in expertise, procedural rationality, and restriction of the areas regulated.

5. Conclusion

Independent commission as an organizational form developed originally in the United States and has evolved in the modern era. A similar concept was introduced into other political systems with divergent social contexts. In those systems, independent commissions often served different functions and had different institutional capacities compared to those in the United States. The creation of the NCC in Taiwan exemplified a unique social context that makes the very conception of agency independence different from its American counterpart. Regime change, transitional constitutional order, the transitional justice deficit and global networking are salient features involving the creation of the first independent commission. Combined, these social backdrops form a model of independence beyond the conception of control or intervention. Broader institutional and operational capacity-building are needed in order to live up to the social trust and contextual needs of democratic transition.

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16 Understanding independent accountability agencies

*John M. Ackerman**

Over the past two decades there has been a veritable explosion in the number and power of independent accountability agencies throughout the world (Ackerman 2010). The spread of electoral institutes, ombudsmen, anti-corruption agencies and other oversight institutions has paralleled the equally important upsurge in independent regulatory agencies and new constitutional courts (Jordana and Levi Faur 2006, SCJN 2008). This chapter offers a theoretical approach to understanding the present conditions and future potential of these new independent accountability agencies. It also provides an overview of the different ways in which countries have tried to incorporate these institutions into their respective constitutional frameworks.

There is an extensive literature on regulatory agencies and constitutional courts that is helpful in gaining an initial analytical hold on accountability agencies (Stone Sweet 2000, Rose-Ackerman 2007). Nevertheless, it is a mistake to import these analyses wholesale. Independent accountability agencies have their own institutional dynamics and must be understood on their own terms (Vázquez Irizarry 2007). Why are such agencies created? What are their fundamental strengths and weaknesses? What are the most important factors that explain their effectiveness or failure at fulfilling their constitutional mandates? I try to respond to these questions in the first section of this chapter.

In the second section, I offer the initial results of a global survey of autonomous agencies in the constitutions of the world. The academic literature includes numerous case studies of specific agencies and countries (Schedler 1999). In addition, there are important international policy networks that link up institutions that work on the same issues, for example elections, human rights, corruption or budget oversight.[1] Reports from the Constitutional Design Group, an offshoot of the Comparative Constitutions Project, usefully summarize material on three types of agencies, and confirm the upward trend, but do not place them in a broader constitutional context.[2] No one has yet conducted a comparative analysis of the broad diversity of independent accountability agencies in the constitutions of the world.

My initial findings reveal that there are three different ways in which these agencies have been integrated into the overall constitutional framework of their respective countries. One path is formally to group together the most important agencies under a new

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[1] See, for example, International Institute for Democracy and Electoral Assistance (IDEA) http://www.idea.int/; International Organization of Supreme Audit Institutions (INTOSAI) http://www.intosai.org/en/portal/; Iberoamerican Federation of Ombudsman http://www.portalfio.org/inicio/, etc.

[2] The reports on the ombudsman, counter-corruption commissions and human rights commissions are at ConstitutionMaking.org (2009a, 2009b, 2009c).

'branch' of government. This is the case in countries such as Venezuela and Ecuador. A second path is to include all of the agencies under a single heading in the constitution and subject them to a series of common regulations without formally creating an additional branch of government. The third path, which appears to be the most common, is the ad hoc creation of such agencies at different times and in different sections of the respective constitution. In this case, the corresponding constitutional court has had to intervene to carve out a formal constitutional role for this type of agency.

In the final section of the chapter, I assess the impact of the global growth of independent accountability agencies on the separation of powers. I conclude that this phenomenon implies an authentic sea change in the organization of state authority that needs to be given its rightful place within contemporary theories of constitutional design. This transformation is particularly interesting and remarkable because it is an innovation which flows principally from the global 'south'. The creation and strengthening of independent accountability agencies has been especially important in new democracies. Older democracies would do well to learn from their younger cousins.

1. The institutional dynamics of independent accountability agencies

In this section, I explore the specific institutional challenges faced by independent accountability agencies. What are the key areas to watch when evaluating their institutional design and performance? To what extent are these agencies similar or different from regulatory agencies or constitutional courts?

Brian Crisp, Erica Moreno and Matthew Shugart (Crisp et al. 2003) argue that what they call 'superintendence agencies' are usually created by authoritarian, 'majoritarian presidentialist' or patronage-based governments in order to boost their legitimacy and apparent accountability without actually changing their behavior. According to these authors, accountability agencies, hence, are doomed to be highly dependent and ineffective. 'The proliferation of entities of superintendence in Latin America, then, must be seen as largely a product of discontent with the functioning of accountability and it represents an effort to find a way around the problem without tackling the roots of the accountability deficit' (Crisp et al. 2003: 82). They conclude that government reformers should not allow themselves to be distracted by the fool's gold of such agencies, but should turn towards the real business of perfecting voting rules and institutions.

But to Crisp et al.'s chagrin, in recent years governments have rushed to create and consolidate hundreds of new independent accountability agencies throughout the world (Ackerman 2010). This has occurred with particular strength in new democracies under pressure from civil society and international actors to find innovative ways to enforce accountability beyond electoral politics. In this context, the celebration of relatively free and fair elections does not represent the end of the struggle for democracy, but the first step in the broader search for truly accountable government (Ackerman and Sandoval 2006). It may turn out that the creation of so many new accountability agencies was a mistake, since in the end they are only a 'way around the problem' of accountability. But this is an empirical question that needs to be resolved through careful research. Crisp et al. are wrong to generalize in such a blanket fashion about the nature of such agencies.

What determines whether an independent agency ends up as an authoritarian cover-up or as a positive force for accountable governance? I suggest that the answer lies in how these agencies respond to and deal with a series of key challenges which together

constitute what I call their 'institutional situation'. Based on previous research on this topic,[3] I propose four areas of particular importance: public legitimacy, institutional strength, second-order accountability and bureaucratic stagnation. If an independent agency successfully rises to each of these challenges, it will likely be successful in fulfilling its mandate. If it fails on one or more of these fronts, it will tend to become a failed institution which fits nicely into Crisp et al.'s framework.

The first key challenge is the issue of legitimacy. Independent accountability agencies start out with an enormous potential to make a fresh start in terms of public confidence and support. If they do their jobs well, they can even overcome the level of public trust in the other traditional branches of government. This is especially the case in situations of overall low regime legitimacy where the government is perceived to be corrupt, authoritarian and elitist. Here a new agency may be elevated in the public's eye as an example for the future of the regime as a whole, transforming it into a pioneer of state reform.

Nevertheless, the newness of independent agencies is also a disadvantage. Because such institutions are normally created by the very same political class that they are supposed to control and regulate, the immediate suspicion is that their purpose is to cover up problems instead of actually to address the issues they were created to solve. Once again, this is particularly the case in situations of low overall regime legitimacy. In that context, it is difficult to believe that the new agency will represent an authentic break with the corrupt ways of the political class. These low expectations may also provoke low performance through a negative feedback loop between state and society.

A new independent accountability agency, therefore, faces the contradictory situation of facing simultaneously high and low expectations. The population shares a profound hope that the new institution will actually make a difference and is willing to accompany it if the agency demonstrates that it is able to act independently of its creators. Nevertheless, based on past experience and the lack of legitimacy of the reformers themselves, the population also knows that the most likely scenario is that the new agency will simply reproduce old problems. Citizens are therefore hyper-sensitive to any sign that the agency is not strictly fulfilling its mandate or defending the public interest.

This situation translates into the potential for great volatility with regard to the public legitimacy of a new independent agency. Depending on the political context and the specific issues at hand, the population alternates between using its hope and its knowledge

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[3] In a recent book (Ackerman 2007), I call into question two widely accepted theses in the literature on delegation and political development. First, the thesis defended by authors such as Terry Moe (1990) and George Tsebelis (2002) that 'divided government' and an increase in the number of 'veto players' lead to policy deadlock and disjointed delegation. Second, the thesis promulgated by authors such as Barry Weingast (2005) and Robert Kaufman (2003) that government agencies are most effective when they defend the administration/politics dichotomy and isolate themselves from civil society and elected politicians. I try to show that neither of these theses holds for the case of independent pro-accountability agencies (IPAs) in Mexico. Specifically, the history of the design and development of IPAs in Mexico demonstrates: (1) that pluralism and the decentralization of authority can often be more effective than the unification of power in stimulating both policy change and effective delegation, and (2) that open political debate within agency leadership and the active involvement of civil society in agency functioning are keys to effective bureaucratic performance.

when passing judgment on agency performance. In order to consolidate a long-term trajectory of increasing legitimacy, the agency, therefore, needs to show concrete results extremely quickly as well as to be particularly careful not to reveal any outward signs of weakness or of political motivations behind its decisions. The need to act swiftly and the pressure to perform impeccably, at least at the beginning of its institutional life, is a central aspect of the 'institutional situation' of this type of agency.

This dynamic distinguishes independent accountability agencies from both independent regulatory agencies and constitutional courts. Regulatory agencies are not as much in the public eye as accountability agencies. They therefore have the advantage of having more time to construct their public legitimacy. Although regulatory agencies are eventually called to account for their effectiveness, the spotlight does not shine on them as strongly from the very beginning.

Also, since the job of economic regulation is highly specialized, it is more difficult for ordinary citizens to evaluate performance and come to their own conclusions. Counting votes and combating corruption are much easier to understand for the common person than regulating markets and guaranteeing economic competition. The result is that regulatory agencies are not as vulnerable as accountability agencies with regard to public legitimacy. But, on the down side, this also means that they also are not subject to the social pressure which is often necessary to prevent capture by powerful interests.

Constitutional courts are similar to independent accountability agencies insofar as they are also constantly in the public eye. Nevertheless, their location at the 'top' of the system of constitutional control makes them much less vulnerable in terms of public legitimacy. Because the status of the court is formally equal to that of the other branches of government,[4] such institutions are normally less vulnerable than independent agencies, which only deal with specific areas of control. Constitutional courts can, therefore, stand up to intense public criticism in a way that an independent electoral authority or ombudsman cannot. Nevertheless, as in the case of regulatory agencies, this can also be interpreted as a weakness. Their impermeability to social critique can lead to irresponsible and unaccountable behavior.

The second key challenge which determines the institutional situation of independent accountability agencies is the area of institutional strength. Although legitimacy speaks to the presence of the institution in society, 'strength' refers to an agency's ability to influence and control other areas of government. Here independent agencies start from a clear position of weakness. Because they do not belong to any of the traditional three branches of government, these agencies are immediately at a disadvantage in many key areas.

For instance, in the negotiation of the budget an independent agency has much less presence and influence than agencies that are part of the executive, judicial or legislative branches. Independent agencies do not normally have a specific constituency that can support them, and they are relatively small and unconnected when compared to executive agencies.[5] The sheer size and constitutional roles of the judiciary and the legislature

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[4] The Spanish scholar Manuel Garcia Pelayo has argued that Constitutional Courts should be considered to be at the same institutional level as the traditional branches of government, such as the executive, the legislative and the judiciary. See García Pelayo (1981).

[5] For an excellent discussion of how executive agencies achieve independent strength and support, see Carpenter (2001).

evidently give them a much stronger presence than an independent agency. The result is that Congress often finds it much easier to trim the budget of such agencies than to cut back support for the three principal branches of government.

Beyond budgetary questions, independent agencies also run the risk of simply being ignored by other areas of government when they try to investigate and punish wrongdoing. Because they are relatively small and not formally backed up by one of the other branches, they will tend to be marginalized both politically and institutionally.[6] This is especially the case because the work of accountability agencies is by nature uncomfortable for other areas of government. Few government officials find it in their interest to expose themselves to external scrutiny and tough sanctions for wrongdoing. Furthermore, many independent agencies have few formal coercive powers. Ombudsmen, for instance, generally depend entirely on the goodwill of executive agencies to comply with their recommendations and requests for information.

In order to confront this challenge of institutional weakness, independent accountability agencies need to work hard to establish alternative sources of political and institutional support. Their most important ally in this regard is civil society, including the press, universities, non-governmental organizations and social movements. As Frederick Uggla has argued, 'the influence of the ombudsman can hardly be deduced from the formal, legal dispositions regulating the institution. Instead, the strength and autonomy of the institution are generated by a process that is primarily political' (Uggla 2004: 448).[7] Specifically, he argues that ombudsmen often appear to work more like pressure groups than as state institutions.

> In common with pressure groups, the ombudsman has to advance an agenda in a general context that is often indifferent or hostile; it lacks the instruments to ensure that its decisions and resolutions are fulfilled. Popular support and favourable media coverage therefore become important factors for compliance and influence . . . Alternatively, the absence of such factors will greatly undermine the institution's standing. (Uggla 2004: 440)

Once again there are clear differences between the institutional situation of an independent accountability agency and a constitutional court or a regulatory agency. Regulatory agencies also tend to face a David and Goliath situation in their battle

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[6] For instance, the head of Mexico's National Institute of Statistics, Geography and Information (INEGI) recently argued against a reform which would grant his institute formal constitutional autonomy based precisely on this type of argument. From his perspective, independence would be equivalent to a death sentence for the INEGI. This is because it would make it much more difficult for the agency to demand collaboration from other areas of government. The INEGI conducts the national census on its own, but in order to do so, it needs a great deal of logistical and other support from the executive branch. In addition, the executive holds a large amount of information which is essential to the INEGI, for instance, data on births, deaths, marriages, sickness, etc. In order to do its job, the statistics institute needs to be in constant contact and collaboration with the federal government. The director of the institute argued that this is best done as part of the executive branch itself, and that independence might make these tasks much more difficult. (Appearance before the Commission on Constitutional Affairs, Chamber of Deputies, November, 2003.)

[7] Moshe Maor has made a similar argument with respect to independent anti-corruption commissions (Maor 2004).

against economic monopolies. Nevertheless, in principle, regulatory agencies have the full force of the government behind them because their struggle is that of the state as a whole against monopolists in the market. In contrast, independent accountability agencies have a more adversarial relationship with the rest of government since their job is to control and punish government officials.

Constitutional courts are in a different position altogether. Although they do not have any coercive means to enforce their judgments, their location in the system of constitutional control means that other areas of government normally can be expected to respect their decisions. Generally speaking, constitutional courts occupy a position of great institutional strength compared to the relative weakness of independent accountability agencies.

The third fundamental challenge for independent accountability agencies is the issue of their own accountability. The autonomy of these agencies is a great advantage insofar as it separates them from the *quid pro quo* of normal politics and allows them to focus on long-term fundamental goals. Nevertheless, this very autonomy puts them in a delicate situation because it is not always clear to whom they themselves are accountable. This is the classic problem of second-order accountability, or of 'who guards the guardians' (Schedler 1999). How do we prevent the external overseer from himself becoming captured, refusing to act or pursuing a particularistic agenda?

There are at least two different ways to deal with this problem. First, independent accountability agencies may build in daily institutional oversight of their own activities. It is not enough for them to be subject to basic judicial controls and general congressional oversight. They also need to establish an oversight council of some sort to keep a permanent watch on their own activities. Autonomy should not be confused with autarchy or irresponsibility.

A second useful measure is a total commitment to transparency. On the surface, it would appear that independent agencies would be justified in restricting access to information and transparency because the purpose of autonomy is precisely to isolate their actions from social pressures and political negotiations. This may be particularly the case for financial institutions such as central banks although even here it seems transparency is beneficial for performance (Kaufmann and Vishwanath 2001, Stasavage 2003, Sandoval 2008).

But opacity is definitely not a benefit for accountability agencies. Given the institutional vulnerability discussed above, as well as the tendency, identified by Crisp et al., for such agencies to subordinate themselves to the powers that be, transparency is an absolutely essential ingredient. By opening up the entire process of reception of complaints, investigation, documentation, discussion and decision making, independent accountability agencies can protect themselves from external capture and open themselves up to crucial social scrutiny of their performance. Transparency and the participation of civil society are not only important as supports for independent agencies in their struggle to consolidate their institutional strength but also as a whip to assure their practical independence (Ackerman 2007).

The question of second-order accountability and the need for oversight and transparency also apply to regulatory agencies and constitutional courts. One might first imagine that these issues are not as relevant for these other institutions because the information they handle is often more delicate and technically sophisticated. Nevertheless, recent

research reveals that the same demands for oversight and transparency are also crucial for these other institutions (Jordana and Levi Faur 2006).

The fourth challenge to independent accountability agencies is bureaucratic stagnation or the routinization of institutional procedures. New agencies often start out strong then slowly settle into a low-level equilibrium trap where bureaucratic procedures dominate creative thinking and independent action. The value of an independent agency is that it offers a fresh perspective on governance and has the potential to be brave enough to take on central issues that have been swept under the rug for years. With bureaucratic stagnation, such agencies lose their value-added contribution to democratic governance.

But, as Max Weber has famously pointed out, it is often difficult to keep up the initial momentum (Weber 1947). Bureaucratic institutions tend to consume and influence the world view of public servants, even if they are new and come from outside government.[8] In addition, independent agencies threaten powerful interests that often make a concerted effort to weaken the agencies' power and influence. The literature has documented numerous cases of anti-accountability backlash.[9]

Indeed, there appears to be a life-cycle for independent agencies. They often start out relatively weak and dependent on their creators. Then the successful ones break out of their shells and start to have a significant impact on government functioning. In response, politicians, government officials and other affected parties try to cut back on the independence or the powers of the agency.[10]

Perhaps the defining moment for the long-term survival and success of an independent accountability agency is whether and how it overcomes this almost inevitable backlash. If the agency is able to emerge victorious with its independence and powers intact, this bodes well for its long-term consolidation as an effective accountability institution. If it fails to resist the attacks, that could be the beginning of the end of its ability to make a difference in governance.

The discussion above constitutes an initial attempt to capture what is unique about independent accountability agencies. If we can develop a general theory of the 'institutional situation' of such agencies, this will help us greatly in understanding their specific institutional challenges and possibilities for success.

2. Independent accountability agencies in the constitutions of the world

This section offers some initial results from a survey I am presently conducting of the legal design of independent accountability agencies in the world. At least 81 countries presently have independent agencies at the constitutional level. Twenty have four or more independent agencies in their constitutions and provide an interesting profile of the phenomenon.

In general, it appears that the creation of independent agencies has become a strategy used by government reformers to give the impression of starting anew. In contexts as different as the US invasion of Iraq and the Bolivarian revolution in Venezuela,

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[8] This dynamic has been amply studied by the institutionalist literature in political science and public administration. See, for example, the classic study by March and Olsen (1984).

[9] For instance, Ireland, the United States and Mexico (Ackerman and Sandoval 2006, Roberts 2006).

[10] The case of the Federal Electoral Institute in Mexico (IFE) is a classic case in this regard. See Ackerman (2007).

Table 16.1 Countries with four or more independent agencies at the constitutional level

Country	No. of agencies
South Africa	12
Somalia	12
Iraq	11
Venezuela	10
Rwanda	10
Nigeria	10
Peru	7
Ecuador	7
Swaziland	6
Bhutan	6
Uganda	5
Serbia	5
Mozambique	5
Mexico	5
Malawi	5
Hungary	5
Philippines	5
Afghanistan	5
Greece	4
Chile	4

independent agencies seem to offer the possibility of a new face to government. This is consistent with the reports of the Constitutional Design Group that surveyed constitutions back to 1789. Most constitutional provisions establishing an ombudsman, a counter-corruption commission, or a human rights commission are of recent vintage and, except for the ombudsman, they are more prominent outside of wealthy countries (ConstitutionMaking.org, 2009a, 2009b, 2009c).

In terms of political context, the twenty countries in Table 16.1 appear to fall into three different categories. First, there are those countries which have recently experienced a democratic transition brought about principally by domestic political forces. Some notable cases include Chile, Greece, the Philippines and Hungary. Second, there are those countries which recently have gone through significant internal strife and where foreign nations have had an important role in imposing the new institutional framework. This is the case for Afghanistan, Rwanda, Iraq, Serbia and Somalia. Third, there is the case of relatively long-standing democracies which have recently undergone radical political change. This is the case, for instance, for Ecuador, South Africa, Peru and Venezuela.

The question is whether the creation of so many new independent accountability institutions short-circuits or complements deeper democratic reform. Cases such as Chile, Greece, Mexico, Ecuador, Peru and South Africa seem to offer particular hope with regard to the possible complementarity of democracy and independent accountability agencies. In these cases, the creation of independent agencies fits smoothly into a process of positive democratic reform. Here we seem to be witnessing the birth of a truly new and different way to organize state power in a democratic context.

The case of Ecuador is particularly interesting. The new Constitution of 2008 definitively breaks with the almost religious obsession with the trinity of three branches of government. The constitutional text divides power into five different 'functions': executive, legislative, judicial and indigenous justice, transparency and social control, and electoral. In addition, the office of the *Procurador General*, the *Fiscal General* and the Constitutional Court are established as independent powers.

The transparency and social control function includes four separate agencies: the Citizen Participation and Social Control Council, the General State Comptroller, an ombudsman, and a network of 'superintendents'. All of these are accountability agencies insofar as their principal mandate is to control and avoid the abuse and corruption of power. They are also supposed to help strengthen citizen participation in government. The heads of these four agencies make up a coordinating council for the 'function' as a whole that is responsible for informing the other branches of government about its activities as well as presenting bills to Congress that would facilitate the agencies' work in cleaning up and improving government.

Venezuela's 1999 Constitution is another fascinating example of institutional engineering. As in the Ecuadorian case, it also formally enshrines five 'powers': legislative, executive, judicial, citizen and electoral. The 'citizen power' is made up of the 'public defender' (or ombudsman), the comptroller, and the *Fiscal General* (or attorney general). The leadership of each one of these agencies makes up the Republican Moral Council, which coordinates the activities of each and presents a unified voice on issues of national importance related to corruption and the abuse of power.

The South African Constitution does not bring together its various independent agencies under a single roof as do the Ecuadorian and Venezuelan cases, although South Africa does include them all under a single chapter entitled, 'State institutions supporting constitutional democracy'. Six institutions fit into this category: the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. The constitution also includes other independent bodies, for instance a special commission for complaints against the police and for determining government salaries.

The new constitution of Iraq is similar to the South African Constitution insofar as it includes a specific chapter which mentions the most important independent agencies and commissions. These include a human rights commission, an electoral commission and a commission on public integrity. It also includes agencies with more specific mandates, such as a 'Martyr's Commission' and a commission responsible for regulating the relationships between state and federal governments, among others.

Although the Ecuadorian and Venezuelan cases join together their independent accountability agencies into a formal 'power' and the South African and Iraqi cases group together their agencies in a separate 'chapter' of their respective constitutions, other constitutions do not group their different agencies together at all. For instance, in Mexico, the five different agencies with formal constitutional autonomy (Human Rights Commission, Central Bank, Federal Electoral Institute, the Superior Federal Auditor and the National Statistics Commission) are located in entirely different sections of the constitution and the autonomy of each has very different characteristics.

This reflects a certain resistance by politicians and legal scholars to accepting the

importance of such agencies. Specifically, some claim that since the Mexican Constitution explicitly states that 'the supreme power of the federation is divided for its exercise in legislative, executive and judicial' (Article 49) there is no room for the creation of agencies which exercise government power but are not part of these three branches of government.

If the constitution does not explicitly group together or sufficiently recognize the importance of independent agencies in the exercise of power, the corresponding judiciary or constitutional court has sometimes intervened in order to carve out a legal space for these agencies. In Mexico, the Supreme Court finally gave the country's independent agencies a formal role within the constitutional order in an historic decision in 2007[11]. This decision put at least a temporary end to the debates with regard to the constitutionality of such agencies.

According to the court, the creation of independent agencies implies an 'evolution of the traditional theory of the separation of powers'. Specifically, it argued that 'the creation of this type of institutions does not alter or destroy the traditional separation of powers' because their independence does not imply 'that they are not a part of the Mexican state, because their principal mission lies in attending to central needs both of the State and of society in general, by creating institutions which are at the same level as traditional institutions' (my translation).

The different autonomous agencies in the constitutions of the world cover a wide range of different topics. The most common agencies appear to be those responsible for budget oversight, electoral administration and human rights protection, although there has also been an important surge in creation of independent prosecutors and autonomous civil service commissions. There are also dozens of commissions which do not fall into any of these categories. Some examples include the Disarmament and Demobilization Commission of Somalia, the National Economic and Social Advisory Council of Thailand, the Pay Commission in Bhutan and the National Statistics Institute in Mexico. The granting of autonomous status to institutions responsible for specific areas of government accountability apparently has become an international 'best practice' which is now applied to a broad diversity of topics and government functions.

3. Concluding remarks

The global spread of independent accountability agencies can no longer be controlled or denied. Instead of looking for excuses to ignore or cast aspersions on this new phenomenon, we need to conduct careful research to determine the best institutional designs and to document when and how such agencies are able to fulfill their mandates.

Nevertheless, the explosion in the number and strength of such agencies appears to be more of a fad than a well-thought-out strategy to improve governance. This new institutional design is generally used in ad hoc ways to deal with a wide diversity of issues that need some sort of protection from 'normal politics'. The result is that the existing agencies normally fit uncomfortably into the existing constitutional framework.

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[11] Órganos Constitucionales Autónomos. Notas Distintivas y Caracteristicas Tesis de Jurisprudencia, P./J. 20/2007, Semanario Judicial de la Federación y su Gaceta XXV, Mayo de 2007, Página 1647, Novena Época, Registro No. 172456. Surgido de la controversia constitucional 31/2006. Tribunal Electoral del Distrito Federal, 7 de noviembre de 2006.

With the notable exception of Ecuador and Venezuela, the rise of independent accountability agencies has not formed part of a self-conscious attempt to restructure the traditional understanding of the separation of powers between three branches of government. But perhaps it should be. The proliferation of independent agencies has changed the organization of state authority throughout the world to the point of no return. Theorists and practitioners of constitutional reform urgently need to think of innovative ways to incorporate these agencies smoothly into the structure of the modern state. The alternative could be a dangerous fragmentation of state power which provokes instead the decay of the strengthening of democratic accountability.

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17 Independent administrative authorities in France: structural and procedural change at the intersection of Americanization, Europeanization and Gallicization

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Over the past twenty years, the French administrative sphere has experienced dramatic structural changes, some inspired by American examples, others prodded by the EU or the European Court of Human Rights (ECtHR) (Sauvé 2008: 239). On the one hand, since the late 1980s and early 1990s, French public utilities have undergone a liberalization that first affected air transport and telecommunications, then the electricity and gas sectors, eventually reaching postal and railroad services. The restructuring of state-owned companies in the 1980s generally resulted only in the shrinking of the public sector and an influx of private law rules into the operation of some public corporations. The 1990s liberalization, by contrast, had more far-reaching consequences. The new regulatory framework, imposed by EU directives or rulings by its judicial arm, the European Court of Justice (ECJ), gave a central role to independent administrative authorities (IAAs) in French administration and regulation. In this regard, the emerging regulatory framework bears a striking resemblance to the revised common carrier model that emerged in the United States following the deregulation of public utilities in the late 1970s.

These various changes have forced former publicly owned monopolies into a competitive environment. As a consequence, a fundamental transformation has taken hold, which arguably upsets the core of the French administrative foundations: the ideal of *service public* or public service. Moreover, starting in the 1990s, the ECtHR's direct or indirect condemnations of key features of the French administrative procedure on the basis of the right to a fair trial have refashioned key aspects of French administrative adjudication (*la décision individuelle*). Additionally, this activity has given rise to features in French administrative and regulatory practice that are similar in several respects to what one finds in the United States. These latter changes particularly concern sanction proceedings conducted by the new public utility regulators in France. The advent of IAAs as a feature of the French administrative landscape arguably reflect, therefore, combined processes of Americanization, Europeanization and 'Gallicization', or the process of preserving a French character in the legal transplants in order to promote their acceptability. Section 1 of this contribution will explore the structural dimension of this process, whereas Section 2 will examine its procedural ramifications.

1. The structural transformation: Europeanization, Americanization, and Gallicization

As part of the realization of the single market in the late 1980s, the European Commission placed the liberalization of network industries on its agenda (Green Paper

1987, and 1991). The new regulatory principles of public utilities embodied in the governing directives were often modeled along lines championed by Thatcherism in the UK (Bell 1989: 890, Géradin 2000a: 7, Ranci 2003: 122). Consequently, the transposition of the European directives implied a tremendous change in France. Most importantly, it involved a transformation in the conceptual cornerstone of the construction of the French administrative state and administrative law over the course of the twentieth century: the notion of *service public*. The sections that follow will outline briefly the regulatory framework that previously prevailed in France (Sub-Section 1.1). This will then allow us to better gauge the impact of the implementation of the EU directives in France (Sub-Section 1.2), before considering the persistent Gallicization in the resulting structure (Sub-Section 1.3).

1.1. The former regulatory framework

Prior to the liberalization of the 1990s, the French regulatory framework was not unlike that of other Member States of the European Union, excluding the British. The French case stood out not so much because of the allocation of regulatory powers, but rather because of the sacrosanct concept of 'public service' (*service public*). In France, as elsewhere (again with the exception of the UK, where the overhaul of the regulatory landscape had taken place earlier), the state concurrently exercised overlapping functions in network industries by virtue of public monopoly and the status of these entities as public authorities. The operation of public utilities was under the control of, and regulated by, a single government ministry, which in turn was politically responsible for the provision of services. This was a concrete expression of the classic distinction in administrative practice between the United States and continental Europe. The US had generally opted for privately owned monopolies flanked by independent regulators, whereas Europe embraced publicly owned monopolies directly under the control of government ministers.

1.1.1. A ministry vested with overlapping functions In its proprietary capacities, the French state conceived of the public utility as an instrument to further its industrial strategy and socio-political agenda. Accordingly, the state entered into a contract with the operator setting out the terms and conditions of that public policy. Within the bounds of that agreement, and on the basis of the legal personality afforded the operator, the latter enjoyed relative autonomy, designed to ensure its ability to conduct its activities as an economic actor. In its regulatory capacities, the state (represented by the minister) solely defined and enforced the overall legal framework within which the public utility operated. It was never clearly specified whether the powers vested in the state, such as oversight, rate-setting and subsidization, flowed from the state's owner status, its role as a regulator, or its prerogatives as the possessor of public authority (*puissance publique*). The proper labeling did not really matter in light of the very diverse nature of state intervention during that period. Stockholder functions, regulatory functions, and public authority functions were so enmeshed as to defy precise conceptual identification.

Not surprisingly, at the outset of the 1990s, the concept of public utility 'regulation', so prominent in the American tradition and the cornerstone of the approach championed by the European Commission, had little correspondence in French administrative law theory. However, the respective roles of the state and the operator corresponded

perfectly to the notion of *service public*, which was a core feature of French theory going all the way back to the early twentieth century, when it was first articulated by Duguit as central to the modern construction of French administrative law and practice (see, in English, Duguit 1923). This notion of public service irradiates all across modern French administrative law, from the definition of fundamental concepts (such as public property and civil service status), to the use of procedural categories of administrative action (such as the administrative act, either unilateral or contractual), to the triggering of a specific set of public liability rules.

1.1.2. An industrial and commercial public service As far as its legal status was concerned, the public-utility operator could take one of two forms. First, it might constitute a public person, categorized as an *établissement public industriel et commercial* (EPIC), an industrial and commercial public establishment enjoying a certain measure of autonomy vis-à-vis the state, governed by a mixture of public and private law. Second, it might constitute a private legal person, a *Société Anonyme* (SA), that is, a public company whose operation was governed primarily by private law. Irrespective of the form, however, in both law and politics the operator was understood to be an 'industrial and commercial public service' (such as the national railroad system, the SNCF; or Paris transport authority, the RATP). This notion refers to an entity serving a mission of public interest entrusted to it by the state, but which, unlike one carried out by a public service entirely within the state framework (such as universities and museums), is capable of provision in the market sector. Nevertheless, these entities are still recognized as a *service public*; as such, the public utility is understood to be part of the administrative state, with the function of meeting public needs and, more particularly, of fulfilling the solidarist duties of the state.

1.2. The new regulatory framework

1.2.1. Undeniable Europeanization, indirect Americanization The European Commission's resolve to liberalize network industries as part of the attempt to achieve the single market doomed this legal framework. From air transport and telecommunications, to electricity and gas, to postal and railroad services, European directives have redefined the regulatory framework for public utilities throughout the Member States (Buendia 2000, Barnard 2004, Géradin 2000b). Reflecting a regulatory philosophy newly shared by the EU and the US (Breyer 1982, Aman 2000: 263), demonopolization, separation of functions, and universal service became the prevailing leitmotifs of the new regulatory approach in the EU. With the US framework providing the model, the EU served as a conduit for a process of Americanization in national law. However, given the peculiarities of European directives as legal instruments, implementation was left in part to Member States' discretion. Thus, the Europeanization/Americanization of the law of public utilities was open to national crafting during the transposition into each national system of law – hence the possibility of a persistent 'Gallicization' of IAAs in French administration and regulation.

1.2.2. French transposition: a network of inter-exchanges The French transposition resulted in a marriage of old and new. The first stage involved the dismantling of public

monopolies, reducing them to just one of several competing operators. This was the only step required by the European directives, but it led to another evolution not strictly required under EU law: privatization. This entailed transforming the public entity into a private firm and then having the state relinquish its majority stake.[1] As a consequence, public control of network industries, an entrenched characteristic of the old French model, increasingly passed into history. The emerging market structure includes a plurality of competing private operators, among which one finds the hardly recognizable former government-owned company retaining responsibility for public service (although under the new scheme, private companies are also eligible to provide the *service public*). Indeed, the notion of 'universal service' is increasingly overtaking *service public*, operating under the supervision of an independent regulator (IAA), now firmly implanted as a feature of the new French public utility regulatory landscape. Nevertheless, the state often maintains a sizeable stake in the private company. In other words, in the course of the passage from an administrative state based on direct production of goods and provision of services to one based in regulation, the state has not completely renounced its former influence that flowed from its proprietary position.

EU directives also mandated the separation of rulemaking and oversight functions, which in France led to the development of a recent institutional form, known as the Independent Administrative Authority. By opting for the IAA form, France rejected other possible solutions, such as the distribution of regulatory functions among two distinct executive agencies (one being responsible for rulemaking, the other for oversight, as suggested by the *Conseil d'État* in its 1996 Report). The other possible solution was the establishment of the network industry operator as an *établissement public industriel et commercial* (EPIC).[2] The solution advocated by *the Conseil d'Etat* would have preserved the unity of the regulatory structure by entrenching exclusive powers in ministers acting through executive agencies. The second would have signaled a break-up of that structure. Instead France opted for a dual system: on the one hand, ministers continue to play a role, albeit reduced; on the other hand, the IAAs now form a constellation of independent regulators whose role does not quite mirror that of their American counterparts.

In selecting the IAA as its preferred form of transposing the functional separation mandated by EU law, France was not in fact embarking on a new institutional experiment. Rather, it was extending a process of legal borrowing that it had begun in the late 1970s, to deal with both the challenge of protecting privacy related to the computerization of social life,[3] as well as regulating financial and securities services.[4] By the 1990s, however, both Europe and France became converts to deregulation, and as part of that program, they both turned to the independent regulatory agency, which the US had

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[1] This occurred with France Telecom, Air France-KLM, and the French electricity and gas operators, EDF and GDF.

[2] Exceptionally this category has been used for railway since 1997 with *Réseau Ferré Français*; and was used for electricity with *Réseau de Transport d'Electricité*.

[3] *Commission Nationale de l'Informatique et des Libertés* (CNIL), that is, the personal data protection regulator, created in 1978.

[4] The *Commission des Opérations de Bourse* (COB), the *Conseil des Marchés Financiers* (CMF), and the *Commission bancaire* merged into the *Autorité des Marchés Financiers* (AMF) in 2003 as the new French counterpart of the American SEC (Securities and Exchange Commission).

invented a century earlier. Thus, when France contemplated the liberalization of public utilities in the 1990s, it already had its own experience of two decades on which to build, as well as the American model. In addition, it could look to the experiences of the UK,[5] as well as those of the other Member States of the EU (Géradin 2005: 1, Prosser 1997). It therefore appears that the resort to the independent regulator model in France in the 1990s was fueled by such a varied cocktail of influences that it is difficult to conceive of it other than as the result of a web-process, that is, a network of inter-exchanges of a particular legal transplant. The French independent network industry regulator emerged from the interweaving of European Union encouragement, American inspiration, the UK example, deliberate or unconscious mimicry among Member States and the constraints of the administrative tradition of France.

Beyond the choice of the IAA model, the articulation of new regulatory powers also reflected an effort to accommodate old and new features. The French constitutional text and tradition centralize rulemaking power in the hands of the executive branch (President and Prime Minister).[6] Consequently, French independent regulators do not enjoy autonomous rulemaking power; rather, they are always flanked by the Prime Minister and a specialized minister who shares the regulatory functions. Indeed, the IAAs that deal with public utilities tend to enjoy greater rulemaking power than the category of independent administrative authorities as a whole;[7] yet the rulemaking authority vested in the French independent regulators is limited both in its scope and in its breadth.[8] It always operates under the constitutional primacy of the Prime Minister's general rulemaking power.[9] Moreover, even where the body formally possesses independent rulemaking authority, a government representative may, depending on the statute, have the right to intervene in its functioning by demanding either a re-hearing[10] or the right to place a particular item on the Authority's agenda.[11] Government representatives are also sometimes entitled to attend the meetings of the body and to submit observations,[12] although, due to the body's independence, the representative may not participate in the decision per se. In fact, a 2006 legislative report recommended the generalization of these rights for governmental representatives across all IAAs.[13] The minister and the independent regulatory body must operate symbiotically for the regulatory regime to function effectively.

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[5] The liberalization of public enterprises in the UK took place during the two conservative administrations of Margaret Thatcher (1979–90) and John Major (1990–97). By 1998, this large-scale undertaking spanned the telecommunications (1984), gas (1986), water (1989), airways and airports (1987), electricity (1990) and rail (1996) sectors.

[6] Constitution, Arts. 13 and 21.

[7] CRE (Power Commission), ARCEP, AMF, CSA (Broadcasting regulator), and CNIL (a non-public utility regulator) are the only independent administrative authorities entrusted with the power to issue regulations (Office Parlementaire d'Évaluation de la Législation 2006: 33).

[8] Conseil Constitutionnel 248 DC 17 January 1989 and 378 DC 23 July 1996.

[9] The Prime Minister issues regulations concerning the provision of universal service, for instance.

[10] This is the case with AMF, France's financial markets regulator.

[11] This is the case with CRE, the French power commission.

[12] This is the case with the former *Conseil de la Concurrence*, or the competition regulator, the counterpart of the Federal Trade Commission in the US.

[13] Supra note 6.

Selection of universal service operators is, for example, the minister's responsibility although ratemaking may have been delegated eventually to the independent body.[14]

1.3. The Gallicization of the American regulatory framework

The subjection of French public services to competition law, as well as the seeming adoption of the US revised common carrier model for the regulation of the liberalized public utilities, strongly suggest a process of Americanization in French administrative law and practice. Nevertheless, the distinctiveness of the French new regulatory framework is still discernible in several respects.

Clearly, the powers of French independent regulators pale in comparison with those of their US counterparts (Custos 2009: 66). The French bodies lack both broad rulemaking powers as well as the primary prerogative to exercise rulemaking authority, which has remained with the Prime Minister and cabinet ministers. These impediments have plagued the emergence of genuinely independent regulatory authorities to counterbalance France's strong centralist bent. But for several reasons one should still not overstate the distance between the French and the American independent regulatory models.

While French independent regulators may appear to have much more limited powers, in practice they in fact maximize their allocated powers, often well beyond the restrictions seemingly set forth in their organic statutes (Jeanneney 2000: 44).[15] Moreover, the constitutional effects of their establishment have arguably been profound. One can, for example, detect a certain degree of continuity from the advent of independent administrative authorities on the French administrative landscape to the decentralization of rulemaking power to local governments under the 2003 constitutional amendment (Custos 2007b). In addition, the allocation of regulatory powers to both the Minister and the independent entity reflects the uneasy coexistence of old and new in the legal framework governing the operation of network industries in French. The emergence of universal service has not resulted in the disappearance of the concept of *service public*. This translates into institutional competence of regulators in interesting ways. The competence of independent regulatory bodies extends only to universal service, whereas that of the government through ministries encompasses both universal service and *service public*.

As we shall see below, the decision-making processes of the French independent regulators do not conform to American-style notice of comment procedures, despite the proliferation of public consultations**.** Moreover, the old regulatory regime for public services outside the context of public utilities remains. In short, the *service public* notion, although undergoing an overhaul, is still central to the architecture of French administrative law. Recent legal developments thus suggest a juxtaposition of two regimes, one old, another new. Indeed, EU law, despite all its liberalizing tendencies, also retains elements of the old, *service public* notion. The reference to obligations of public service in EU legislation, and the recognition of services of general economic interest by the Charter of Fundamental Rights of the EU and the Lisbon Treaty are patent marks

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[14] Under the '*loi n° 2004-669 of July 9, 2004 relative aux communications électroniques et aux services de communication audiovisuelle*', the ARCEP (former ART) ensures the affordability of communications services other than broadcast, whereas under the 1996 law it could only submit an opinion to the minister in this respect.

[15] Jeanneney is a former chief executive officer of the French telecommunications regulator.

of this reception. Thus, with the EU ingesting some of the regulatory features of the Member States, the *service public* notion furnishes an example of the interactive nature of the process of legal migration.

2. The procedural transformation: French administrative law under European influence

To measure the extent of the procedural transformation in French administrative law under the influence of European integration, we must begin with a brief outline of the former procedural characteristics of the French system. I take up this task in Sub-Section 2.1, before turning to the procedural transformation in Sub-Section 2.2. But as we saw in the structural evolution outlined above, Gallicization is also at play in this process of procedural change. Nevertheless, the influence of common law models (via the UK) is also strong in this process, with procedural consequences that once again show some similarity to the US model. In this regard, even on the procedural plane, the importance of IAAs remains clear.

2.1. Former procedural characteristics

2.1.1. Respective roles of administrative procedure and judicial review of administrative action An analysis of the general structure of French administrative law inevitably leads one to observe the paucity of administrative procedure in comparison with the preeminence of judicial review of administrative action performed by the *Conseil d'Etat* (Custos 2007b). The goal of French administrative law is to strike a balance between the protection of the rights of the public service user and the general interest pursued by the public service, and the achievement of that balance depends significantly on this sort of external legal control. For reasons relating to its status, powers and methods, the administrative judiciary – at the summit of which is the *Conseil d'Etat* – is seen as the best protector of citizens in their dealings with agencies.

When adjudicating disputes between citizens and the state (*le contentieux administratif*), the French administrative judge deploys a particular understanding of *service public*, one that is very much a reflection of the dual (advisory and judicial) functions of the *Conseil d'Etat* itself. The French administrative judiciary is a subpart of the national civil service, and as such, is presumed to exhibit all the virtues attached to meritocratic selection and professional training, manifested, it is hoped, in the quality of its decisions. Greatly contributing to this decisional quality is the intervention of the *Commissaire du Gouvernement*, renamed *Rapporteur public* in 2009.[16] The person holding this office is also a member of the *Conseil d'Etat* but acts independently of the adjudicators actually assigned to rule on the case. The *Rapporteur public* assists the adjudication of the dispute by submitting an opinion that not only puts the case in a broader legal and policy perspective but also stimulates debate among the judges who are charged with ruling on the controversy.

This procedural structure, in other words, exhibits 'the institutional and republican judicial control and legitimacy' (Lasser 2005: 1002) that is central to the French legal tradition. The focus of this control is the objective legality of administrative acts (under

[16] Under Décret no. 2009-14 of January 7, 2009, the renaming became effective in February 2009.

the so-called *recours pour excès de pouvoir*, or action for breach of authority). Because it is the act itself that is 'on trial', so to speak, the French administrative judge is not constrained by a case-and-controversy requirement (although the claimant must still show a sufficient 'interest' in order to establish standing). This judge may also strike down an administrative act because it was taken in furtherance of a goal other than the one for which it could legally be taken.[17] In believing so firmly in the republican virtue of its administrative judges, the classical theory of French administrative law justifies its strong preference for external legal control of administrative acts as the principal means of protecting the rights of the user of public services. Concomitantly, French administrative law has generally regarded the imposition of procedural requirements on agencies as of secondary importance, thus ignoring the 'democratic' potential of increased participation and transparency through this channel. The respective roles of administrative procedure and external legal control (again, in effect, 'judicial review') in the classical architecture of French administrative law reflect a conception of administrative democracy that is resolutely more curative than preemptive.

2.1.2. Top-down procedural features Traditionally, the rulemaking process in France requires nothing more than consultation of established bodies,[18] which either represent distinct interests in society or enjoy particular expertise.[19] This institutionalized and indirect consultation thus confines participation in administrative proceedings to a few selected advisors, and is at best characterized as an indirect form of administrative democracy. Correlatively, there is little role in traditional French administrative law for direct participation by potential stakeholders, acting individually or collectively, on their own initiative, which in other systems is regarded as a more direct form of administrative democracy. To the extent that competitive debate occurs prior to the issuance of a regulation in France, it is mediated through the consultative bodies. Moreover, for purposes of demonstrating the 'reasoned' nature of the regulatory action, the issuing body must merely mention that the proper bodies were consulted and their opinions were taken into account. Unlike in American or even EU administrative law, there is no general duty to explain the substantive basis of the regulatory approach chosen by the deciding body (that is, no general requirement of a detailed 'statement of basis and purpose' as in the US Administrative Procedure Act (APA). The duty to give reasons is limited to specific (adverse) individual decisions, not general regulatory acts. In fact, whether one looks at the institutionalized and mediated consultation that French administrative procedure demands, or at the closed deliberations of French administrative judges in *le contentieux administratif* (Lasser 2004), it is clear that French administrative law reflects a strong preference for confidential debate among selected participants.

That the *Conseil d'Etat*, in its advisory capacity, may introduce a measure of expertise

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[17] The *détournement de pouvoir* ground, although frequently used by litigants, does not frequently generate invalidation (Bermann 1975).

[18] There are three categories of consultation: mandatory, optional and spontaneous. The failure to request an opinion required by law gives grounds for challenge the illegality of the administrative act.

[19] To be precise, the *Conseil d'Etat*, in its advisory capacity, is expected to impart its legal expertise and familiarity with administrative practices.

into the rulemaking process certainly may be a factor in improving administrative decision-making overall. Yet, when viewed in light of the overall consultation environment, this characteristic takes on a different meaning. The combination of a privileged governmental counsel status (which, in some instances, may rise to the level of co-decision-maker), and the presence of agencies' representatives in some of the consultative commissions, as well as the absence of individual participatory rights, contribute to the impression of a relatively enclosed process that somewhat undermines the intrinsic values of consultation more broadly speaking.

Undoubtedly, in light of the central role assigned to external legal control by the administrative judge, as well as the weakness and limited character of the pre-decisional participatory process, the construction of classical French administrative law betrays a top-down conception in which substantial administrative accountability is suspended until after the administrative decision has been promulgated. During the decision-making phase, the user and the operator of the public utility and other concerned entities are required to maintain a low profile while the agency is in strict command of the procedure. In the course of the preparation of the regulation, procedural resources allowing parties to challenge the government position remain scarce. Evidently, bureaucratic policy-formulation is deemed sufficient to compensate for the meager procedural rights at the pre-decisional stage. The traditional French system reflects strong faith in the careful selection of public employees through national competitive exams, their demanding training within diverse civil service schools and programs duly magnifying the public interest concept and the *service public* ideal, and the meticulous programming of their professional advancement according to seniority. Once the decision has been published, citizens emerge from their relative invisibility as they are entitled to avail themselves of *le contentieux administratif* as the primary means of holding the agency accountable. They can then seek judicial relief through legality or tort actions not only against administrative action but also against administrative inaction. In this construction, bureaucratic legitimacy and external legal control by the administrative judge provide the two supporting pillars to administrative accountability, while procedural requirements appear as secondary. On the one hand, bureaucratic legitimacy operates as an internal and status-based safeguard; on the other hand, due to the relative absence of procedural protection in the rulemaking process, intervention by the administrative judge after the fact bears full responsibility for ensuring the accountability of administrative action.

2.2. New procedural characteristics

The penetration of the European Convention on Human Rights (ECHR) into French administrative procedure, via judgments of the European Court of Human Rights (ECtHR),[20] has brought about a noticeable transformation in French administration that is particularly apparent in the regulatory context. The principle of impartiality entailed in the due process and fairness concepts championed by the ECtHR has clear import for the procedures that independent regulatory authorities must follow in the course of adversarial proceedings. If the European roots of the developing procedural

[20] The European Court of Human Rights (ECtHR) was established in 1959 under the 1950 Convention on Human Rights and Fundamental Freedoms signed by the Member States of the Council of Europe (COE), which was founded in 1949.

transformation are undeniable, it could also potentially signal an American-inflected reconceptualization of the forms of French administrative action. The interplay between French and European conceptions involves a broad range of actors. Among the latter, courts and other branches of government unsurprisingly figure prominently, but so, more interestingly, do independent regulatory authorities.

2.2.1. Europeanization and potentially broader Americanization Article 6 of the ECHR sets out due process and fairness rights in civil and criminal proceedings. Recent French legislation conferred the authority to review regulatory sanctions either on the *Cour de Cassation*, the ordinary supreme court, or on the *Conseil d'Etat*, the administrative supreme court. Thus, judicial review of the independent regulators is split between the private law judiciary and the administrative law judiciary.[21] As early as 1996,[22] the *Cour de Cassation* had brought the exercise of the sanctioning power in the context of independent regulation (that is, the power vested in the independent regulator to impose a punishment on the operator found in breach of regulatory prescriptions) in line with Article 6. The *Conseil d'Etat* endorsed this position in 1999.[23] This Europeanization must be analyzed as a turning point for at least two reasons.

First, insofar as the French courts acknowledged the applicability of Article 6, they did so by equating a French independent regulator with a tribunal within the meaning of the European Convention as interpreted by the ECtHR.[24] Imposing a sanction on a firm for breach of securities law or competition law was tantamount to the punishment of a criminal wrongdoing. Both supreme courts purported to follow a 1989 decision of the French Constitutional Council, which conditioned the constitutionality of the sanctioning power of French independent administrative authorities on its subjection to substantive requirements pertaining to the criminal trial.[25] However, that decision had in fact suggested a different analogy, that is, to classical administrative authorities, at least when the Council listed the rights of defense (*les droits de la défense*) and the right to judicial review while specifying the applicable procedural requirements. Given that the French understanding of rights of defense is much less encompassing than the common law right

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[21] For instance, challenges to rulings of the postal and telecommunications regulator are dealt with either by the *Cour d'appel de Paris* and the *Cour de Cassation* (with regard to cases involving the resolution of conflicts among operators) or by the *Conseil d'Etat* (with regard to cases involving sanctions and other matters). The *Cour de Cassation* has jurisdiction over the sanctions proceedings of CRE, ARCEP, *Autorité de la Concurrence*, and non-disciplinary sanctions pronounced by AMF.

[22] Cour de Cassation, Comm., February 1996, *Haddad*, and October 5 1999, *COB v. Oury*. Both judgments are related to the French SEC, the former *COB* (now AMF), October 5, 1999, *SNC Campenon Bernard SGE* (with regard to the former *Conseil de la Concurrence*).

[23] Conseil d'Etat, December 3, 1999, *Didier* (with regard to the *Conseil des Marchés Financiers* which merged with the former COB to form the new AMF, securities regulator).

[24] See, for example, *Demicoli v. Malte* 210 ECtHR (ser. A) (1991). However, both Courts simultaneously stressed that the independent regulator did not fall under the domestic category of tribunal.

[25] *Conseil Constitutionnel*, DC, January, 17 1989 (CSA). In other words, the *Conseil Constitutionnel* found no infringement of separation of powers as long as the exercise of this quasi-judicial power was limited by substantive principles such as the legality of crimes, the necessity of punishments, and the non-retroactivity of laws providing for more severe punishments.

to be heard (Bignami 2005: 266), the reference did not hold out a great deal of promise to regulated entities seeking to effectively defend themselves before IAAs. Nevertheless, when over the next decade the *Cour de Cassation* and the *Conseil d'Etat* recognized the applicability of Article 6 of the ECHR in this context, they relied on the procedural dimension of this analogy. The implications of this reasoning stretch beyond challenges to sanctions imposed by independent regulatory bodies, perhaps reaching those imposed by the classical administrative agencies. Potentially, the reasoning opened the gate to the penetration of Article 6 into several other areas of classical administrative law, such as disciplinary, fiscal,[26] and customs-based sanctions.[27]

Second, as a consequence of the demands of Article 6, France's private law supreme court, the *Cour de Cassation*, introduced the principle of separation of investigatory, prosecutorial and adjudicatory functions into French administrative law. The position of the Court (relating to the then-*COB* – France's securities regulator – and the former *Conseil de la Concurrence*[28] – France's competition authority) was extremely unforgiving, concerned not merely with the reality of partiality, but also with the mere appearance of it. The court reasoned that the presence of an investigatory (reporting) officer or *rapporteur* during the deliberations of the adjudicatory panel deciding the sanction, whether or not she or he may participate in the vote, constituted a violation of Article 6. Assuredly, the ECtHR, when examining sanctions involving non-regulatory entities, condemned the exercise by the same judge of both investigating and adjudicative functions.[29]

Over time, this development may theoretically allow for the reconceptualization of the individualized decision, at least when it consists in an unfavorable pronouncement by administrative agencies in general (sanctions, denials). Insofar as the individualized administrative act in French law would be redefined (following the English and American conceptions) as an order resulting from an adjudication between the public service operator and the private person, the classical French principle of the rights of defense could be converted into the right to be heard. The intermediary step of such a development would be the generalized application of the impartiality principle to all sanctions regardless of the independent status of the adjudicating body. This potential evolution would move an important area of French administrative law very much in an American direction (Custos 2009). In the US, agency action other than rulemaking is residually categorized as adjudication and, when formal processes are required, analogized to a judicial intervention. American law mandates separation of functions to shield ALJs from the rest of the staff, despite the combined legislative, executive and judicial roles played by agencies. However, such a step remains unlikely because the *Conseil d'Etat* seems disinclined toward any systematic condemnation of the confusion of investigative prosecutorial and adjudicative powers.

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[26] In 1995, the *Conseil d'Etat* declared the applicability of Art. 6 of the 1950 Convention to fiscal sanctions, to the extent they entail a determination of criminal charges: Conseil d'Etat, March 31, 1995, *Ministre du Budget v. SARL Auto Industrie Méric*.

[27] With regard to fiscal sanctions, in two advisory opinions, March 31, 1995 and April 12, 2002 the *Conseil d'Etat* ruled that late fees inflicted by the tax administrations were criminal sanctions under Art. 6 (1)).

[28] The *Conseil de la Concurrence* was renamed *Autorité de la Concurrence* by the Law no. 2008-776 of August 4, 2008.

[29] *De Cubber v. Belgium*, 86 ECtHR (ser. A) (1984).

As a matter of fact, France's two supreme courts diverge on the question of functional separation within agencies. The *Conseil d'Etat* adopts a pragmatic and casuistic posture and ascribes a different weight to two sets of separation. The separation of prosecuting and adjudicating functions is deemed indispensable to compliance with impartiality, whereas the separation of investigating and adjudicating powers is not.[30] By way of justifying this nuanced interpretation of Article 6 (one in fact shared by the ECtHR in non-regulatory contexts),[31] the high court noted that the availability of judicial review against the sanction meant that it was unnecessary to impose all the requirements deriving from the fair trial principle to this type of regulatory proceedings. The ECtHR itself adopts this view when assessing the procedure of quasi-judicial organs under Article 6.[32] (Indeed, the US Supreme Court arguably takes the same position when determining the scope of the due process rights in the context of agency adjudication.)[33] This line of cases reminds us of the compensatory role that external legal control plays vis-à-vis the insufficiencies of the administrative process. It is also suggestive, in the French case, of the continuing attachment to the traditional structure of French administrative law, even when confronting administrative bodies characterized by the commingling of powers (legislative, executive, and adjudicative).

More recently, in January 2006,[34] the *Conseil d'Etat* seems to have taken a tougher stand when it explicitly ruled that the separation of investigatory and adjudicative functions could not be understood as mandated by either general principles of law or Article 6(1) of the ECHR. By refusing to find the separation of functions to be implied in the principle of impartiality, whether within the meaning of European law or under French creative administrative law jurisprudence, the *Conseil d'Etat* may well cut off a fledgling evolution that had the potential to redefine a fundamental feature of French administrative law, namely the administrative individualized act. In doing so, the *Conseil d'Etat* seeks to prevent or at least delay a development that could potentially bring the French distinction between the act resulting from a rulemaking proceeding and the individualized act closer to the American distinction between a regulation deriving from a rulemaking and an order issued in the course of an adjudication.

Despite the divergence between the two supreme courts, and the efforts deployed by the *Conseil d'Etat* to limit the ramifications of impartiality, the judicialization of the

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[30] Significantly, separation of investigatory and decision functions is observed neither in the French administrative courts, nor in the French *Cour de Cassation*, nor in the ECtHR (Arts. 48(1), 49(2) and 50 of Rules of the Court).

[31] The ECtHR systematically condemns the non-separation of prosecution and decision: *Piersack*, 53 ECtHR (ser. A) (1982). On the other hand, it does not read a violation of Art. 6 into the non-separation of investigation and decision when investigation is confined to hearing the accused: ECtHR, February 26, 1993, *Padovani v. Italy*, 257-B ECtHR (ser. A) (1993). However, the existing ECtHR's case law does not concern impartiality in a regulatory context.

[32] *Albert and Le Compte v. Belgium,* 58 ECtHR (ser. A) (1983).

[33] *North American Cold Storage Co. v. Chicago*, 211 US 306 (1908); *Ingraham v. Wright*, 430 US 651 (1977); *Cleveland Board of Education v. Loudermill*, 470 US 532 (1985).

[34] *Conseil d'Etat*, January 16, 2006, *Société Euro Trading Capital Market*. The position is reiterated a few months later: November 17, 2006, *Société CNP Assurances*. This ruling concerns the former *Commission de contrôle des assurances*, now known as the *Autorité de contrôle des assurances et des mutuelles* and which is an independent administrative authority. Idem *Conseil d'Etat*, May 30, 2007, *Société Dubus Management SA*; July 25, 2007, *Société Dubus Management SA*.

independent regulators' sanction proceedings is at an advanced stage of development. This is best demonstrated by procedural innovations taken by IAAs themselves, which is the topic of the next sub-section.

2.2.2. Procedural innovations by the IAAs In their original forms, many of the statutes governing IAAs were generally silent with regard to procedural provisions. Today, however, they are often more specific, typically providing for the insulation of the adjudicative panel from other agency personnel participating in the adversarial proceedings. The latest version of the enabling statute governing the French independent securities regulator (AMF) is illustrative of this trend.[35] The new act models the agency's sanction procedure on French criminal procedure, requiring a clear separation of functions. First, the members of the AMF (analogous to SEC commissioners in the US), or more exactly one of those belonging to one of its three specialized sections, decide whether to press charges; second, a reporting officer investigates; third, an independent board, the sanctions commission, which itself comprises two sections, then adjudicates, while the reporting officer is duly excluded from its deliberations.

The independent regulatory authorities themselves have proven eager to couch their procedural guidelines in trial-like terms, and, in particular, to require a separation of the three functions. On July 18, 1999,[36] five months before the *Conseil d'Etat* registered its disagreement with the *Cour de Cassation* on the question of separation of functions, the postal and telecommunications regulator in France (the ARCEP) revamped its by-laws to ensure better compliance with Article 6 of the ECHR, guaranteeing the separation of investigation and adjudication in its sanction proceedings.[37] Indeed, earlier, in February 1999, the competition regulator, in anticipation of the *Cour de Cassation* pending judgment,[38] on its own initiative incorporated into its procedural rules this aspect of the right to a fair trial, by barring the *rapporteur* from participating in the final deliberations. Clearly, in the matter of functional separation, independent regulatory agencies embraced the harder line inaugurated by the *Cour de Cassation*, regardless of whether they operated under the judicial oversight of the *Cour de Cassation* or the *Conseil d'Etat*. In effect, these regulatory entities became independent agents of Europeanization and, indirectly, Americanization. Thus, they compensate for and overcome the *Conseil d'Etat*'s strict delimitation of separation of functions.[39]

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[35] Law no. 2003-706 August 1, 2003: Art. 14.

[36] Décision no. 99−528 de l'Autorité de régulation des télécommunications en date du 18 juillet 1999 portant règlement intérieur. The regulator established in 1996 was known as ART. The 2006 by-laws confirm the functional separation: Décision no. 06-0044 de 1'Autorité de régulation des communications électroniques et des postes en date du 10 janvier 2006 portant modification du règlement intérieur.

[37] More precisely, the reporting judge was excluded from the college's deliberations.

[38] The former *Conseil de la Concurrence*, February 23 1999, that is, after the *Cour de Cassation*'s February 5, 1999 judgment (dealing with the COB) but prior to the *Cour de Cassation's* pronouncement on October 5, 1999 (dealing with the *Conseil de la Concurrence*).

[39] This institutional practice exhibited by French independent regulators is reminiscent of the trend discerned among American 'agencies [which] have separated functions in many proceedings to which section 554(d) of the APA is inapplicable, and gone beyond the requirements of section 554(d) where it is applicable' (Asimow 1981: 760).

2.3. Gallicization as an instrument of Europeanization

Notwithstanding the *Conseil d'Etat*'s rejection of a broad conception of impartiality, France's supreme administrative court should not be viewed as generally setting obstacles to the penetration of Article 6 into French administrative law. In fact, the high court arguably employs Gallicization as an instrument of Europeanization.

The *Conseil*'s November 2006 ruling in *Parent*,[40] for example, is indicative of a turning point with regard to the implications of the right to a fair trial in an adversarial regulatory context. In a case where it was asked to examine the conformity of a sanction inflicted by the competition regulator with the rights of defense, the *Conseil d'Etat* considerably enlarged the definition of the right while establishing a conceptual link between it and Article 6. The *Conseil* viewed the formulation in the ECHR as a reiteration of the French rule (Article 6(1)) and a precise articulation of its substance (Article 6(3)). Not only is Article 6(1) applicable to the sanctioning power of independent regulators (as already established in the case law), but Article 6(3) also governs. This reasoning is typical of a court resolutely concerned with preserving and stressing the ultimately home-grown character of jurisprudential developments, while also subtly suggesting its historical influence on the design of the corresponding supranational provision. This tactical repackaging of a new judicial position arguably helped to facilitate the incorporation of an imported legal change, conditioning it on a requisite degree of Gallicization.

It is also revealing of the process and network of convergence: from French origination by the name of rights of defense, to exportation to Europe as Article 6 of the ECHR, to importation back into France as a conceptual repatriation deliberately forgetful of the many contributions by other participants in the exchange. Having established an analytical relationship between the European right to a fair trial and the French rights of defense, the *Conseil* proceeded to list the requirements of the latter in light of those set out in Article 6(3). As a result, the French rights of defense applicable to a French independent administrative authority cover almost all of the rights specified in Article 6(3). This includes the right to cross-examination of witnesses, which under classical French administrative law was exceptional. It excludes, however, the right to legal assistance, which the administrative high court confines to truly judicial proceedings.

The *Conseil d'Etat*'s 2006 ruling in *Parent* suggests a broader principle of the rights of defense than had originally been established in 1945.[41] The broader definition applies only to the imposition of sanctions within the scope of Article 6 of the ECHR. But independent regulators are not the only bodies in France that impose such sanctions. Rather, they may also be imposed by the tax administration in response to violations of taxpayers' obligations, by civil or military agencies, and by professional organizations in their disciplinary capacity, whose determinations come within the legal control of the state through the *Conseil d'Etat*. Although this jurisprudence in principle leaves intact the core of the procedure employed to issue an administrative individualized act, a second legal regime governing the administrative act is inexorably taking shape under European influence. It is worth noticing that in this process of Europeanization, the developing French administrative case law is not unfolding an exact reproduction of the

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[40] *Conseil d'Etat*, October 27, 2006, *Parent*. The *Conseil* struck down a sanction pronounced by the *Autorité des marchés financiers*.

[41] *Conseil d'Etat*, *Dame Veuve Trompier-Gravier*, Recueil Conseil d'Etat 133 (May 5, 1944).

requirements set forth in Article 6. Rather, the *Conseil d'Etat* has engaged in a kind of legal cherry-picking, noticeably rejecting the separation of investigative and adjudicative functions within independent regulatory bodies, signaling a limit to its willingness to Europeanize the impartiality principle. In the absence of case-law coming from the ECtHR relating to impartiality in a regulatory context, this position has not yet led to open confrontation between French and European courts.

Even the divergence between the *Conseil d'Etat* and the *Cour de Cassation* should not be overstated. Both French supreme courts promote a common vision of regulatory impartiality, albeit with nuances, each placing IAAs at the center of a procedural transformation. IAAs themselves, in making their own procedural changes that in effect neutralize the judicial disagreement, have proven to be autonomous accelerators of this legal change. With their role on the procedural front echoing their significance in the structural rearrangement of the French administrative landscape, IAAs have provided an institutional conduit through which French administrative law has been perceptibly transformed. These entities are central nodes in a web of changes that combines elements of Americanization, Europeanization, and Gallicization, suggesting the operation of a broader network of influences, dramatically affecting this branch of French law.

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18 A comparison of US and European independent agencies

Martin Shapiro

A comparison of 'independent' agencies in the United States and Europe inevitably must address two questions. First, what do we mean by independence and from whom? Second, why do we want some agencies to be independent? I consider each issue in turn for the United States and the European Union.

1. The United States

No doubt a review of the whole history of public administration would reveal hundreds of administrative units in many times and places that correspond to whatever definition of 'independent' we choose to adopt. A comparison of contemporary US-European independent agencies safely may begin, however, with the US Interstate Commerce Commission (ICC) established in 1887. US agency independence begins in the context of government regulation of private business enterprise in a resolutely capitalist economy.

1.1. What is independence? The case of the ICC

The ICC is the very model of, and indeed a principal source of, the more or less standard 'law and economics' model of capitalist regulation.[1] The proliferation of rail lines owned by a host of separate private entrepreneurs led to a curious paradox. From the point of view of agricultural shippers, each rail line constituted a natural monopoly for the second nearest line would be too far away from any given farm to offer an economically feasible shipping alternative. From the railroads' point of view, however, two, or often many more, lines that were indeed far apart in the agricultural hinterlands converged at the big city terminals, resulting in ruinous, rate-cutting competition. Moreover, the US was a highly fragmented federal system in which state-by-state regulation would subject interstate rail lines to multiple and potentially conflicting regulation.

The result of all this was a consensus among politically powerful farmers and railroads in favor of national regulation that would assure shippers of relatively low rates and railroads of a reasonable return on investment. This consensus, however, occurs at a particular, and somewhat peculiar, time in American history, the Progressive Era. It is the intersection of regulatory consensus and Progressive political and administrative theory that yields agency 'independence' in the American sense.

Two theories of public administration had coexisted in the US from the founding of the republic. A Hamiltonian theory had touted government by experts. The Jacksonian theory proclaimed that the average citizen should take a short time away from his plow to perform public service and then return to his fields. This would be 'rotation in office'. Given American, competitive two-party, electoral democracy, Hamilton gives us a

[1] In general, see Bernstein (1955) and Cushman (1941).

career civil service staffed by technical experts isolated from politics, and Jackson gives us the 'spoils system' in which the winning party staffs government service with its own stalwarts until the second party wins an election and replaces the other party's stalwarts with its own.

The spoils system and rotation in office dominated much of the American public service in the nineteenth century. To the Progressives, late in that century, such Jacksonianism led only to corrupt, inefficient government in an era of rapid technological change that demanded expert efficiency. The Progressive era gave us nonpartisan elections, city managers to replace mayors, career civil services recruited by examinations that tested specialized technical knowledge and skills, and the commission form, that is, multi-headed administrative agencies. To put an agency 'in commission', that is, to replace a single executive head with a governing board, would reduce the chances of corruption as the commissioners watched one another. Or, at the very least, it would be more expensive and riskier to attempt to bribe three or five or seven commissioners than a single agency head.

Independence was part of this Progressive package and went hand-in-hand with the commission form. The Progressives certainly subscribed to democracy and thus to some form of ultimate democratic accountability for public administration. There was a strong American consensus on the constitutional separation of powers. In general, the appropriate solution to the collision between the Progressive hostility to partisan, party politics and American dedication to democracy would be a federal, career, expert civil service serving under a democratically elected Chief Executive and his political appointees. There was, or should be, no Republican or Democratic way to pave a street. But the experts should be 'on tap but not on top'.

Government regulation of capitalist enterprise, however, might require some variant on this standard solution to what in Europe is called the 'democratic deficit' problem of the Progressives. Such intervention in the private sector called for particular vigilance in combating the downside of the democratic dimension of public administration, that is, the inclination of the democratically responsible public administrators to seek partisan, electoral political advantage. Here, of course, comes 'independence'.

At first glance, and with hindsight, the concept of the 'independent regulatory commission' first embodied in the ICC appears to involve independence from the President. What may appear, however, to be an attempt to isolate the ICC and later regulatory commissions from the institution of the Presidency is really much more an effort to insulate them from partisan, party attempts to seek electoral advantage through regulatory decisions. It is here that the connection between independence and the commission form becomes crucial.

One paradox of the independent regulatory commissions is that they rather openly combine executive, legislative and judicial functions in a political system deeply dedicated to 'three great branch' separation of powers. However, precisely because of this dedication, the ICC and subsequent regulatory commissions were placed firmly within the executive branch. The commissioners are presidential appointees. The staff are members of the general federal civil service. The general administrative law rules and procedures that govern the rest of the executive branch govern the commissions. It is only in very long delayed retrospect that the Supreme Court tells us that unlike the executive department heads, the commissions, while appointed by the President, do not

serve at the President's pleasure but may only be removed by him or her for cause. The sole, completely clear and specific constitutional dimension of independence is thus a limitation on the President's removal powers imposed by the Supreme Court almost fifty years after the establishment of the first independent commission.

Congress had been thinking of independence in a somewhat different way; as independence from party, electorally oriented politics. What makes the ICC independent is far less its location outside of any of the cabinet departments than the statutorially prescribed terms of its commissioners. For the ICC and the later commissions, each commissioner serves for a longer term than that of the President, and their terms are staggered. Given the American competitive two-party system, typically at any given moment the Commission will enjoy a rough balance between Republican and Democratic commissioners. Indeed the statutes creating many of the later commissions formally require such a balance. Jacksonian rotation in office is turned to Hamiltonian purposes. Democratic party politics is too deeply ingrained to be denied, but it is denatured in the commissions by counteracting the partisan inclinations of one set of commissioners by those of the other.

1.2. Expertise

Only a small corner of the claimed expertise of the ICC concerned itself with the physical operation of the railroads. Real ICC expertise had to lie in railroad bookkeeping. The basic purpose of the ICC was to serve as a surrogate for the free market setting of shipping rates. The ICC was to protect farmers from the too high rates that monopoly railroads would impose and to protect the railroads from the too low rates that 'ruinous' competition would impose when 'too many' roads served the same city. The ICC was to set rates that provided the roads with a reasonable return on investment, in short, rates the market would have produced but for the peculiarly high costs and rigidities of rail construction.

In reality, the Commission exercised considerable rate-setting discretion (Huntington 1952). So the ICC developed an elaborate, 'comparative', rate-setting hearing procedure that facilitated participation by all interested parties, maximized the amount of cost and operating data available and added an aura of quasi-judicial legitimacy to the Commission's technocratic legitimacy.

Yet for all of the claims of technocratic expertise, expertise does not really distinguish independent from non-independent agencies. In many countries in the world, including the US, there is plenty of technical expertise in many of the sub-units of many of the cabinet departments and ministries and plenty of claims of technocratic legitimacy. An ICC located within a Department of Commerce or Department of Transportation could have just as much claimed expertise as an independent rail regulator.

What distinguishes the ICC and other commissions is not their levels of claimed expertise, or their real expertise, but their claim that a two-part balance on the Commission will balance any partisan, political incursions on that expertise. Thus its decisions will be more neutral, objective and market approximating than those of units within cabinet departments headed by single, party-identified and loyal, political notables.

One might argue that the combination of legislative, administrative and judicial functions characteristic of US independent agencies is a distinguishing mark of independence. In reality, however, many sub-units of cabinet departments also mix the three

functions, notably the Internal Revenue Service and the Social Security Administration. On both sides of the independence-cabinet alley, the word quasi is tacked on at the front of all three to preserve our separation of powers, constitutional sensitivities.

1.3. Administrative law

It is a truism, and indeed a true one, that the US executive branch does not operate under a single, unified code of administrative procedure. Instead, typically, the statute creating a particular agency and/or particular program prescribes administrative law provisions peculiar to that agency or program. In theory, the Administrative Procedures Act serves as a kind of residual cover resorted to when gaps occur in the procedural provisions of particular statutes. In reality, of course, a great mass of generally applicable US administrative law lies in judicial decisions interpreting the APA. For our purposes here, however, there is no need to untangle all of this complexity. It is enough to say that most of the tangle applies in roughly the same ways to both independent and non-independent agencies.

If there is any distinction in federal administrative law between independent and non-independent agencies, it consists of a kind of zone of uncertainty about the relationship between the Presidency and the independent commissions. One aspect of that uncertainty involves ex parte communications. Presidential ex parte communication remains a highly uncertain area of administrative law as a check of any administrative law casebook will indicate. One of the uncertainties is whether the president legitimately has the same or less capacity to intervene in the quasi-judicial proceedings conducted by independent agencies than in those conducted within cabinet departments.

Another uncertainty involves 'legislative clearance'. Concerns for the president's ability to effectively engage in policy coordination of the ever growing and highly fragmented executive branch are a constant of American political discourse (Neustadt 1990). Legislative clearance is the presidentially imposed requirement that executive branch agencies not submit their proposals for new legislation to Congress unless the Office of Management and Budget (OMB) has vetted them to be sure that they accord with the President's policies. Although the independent agencies customarily do submit their proposed legislation for clearance, it is not clear that they are legally required to do so. Here again independence leads to uncertainty rather than a bright line.

It may be that independent agencies use their independence as a bargaining chip in their negotiations with OMB, but ultimately both they and the non-independent agencies share the same institutional power to submit whatever they like through friendly members of Congress who exercise the ultimate, indeed the sole, power of actually introducing legislative proposals.

There is less uncertainty about the independent agencies' degree of independence from Congress. The budgets of the independent agencies are set by the joint presidential-congressional budget process. There is evidence that the independent agencies may be considerably influenced by the congressional committees that have jurisdiction over them and can offer the prospect of rewards or punishments in the budgets finally adopted by Congress. These committees can also threaten a committee hearing on agency practices that, at the least, require large expenditures of agency preparation time and, at worst, entail agency embarrassment and even the initiation of new legislative proposals hostile to the agency. And, of course, an independent agency may be attentive

to congressional concerns because it itself is seeking new legislation that facilitates its operations (Weingast and Moran 1982). In all of these relationships with Congress, however, independent agencies essentially are no different from non-independent ones. US administrative law makes little or no distinction between the scope and intensity of judicial review of independent and non-independent agencies.

All things considered, the American answer to the question: 'Independent from whom?' is clear enough. They are independent from partisan, electorally oriented regulatory decision-making to the extent that the representation of both parties on their multi-headed executives cancels out partisan favoritism.

1.4. Why independence?

The why of independence is clear for the prototypic independent agency, the ICC. Although it always had a small railroad safety mission, the essence of the ICC was its role as a surrogate for a competitive market as a rate and route setter. Achieving this goal depended on agency expertise in calculating shipping costs. Shielding such analyses from partisan politics made a good deal of sense, particularly in a polity that worshiped free enterprises.

A number of the later independent commissions had rate and route regulatory powers, but a number, notably the Federal Trade Commission (FTC) and Securities and Exchange Commission (SEC), received powers to police economic misconduct of various kinds. At least in the Anglo-American legal tradition, such investigative and prosecutorial tasks are considered to contain a large discretionary component. Because the resources assigned to investigators-prosecutors are always limited, they must make choices about what to investigate and whom to prosecute, choices that are, in some sense, political. This type of discretion is particularly salient for federal regulatory agencies because of Congress's notorious tendency to enact ambitious regulatory programs that it then consistently under-funds. Thus there was always a breach in the neutral, objective, expertise-based appeal of independence for the investigator-prosecutor independent agencies. If their decisions are necessarily discretionary, ought they not be politically controlled, just as prosecutors are controlled either through election or political appointment *and dismissal*? The FTC, which shares antitrust jurisdiction with the Justice Department, a line cabinet agency, highlights this anomaly. Why should there be both independent and non-independent antitrust regulators?

Safety, health and environmental regulation have been center stage in the late twentieth century and go beyond government regulation of private enterprise. Again there is hardly a bright line between independent and non-independent agencies. In spite of its alphabetical reference, the Environmental Protection Agency (EPA) is neither independent nor a commission, but a single-headed agency whose head is appointed by and serves at the pleasure of the President and normally attends cabinet meetings. A major safety regulator, the Occupational Health and Safety Agency (OHSA), although the statute creating it grants it a certain autonomy, is a sub-unit of a regular cabinet department, as is the Food and Drug Administration (FDA). The Nuclear Regulatory Commission is an independent agency granted both economic and safety regulatory powers over a new high tech industry.

All in all, then, the why question about US independence cannot be answered clearly. It is not simply or solely to shield market-surrogate agencies that set price and service

levels from partisan politics. It is not because certain regulatory functions are particularly or exclusively suited to independence. Antitrust, investigative prosecutorial, safety and other functions are to be found in both independent and non-independent agencies. It is not because neutral, scientific, objective, technological expertise can only be expected from independent agencies. Such expertise flourishes in many sub-units of cabinet departments as well.

The best answer we can give to the American 'why' question is that independence is a matter of degree, the desire to give some greater degree of shielding from partisan, party, electoral concerns than is given to non-independent agencies – a little more Hamilton, a little less Jackson.

The ICC and the commission setting airline rates and routes have been abolished. Their departure, however, is not due to disillusion with the independent regulatory commission form but only an instance for the late twentieth century vogue for deregulation. With their industries deregulated, there was no longer any need for the commissions as surrogates for competitive markets. The post-World War II creation of the Nuclear Regulatory Commission indicates the continued viability of the form, as does that of the Civil Rights Commission, although it is not a classic regulatory agency.

1.5. Political accountability

Throughout their history the American independent regulatory commissions have posed two classic problems. One is political accountability. In a democracy, all parts of government ought to be accountable to the people. Of course, if the very purpose of independence is to shield certain regulatory decisions from partisan, electorally oriented politics, the have-your-cake-and-eat-it-too problem necessarily arises and probably is insolvable. During times of economic crisis, the SEC and the Federal Reserve, which is an independent agency, have come under fire. At such times, a modicum of democratic political accountability arises through congressional hearings and media attention. It is notable, however, that the political debate that then arises often is over whether or not to give such independent agencies more regulatory powers, not over reducing their independence.

The other classic problem concerns presidential policy coordination within the executive branch. Given the size of that branch and the proliferation of units and sub-units, periodic waves of enthusiasm occur for strengthening the President's coordinating powers. The independence of the independent agencies from partisan political pressures is, of course, achieved through an attenuation of presidential control. Here the response has been to somewhat strengthen the powers of the commissions' chairs and to grant the President the power to designate the chair. The custom has arisen that at the beginning of each presidential term, commission chairs resign not only their chairmanships but also their seats on the commission and that the incoming President appoints a new chair. It is not at all clear, however, that this practice does much to enhance the President's coordinating powers.

The coordination problem has not proved to be acute because the independent agencies have not been centers of policy innovation. They have not been prolific either in legislative proposals to Congress nor in their own rule making. In its early days the National Labor Relations Board, as intended, was very pro-union, but it has long since settled, first into a middle ground and then almost into quiescence as the union movement itself

dramatically declined. The Federal Communications Commission has taken some bold, trivial steps concerning the broadcasting of nudity and four letter words and some more important ones concerning political fairness. But overall, there have been few notable clashes between independent agency policies and those of the President.

2. The European Union

The European Union is a fascinating focus for comparative studies because it is so new that it is still in the process of inventing itself. One of its inventions is a great proliferation of independent agencies. To understand the EU, as opposed to the American, meaning of 'independence' requires a brief review of the structure of the EU (Hofmann and Turk 2006). The Council consists of a representative of each Member State, but its membership varies from the Member State prime ministers to the cabinet member relevant to the policy area under consideration. So sometimes it will consist of finance ministers and at others of ministers of transportation. It legislates, with some exceptions employing 'weighted majority' voting; that is, its members cast one or more votes on the basis of relative Member State populations. It has a permanent staff of European Union career civil servants.

The EU Commission is its administrative arm. Its president and commissioners are political appointees of the Member State governments. The bulk of its staff are career EU civil servants. It is divided into Directorates General, each headed by a commissioner. Most EU legislation is implemented only indirectly through the Commission. Member State bureaucracies do the direct administration. Over time, the Parliament's legislative powers have increased, but the Council remains the final enactor, and the Commission the sole proposer of legislation. Some lawmaking powers, subject to considerable oversight, have been delegated by the Council to the Commission. When exercising such delegated lawmaking powers and, more generally, in constructing legislative proposals, the Commission employs what has come to be known as the comitology process which requires some special explanation (Hofmann and Turk 2006, chapters 4, 13, 15).

When considering a particular policy initiative, the Commission typically appoints an ad hoc committee with a membership of appropriate subject-matter experts from both the public and private sectors of the member states. At any given moment, it is hard to tell how many or what committees there are or their current membership. There may or may not be opportunities for outside participation in their discussions. Transparency is low, although after a long and never-really-over fight, the Parliament has obtained the means to monitor committee proceedings. The Commission maintains control through its chairmanships of the committees, and all committee proposals flow back to the Commission which, as noted, has a monopoly power over actually introducing new legislative proposals.

2.1. Independent agencies in the EU

If we tentatively define an EU independent agency as an administrative agency that is not a sub-unit of one of the Directorates General (DG) of the Commission, a few were created by EU legislation very early in the history of the then European Communities. Two subsequent waves of creation occurred in the mid-1990s and at the turn of the century. As with the US Federal Reserve, the European Central Bank is an independent

agency, but will not be considered here because central banks have a character all their own.

In the US, the Supreme Court accepted the ICC and other early commissions with little concern about the separation of powers. Subsequently, it created an even greater separation of powers anomaly by limiting the President's powers to dismiss commissioners. In contrast, the European Court of Justice early ruled that units outside the DG framework were, nevertheless, legal dependencies of the Commission because no such organizations had been specifically provided for in the treaties establishing the Union (9/56 *Meroni v. High Authority* [1957-8] ECR 133).

Today there are over thirty EU independent agencies, with some units so anomalous as to defy classification.[2] Roughly speaking, they fall into three categories. A few, such as the Office for Harmonization in the Internal Market and the Community Plant Variety Office, assign Union-wide marketing rights that are in the nature of patents. In this sense, they are clearly regulatory agencies. At the opposite extreme, a substantial number simply gather and disseminate information on particular topics such as vocational training and coordinate discussions among Member State civil servants and other experts. A large number of agencies engage in 'soft law' making of various sorts. A few administer funding programs. Many engage in indirect regulatory implementation through their relations with Member State bodies. Some, such as the Fisheries Control Agency, do some direct regulation. None of the agencies has 'hard law' making powers, that is, delegated lawmaking powers or the power to issue legally binding rules, a power exercised by many independent and non-dependent US agencies.

As noted earlier, Member States administrations implement most EU legislation. In contrast to the US, few EU agencies directly administer regulatory or other programs.

All EU organs, including the agencies, are subject to a general 'giving reasons' requirement specifically contained in the treaties establishing the EU and to a duty of 'good administration' which the Court of Justice has read into the treaties. For judicial review purposes, these norms can function like the notice and comment, statement of basis and purpose and arbitrary and capricious provisions of the US Administrative Procedures Act. How far US-style 'hard look', 'partnership', review has developed in the EU currently is a matter of debate (Shapiro 2002a, 2002b, Nehl 1999). The Court of Justice and the Court of First Instance, which hears most challenges to EU administrative actions, may well be developing a dynamic similar to that which developed between the Supreme Court and the DC Circuit, with one trying to rein in the activism of the other. As we shall see, however, the prevalence of 'soft law' making in the independent agencies, plus the scarcity of direct regulatory implementation by them and their inability to make rules that have the force of law, yield far fewer opportunities for judicial review than in the United States. Very searching judicial review, however, is built into the decision-making processes of the agencies able to grant patent-like rights.

2.2. Independent of whom?

In the purely formal legal sense, the independent agencies are not independent at all. They are, unless and until the Court of Justice changes its mind, dependencies of the

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[2] In general see Geradin et al. (2005), and Kreher (1996).

Commission. It can only be said that they are independent of the permanent staffs of the DGs. Their operations are conducted largely independently of day-to-day Commission operations, but their chairs, who are Commission staffers, exercise considerable control.

As in the US, the crucial dimension is independence from partisan, electorally oriented politics. The EU as a whole is said to suffer from a major 'democratic deficit' problem. The Council is indirectly democratic. Member State voters select their national governments. Their national governments then send cabinet ministers to be the Council.

The President of the Commission is chosen by the Member State governments. A balance of Member State citizens is maintained in the appointment of heads of the DGs. Although some changes will occur if the Treaty of Lisbon is ratified, the dominant theme of national influence over the appointment of the political executives of the Commission will remain. The heart of the Commission is its staff, drawn from a competitively recruited, merit-based, career, civil service which defines itself as a set of experts serving Europe, not their states of origin. The Commission is supposed to and generally does serve as a transnational counterweight to the national interests which meet and negotiate in the Council.

In the US, independence is independence from, or, at least, attenuation of, a party politics seeking electoral advantage. The politics most feared in the EU is not party politics in the direct sense. There are no EU-wide political parties, and only the Parliament is a product of EU elections. Rather the fear is influence from politicians oriented to their fate in Member State elections.

Although not all the independent agencies have exactly the same structure, typically they reflect the tension between national political interests and optimal EU performance. Most have executive boards consisting of appointees from each Member State. Thus, like US independent commissions, EU independent agencies employ the commission or multi-headed form as a mode for integrating politics into administration. The EU commission form, however, unlike the American, does not attenuate the most feared political influence; rather the form accentuates it. The EU agency structure is a microcosm of the balance between national and transnational interests struck by the Council-Commission relationship. The agency executive boards are mini-Councils and the working staff a mini-Commission.

So, at least in formal structure, the EU independent agencies are independent neither of the Commission nor of Member State political interests. In this sense, about all they are independent of is the DGs and they are somewhat more distanced from overall Commission control than the DGs.

2.3. Why independence?

So why this problematic form of independence? Like US independent agencies, EU agencies emphasize their specialized expertise. Like US agencies as well, however, the many sub-units of the non-independent departments under the DGs claim the level of expertise. The difference from the US is that, in theory at least, EU independent agencies are even more subject to, rather than less subject to, electorally oriented politics than the sub-units of the line departments. So the reason for independence is not essentially about privileging either expertise or efficiency.

It is tempting to seek the causes of the proliferation of EU independent agencies in the dynamics of the EU itself. That proliferation occurred, however, at the same time

as Member States were also creating many new independent agencies. So attention must be paid to general European causes as well. The 'crisis of legitimacy', like the rise of the middle classes, seems to be constantly with us as an all-purpose explanation of whatever is going on at whatever time and place. Yet it is certainly true that denunciation of government bureaucracy is a central theme of modern political discourse on both sides of the Atlantic. In Europe, precisely because of proud traditions of high esprit de corps, career, technically expert, supposedly politically neutral, state civil services, unadulterated by Jacksonianism, the hostile reaction to government bureaucracy has been acute. That hostility has concentrated on the cabinet departments, that is, the ministries staffed by career services, because that is where the bureaucrats manufacturing the red tape were located. The British TV version is, quite correctly, entitled *Yes Minister*.

Paradoxically, if you hate the ministry administrators, but find that you need new administrative tasks to be done, about all you can do is place the new administrators you need outside the ministries you hate. One general European cause of independent agencies is the desire not to further bloat what are seen to be already over-bloated ministry bureaucracies.

To put the same matter in somewhat different terms, subsequent to World War II we experienced a grand vogue for 'new administrative management' or 'new public administration', in which the citizenry are supposed to be seen as clients to be served rather than subjects to be ordered about. Critics inevitably saw the old line agencies or ministries as strongholds of the old public administration. The very elitism and high esprit de corps their bureaucracies projected appeared to be the principal barrier to the introduction of new client-serving reforms. Perhaps the creation of new agencies outside the ministries could be a vehicle for ringing out the old and ringing in the new management.

The fall of socialism results in the need for new regulation. Free markets only work if they have rules. If, however, we are deregulating or privatizing certain enterprises in order to achieve greater efficiency than under the old regime, it hardly seems to make sense to turn over the new regulatory tasks to exactly the same ministries that produced the old inefficiencies. So here again the reaction to old bureaucracy tends to be the creation of new bureaucracies. Independence is independence from the ministries.

One element of independent agency proliferation has been the creation of 'rights' or anti-discrimination agencies. Here, again, the very merit-based elitism that the old ministry civil services claimed as their principal virtues rendered them citadels of white, male domination. It hardly seemed right to put the anti-discrimination bow in the hands of the discriminators. New anti-discrimination independent agencies could be established outside the ministry old boy net.

On both sides of the Atlantic, organization forms can be highly visible declarations of priorities. Any new administrative activity placed in a department or ministry is likely to sink into the complexity and obscurity of the organization chart. The creation of a new independent agency declares a high priority. Environmental, consumer protection, anti-discrimination, energy and other policy concerns can be highlighted by independence.

The traditional political neutrality of ministry-based administration has been undercut in many EU Member States by increased political influence over appointments to high-level ministry positions. As ministry career staffs appear less independent or neutral, the appeal of independent agencies no doubt increases. Interests that were not

well represented in the ministries were likely to find independent, clientele-oriented agencies a particularly attractive option.

Against this national background, it is possible to identify some of the causes of EU independent agency proliferation. As the administrative arm of the Union, the Commission has experienced much of the general hostility to bureaucracy prevalent in Europe. This quantum of hostility is greatly multiplied by hostility to the EU in general. From its beginnings as essentially a free trade zone, the union has developed into a major European regulator and a massive source of subsidies, particularly of agriculture. In their very nature, these activities threaten deeply entrenched, highly vocal local interests. There is a constant barrage of animosity directed at 'Brussels' and 'the Eurocracy'. The Commission administers regulations and subsidies. Unlike the Council and Parliament, the Commission structure does not embody Member State interests. The Commission has suffered a number of specific administrative failures and possible malfeasances. The growth of EU regulation inevitably leads to a growth of its staff and denunciations of Commission empire building.

One obvious response to all the anti-Commission-Brussels-Eurocracy sentiment has been to take advantage of the general European vogue in independent agencies by channeling some of the desired growth in Union administrative resources, not to the Commission itself, but to new agencies ostensibly independent of the Commission. Significantly, the headquarters of these agencies have not been placed in Brussels but distributed among major cities of the Member States.

Probably the most revealing way to approach the EU independent agencies is to view them in parallel to the comitology process. In many ways, the independent agencies are a further institutionalization of the comitology practice. They are specialized in particular functions or policy areas. They are located 'outside' the Commission organizationally and physically. Most of them have quite small permanent staffs and basically serve as a locus for meetings of experts from the Member States, particularly for specialists from the Member State government ministries. Whatever policy proposals they come up with can be formalized into legally binding norms only by submission to the Commission for possible submission to the Council-Parliament legislative process. So, ultimately, the why of independence is to render more palatable the expansion of the EU administrative and regulatory bureaucracy by placing some of it 'outside' the Commission and outside Brussels, while subjecting it to more institutional visibility and approachability than the comitology process.

2.4. European problems

Like the comitology process, the EU agencies raise serious democratic deficit problems. And like comitology, one answer to these problems is the substitution of technocratic for democratic legitimacy (Majone 2001). The committees and the independent agencies are staffed by specialized experts seeking technically correct, economically efficient and thus politically neutral outcomes. Precisely because they are far more institutionalized than the committees, however, this answer has not proved entirely convincing for the independent agencies. As we have seen, although staffed by experts and providing meeting places for specialists, typically they are headed by boards, composed of experts to be sure, but each representing one of the Member States. Like the US too, this design aims to balance differing political interests – in the European instance, national ones rather

than partisan, political party ones. And in the European instance, there is further tempering because the national representatives are supposed to be drawn from their nation's technical experts, rather than from among its politicians. To a degree, of course, there is more or less of this tempering in the US as well. Many US Commissioners do have strong backgrounds in the specialized practices they regulate.

Ultimately, the balance between Member State representation, and thus, at least, some indirect electoral accountability, and expert, technocratic legitimacy was struck on the side of technocracy for the EU independent agencies, but, nonetheless, there is some balance.

Two other problems are the same as those that arise in comparable US agencies: policy coordination and transparency-participation-democratic accountability. A third is judicial review, although that may be viewed as an aspect of the second.

The Commission structure is essentially Weberian, with the usual potential for coordination presented by such structures. As in the US, the multiplication of independent agencies outside that structure of ministries subordinate to a cabinet and chief executive creates problems of both policy and implementation coordination. Along one dimension, coordination problems are far less pressing in the EU. None of the EU independent agencies has formal rule-making or delegated legislative authority. All of their decisions apply only to the immediate parties. Any legislative proposals they come up with must be submitted to the Commission. There is no back door. In American terms, 'legislative clearance' can be absolutely enforced. For agencies that award patent-like, marketing rights, however, precedential patterns of individual decisions are likely to function like legal norms beyond any direct control by the Commission. As we shall see, the information and 'soft law' functions of the agencies will generate pressures for policy change partially beyond Commission control. Furthermore, because Member State bureaucracies implement most EU legislation and many EU agencies are loci of coordination for these bureaucracies, agency transnational communication and coordination functions may disturb Commission implementation initiatives.

The second problem, that of transparency, participation and electoral accountability, is a complex one. On the one hand, the agencies are at least more transparent and open to outside participation than the committees because they are more formally institutionalized. We know which ones exist, where they are, who staffs them, and that all this will be the same tomorrow as yesterday. On the other hand, the agencies present still another layer of institutional complexity in a governing system that most Europeans understand poorly.

The principal problem of transparency and accountability, however, lies along another dimension. Most of what the agencies do is generate 'soft law'. Initially, the early independent agencies, for instance the Environment Agency, proclaimed that they did not contribute to the democratic deficit because their sole function was to gather and disseminate science-based information. Yet, as the constant squabbles over the suppression, distortion and selective release of such information by the Bush administration indicate, the flow of information may have crucial policy consequences.

Beyond information, the agencies sponsor an array of recommended 'best practices', reports and study papers designed to facilitate coordination among Member State bureaucracies, conference and consultative meetings for national bureaucracies and model rules and recommended guidelines. Most of these outputs are 'soft', taking the

form of non-binding communications to and among Member State regulators. They are not easy to challenge either politically or in court. Moreover, there tends to be a constant flow of such discourse, with each new bit slightly modifying the messages of the earlier bits, so that outsiders, those not in a position to swim continuously in the stream, find their sporadic interventions quickly diluted or swept away.

Above all, most of the agencies serve as loci of communication among Member States' specialized, expert bureaucracies seeking to 'coordinate' their implementation of EU norms. There is the strong suspicion that some of this coordination is actually end runs by national bureaucracies around their politically responsible cabinet ministers in order to get policies out of the EU that they could not get out of their own governments, thus adding to the democratic deficit. Agency pronouncements can arm national bureaucratic experts with the clout to tell their ministers and their publics that they must do what the EU says. And what the EU says is often the collective voice of the ministry technocracies.

It is doubtful that the executive boards of the agencies, appointed by Member State governments to safeguard their interests, introduce a very significant element of political control. The national board members are supposed to be experts. Most of them are drawn from national government bureaucracies or universities or research centers, most of whose professors and principal researchers are, in the European tradition, government employees. All these people are more likely to represent the views of national bureaucracies than of national politicians. Moreover, each agency board is a set of experts sharing the same expertise. When board members who are nuclear engineers check on agency staff nuclear engineers who are acting in a joint, collaborative 'coordination' with Member State nuclear engineers, it is far more likely that the professional norms and interests of nuclear engineering will dictate outcomes than that the demos, either EU or national, will have much influence.

All in all, then, the EU independent agencies tend to augment the technocratic aspects of EU governance just as does the comitology process and, indeed, the Commission itself.

Conclusion

Both US and EU independent agencies are independent in the narrowest sense, that is, they fall outside any cabinet department or ministry organization chart. Both are designed to strike a balance between democracy and technocracy on the technocratic side. Both seek to do so by attenuating the influence of electorally oriented politics. Here, however, there is a major difference. In the US, the political influence of party politics is attenuated by a commission form calculated to balance the political clout of the two parties. In Europe, the political influence of Member State governments is fully admitted through the independent agencies' boards but is then attenuated through the shared, specialized, technical expertise of board members, staff and participating national bureaucracies. In both the US and EU, almost the same rules of administrative procedure apply to line and independent agencies. In both, judicial review has been relatively, if somewhat controversially, active. Because EU agencies mostly do not have rule-making power, are involved only indirectly in the implementation of most regulations, and deal largely in soft law rather than legally binding decisions, judicial review is generally much less intrusive in the EU than in the US, and is often completely unavailable. So the US

tendency for review to force greater transparency and participation in administration is not nearly so strongly felt by the EU as in the US.

Both US and EU independent agencies generate serious problems of policy coordination, but ones that tend to become salient long after the creation of the agencies. In both, the agencies arise out of a curious paradox. The distrust of government administration leads to the creation of more, and more fragmented, administration. In the final analysis, however, US independent agencies were created to reduce the evils of partisan, party politics while EU independent agencies were created to increase EU administrative resources without obviously expanding the size and resources of the 'Brussels Eurocracy' that is the Commission.

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PART 4

TRANSPARENCY, PROCEDURE, AND ADMINISTRATIVE POLICY-MAKING

19 Comparing regulatory oversight bodies across the Atlantic: the Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU

Jonathan B. Wiener and Alberto Alemanno

'Quis custodiet ipsos custodes?' asked the Roman poet Juvenal – 'who will watch the watchers, who will guard the guardians?'[1] As legislative and regulatory processes around the globe progressively put greater emphasis on impact assessment and accountability, (Verschuuren and van Gestel 2009, Hahn and Tetlock 2007), we ask: who oversees the regulators? Although regulation can often be necessary and beneficial, it can also impose its own costs. As a result, many governments have embraced, or are considering embracing, regulatory oversight – frequently relying on economic analysis as a tool of evaluation. We are especially interested in the emergence over the last four decades of a new set of institutional actors, the Regulatory Oversight Bodies (ROBs). These bodies tend to be located in the executive (or sometimes the legislative) branch of government. They review the flow of new regulations using impact assessment and benefit-cost analysis, and they sometimes also appraise existing regulations to measure and reduce regulatory burdens. Through these procedures of regulatory review, ROBs have become an integral aspect not only of regulatory reform programs in many countries, but also of their respective administrative systems.

Although most academic attention focuses on the analytical tools used to improve the quality of legislation, such as regulatory impact assessment (RIA) or benefit-cost analysis, this chapter instead identifies the key concepts and issues surrounding the establishment and operation of ROBs across governance systems. It does so by examining and comparing the oversight mechanisms that have been established in the United States and in the EU and by critically looking into their origins, rationales, mandates, institutional designs and scope of oversight.

1. The rationale for the establishment of ROBs

1.1. Why oversee the regulators?

Wherever societies engage in economic activity (which is to say everywhere), demand arises for regulation by the state to curb the undesirable impacts of that activity. In the real world of imperfect markets, regulations can be necessary to correct market failures such as externalities (for example, health, safety and environmental risks), asymmetric

[1] Juvenal was asking who would oversee those assigned to guard the queen's fidelity during the king's absence, lest those guards betray their own duty. See Satires, Book 2: Satire VI, 6.029–34.

information (for example, in financial or labor markets), and market power (for example, entry barriers), as well as correcting other problems such as unfair discrimination.

Although regulation can solve such social problems, it can also impose its own problems, including compliance costs, inhibition of innovation, ancillary risks, and rent-seeking. Regulators may make mistakes, may choose poorly designed regulations, may neglect social goals other than their own narrow mission (Breyer 1993), [2] may neglect the adverse impacts of their decisions, may aggrandise their own power, or may serve the interests of narrow groups rather than promoting broader public well-being (Kolko 1965, Ackerman and Hassler 1981). Regulators may pursue policies that reduce some risks while introducing new risks or shifting risks to other populations (risk-risk trade-offs), where regulators are hampered by limited information, bounded decision domains, or the omitted voice of the affected populations (Graham and Wiener 1995). Political scientists and institutional economists have emphasized that in democracies, government decisions are not taken by a single ruler but instead represent a complex aggregation of preferences advocated by specific interest groups and often mediated through contending institutions. Because learning about issues and expressing political voice are costly, the shared general interests of the public at large may go underrepresented while the narrow interests of pressure groups are trumpeted (Olson 1971, Wiener and Richman 2010).[3]

As a result, wherever states deploy regulation, demand arises for oversight of the regulatory system to reduce the costs and side effects of regulation, promote efficiency in standard-setting and instrument choice, encourage consistency and transparency, ensure accountability, and improve the overall social outcomes of regulation. Regulatory oversight, particularly oversight by a centralized governmental body, has increasingly been seen as an effective mechanism for improving regulation. Regulatory oversight can be defined as 'hierarchical supervision of regulatory action by executive and legislative actors' (Lindseth et al. 2008: 3).

1.2. How to oversee the regulators?

The aim of regulatory oversight is both democratic and technocratic: to enhance the accountability of regulatory agencies to democratically elected officials, and to use analytic methods to improve the overall social outcomes of regulation by reducing the costs and side effects and increasing the benefits. Regulatory oversight, as it is generally carried out, uses several analytical tools which are heavily informed by economic analysis. The analytic tools that are generally employed have been discussed at length in the academic literature (Revesz and Livermore 2008, Graham 2008, Adler and Posner 2001, Adler and Posner 2006), and also in several OECD reports (Deighton-Smith 2007, 2006, OECD 2009). These tools include: impact assessment (IA) of proposed legislation;[4]

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[2] This may occur, for example, where regulators are pushed by legislatures or advocacy groups, such as consumer and environmental groups, to regulate despite (or overlooking) the social costs, or where regulators overestimate the risk to be regulated. See Breyer (1993).

[3] A classic on this point is Olson (1971). For further discussion of the political economy of regulatory design, see Wiener and Barak Richman (2010).

[4] IA can be defined as the process of systematic analysis of the likely impacts of a policy or intervention by public authorities. It may employ each of the analytic tools noted here. An IA also refers to the report or document containing such an analysis.

benefit-cost analysis (BCA) and cost-effectiveness analysis (Graham 2008, Revesz and Livermore 2008, Wiener 2006);[5] risk-risk tradeoff analysis (Graham and Wiener 1995, Revesz and Livermore 2008);[6] and scientific analyses (Bagley and Revesz 2006).[7] Other tasks may involve simplification of existing legislation and regulation (through codification, recasting, and repeal) (Beslier and Lavaggi 2006); consultation procedures on drafting proposals;[8] screening and withdrawal of pending proposals;[9] and monitoring and reducing administrative burdens.[10]

1.3. Who oversees the regulators?

The analytical tools and methodologies that are typically employed in regulatory oversight could, in principle, be employed by a variety of actors, including legislatures or their accountability arms, courts, auditors, executive officials, advisory bodies, review commissions, and non-governmental organizations. The distinctive institutional development of the past four decades in the US and during the past decade in Europe has been the emergence of regulatory oversight bodies (ROBs) to 'watch the watchers'. A typical ROB is an office in the executive branch (center of government) charged with supervising regulation government-wide. Some countries also have ROBs in the parliament or legislature. As shown below, both the US and the EU centralize regulatory oversight functions within the executive branch, though under different institutional designs.

One key attribute of any ROB is expertise, in the form of a trained professional staff capable of undertaking technical evaluation of regulatory impacts and options. These staff may be economists, but also may include experts in other fields of social science, law and policy, life science and physical science. As Adam Smith observed, expertise can be an antidote to passion – to politicized distortions of regulation – or at least a means to reveal and make transparent the significant impacts, tradeoffs, and alternatives of regulatory choices and to inform decision makers and the public of the promises and pitfalls of regulation. By contrast, any ROB lacking expertise or headed by a non-expert political appointee may simply exercise politicized influence over expert regulators and thereby undercut the ROB's perceived legitimacy.[11]

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[5] While BCA compares benefits and costs, seeking to maximize net benefits, cost-effectiveness seeks to minimize cost for a given objective or maximize benefits for a given cost. For further discussion of degrees of quantification in IA, see Graham (2008), Revesz and Livermore (2008), and Wiener (2006).

[6] Including both ancillary harms and ancillary benefits. See Graham and Wiener (1995), Revesz and Livermore (2008).

[7] See Bagley and Revesz (2006) (advocating centralized coordination of agency science). The US Information Quality Act of 2001 calls for centralized review of the quality of agency data and publications.

[8] Commission communication, 'General principles and minimum standards for consultation of interested parties by the Commission', COM(2002) 704 (hereinafter 'minimum standards'). See, on this initiative, Obradovic and Vizcaino (2006).

[9] For an insightful analysis on this initiative in the EU, see Allio (2008).

[10] See Commission Communication, 'Action programme for reducing administrative burdens in the EU', COM(2007) 23 final.

[11] Judicial oversight generally involves generalist professionals who are not experts in one regulatory topic, but who are experts in administrative law, and who are ideally independent,

A second key attribute of any ROB is political accountability, such as accountability to the center of government (for example, the President or Prime Minister) or to a powerful ministry (such as budget/finance), to ensure that regulation serves the program of these high-level officials who are in turn accountable to the electorate (Lindseth et al. 2008, Bickel 1986, Tushnet 1995, Ackerman 1993, 1998).[12] Political accountability enhances the ability of ROBs to influence regulators who also have their own political constituencies. Just as regulators need oversight, so too ROBs warrant oversight, by the President or Prime Minister, by the legislature or parliament, perhaps by courts,[13] and by the public.

Any ROB faces possible tensions between these two key attributes. Expert technocratic criteria for regulation may or may not coincide with political democratic criteria. That is, the President's or Prime Minister's (or legislature's) policy program may differ from the experts' advice regarding the optimal policy (Shapiro 2006, Graham 2007b). In such cases, the ROB may need to explain its expert technical analysis to a political leader with a different priority and try to convince the leader to change course, or the ROB may help make the impacts and tradeoffs transparent while recognizing that the political leader's priority will override the ROB's expert technical analysis.

The ROB may have both a need for independence from political micro-management, to assure its neutrality and technocratic objectivity, and simultaneously a need to be close to power in order to have authority over other ministries and to carry forward the President's (or Prime Minister's) regulatory agenda (E. Kagan 2001). In some cases, this tension can become acute.

Like any government body, a ROB may seek external social support to maintain its own budget and influence. If that support comes predominantly from advocacy groups on one side of a debate (for example, business groups), this may compromise the perceived legitimacy of the ROB's advice. Meanwhile, ROBs may also need to have their own external advisory bodies to offer useful insight and feedback, both on advances in technical analytic methods and on emerging issues in regulatory policy (OECD 2007a).

These internal and external tensions are partly mediated through the rules for the appointment and removal of ROB officials. Therefore, an analysis of ROBs needs to address questions such as: Who has the power to appoint and remove the head of the ROB? How does the power to appoint/remove officials affect the performance of the ROB? What kind of expertise does the ROB have, or should it have? How does the ROB use its expertise and its political position to influence regulatory quality and decisions? Should political officials instruct the ROB on particular regulatory decisions (and do they)? These are some of the questions that we address in the following sections, focusing on the US and EU experiences with ROBs.

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maintaining their perceived legitimacy by being shielded from political influence via secure job tenure (though in reality judges may also be influenced by political affiliations).

[12] See Lindseth et al. (2008). Judicial review is typically not accountable to the electorate, but rather derives its legitimacy from its independence from politics. Its influence is generally defined as counter-majoritarian.

[13] In the US, the Office of Management and Budget (OMB)/Office of Information and Regulatory Affairs (OIRA) has not been subject to judicial review; Revesz and Livermore propose that OIRA's issuance of key oversight guidelines should be subject to judicial review similar to rulemaking by regulatory agencies. Revesz and Livermore (2008: 172).

2. Origins of ROBs

A brief historical perspective can help to illustrate the origins and objectives of these bodies in OECD countries. In the past, countries with a Roman law tradition set up forms of ROBs, as part of Councils of State, as in France (Robineau and Truchet 2002) and Italy (Caretti and De Siervo 1996). These bodies served as advisors to the government on the legality of regulatory decisions. They were also the superior level of the administrative courts, so they also exercised an adjudicative role meant to protect governments and avoid litigation in the civil courts regarding specific regulations. For example, in France after the Revolution, the *Conseil d'Etat* and the system of administrative courts were designed to shield the administrative state from being unduly constrained by the separate system of civil courts; the civil court judges were viewed as more sympathetic to the monarchy, while the administrative courts were meant to be more sympathetic to the legislature and to its efforts to redistribute power and wealth in France after the Revolution. Today, the *Conseil d'Etat*, acting as both a court of appeals for the administrative courts and a supervisory body for the administrative state, brings significant expertise to bear on the legality of regulatory decisions (Breyer 1993, Part III). However, it does not review impact assessments of proposed new regulations prepared by regulatory agencies (Bouder 2008, Trosa 2008).

Modern ROBs, established since the 1970s, especially in common law countries such as the USA and UK, but also in other countries such as the Netherlands, and in the European Union, have a different origin. They were mainly created in response to stagnating economic conditions; a rising tide of regulation of health, safety and environmental risks; an accumulated array of economic regulation of sectors such as banking, communications, and transportation; and an academic literature on both the need for and problems with regulation.

2.1. The origin of the US Office of Information and Regulatory Affairs

In the late 18th century, the US Constitution's strategy of checks and balances among branches of government was designed to avoid the concentration of power that existed in monarchic regimes. By the 20th century, that foundational strategy continued to animate the evolution of regulatory oversight. The US Administrative Procedure Act (APA) enacted in 1946 was a response to the 'New Deal' expansion of federal regulation in the 1930s and 1940s. In turn, the US Executive Orders on regulatory impact assessment issued beginning in the 1970s were, in part, a response to the 'Great Society' expansion of health and environmental legislation in the 1960s and 1970s, as well as the slowing economy, accumulated economic regulation, and academic analysis. In 1978, President Jimmy Carter, a Democrat, issued Executive Order (EO) 12044, requiring economic analysis of new regulations, and he created the Regulatory Analysis Review Group (RARG), an interagency working group that gathered when needed to review these economic analyses. Then in 1980, the US Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) was established by the Paperwork Reduction Act of 1980. OIRA was thus located in the Executive Office of the President. The Administrator of OIRA is appointed by the President and, since the 1986 amendments to the Paperwork Reduction Act (Pub. L. 99-591), is subject to confirmation by the Senate. OIRA has approximately 50 expert non-political staff. Whereas the RARG had been an interagency group that met on occasion, OIRA is a standing centralized expert oversight body.

When Ronald Reagan (a Republican) became President in 1981, he promptly issued Executive Order (EO) 12291 (February 1981), formally giving OIRA the role and authority of a ROB. The Reagan EO required agencies to conduct regulatory impact assessments using benefit-cost analysis, to ensure that regulations' benefits 'outweigh' their costs, and to submit those IAs to OIRA for review, while giving OIRA the power to 'return' an unsatisfactory regulation or IA to the agency. Some viewed the EO as an intrusion into the agencies' duty to carry out statutory instructions from the Congress; but the EO expressly provided that it did not override statutes, and others replied that in any case the President still has the authority to manage the executive branch. It also received criticism from those who saw it as anti-regulatory. President George H.W. Bush continued OIRA's role under EO 12291.

After Bill Clinton, a Democrat, became President in 1993, there was much speculation that he might issue a new EO diminishing OIRA's role in regulatory oversight. Instead, Clinton's EO 12866 (September 1993) reaffirmed the basic role of OIRA in reviewing agencies' policy proposals and regulatory IAs using benefit-cost analysis. It replaced the word 'outweigh' with the word 'justify', thereby emphasizing the importance of qualitative as well as quantitative criteria, and orienting benefit-cost analysis to be 'a tool not a rule' – informing the considered judgments of publicly accountable officials, not dictating decisions arithmetically. Clinton's EO also broadened the scope of the impacts to be considered in IAs to include distributional impacts and ancillary impacts, and enhanced the transparency of OIRA review. The Clinton administration also issued best practice guidelines on preparing IAs.

George W. Bush was elected president in the contentious 2000 election, and soon speculation arose again that he might issue a new EO enhancing OIRA's oversight role. Instead, Bush retained Clinton's EO 12866 (with only minor modifications made in his second term, such as adding coverage of agency 'guidance documents' through EO 13422 in January 2007). During the Bush administration, OIRA also issued guidelines on the conduct of IA, notably through Circular A-4 in September 2003.

Just after his inauguration as President in January 2009, Barack Obama rescinded his predecessor's EO 13422,[14] but left in place EO 12866 as issued by President Clinton. At the same time, President Obama also issued a request for recommendations on a new EO on regulatory oversight, listing several topics to be addressed, but implying that he would continue the basic approach of requiring regulatory review by OIRA.[15] As of January 2010, he had not yet issued a new EO.

Thus, the creation and role of OIRA reflects a bipartisan consensus – at least among the US Presidents of the last four decades – that the executive branch needs tools to oversee the regulatory state and manage its choices, employing both expert analysis

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[14] 74 Fed. Reg. 6113 (February 4, 2009).

[15] President Barack Obama, Memorandum of January 30, 2009 – Regulatory Review, 74 Fed. Reg. 5977 (published February 3, 2009). President Obama directed the the Office of Management and Budget (OMB), in consultation with representatives of regulatory agencies, to produce within 100 days a set of recommendations for a new Executive Order on regulatory review. OMB then invited public comment, 74 Fed. Reg. 8819 (February 26, 2009), and more than 180 public comments were received by April 20, 2009. These memoranda and the public comments received are posted at http://www.whitehouse.gov/omb/inforeg_regmatters/.

and political accountability, regardless of which political party is in power (E. Kagan 2001).

2.2. The origin of the EU's Impact Assessment Board

In Europe, regulatory review was not formally established until after 2000. Nonetheless, this history reflects the same pattern seen in the US, in which the ROB is created in response to the growth of the regulatory state.

The European Union (EU) launched its formal impact assessment (IA) procedure in 2002 as a regulatory review system within the European Commission. This process scrutinizes the quality of IAs conducted by the Commission services (Directorates-General, or DGs) on proposals for new policies. From 2002 to 2006, these IAs were shared among the Commission; then in November 2006, an ROB was established to oversee the IA process: the EU Impact Assessment Board (IAB), located in the office of the Secretariat-General of the European Commission. The IAB grew out of the 'Better Regulation' initiative (Wiener 2006), which was spurred by the Lisbon Agenda and the Mandelkern Report of 2001.[16] The Commission issued Impact Assessment Guidelines in 2003, revised them in 2005, and updated them in 2006, before they were replaced by new ones in 2009.[17] The IAB's primary role is to oversee the quality of the IAs produced by the Directorates-General (DGs) when the latter propose new policies. The IAB is a five-member board made up of representatives from several DGs and chaired by the Deputy Secretary-General; this structure is more akin to the interagency RARG than to the standing body of OIRA with its single Administrator and permanent staff.

As in the US, albeit with a different institutional history and structure, the EU Better Regulation initiative and its Impact Assessment program, including the creation of the IAB, have been in part a response to the growth of EU-level regulation, notably following the 1987 Single European Act and the 1992 Maastricht Treaty (Alemanno 2008: 45–6). The EU's adoption of the IA review process was also a way to support the Lisbon strategy for economic advance.[18] The setting up of the IAB drew lessons from the US, but also from the UK and Swedish examples, where significant improvements in the regulatory frameworks and deregulation had been seen as associated with renewed economic growth (Radaelli and De Francesco 2007). As in the US, regulatory oversight achieved a kind of bipartisan consensus in the EU: the EU Better Regulation initiative and the IA process have been supported through varying presidencies of the Commission, including both Presidents Romano Prodi and José Manuel Barroso, and have also been endorsed by the Council of the EU.[19]

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[16] The final Mandelkern report on Better Regulation was finalized in February 2001 and published on 13 November 2001.

[17] European Commission, Impact Assessment Guidelines, SEC(2009) 92. See generally the IA website at http://ec.europa.eu/governance/impact/index_en.htm.

[18] The EU Better Regulation strategy is a centerpiece of the renewed 'Lisbon Strategy', which aimed at turning Europe into the most competitive and dynamic knowledge-based economy in the world by 2010. See European Commission's 'Partnership for Growth and Jobs' – the renewed 'Lisbon Strategy' launched in Spring 2005.

[19] Council of the European Union, Conclusions of the Competitiveness Council on Better Regulation, December 3–4, 2009.

2.3. Other examples of ROBs

These trends have been mirrored in many other countries and jurisdictions, gradually spreading across almost all OECD countries. For example, the UK has had a Regulatory Impact Unit, followed by a Better Regulation Executive, with an advisory body called the Better Regulation Task Force; these were succeeded by the Better Regulation Commission in 2006, and in turn by the Risk and Regulation Advisory Council in 2008, as well as being accompanied by additional scrutiny from the National Audit Office, the Panel for Regulatory Accountability, and the House of Commons. The Netherlands program to reduce administrative costs was overseen by the Inter-ministerial Project Team (IPAL) in the Ministry of Finance, with external scrutiny by the Advisory Board on Administrative Burdens (ACTAL) (OECD 2007b). Countries such as Mexico, with COFEMER (Comisión Federal de Mejora Regulatoria) following the previous example of the Economic Deregulation Unit (UDE), and Korea have also set up ROBs, influenced by examples in other OECD countries and by advice from the OECD. At the EU level, the European Court of Auditors (an institution created to audit the EU budget) has also indicated some interest in performing a role in regulatory oversight.

3. Structure: constitutional and institutional design of ROBs

ROBs could in principle be located in any branch of government. Thus, they might be established within the executive/administrative branch (for example, as an interagency working group; as an office of the president or prime minister; as an independent government watchdog office such as an auditor or ombudsman or inspector general; or at a government ministry for reform of regulation or state reform); within the legislative branch (as a legislative committee or a technical body attached to the legislature); or within the judicial branch (indeed judicial review functions as a kind of ROB, with the authority to reject regulatory decisions, though typically without the expertise and routine oversight role of an executive branch ROB). The function of ROBs may also be carried out, in part, by external advisory groups, national academies of science, or other external non-governmental actors such as advocacy groups, think tanks, academic researchers, and the news media. Although such groups may be expert and may conduct and publicize their reviews of regulatory IAs, they typically lack the authority to determine choices by the regulators. Within a multi-level governance system such as a federal republic or supranational union, the tasks of ROBs may also be exercised by the member states of the Union or federation.

The choice among these locations is always a question of comparative institutional analysis: Which institution is best equipped and best placed to perform oversight in each system of governance? In making such choices, there may be tradeoffs among criteria such as expertise, authority, transparency, and political accountability. Different constitutional structures may thus warrant different optimal locations.

3.1. The location of OIRA in the US structure of government

In the US, the location of the main ROB, OIRA, is in the Executive Office of the President. The OIRA Administrator is appointed by the President, with confirmation by the Senate. The OIRA Administrator reports to the Director of Office of Management and Budget (OMB), and then to the President.

The location of OIRA reflects the horizontal separation of powers in the US federal

government. OIRA enables the President to manage the regulatory powers deployed by the legislature (the Congress). In response to New Deal expansion of the federal regulatory state, the courts were asked by petitioners to undertake judicial review of agency regulation. In 1946, Congress, with the enactment of the Administrative Procedure Act (APA), gave courts the authority to enforce provisions that required notice and public comment when agencies make rules, and to be sure that regulations are not 'arbitrary or capricious'. Three decades later, in response to the Great Society expansion of federal regulation in the 1960s, the courts intensified their review by allowing increased access to the courts for advocacy groups and by adopting the 'hard look' doctrine in the 1970s. But active judicial review of agency action was seen by presidents as insufficient, because judicial review is episodic, conducted by non-expert judges without staff resources, not always subject to benefit-cost criteria, and not accountable to the President's policy agenda. Meanwhile, federal regulatory agencies were a contested terrain in the US constitutional structure: they conduct executive branch functions (with heads appointed by the President with Senate confirmation), and are also agents of the Congress exercising delegated legislative power, and they may perform adjudicatory functions as well.[20]

Although OIRA's initial focus was on paperwork reduction – reducing the administrative burden of government requests for information – it soon took on a role in overseeing regulation. OIRA has substantially, although not exclusively, been oriented as a way for the executive to check or shape legislative (Congressional) pressure to regulate. But OIRA operates only at the second stage, reviewing agencies' implementing regulations, not reviewing the legislation initially enacted by the Congress itself. OIRA review has historically been aimed primarily (though not exclusively) at countering the agencies' mission-driven tunnel vision, to check proposed regulations whose benefits do not justify their costs (or to help revise those proposals to better maximize net benefits) – though some argue that public choice theory implies that agencies will regulate too little.[21] One response to the latter concern has been the innovation of 'prompt' letters, which were introduced, interestingly, in the George W. Bush administration, and which enable OIRA to ask an agency to consider adopting a new regulation (Graham 2007a).

The US has no IA process nor ROB to oversee Congressional legislation itself. Compared to the courts and the executive branch, Congress has played a smaller role in regulatory review. Congress holds periodic committee hearings on specific policy areas. The General Accountability Office (GAO) attached to the Congress issues occasional reports on regulatory matters. The Congressional Budget Office (CBO) estimates the impacts of new laws on federal government spending and revenues, but not usually on private sector costs and benefits. Congress did enact the Unfunded Mandates Reform Act (UMRA 1995), calling for nonbinding analyses of new regulations; the Congressional Review Act, authorizing expedited passage by Congress of a bill to rescind an agency regulation (though still requiring passage by both houses of Congress and signature by the President, hence rarely used); and a law calling for

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[20] Some US federal agencies are called 'independent', because the President's power to remove the agency head is restricted; it remains an unresolved question whether the President can require those agencies to comply with the IA process and OIRA oversight.

[21] Compare Breyer (1993) (worrying about agencies' tunnel vision and excessive regulation), with Revesz and Livermore (2008) (worrying that agencies may regulate too little).

annual reports by OMB/OIRA to the Congress on the aggregate costs and benefits of federal regulation over the last decade. But, in general, after having created OIRA, Congress has not strongly favored regulatory oversight – especially of its own legislative enactments. Congress has no ROB of its own equipped to carry out such a function. In the 1980s, some in Congress resisted the Presidency's efforts to oversee regulation through OMB/OIRA. The Congress considered, but not did enact, broad regulatory reform legislation in the mid-1990s. Congress even de-funded its own expert advisory bodies, the Office of Technology Assessment (OTA) and the Administrative Conference of the US (ACUS).

3.2. The location of the IAB in the EU structure of government

The EU has a hybrid system. In contrast to the US system, in which the roles of the principals (the Congress, the Presidency) and the agents (the federal agencies) are fairly easy to identify, with lateral oversight by the courts and internal oversight by the President's executive office (OIRA), in the EU the roles of principals and agents are more fragmented and interwoven across several institutions. These include the European Commission exercising internal oversight through its Secretariat-General, its inter-service consultation practices, and its new IAB; the Council of the EU; the European Parliament; and the member states; with lateral oversight by bodies such as the European Court of Justice, the European Court of Auditors (which reviews the budget), and the European Ombudsman (which can investigate 'maladministration') (Lindseth et al. 2008, Alemanno 2009).[22] Indeed, in the last ten years the European Commission has undertaken a sweeping effort to introduce better regulatory oversight mechanisms, mainly to further European economic competitiveness.[23]

The ROB in the EU that most closely corresponds to the US OMB/OIRA is the European Commission's relatively new Impact Assessment Board (IAB), created in late 2006, and located in the Commission's Secretariat-General under the direct authority of the Commission President. The IAB is composed of five high-level officials, in particular, the Deputy Secretary-General of the Commission, and four Directors coming from four Directorates-General: DG Enterprise and Industry, DG Environment, DG Employment, Social Affairs and Equal Opportunities, and DG Economic and Financial Affairs (Alemanno 2008).[24] The IAB has some expert staff, but the five members meet periodically; and the DGs represented on the IAB may be proponents of policies being reviewed by the IAB. The IAB's location in the Commission is on its face similar to the location of US OIRA within the executive branch, but the European Commission's distinctive role as the sole institution empowered to introduce legislation gives its IA process oversight of legislative, rather than exclusively administrative, action. Thus,

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[22] Under Article 228 of the 2009 Lisbon Treaty on the Functioning of the European Union (TFEU) (former Article 195 EC), the Ombudsman may investigate complaints from EU citizens in instances of maladministration, 'with the exception of the Court of Justice and the Court of First Instance acting in their judicial role'.

[23] See Lofstedt et al. (2008: 135) (observing that the EU has done more on regulatory reform from 1998–2008 than it had in all the years from 1956–97) and Wiener (2006).

[24] To know more on the IAB, see Alemanno (2008). See also the Commission Staff Working Paper, 'Impact Assessment Board – Report for the year 2007', COM (2008) 32 final.

the Commission has created an internal, quasi-specialized, executive/legislative ROB to oversee effective compliance by the Commission with IA requirements.

3.3. Comparing oversight structures across the Atlantic

The different approach to the structure of oversight in the EU system compared to the US derives from the different structures of governance. In the US, legislation begins in the Congress, a political body, which enacts statutes and can thereby create regulatory agencies and delegate tasks to these agencies. The agencies possess technocratic expertise that the Congress lacks, and Congress often relies on the agencies to determine essential issues such as the appropriate level of protection of health and environment. OIRA in turn is also a highly technical body, staffed by professional experts, that reports to the President. The heads of the agencies and the head of OIRA are all appointed by the President, but nonetheless it is sometimes a challenge for the Presidency to steer the policy direction of the agencies, each of which has its own constituencies among the public and in Congressional committees, and some of whose heads are legally shielded from being easily removed by the President. Regulatory oversight through OIRA is one means for the President to manage the multi-headed regulatory state (E. Kagan 2001). Thus in the US, OIRA is a politically accountable body that exercises technocratic review of regulatory power delegated by Congress to the federal agencies.

In the EU, by contrast, legislation begins exclusively in the Commission, which is mainly a technical executive body, although the political accountability and authority of the Commission's president is growing. (The Commission's President is not popularly elected like the US President, but rather is appointed by the European Council and subject to a vote of approval by the European Parliament.) 'Agencies' such as the European Environment Agency or European Food Safety Authority exist in the EU, but, being judicially barred from exercising delegated regulatory authority,[25] their main function is to engage in preparatory executive acts under direct Commission oversight.[26] Regulatory power is exercised by the DGs (such as DG Environment), subject to their proposals for Directives and Regulations being adopted by the full Commission. The Commission proposes new legislative initiatives to the Council and the Parliament, both political bodies. The Council is made up of the relevant ministers of the member states – a kind of legislature composed of national-level executives – and the Parliament is a large legislature composed of elected representatives, seated by party not by member state. The adage is that 'the Commission proposes, the Council disposes'. Yet these institutions also operate in a complex relationship of delegation and cooperation, the framework of 'comitology', that is, the committee system which oversees the delegated acts implemented by the European Commission (see Saurer, Chapter 36 of this volume).

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[25] Although the European Court of Justice recognized the need for delegated legislation in *Meroni* (case 9/56, *Meroni v. High Authority*), it limited significantly the possibility of delegating regulatory authority. The idea is that agency decisions should not entail any use of regulatory discretion beyond a purely technical evaluation of the applications against fixed criteria. For a recent critique of the 'Meroni doctrine', see Majone (2010).

[26] For an introduction to the EU Agencies, see Communication from the Commission, The Operating Framework for the European Regulatory Agencies, COM(2002) 718 final; Interinstitutional Agreement on the operating framework for the European regulatory agencies, presented by the EC Commission, 25/02/05, COM(2005) 59 final; Gilardi (2002: 873), Chiti (2000).

Moreover, within the Commission and its DGs, many staff and observers point to a tradition of collaborative harmony or collegiality rather than adversarial or hierarchical relations; the 'College of Commissioners' (each from a different member state, and appointed together as a slate) makes its decisions in a consensual style. This emphasis on harmony and collegiality may derive from several factors, among them the original purpose of the European Community to heal and unify the continent. This may also be related to the substantially smaller and more close-knit size of the Commission compared to the larger US multi-agency administration. This collegiality within the Commission stands in contrast to the more hierarchical relationship in the US executive branch between OIRA (and the White House generally) and the federal agencies it oversees. Although the IAB has the power to comment on the quality of the IA accompanying a DG's policy proposal, the IAB does not (yet) have the explicit power to reject a policy proposal – that power is held by the College of Commissioners as a whole. Perhaps the IAB's power to influence policy decisions will accrete over time, as the President of the Commission becomes more powerful (an issue currently in flux with the adoption of the Lisbon Treaty in late 2009) and as technocratic review of regulatory policy becomes more customary in Europe. Even today internal debates do occur. Whatever its origins, this collegial style may help explain the more limited powers of the IAB, compared to OIRA, to reject or 'return' impact assessments and policy proposals to the agencies (Allio 2007b: 5). On the other hand, the persuasive influence of the IAB's report may induce the proponent DG to improve its IA or its policy (Alemanno 2008: 70). The Secretariat-General may also issue a negative opinion on a policy.[27] In the US, by contrast, there is a strong tradition of using adversarial debate to test and shape decisions, not only in courts but also in the executive and legislative branches (R. Kagan 2001).

Thus in the EU, the IAB reviews proposals from its own technical administrative branch of government (the Commission), in a setting that softens overt discord, before those proposals go to the political branches for assent (and then often to the member states for implementation). The structural role of regulatory 'oversight' is thus different in the EU, where legislation comes initially from the technical branch and where the Commission internally follows a collegial structure and style, than it is in the US. In the US, legislation comes initially from the most political branch, and the agencies occupy a position that, functionally at least, bridges the gap between the Congress and the Presidency. In the US, the ROB is a mechanism for the Presidency to manage the administrative state through technocratic expertise in a hierarchical structure.

3.4. Plural ROBs

Oversight need not be limited to a single ROB in each national or supranational administrative system. Plural oversight could involve several ROBs, each located in a different part of the regulatory structure. Indeed, the US has not only OIRA in the executive (and direct presidential power itself), but also interagency consultation, potent judicial review, numerous scientific advisory bodies, and always the possibility of a regulation being mandated or blocked by act of Congress, as well as a system of cooperative federalism with the 50 states. Meanwhile, the EU has the new IAB in the Commission, but also

[27] See European Commission, Impact Assessment Guidelines, updated March 2006, pp. 14–15.

aspects of oversight exercised by several other institutions, including inter-service consultation among the DGs, as well as the Council, the Parliament, the Ombudsman, the Court of Auditors, and the Court of Justice, and the 27 member states themselves. The optimal number and location of ROBs seem likely to differ from system to system and to depend on each polity's own constitutional features.

Oversight can also be located in networks of internal or external communities of experts. For example, interagency working groups can supply oversight. These include the former RARG in the Carter administration, and interagency consultation on proposed actions, as under the EU system of Inter-service Consultation, and the US system of interagency consultation on IAs submitted to OIRA.[28] The European Commission IAB itself builds on the pre-existing system of inter-service consultation on DGs' impact assessments (Alemanno 2008, Allio 2007b). Additionally, external or quasi-governmental networks of nongovernmental experts, such as science advisory bodies, and public comment can provide influential advice (Jasanoff 1990, Morgan and Peha 2003, Graham 1991).

One can, of course, always ask if such external bodies actually influence government decisions. ROBs themselves may have external advisory bodies. For example, the UK Better Regulation (BR) Executive has had its BR Task Force, which then became the BR Commission, and is now being converted to the Risk and Regulation Advisory Council (OECD 2007a, chapter 3). Neither the US OIRA nor the EU IAB has a standing external advisory body, but such an external body has been called for by some members of the Commission[29] and has recently been required by the European Parliament.[30] Such calls could soon be amplified, should the European courts show any readiness to conduct judicial review of the EU Institutions' compliance with Better Regulation procedures.[31]

4. Mandate and tasks

4.1. Mandate

The mandate of any ROB is usually set forth in its enabling document. Its mission may be limited to quality control of impact assessments and other evaluative tools, or it may have the authority to inhibit undesirable policies (for example, via 'return' letters), promote desirable policies (for example, via 'prompt' letters), and conduct ex post (retrospective)

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[28] This also includes interagency consultation on Environmental IAs submitted to EPA and CEQ under NEPA, and interagency consultation on biological opinions submitted to DOI/FWS under the Endangered Species Act.

[29] Keynote Speech by Commissioner G. Verheugen, 'Better Legislation in the EU', delivered at the European Conference on Subsidiarity during the Austrian Presidency, April 19, 2006 ('what we need is the independent validation of impact assessment').

[30] Report on Better Regulation in the European Union prepared by the Committee on Legal Affairs of the European Parliament (Rapporteur: Katalin Levai, 2007/2095(INI)) as a motion for an EP Resolution. See A6-0273/2007, para. 6.

[31] For example, in *Spain v. Council* (2006), the European Court of Justice held that failure to produce an IA to support a regulatory decision may lead to a violation of the 'proportionality' principle of EU law. See Case C-310/04, *Kingdom of Spain v. Council of the European Union* (2006) (holding that failure to conduct an IA might, in certain circumstances, be a breach of the proportionality principle); see Alemanno (2009).

evaluation in order to foster learning and policy revision. Ancillary missions may also include capacity building, training, and strategic planning of future policies.

The type of authority accorded to an ROB may depend importantly on the source of its authority, that is, on the institution that created the ROB. For example, authority conferred by a statute enacted by the legislature may have broader application to reviews of future legislation, whereas authority conferred by order of the President or Prime Minister may be confined to oversight within the executive branch, though this distinction itself depends on the constitutional structure of the government.

4.2. Tasks

Depending on their mandates, ROBs may perform a variety of functions or tasks. Neither OIRA's nor IAB's missions are limited to quality control. Although their priority task is to review the quality of impact assessments, they enjoy a larger array of powers. These include:

Inhibiting undesirable policies OIRA has sought to inhibit the adoption of undesirable policies since 1981 using return letters to the federal agencies.[32] Unlike OIRA, the IAB has no veto power over the IAs conducted by the Commission DGs. However, the IAB may ask the relevant DG to resubmit a revised version of the original IA.[33] Thus, while it is true that the IAB itself cannot veto a flawed IA draft, its (negative) opinion may produce some relevant, though indirect, effects on the outcome of the quality control process. In particular, the Secretariat-General may block an initiative if the IAB opinion has not been taken into account by the DG author of the IA. This may occur to the extent that the Secretariat-General, unlike the IAB, enjoys this sort of veto power.

The question is then how far ROBs may go in inhibiting undesirable policies. OIRA can issue return letters, but under the EO, the agency can then appeal to a more senior administration official (such as the Vice President or the White House Chief of Staff). Can the ROB go to court, or be challenged in court? In the US, courts usually do not enforce Presidential executive orders against executive agencies, but they will require agencies to abide by Congressional statutes, which may affect regulatory oversight in various directions (including enforcing legislative requirements to conduct IA, enforcing legislative prohibitions on some types of analysis, and enforcing legislative time limits on agency action notwithstanding ongoing OIRA review). As for the EU, the European Courts may be starting to enforce such requirements.[34] Indeed, despite the Commission's efforts to dismiss any attempt to legalize the Better Regulation requirements, these requirements, by dictating a more informed and more inclusive method of decision-making, are expected to influence public expectations, thus encouraging stakeholders to act in order to ensure their implementation by the Commission. Not only are private parties willing to challenge the correctness of IAs carried out by the Commission services, but it may be that the ECJ is ready to rely on IAs to determine a possible breach of a general principle of law, such as the principle of proportionality (Alemanno 2009).

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[32] Executive Order 12866. See, in particular, section 6(b).

[33] See IA Guidelines 2009, p. 10.

[34] Case C-310/04, *Kingdom of Spain v. Council of the European Union* (2006) (holding that failure to conduct an IA is a breach of the proportionality principle); see Alemanno (2009).

Promoting desirable policies OIRA began to issue 'prompt' letters to promote desirable new policies in 2001.[35] Rather than being sent in response to the regulators' submission of a draft rule for ROB review, a 'prompt' letter is sent on the ROB's own initiative, and contains a suggestion for how the regulator (be it an agency or a DG) could improve its regulations. The prompt letter, at least as developed by OIRA, does not mandate agency action; it only suggests a prima facie case for action based on an initial benefit-cost assessment showing that such new agency action could increase net benefits. For example, one of OIRA's first prompt letters was to the US Food and Drug Administration (FDA), asking FDA to consider a new rule requiring the listing of trans-fat content on the nutrition labels on packaged foods.

Yet the issuance of prompt letters by OIRA has been episodic and ad hoc. There is not yet a system in place to help OIRA generate prompt letters as routinely as OIRA currently reviews agency proposals and potentially issues return letters. One option would be an external advisory body to OIRA, or a new panel of the National Academy of Sciences, or both, that would generate candidate prompt letters.[36] An interagency working group could play a similar role. Another option would permit nongovernmental organizations to appeal to OIRA to issue a prompt letter if an agency denies a rulemaking petition (Revesz and Livermore 2008).

In Europe, the IAB's Mandate and Rules of Procedure also speak of 'prompt' letters, but, unlike in the US context, they are prompts to conduct an IA, not to develop a regulation.[37] The current blanket application of IAs to *all* items on the Commission's Work Program (CLWP) does not necessarily cover all proposals with the most significant impacts.[38] Hence prompt letters might have the potential to fill this gap. Following the establishment of the IAB, the Secretariat-General is in charge of identifying as early as possible items that are not included in the CLWP, but which could benefit from IA. When the IAB shares the opinion of the Secretariat-General, it may prompt, though not require, the relevant department to undertake an IA.

Information burdens and quality The ROB may also oversee the administrative burden of governmental requests for information. This was the objective of the US Paperwork Reduction Act of 1980 that created OIRA, and the original reason for the 'I' in OIRA. It is also the objective of the efforts at administrative burden reduction by many European governments. Meanwhile, the ROB may also oversee the quality of information produced by government agencies, as under the US Information Quality Act of 2001.[39]

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[35] OIRA has issued several prompt letters to agencies in this way since 2001. For more about the genesis and rationale of this device, see Graham (2007a). OIRA posts its prompt letters online at http://www.reginfo.gov /public/jsp/EO/promptLetters.jsp.

[36] See Committee of Past Presidents, Society for Risk Analysis (SRA), Recommendations to OMB on Regulatory Review, March 16, 2009, Recommendation no. 7, p. 9, available at http://sra.org/OMB_regulatory_review.php.

[37] IAB Mandate, point 4 and Article 6 of the IAB Rules of Procedure.

[38] Thus, for instance, among the initiatives which are not a priori subject to IA, there are non-priority list CLWP items and certain implementing measures such as comitology decisions.

[39] Information Quality Act of 2001, Pub. L. No. 106-554, § 515, codified at 44 USC 3516 (Note) (directing OMB to issue guidelines that 'provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information

Capacity building Both OIRA and the IAB are instructed to help agencies and DGs to perform better IAs. In particular, they may perform this task by issuing guidelines on how to conduct IA[40] and also engage in early collaboration to shape the rule toward increasing net benefits – not just waiting to receive the proposed rule and then critiquing it.[41]

5. Rules of procedure

To fully exercise its tasks and discharge its mandate, any oversight body must act within the framework of a set of procedural rules. The specific rules of procedure of an ROB can be important in determining its effectiveness, quality, and perceived legitimacy (Rose-Ackerman 1995). US OMB/OIRA follows rules of procedure established in EO 12866, including rules regarding the timetable to review agency IAs, the transparency of OIRA's contacts with outside parties, and the opportunity for an agency to appeal an OIRA decision. EO 12866 (September 1993) replaced the earlier EO 12291 (February 1981), and significantly changed OIRA's rules of procedure, notably by requiring much greater transparency. The European Commission's IAB has rules of procedure issued in early 2007, governing the composition and voting of the five-member IAB, the timing of reviews of IAs, transparency of IAB deliberations, and sources of internal and external expertise. In addition, US OMB has guidelines for impact assessment, mainly in Circular A-4, September 2003, as does the European IAB, mainly in its IA Guidelines of January 15, 2009. OIRA also issued guidelines for good risk analysis (jointly with Office of Science and Technology Policy – OSTP, in September 2007).

5.1. Leadership of the ROB: number and affiliation

US OIRA is headed by a single Administrator, who is assisted by career staff members. By contrast, the EU IAB is a five-member board, chaired by the Deputy Secretary-General responsible for regulatory matters, with four additional members who are senior officials of key DGs.[42] The IAB's rules say that its members are supposed 'to act independently of the policy making departments' notwithstanding its members' affiliation of origin.[43] This might seem odd to the extent that, besides the Deputy Secretary General who chairs it, the board's other four members are appointed by the Directors General heading the DGs to which these four IAB members belong. In other words, they are appointed to a body to oversee the DGs by their own bosses at the DGs.[44] Yet, perhaps surprisingly, during its first four years of activity, the IAB has been perceived as reasonably impartial and independent. One may venture to suggest that the main driving force behind this positive development is a reputational factor: IAB members know that their professional future is linked to the success of the IAB; hence they have an incentive to defend their own name and expertise by privileging an impartial and consistent approach in analyses rather than acting to favour their home DGs.

. . . disseminated by Federal agencies'). OMB issued its guidelines in December 2001; see 67 Fed. Reg. 8452 (republication of February 22, 2002).

[40] See OIRA Circular A-4 (September 2003), and the EU IAB Mandate 2005, point 6.

[41] See Graham (2007a); IA Guidelines 2009: 10; IA Rules of procedure, Article 5.3.

[42] For a critique of the actual IAB membership, see Alemanno (2008: 70).

[43] COM(2006) 689, 8.

[44] See Article 1, para. 3, of the Rules of Procedure.

It remains to be seen whether a five-member board can operate effectively to review IAs, compared to OIRA's single Administrator (irrespective of the home affiliations of the IAB members). The IAB's self-evaluation in early 2008 sought to allay these concerns. The audit exercise by the European Court of Auditors on the EU IA system, which is currently ongoing, is expected to provide some recommendations on the IAB's institutional membership.[45]

5.2. Time to review

In the US OIRA, the time for review extends up to 90 days from the receipt of a proposed rule. In the EU IAB, the time to review extends at least 30 days before inter-service consultation begins. Too short a time period may make meaningful review of complex IAs difficult or impossible. But too long a time period may impose unwarranted delay on needed new rules and may undermine morale. In the US in the late 1990s, a significant number of proposed rules had waiting times longer than 90 days. In 2001 and 2002, OIRA made substantial progress in reducing the time for review below 90 days.[46] In 2008, the IAB has uploaded its opinions on time in almost 80 per cent of the cases.[47]

5.3. Who can participate in review

The EU IAB rules expressly allow the IAB to solicit advice from outside experts. OIRA can receive communications from parties outside government (so long as they are identified in its docket), but does not seem to have the standard practice of soliciting advice from outside experts. Both the IAB and OIRA have processes of inter-service (or inter-agency) consultation on proposed rules.

5.4. Opportunity for the regulatory agency to be heard and to hear critiques

EO 12866 calls for the agency proposing the rule to be invited to have a representative present whenever OIRA staff meet with an outside party about the rule. Under the IAB rules of procedure, during the meeting between the IAB and the author DG, the latter is represented by the head of the relevant unit and a support official.

5.5. Appeals to higher authority

EO 12866 provided that disputes over a return letter could be appealed to a cabinet-level committee chaired by the Vice President. Under the George W. Bush administration, this responsibility was shifted from the Vice President to the President's Chief of Staff. In the EU, a DG may appeal to the full Commission from an IAB opinion or Secretariat-General decision.

5.6. Influence of statutory deadlines

In the US, a statutory deadline or a court-ordered deadline for rulemaking will force the agency to act (for example, to publish a rule) even if OIRA has not yet completed its review. A similar constraint does not exist in the EU, where IA is not mandatory, being

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[45] Council of the European Union, Conclusions of the Competitiveness Council on Better Regulation, December 3–4, 2009.

[46] See US GAO (2003).

[47] Impact Assessment Board Report for 2008 (2008: 9).

contained not in statutes but in soft law acts, such as guidelines,[48] and where some IAs are conducted regarding the Commission's proposals for legislation which have no time deadline.

5.7. Public access to information about the review

Rules of procedure not only dictate each stage of the examination undertaken by the ROB, but also introduce transparency requirements. In the US, agency rulemaking is already public, pursuant to the APA, with notices of proposed rulemaking, proposed rules, and final rules all published in the Federal Register and now also online. EO 12866 added transparency provisions to ensure public awareness of the OIRA process, including a record of those who met with OIRA regarding each rule. During the George W. Bush administration, in contrast to efforts to withhold information in some other parts of the administration, OIRA went further than required by EO 12866 and posted all of its return letters, prompt letters, guidelines, and almost all other important documents on its public web site.[49]

In the EU, the location of IAB review in the regulatory process limits the transparency of its activities. Article 16 of the IAB Rules of Procedure seems to ensure transparency to the extent that it requires the Board to make available its draft agendas, meeting records, opinions, prompt letters, and notes signed by the chair on behalf of the IAB as quickly as possible to all Commission departments. At the same time, it ensures public access to the Board's documents by subjecting them to principles and conditions as laid down in Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.[50] Although all IAB opinions must be available to all Commission services,[51] they are released, through a publication on the IAB page within the Europa website, only when the Commission has adopted the corresponding proposal. This is automatically done by the IAB as the sole owner of its opinions. If the IAB opinions were to become public before the final adoption of the Commission proposal, this would lead to a situation in which an IAB opinion on a draft IA would be disclosed before the Commission proposal itself, thus inevitably disclosing the contents of the latter. However, the lack of publication of the draft IA report, combined with the delayed disclosure of its final version, make it difficult to determine, after the fact, the exact object and influence of the IAB review. This may only be inferred by reading the published final IA report from the DG, in the light of the suggestions contained within the IAB opinion.

6. Scope of oversight

ROBs may address a wide array of regulatory activities, including proposals for new regulations, the stock of existing regulations, proposals for new statutes and legislative

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[48] On the legal status of RIA in the EU, see Alemanno (2009).

[49] See the OIRA website at http://www.whitehouse.gov/omb/regulatory_affairs/default/, the OIRA Regulatory Matters website at http://www.whitehouse.gov/omb/inforeg_regmatters/, and US GAO (2003).

[50] Regulation 2001/1049 of the European Parliament and of the Council of 30 May 2001, OJ L 145, p. 43.

[51] Article 6 of the Rules.

acts, information requests, and others. They may oversee the full span of government actors, or only a subset.

6.1. Timing: ex ante and ex post

Most ROBs focus mainly on the flow of new regulations while giving less attention to the existing stock of rules. Thus, both US OIRA and EU IAB focus on ex ante impact assessment of new regulations, with only occasional attention to the stock of existing rules, or to retrospective ex post IAs of previously adopted rules. Yet, ex post review would be useful to identify needed policy revisions, and to assess and improve the accuracy of ex ante IAs (Wiener 2006, Harrington et al. 2000).

6.2. Administrative costs

Some ROBs do focus on the burden of existing rules and are less concerned with new regulations. Countries that have sought to reduce administrative burdens have taken this approach. Many employ the Standard Cost Model (SCM), compliance cost evaluations, 'simplification', and 'regulatory budgets' to reduce paperwork burdens. The Netherlands has been a leader in this area (OECD 2007b), but the UK has also made major strides in reducing administrative burdens on the private sector.[52]

Despite the widespread enthusiasm for cutting red tape, it is not always obvious that cutting administrative burdens is desirable. Subjecting administrative burdens to a benefit-cost test (as for other regulations) would be superior to simply enforcing arbitrary burden reduction targets. Information-based regulations can be warranted in some cases (OECD 2007b, Wiener 2006: 500–501). The European Commission recognized this in its revised IA Guidelines on March 15, 2006, stating in Box 11 that:

> The fact that one option would impose lower administrative costs is *not* in itself a sufficient reason to prefer it. For example, a measure . . . likely to impose relatively fewer administrative costs [by mandating specific technical standards, instead of requiring labels that disclose product data] . . . could give manufacturers less flexibility and could reduce consumer choice, [so that] its overall costs may be higher than the 'administrative' requirement to display data . . .

Information collection and disclosure rules, such as product labelling, the US Toxics Release Inventory, and similar pollution discharge registries, may be especially cost-effective ways to protect society (Hamilton 2005, Sand 2010).

6.3. Topical areas of regulation

In principle, an ROB could oversee all regulation, covering all topics. In practice, ROBs often focus only on one type of regulation, such as rules imposing administrative burdens (information collection costs). ROBs often focus on health, safety, security and environmental regulations (sometimes called 'social regulation' or 'risk regulation'), while sometimes having curtailed powers or less emphasis in the areas of banking, finance, competition, trade, and other 'economic regulation'. In some countries, sensitive areas such as defense or taxation/fiscal policy (Mexico, for example) are exempt from the review process.

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[52] See UK House of Commons, Regulatory Reform Committee, 'Getting Results: The BRE and its Regulatory Reform Agenda' (July 2008).

Expanding the ROB's scope could bring the benefits of oversight to those areas and could also help correct the misimpression that oversight tools, such as benefit-cost analysis, are biased against the subjects of their current narrow application. For example, extending benefit-cost analysis beyond social regulation to cover economic regulation and government-funded projects would help demonstrate that benefit-cost analysis need not be biased against health or the environment. Benefit-cost analysis would then be deployed to assess environmentally damaging projects such as dams, deforestation, and power plants – as it had been in its early uses decades ago (Kneese 2000, Hufschmidt 2000).[53] Early in the modern environmental movement, benefit-cost analysis was seen as a useful tool for environmental protection when applied to the evaluation of projects in the US and elsewhere.[54] At the same time, expanding the scope of oversight could stretch ROBs' capacity, and could bring ROBs into conflict with other institutions already active in those areas.

In the US, OIRA has emphasized impact assessment of proposed new regulations addressing health, safety, and environmental risks. Over the last several years (at least since September 11, 2001), it began to address proposed new regulations of homeland security risks as well. On a related front, OIRA could expand its mandate to oversee international treaty commitments (via impact assessments); the US State Department has recently proposed requiring agencies to consult with OMB/OIRA on the regulatory impacts of pending new international agreements,[55] and the State Department already requires agencies to consult with OMB before making new budgetary commitments in international agreements.[56] In Europe, many ROBs at the national level consider the national impact of proposed EU-wide policies. ROBs could extend their role further, addressing existing as well as new regulations. They could address decisions not to regulate, or to deregulate, as well as to regulate,[57] and also assess economic policies and projects. For example, a US statute, section 201 of the Trade Act of 1974, 19 USC 2251(a), already calls for benefit-cost analysis of trade measures, but this law has not been implemented by OIRA.[58]

Another area of potential expanded scope for regulatory oversight is the banking, finance and insurance sector, as well as fiscal policies. In many countries, these policies are handled in a separate way and are not subject to regulatory quality oversight. For example, in the US, fiscal spending and taxation policy has traditionally been handled

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[53] See the Federal Flood Control Act of 1936 (requiring that the 'benefits to whomsoever they may accrue are in excess of the estimated costs', 33 USC § 701(a)).

[54] See, for example, Berkman and Viscusi (1973) (using BCA to critique federal dams); *Calvert Cliffs Co-ordinating Committee v. AEC*, 449 F 2d 1109 (DC Cir 1971) (finding that the Environmental IA provision in NEPA section 102(2)(C) requires benefit-cost analysis of federal projects such as nuclear power plants, in order to take into account their previously neglected environmental costs), cert denied, 404 US 942 (1972).

[55] 71 Fed. Reg. 28831 (May 18, 2006).

[56] See 22 CFR § 181.4(e).

[57] See Revesz and Livermore (2008). This may already be the practice at OIRA.

[58] See on this point, Review of the Application of EU and US Regulatory Impact Assessment Guidelines on the Analysis of Impacts on International Trade and Investment, Final Report and Conclusion, prepared by the OMB and Secretariat-General of the EU Commission, available at http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/sg-omb_final.pdf.

by the budget side of OMB (and at the CBO), whereas OIRA is on the management side. Banking and finance regulatory agencies such as the Securities and Exchange Commission (SEC), the Department of the Treasury, the Federal Deposit Insurance Corporation (FDIC), the Comptroller of the Currency, and the Federal Reserve Bank have not been subject to regular OIRA oversight, although policies of the Department of Housing and Urban Development (HUD), which governs among other things the mortgage loans made by Fannie Mae, have been subject to OIRA review. The mortgage and credit crisis of 2008–10, and the dramatic move to restructure the banking and financial markets to rescue the economy from this crisis in the US and Europe, suggest that past choices by markets and regulators have been suboptimal, to say the least. This implies that this area could benefit from oversight on benefit-cost criteria by ROBs.

6.4. Types of legal action

ROBs differ in the type of legal action they oversee. This may include legislation, rule-making, guidance documents and other avenues. Under section 3(b) of EO 12866, US OIRA oversight is limited to regulations promulgated by federal executive agencies. From January 2007 to January 2009, EO 13422 added review of guidance documents issued by these same agencies. By contrast, in Europe, the IA Guidelines and IAB oversight apply to legislation proposed by the European Commission, and indeed to all matters in the Commission's annual Legislative and Work Programme (CLWP).[59] The nature of the US institutional system, with its separation of powers, precludes OIRA review from being meaningfully extended to cover legislation (although the executive branch could prepare IAs of pending legislation as a way to influence legislators or to inform the President's veto decisions). Perhaps a new ROB, attached to the Congress, could be established to supervise impact assessment of legislation proposed in the Congress. To the extent that agency regulations warrant oversight, in many cases a large share of their costs and benefits derive from the underlying legislation impelling the agency to issue that regulation. As noted above, CBO estimates the fiscal impacts of new laws on government spending and revenues, but does not focus on private costs and benefits. This underlines the need for IA and oversight of regulatory quality within legislatures. In many countries, finding an oversight mechanism to enable Parliament to conduct and heed impact assessments on its own legislative proposals, and ex post assessments of laws already enacted, could help fill significant gaps. The adoption of such a mechanism would, however, face political obstacles because it threatens to make transparent the distribution of costs and benefits posed by legislation. It is interesting to observe that a debate is currently under way in the EU on whether the scope of regulatory oversight should be narrowed because the current regime is suffering from its own success in producing too many IAs.

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[59] Some important decisions handled through 'comitology' may fall outside this scope of review, but the IAB is expressly authorized to reach out with a prompt letter to identify such decisions warranting an IA. See IAB Mandate, point 4, at http://ec.europa.eu/governance/impact/docs/key_docs/iab_mandate_annex_sec_2006 _1457_3.pdf.

6.5. Selection of which regulations to review

Any ROB with limited oversight resources (staff, funding, time) must have some criteria for selecting which regulations to review. Most of the cost of conducting IAs falls on the agencies or DGs that wish to promulgate rules, because they prepare the initial IAs which the ROB (OIRA or the IAB) then reviews. But the ROB must also have the capacity, and some selection or triage mechanism, to use its own scarce resources effectively.

In the US, section 3(f) of EO 12866 makes the cut by using a threshold of the magnitude of impact, requiring an IA for any regulation imposing $100 million or more in impacts. In 2003, OIRA added the criterion that any regulation posing an impact exceeding $1 billion should be accompanied by an IA using formal probabilistic scenarios to assess its impacts.

The European Commission takes a different approach. Under its IA Guidelines, it employs the concept of 'proportionate analysis', meaning that the degree of analysis should be greater where the potential impacts of the regulation are larger. This approach avoids the sharp disjunctions and potential estimation errors of agencies' efforts to avoid review by undercounting impacts to come under the dollar-value thresholds used in the US. OIRA and the Office of Science and Technology Policy (OSTP) endorsed the concept of proportionate analysis in 2007, saying 'The depth or extent of the analysis of the risks, benefits and costs associated with a decision should be commensurate with the nature and significance of the decision'.[60]

6.6. Analytic methods

As discussed above, ROBs can employ a variety of analytic methods in their reviews, and can ask agencies to use these methods in their regulatory IAs. Statutory restrictions sometimes limit the type of analysis that an agency may use in making its regulatory decisions. For example, in the US, Congress has in some statutes required (or the courts so infer from statutory language) agencies to use benefit-cost analysis in developing rules, but in some other statutes Congress has forbidden agencies to use benefit-cost analysis. One example is the setting of national ambient air quality standards under section 109 of the Clean Air Act, where the courts have held that the statute forbids the US Environmental Protection Agency (EPA) to consider cost.[61] In such cases, the agency still prepares an impact assessment using benefit-cost analysis for OIRA review under the EO, but the agency is not supposed to refer to or base its decisions on that analysis when it sets standards in the rule itself.[62] In the early 1990s, Congress considered but did not enact a law including a 'supermandate' to require benefit-cost analysis in all major rulemakings, notwithstanding prior statutory restrictions on such analysis. A different option would be a legislative 'superauthorization', permitting but not requiring agencies to use benefit-cost analysis in major rules notwithstanding prior statutory restrictions on such analysis. This approach was taken by Congress in one statute, the 1996 amendments to the Safe Drinking Water Act, but has not yet been employed more broadly. In

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[60] OMB/OIRA and OSTP Memorandum on Updated Principles of Risk Analysis, September 19, 2007, p. 4.

[61] See *Whitman v. American Trucking Assns.*, 531 US 457 (2001). Apart from section 109, some other parts of the Clean Air Act allow EPA to consider costs.

[62] See *Whitman v. American Trucking Assns.*, 531 US 457, 471 n. 4 (2001).

effect, a superauthorization of the analytic methods used in impact assessment would stand for a straightforward idea: Let the regulators think things through.

In the EU, where legislation is initiated by the Commission, and the Commission has committed itself to conduct impact assessments, there are no restrictions in particular pieces of legislation on the use of impact assessments. The EU Commission's IA Guidelines require analysis of 'positive and negative impacts', but without imposing any specific methodology. The 2009 Lisbon Treaty on the Functioning of the European Union, Article 191, expressly calls for analysis of benefits and costs only in setting environmental standards. As a result, the IA conducted by DG Environment on the Clean Air for Europe (CAFÉ) policy – the EU counterpart of the US EPA's ambient air quality standards – was an extensive analysis of benefits and costs that many regard as one of the best quality IAs prepared by the Commission to date.[63]

7. Conclusions

As governments around the globe become increasingly conscious of the need for better policy making, they establish regulatory oversight bodies and entrust these bodies with the mandate to supervise the quality of regulatory analysis and action. As our review of US and EU practice has shown, an ROB must be designed to suit the constitutional framework within which it is institutionally housed and also the philosophy of the regulatory improvement initiative that motivates its existence. Thus, the salient differences between OIRA in the US and IAB in Europe derive in part from the different US and EU constitutional contexts, and from the different purposes of their respective IA systems. Impact assessment in the US and the EU is conducted and reviewed at different stages in the process, with different powers and limitations, and for different purposes. In the US, Congress instructs agencies to regulate; the President then requires agencies to conduct IAs to accompany proposed rules, and empowers OIRA, a body created by statute, to oversee the rules and to review the regulatory IAs. In the EU, IAs are conducted on a voluntary basis by the Commission, on all its policy and legislative proposals, and largely for its internal use; the IAs are then reviewed by the IAB within the Commission. As a result, whereas IA serves as an executive branch check on the exercise of legislatively delegated powers in the US system, it functions as a support for proposed legislation in the EU.

These features explain in part why the IAB appears to be a weaker regulatory gatekeeper than OIRA. The US oversight body, having been conceived as a watchdog on legislative (Congressional) pressure on agencies to regulate, was designed with a single head and entrusted with the power to issue return letters on proposed rules or IAs. It has since begun to issue 'prompt' letters to spur beneficial new policies (rather than only checking proposals by the agencies). By contrast, the IAB, having been entrusted with improving the quality of legislative proposals, has an internal, multi-member, institutionally dependent representative board whose powers are mainly the ability to recommend that an IA should be redone and resubmitted to the IAB, and to communicate its views to the collegial Commission. Indeed, lacking veto power, the IAB cannot block, as could

[63] See CAFE references documents, at http://ec.europa.eu/environment/archives/cafe/general/keydocs.htm.

OIRA, a DG draft IA or a policy proposal. Although the IAB appears by comparison with OIRA to be a weaker regulatory oversight body, its role is amplified when seen in the context of the overall quality control mechanisms within the Commission.[64] The IAB opinions may affect the policy outcome if they are invoked at the end of the review process by the Secretariat-General (or by a member of the Commission, or another EU institution) to question the underlying policy initiative. Moreover, the mere existence of the IAB seems to encourage DGs to better prepare their IAs to avoid a negative opinion. More broadly, the general availability of IAB opinions may encourage and support objections raised by concerned stakeholders or other institutions. The IAB may be exercising a sort of 'soft power' within the existing oversight system. Although the long-term indirect effects of the IAB opinions are difficult to predict, it is likely that these opinions will strengthen the overall effectiveness of the quality review system. The European regulatory oversight body seems designed to provide compliance incentives for the actors involved in the regulatory oversight process, consistent with the view that 'to be effective, a system of regulation must create compliance incentives for regulated parties, rather than rely on corrective action and oversight' (Elliott 1994).

Nevertheless, though the IAB has the potential to become the main 'regulatory gatekeeper' within the EU quality control system, it does not yet have the explicit authority to return or to prompt policy proposals. Moreover, it does not currently appear to be adequately equipped to undertake technically sophisticated reviews of DGs' IAs or policy proposals, mainly due to: (a) the lack of effective rules ensuring the independence of IAB members; (b) too few resources to effectively undertake its mission; (c) a scarcity of staff with technical expertise in impact assessment methodologies and in other disciplines relevant to the oversight activities; (d) the lack of retrospective evaluations to improve on the quality of its own opinions; and (e) insufficient time to conduct careful reviews. While there is no doubt that the current IAB's members are among the best IA experts among high-level officials within the Commission departments, the current appointment rules do not seem to ensure that this result will be attained in the future. At the same time, the IAB should take advantage of its opportunities to seek both 'internal' and 'external' expertise, and it should develop its own technical capabilities through the appointment of specialized staff in the field of economic, environmental and social impact assessment in order to strengthen its in-house expertise and, simultaneously, enhance its independence from the DGs it oversees.

Meanwhile, OIRA has been equipped with the explicit authority and expert staff to carry out its traditional reviews and 'return' letters in response to ex ante IAs on agency proposals. In recent years, OIRA has moved to broaden its scope toward: earlier involvement with the agency in developing a sound proposal; later ex post reviews of IAs to improve policies and improve assessment methods; 'prompt' letters that promote good regulation; and oversight of a wider array of types of regulation. The new EO anticipated from President Obama may point OIRA in new directions, roles, and analytic methods.

The emergence of ROBs in both the US and, more recently, the EU demonstrates the new transatlantic consensus on the desirability of regulatory oversight, at least at

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[64] For an analyses of the overall quality control mechanisms existing within the Commission, see Alemanno (2008: 45–6).

the centers of government. An open question deserving further study is how effective the ROBs are at improving the quality of IAs and of regulatory policies. Does 'better regulation' actually yield better regulation?[65] Each polity can now learn from the other's experience to improve its performance. Where differences or disagreements arise, those can be addressed through dialogue and through careful comparison. Differences can be sources of insight and learning if their impacts are monitored, evaluated and shared over time. In that way, the US and EU can use the parallel development of their ROBs to engage in a 'transatlantic policy laboratory' that yields better regulatory results for both (Wiener 2010, 2009).

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20 Towards a third generation of administrative procedure

Javier Barnes

1. New administrative law: dissolving frontiers and opening new pathways

The history of administrative law is a history of change and reform. Today, however, we are witnessing changes that are more intense and far reaching than those that have occurred in the past. There are shifts from state-centered administrative law to global administrative law; from an autarchical and hierarchical administration to collaborative administrative action; from a focus on the formal division between lawmaking and implementation to processes that promote a dynamic interaction between these stages. The traditional concerns of administrative law have been widened to include uncharted 'domains'.

These new and growing domains (global and private spheres, greater discretionary leeway concerning public policies) are being 'colonized' by an emerging *new* administrative law. Administrative procedure will play a major role given its central place in administrative law.

1.1. Disappearance of three frontiers

Three heavily guarded traditional frontiers have begun to fall peacefully in the last decades.

1.1.1. National and supranational borders: from a 'state-centered' administration to transnational and international administrative actions The state and national administrations are no longer absolute protagonists (Cassese 2009: 31). Between the global and the national spheres, there are many hybrid bodies and procedures, joint decisions and complex systems.[1] When making and implementing public policies, administration has become international (Zaring 2005: 547). In response, the administrative law of global governance seeks to address the consequences of globalized interdependence for efficiency, public accountability and legitimacy.

Domestic, supranational and global administrative law extends new procedures into these territories:

- One example is the development of 'composite' procedures that connect domestic and supranational regulatory bodies. In the European Union,[2] these procedures

[1] 'There is no clear separation of function, activity, or in many cases of personnel between global bodies and domestic agencies. . . . National systems of administration and law become porous; global norms penetrate them, circumventing the national legislature' Stewart (2005a: 703), citing Cassese (2005a), currently also available as Cassese (2005b).

[2] The European Union is first and foremost a union of domestic and European administrations based on the collaboration principle. Procedures, information gathering and exchange, control and regulations are not divided according to a separation principle between national and

have grown, both horizontally and vertically, in proportion to the increase in the transnational administrative activities of the Member States.[3]

- The extension of procedural decision-making principles to international bodies, such as those employed by the Basel Committee when the Basel II Accord was established, exemplifies this response as well.[4]
- New procedures are also needed at an internal level. Given that regulatory domestic systems must take into account their effect at the supranational level,[5] globalization and international collaboration must begin at home. Globalization has a 'domestic face' (Aman 2005: 520): the international cooperation of domestic regulatory organizations must be subject to internal mechanisms of democratic legitimacy and cannot be excluded from national accountability. New, globally oriented, domestic administrative law should not ignore internal rulemaking processes involving private and public actors. Even if a policy or rule will ultimately be adopted by a supranational body, national bodies should decide only after having satisfied domestic accountability, transparency, participation and legitimacy standards.[6]

1.1.2. The public-private divide: from an autharchical administration to partnerships and collaborative governance The shift from both traditional regulation and direct state provision of public services to new hybrid models (for example, Lobel 2004) sees private actors in a new light. The relationship between the administration and the citizen has become more collaborative, inclusive and interdependent. Because of this, they now share regulatory responsibilities across the public-private divide.[7]

The public-private construct constitutes 'a new way of organizing public responsibilities and politics',[8] a new regulatory strategy, that shifts the brunt of the transaction costs to the private sector and distributes responsibility between state and society in the promotion of the public interest, although the ultimate control of the final result remains in the hands of the administration (Schuppert 2000). A new administrative law is emerging, in which the concepts of 'public' and 'private' are redefined (Aman 2002: 1688).

European spheres. On the contrary, all administrations and agencies are involved in sophisticated governance models. See Schmidt-Aßmann (2006: 103–11); Schmidt-Aßmann (2004: 377 ff.).

[3] The composite administration in the EU is created and safeguarded by procedure. For examples of these procedures in which different public actors participate, see Röhl (2008: 85–94).

[4] See Barr and Miller (2006). Establishing administrative law procedures at the supranational level has many difficulties. See, for example, Kingsbury et al. (2005: 40–42); Esty (2007: 526–7).

[5] See Aman (1999: 415): 'I believe that there should be a requirement in all rulemaking proceedings that the international and global implications of a proposed policy be considered explicitly – a kind of global impact statement, if you will. The National Environmental Policy Act (NEPA) required environmental impact statements; we should require global impact statements as well.'

[6] Regarding the impact of global governance on the rules of domestic procedure, see Cassese (2005c); Stewart (2005a). Regarding international regulation and global administrative law, see Stewart (2003: 455).

[7] See Freeman (1997: 30): 'A collaborative regime challenges existing assumptions about what constitutes public or private roles in governance because the most collaborative arrangements will often involve sharing responsibilities and mutual accountability that crosses the public-private divide'.

[8] Aman (2005: 515); see also Freeman (2003: 1289). For a European perspective pointing in the same direction, see Hoffmann-Riem and Schmidt-Aßmann (1996).

Privatization is not a zero-sum game between public norms and private power (Freeman 2003: 1290). It does not represent a surrender of powers on behalf of the state, nor does it suppose the creation of a minimalist state (Sagers 2007: 72). Collaboration engages public agencies, the private and non-profit sectors, and members of the public in open discussions of regulatory problems within new institutions designed to facilitate problem-solving; this will optimally lead to more effective and efficient solutions than those reached through traditional administrative decision-making.

Privatization opens new domains. Many problems can be dealt with through a procedural approach.[9]

- For example, if a private organization takes on public responsibilities, it may be required to express public values by means of procedural arrangements, such as operating under due process and fairness requirements (Freeman 2000: 587, 589); or, in standard-setting organizations, assuring balanced representation on their technical committees to avoid the disproportionate influence of more powerful interests (Freeman 2000: 641 ff.), or designing internal procedural rules to promote information disclosure, reasoned decision-making, fairness (Freeman 2000: 643), and the like (private procedure).
- If a government contracts out a function, for example, it might write a contract that sets out the standards to be met. It might, for instance, mandate information disclosure, public consultation and auditing (Freeman 2003: 1288).

1.1.3. Lawmaking and implementation phases: from a staggered division between lawmaking and implementation to processes in which both rules and decisions are to be found Following the classic understanding of the division of powers, legislation, implementation and enforcement are sharply differentiated phases of the traditional regulatory process. In this view, administrative procedure takes a secondary position and is used as a law-applying tool with a 'courtroom-style' method of application. Unlike the traditional system, the governance model does not insist that legislation, implementation, enforcement, and adjudication be separate stages; but rather it seeks to form dynamic interactions among these processes (Lobel 2004: 391).

In new regulatory domains, such as financial markets, environmental protection, public and animal health, or food safety, the barriers between these two formal phases have become more diffuse. The legislature cannot establish substantive criteria on subjects in continuous development. An example of this is the approval of products destined for human and animal use derived from biotechnology and other high-technology processes, or the evaluation, authorization and restriction of chemical substances. The legislature in these cases can only set out values and goals to be met and, no less importantly,

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[9] New changes constitute new regulatory and procedural questions that require new solutions: 'how best can nonstate actors be involved in decisionmaking processes; how can we maximize the flow of information involving these decisions; and how can we mitigate conflict of interest concerns that arise from the fusion of public and private that typify many markets and market approaches to policy issues – issues ranging from private prisons to welfare eligibility' (Aman 2005: 516). In my judgment, in answering these questions, procedural arrangements should play a huge role.

specify *how* administrators are to make future decisions, thus indirectly determining what these decisions will be.

These new procedures aim to find the best solution in a collaborative, deliberative and integrative way. Administrative regulatory bodies establish the relevant standards and implement them by means of procedures: from statutes governing administrations by means of substantive or detailed standards to statutes governing administrations by means of procedures.

1.1.4. Governance models as new pathways between the fallen borders The disappearance of these frontiers means a shift from the traditional monopoly of 'command and control regulations' to a plurality of systems. The traditional regulatory mechanisms of policymaking and implementation differ sharply from the decentralized, often privatized structures and procedures associated with new governance.[10]

New governance models and regulatory strategies are needed to deal with the challenges found in these new domains.[11] Administrative law needs to respond to the move from a state-centered system, in which regulatory authority is the exclusive prerogative of the sovereign, to polyarchic and networked decision-making; from a hierarchical model to a horizontal and collaborative one; and from the traditional two-step system of lawmaking and implementation, in which administrative bodies must find the answer within the constraints of detailed statutes, to a more complex process in which regulatory bodies work actively and continuously to make the best possible decision in accordance with ongoing reality. The new generation of administrative procedures creates pathways of interaction across what were once impenetrable borders.

1.2. The shortcomings of traditional administrative procedure acts

Administrative procedure acts (APAs) resemble a 'Rosetta stone', that is, they provide archaeological information that reveals the main patterns of public law at a given historical moment. APAs are essential for the comprehension of state, administration and society. They contribute to the deciphering of the main principles and values of public law and of society itself.

One might expect that an instrument so fundamental would be subject to constant legislative and theoretical revision (Barnes 2008: 16). This, however, is not the case; the vast majority of national administrative procedure statutes date from the second half of the twentieth century and are now out of step with present-day realities (Barnes 2008, Rubin 2003). They say little or nothing about:

- *The private life of public administration*: how the administration should behave and make decisions when it puts away its 'uniform' and acts as a civilian, subject to the realm of private law.

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[10] See, in the public health field, Hunter (2007: 93).

[11] About the dimensions that the shift from rules to governance implies, see, for example, Karkkainen (2006). See also Aman (2005: 523): 'The tendency to think in state centric terms – to say something is either private or public, domestic or international – cannot capture the complexity of global processes, the diversity of the global networks and players involved, and the decentered nature of the state when it does react'.

- *The public life of private actors*: how private actors should behave and make decisions when their actions are relevant to the public interest.
- *The public life of administrations when not acting through formal and binding instruments*: how the administration makes informal decisions and soft law, negotiates, seeks consensus, or releases information.
- *The international life of domestic administration*: how the administration should behave and make decisions, as well as whom it represents, when acting beyond the borders of the State.[12]

Classical APAs have yet to discover the vast reach of the area beyond the opened frontiers (Barnes 2008).

1.3. New procedural functions for the new administrative law

Traditional administrative law relies on a variety of essentially procedural controls (Salamon 2001: 1672) that aim to improve legality, fairness, neutrality, rationality, accountability, participation, due process and transparency. Its purpose is to prevent arbitrariness. Administrative law 'uses procedure and structure to shape agency discretion so that it is accountable: agencies must demonstrate to others that they reached their decisions consonant with public law values of rationality, responsiveness, and reviewability. Administrative law, then, "regulates regulators"' (Bamberger 2006: 381, Mashaw 2005).

According to McNollgast's political economic analysis, the US Congress passed the US APA to assure continued influence over policies adopted by the administration. Congress invented procedural rules that could be enforced through litigation by individual citizens, that is, lawmakers used the citizens as agents in their competition with the executive (McCubbins et al. 1987, McNollgast 1999, Benvenisti 2005). The McNollgast theory assumes a legislature and a judiciary that are both independent of the executive branch. It might lead to the conclusion that in parliamentary democracies, such as those in Europe, where the legislature is often quite deferential to the executive, this theory would not work (Benvenisti 2005: 322–3). However, this approach is also applicable in the European Union. The European legislature uses procedural features as a way to control domestic administrations. For example, by requiring strategic environmental assessment procedures (SEAs) for plans, programs and policies, the EU ensures that the environmental implications of decisions are taken into account before those decisions are made. The procedural rules that accompany the SEAs require broad and effective consultation and participation of the public and other administrations, free access to information, balancing, reason-giving by the agency, monitoring, remedial actions and

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[12] In other words, when administrators play roles as international lawmakers, producing hard or soft law, guidances, best practices, etc., in horizontal or vertical processes used by domestic regulators to establish international standards. Governing these processes and their outcomes requires new procedural arrangements, far away from traditional forms of administrative procedure. See, for example, Barr and Miller (2006). More generally, see Stewart (2005b). Another example is the case of best practices, see Zaring (2006: 307); see also EU-US Declaration on Combating Terrorism (Dromoland Castle, June 26, 2004), available at http://www.consilium.europa.eu/uedocs/cmsUpload/10760EU_US26.06.04.pdf.

the like, aimed to promote 'responsiveness to the people.'[13] Moreover, the European Union legislature controls through procedure not only domestic agencies but national legislatures as well. Under EU law, the SEA and its procedural requirements 'shall be carried out during the preparation of a plan or program before its adoption or submission to the legislative procedure' (Article 4.1 Directive 2001/42/EC); that is to say, the SEA administrative procedure is to be followed even when the national parliament is the authority empowered to enact the plan, program or policy.

It must be stressed that influence by the legislature does not only mean control against arbitrariness. On the contrary, APAs can also determine the policy outcomes that emanate from these processes in a positive way. Administrative procedure is not limited to formal adjudication and detailed decision procedures or to formal hearings and notice-and-comment requirements. Judicial review and political control of powerful independent agencies' discretion, supervision of an agent or rational decision-making processes are features that in no way exhaust the possible procedural constraints. These are mainly functions of a traditional administrative law understood as a 'court-centered field focusing on judicial review of agency behavior'.[14] The unique constitutional position of US agencies and their increasing activity over time, on the one hand, and the dominant theoretical trends in American legal academia, especially law and economics and public choice theory, on the other, might explain the American focus on the defensive aspect of APA.

Administrative procedure has recently taken on affirmative tasks; accordingly, it may be redesigned to comply with other relevant goals, such as the promotion of efficient and effective outcomes, achieved by encouraging analysis from multiple perspectives, careful assessment of regulatory impact, explanation of underlying assumptions, open deliberation of difficult issues and continuous reassessment of past choices. Procedures may also provide for the development of data, the testing of theories, the scrutiny of assumptions, the review of policy results and the refinement of thinking based on experience, that is, a deliberative legitimacy.[15] Procedures do not only seek a 'structure-and-process' control of agency decision-making by manipulating, for example, an agency's decision costs[16] or creating elaborate statutory procedural provisions that constrain administrative discretion. They also provide a strategic 'structure-and-process' steering tool for agency decision-making by encouraging, for example, effectiveness through careful regulatory impact assessments.[17] Such procedural instruments indirectly affect outcomes even though statutes and rules do not explicitly contain substantive requirements.[18]

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[13] See Articles 3–10 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

[14] Rose-Ackerman (1988: 347). Similar observations can be found on the other side of the Atlantic. See, for example, Hoffmann-Riem and Schmidt-Aßmann (2002), Schäffer (1993).

[15] In relation to the WTO, see Esty (2007: 524).

[16] See Stephenson (2007: 487–88), noting that certain control mechanisms 'operate primarily by manipulating an agency's decision costs, making some courses of action relatively more or less costly by altering procedural requirements' (487).

[17] Administrative law's affirmative tasks, and especially the efficacy and effectiveness in the outcomes of administrative action, have a strong ideological substrate developed in Germany under the so-called 'Steuerungswissenschaft'. See, for example, Schmidt-Aßmann (2004: 18 ff.).

[18] The original constitutional framework of the European Union (division of powers,

New procedures are needed to achieve public goals – procedures that have an increasingly relevant regulatory function for the legitimacy and efficacy of resulting outcomes (Bamberger 2006: 405).

This illustrates the growing importance of administrative procedure. 'Most fights about new legislation focus on the legislation's substance. Yet legislators regularly decide not just what to do, but also when to do it' (Gersen and Posner 2007: 544), and how to do it, which procedural safeguards and components to implement, etc.

In fact, procedural rules laid down by parliament to determine administrative performance have implications for nondelegation doctrines (Rubin 2005: 210, Freeman 2000: 580 ff.). The need for procedural rules is in direct proportion to the lack of substantive provisions. These doctrines might well require that statutes specify procedures in cases where detailed substantive rules are not feasible. These statutory provisions should establish both agencies' structures (how they are to be formed) and procedures (how they are to make decisions and to act). By doing so, legislatures can strategically govern and steer administrators in a desired direction through procedural arrangements.

In sum, the dilemma of statutory regulation is not between 'determinate rules' versus 'indeterminate standards' to enforce administrative compliance. Rather, the question is whether the values, goals and principles that the legislature seeks to achieve are better attained through detailed statutes or through procedural arrangements that control and steer administrators.

2. Three generations of administrative procedure

2.1. Understanding the transformation of administrative procedure

Transforming administrative procedure requires a clear understanding of trends in governance. I propose a systematic approach that groups administrative procedures into generations in light of their method of governance and the underlying model of public administration. This classification enables us to establish a common framework for comparing the wide variety of procedures, to broaden our understanding of new administrative procedures, to promote the exchange of experiences, and to evaluate, foster and guide legal reforms.

In a simplified manner, the evolution of administrative procedure falls into three phases. The first, beginning in the nineteenth century, was the development of procedural requirements for agency decision-making, administrative review and mechanisms of dispute resolution, to prevent unlawful or arbitrary administrative action and to safeguard citizen rights. The second phase took hold in some countries during the 1950s and 1960s; it was the timid emergence of rulemaking procedures, with the remarkable exception of the much more sophisticated 1946 US APA, conceived to regulate influential independent agencies. The third phase is an emergent and still tentative response to global governance, public-private cooperation and dynamic administrative processes

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allocation of responsibilities, interplay between the main three institutions, Commission, Council and Parliament) leads to new modes of governance in search of political legitimacy and effectiveness, through consensus-based processes, broad participation, strong and ongoing inter-agency cooperation, to mention a few paths. Control of discretionary powers is not, by any means, the main goal of such processes.

that fall between lawmaking and implementation. Today's administration makes individual decisions, adjudicates, makes rules and regulations, and develops innovative and wide-reaching public policies in complex situations, such as those of the public-private and inter-agency collaborations within and beyond national-state boundaries.

Accordingly, I distinguish three 'generations' of administrative procedural models. In the first, individual decision procedures are based on a 'judicial' model and on hierarchical and command administrations. The rulemaking procedures of the second generation are the result of a mixture of judicial and normative models and are enacted by hierarchical and authoritative administrations. Finally, the new and most relevant generation encompasses public policymaking and implementation procedural arrangements derived from new methods of governance, and includes procedures situated in a contemporary nonhierarchical and decentralized environment that promotes public/private and inter-agency cooperation.

Of course, there is no single, rigid method for policymaking and implementation, even less one procedure for each policy. On the contrary, this environment is inhabited by a multitude of procedural rules or components that accomplish a wide range of purposes. Whether decisions, rules, assessments, information gathering, collaboration channels and the like are made or generated, third-generation procedures pay much greater attention and analysis to the process itself than the earlier generations, which focus more on the final result and its judicial review. Third-generation procedures conceive of public policy as a process, not a product. They do not aim to extract solutions or decisions embedded in the law, as in first-generation procedures, but rather to discover the solution (for example, the best environmentally sustainable solution) via procedures. Rules, standards, information, discussions, monitoring, etc., are functions of the administrative process itself.

First-generation procedures promote outcomes that are consistent with legal mandates and within the limits of authority granted to those exercising power. Second-generation procedures aim to provide simple rules governing executive regulations derived from a hierarchical administration. Third-generation policymaking and implementation procedural arrangements directly facilitate and channel new needs that arise from contemporary governance models. The first and second generations could be drawn in a formal, linear or staggered structure. A complex intertwined network or web could represent the third.

Mapping generations allows policymakers to assess existing and new procedures. This exercise can help officials not only to decide how to match processes with substantive policy areas, but also to evaluate whether a given procedure should be transferred from one generation to another in light of desired governance methods.[19] Furthermore,

[19] For instance, forward planning procedures for secondary regulations are often much less developed in many countries and there is no systematic coordination. See, for example, 'Better Regulation in Europe: An Assessment of Regulatory Capacity in 15 Member States of the European Union. Better Regulation in the United Kingdom', OECD (2009), available at http://www.oecd.org/dataoecd/0/35/43307706.pdf. These planning procedures, then, could be understood as second-generation procedures. The legislature might choose to move them from the second to the third generation, which means not only a new set of rules but also a new understanding and design for such planning, in line with a more collaborative governance model. See below Section 2.3.

it would highlight cases where the new models do not mesh with traditional methods and help reformers develop procedures that avoid the easy route of imitating traditional court-like processes (Barnes 2008: 32). Last, but not least, this taxonomy reveals the underlying public law values behind each generation as well as gaps and tensions between competing values (for example, by extending public values to private decision-making procedures). This would make it possible to create new procedures more systemically or to redesign procedures that need improvement. On the other hand, an understanding of generations of procedure based on governance models and typologies of administration allows us to contextualize the problems to be addressed and to place each procedural component in that particular context. Requirements concerning transparency, accountability, learning processes or participation, for example, can be fulfilled in an enormous variety of ways depending on which governance model applies.

Ultimately, it will be the content rather than any formal classification that determines the choice of procedural arrangements needed. Nevertheless, these three categories may provide guidance. This chapter aims to explain what 'third-generation procedures' can be and to demonstrate their value in modern regulatory welfare states.

The two first generations center upon decision-making procedures, be they individual decisions or rulemaking. In most countries, these procedures correspond to the traditional command-and-control regulation. These first two procedural systems aim to achieve accuracy in a given case via procedural due process requirements. These procedures ordinarily incorporate a detailed and procedural formality. The third generation is not only about modern decision and rulemaking procedures based on a collaborative model but, more generally, seeks procedural arrangements that make and implement public policies by means of flexibility, informality, public involvement, and new forms of accountability, transparency and mutual learning.

Each generation responds to a specific goal or scenario, that is, newer generations do not render the older obsolete. Reforms can improve the operation of the older models, but the most important innovations ought to apply to the third generation. The emergence of new models and methods of administrative regulation and governance requires new, qualitatively distinct administrative procedures to deal with them. The collaborative model underlying the new methods of regulation and governance means that all parties must work together to realize their interests and goals in a mutually respectful way; this requires procedures that ensure that all 'parties' interests and externalities are taken into account, negotiation processes are adequately structured, and the bargaining power of stakeholders is addressed' (Lobel 2004: 379).

2.2. First-generation procedures

First-generation procedures aim at making individual decisions, such as authorizations, licenses, sanctions, adjudications and dispute resolutions. They seek to guarantee citizens' rights and to assure a proper application and enforcement of the law. Most of today's administrative procedure statutes belong to this generation. They arise from a traditional administration and regulation model. The basic structure of first-generation procedures has remained relatively unchanged since their beginning in the nineteenth century and will probably remain unchanged in the foreseeable future.

As some American scholars explain, administrators adhered to judicial standards and employed quasi-judicial procedures; this was the result of the common law heritage of

administrative law, which had also influenced the legal training of officials, as well as the fact that most agencies had spent previous decades trying to satisfy reviewing courts (Grisinger 2008: 408). The judiciary, trained in the rigors of procedural regularity, has arguably greater institutional competence to address legal norms such as due process, rationality, equality, public participation and openness than do the other branches of government (Freeman 2003: 1335).

Some European scholars stress that the first APAs and case law are overtly inspired by the judicial process. This was the closest model the legislature and the judiciary had as a system of guarantees to resolve disputes between citizens and administrators. These laws, therefore, made special note of the right to be heard, of reasoned argumentation and the like. Due to their familiarity with the adjudicatory process, courts expanded its implications to administrative procedures. This model was furthered by laws passed in the second half of the twentieth century.

Historical reasons aside, the system is most appropriate when a citizen's right is affected and the decision must be found within the confines of the enacted law. This explains why statutory provisions followed a typical judicial pattern: proceedings initiated *ex officio* or by interested parties, investigation and probatory phases, hearings, resolution and enforcement (Barnes 2006: 275–8, 297–8).

2.3. Second-generation procedures

The second generation of administrative procedure concerns rulemaking (secondary legislation or executive regulation), approved by hierarchical administrations, as part of a centralized top-down regulatory process. Thus, this model for rulemaking is not based on the vision of cooperation between agencies and regulated parties.[20]

These procedures arguably resemble legislative decision-making. However, given the fact that there are very few procedural rules that govern legislatures, to a great extent they are also built on the principles that govern courts (Rubin 2003: 95). Participation rights in rulemaking procedures thus often follow the same values and principles present in adjudication procedures: the right to be heard, due process and rule of law. In other words, participation is viewed as a defensive right, not as a collaborative dialogue between citizen and agencies.

These procedures may also encompass the preparation of laws,[21] but the bulk of administrative law pertains to rules and regulations that are usually based on previous statutes. Notice and comment requirements may be very simple.[22]

By separating individual decision procedures from rulemaking, due process and rule of law concerns were dealt with in the former, while a separate, more flexible procedure permitted more efficiency and freedom in the latter. Outside the United States, rulemaking

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[20] Because of its advanced outlook, the US APA could easily be categorized as third generation and not second. Regarding the development of the US APA, see Grisinger (2008).

[21] Sometimes tools in place focus on the production of primary regulations. See, for example, 'Better Regulation in Europe: An Assessment of Regulatory Capacity in 15 Member States of the European Union. Better Regulation in Denmark', OECD (2009), 46, available at www.oecd.org/dataoecd/16/46/43325733.pdf.

[22] For example, the Spanish Statute on the Executive (Ley 50/1997), Article 24, establishes some requirements for rulemaking procedures to be followed by Departments. One of these is that consultation of the Council of State may be judicially enforceable.

Table 20.1 Three generations of administrative procedures (AP)

	FIRST GENERATION (Individual decisions)	SECOND GENERATION (Regulations)	THIRD GENERATION (Public Policies based on new governance models)
When	Since mid 1800s	Post-war era (1945)	Since late 20th Century
Examples	Spanish Administrative Procedure Act (APA), 1889	Legal provisions for executive secondary legislation in European states (50s, 60s)	Strategic environmental assessment procedures in the EU, 2001
Where found	Traditional APAs	Traditional statutes governing rulemaking	New governance models legislation
Scope	Individual decisions Adjudication procedures/ procedures for granting authorizations, licenses, approvals or concessions / award procedure leading to the procurement of contracts . . .	Regulations Rulemaking procedures / rules governing the preparation of laws. APAs do not contemplate a variety of types of rulemaking procedures.	AP that operate in modern policy-making and implementing processes Procedural rules governing inter-agency, public-private cooperation / new methods of governance . . .
Objective	To protect citizen's rights / To apply the law properly Defensive attitude towards abuses of power and arbitrary actions	To make regulations Defensive attitude by assuring participation of affected citizens, or affirmative task by promoting democratic legitimacy	To channel the needs of the new methods of governance Assuring good governance / greater legitimacy / Promoting new regulatory strategies
Nature of procedure	AP is mainly a decision-making process.	AP is mainly a decision-making process.	In the context of the new forms of governance, it may be understood as a system of communication exchange between administrations and citizens.
Focus on	Final decision	Final decision	The process itself

Administrative Procedure Model	'Judicial' model	'Legislative' model	'Administrative' model
	Procedures resemble judicial decision making: bilateral and adversarial procedure, a sequence of administrative actions geared toward a final decision, and a process designed to apply a solution laid down in substantive law.	Procedures resemble legislative decision-making. However, in fact there are few procedural rules that govern legislatures. Therefore they are also based on the rules that govern courts.	New modes of governance: hierarchy comes to be replaced by more fluid and interactive consultative networking.
	Judicial concept of governance: Decisions or solutions to be made are found in the laws.	Legislative concept of governance: Rules and regulations to be made are based on the previous statutes and established material standards.	New administrative concept of governance: Rules, standards, information, discussions, monitoring, etc., are developed through the administrative process itself.
Model of Administration	A pyramidal administrative hierarchy, whose procedures are merely tools to apply and enforce the law.	Rulemaking is mainly a part of a centralized top-down regulatory process.	Networked and collaborative Administration
Method of administrative regulation	Command and control regulation	Command and control regulation	New methods of governance
Administrative procedure and discretionary powers	AP is considered an ex post control mechanism.	AP is used as a limited ex ante control instrument.	AP as a steering tool of discretionary power (ex ante control)
	AP aims to assure the legality (minimum)	AP aims to complete an enacted statute	AP aims to achieve the best solution (Maximum)
	Reactive, Defensive, Ex post		Proactive, Ex ante
Information gathering and processing	Investigation principle *ex officio*:	Limited participation of the affected and at a late procedural stage	Public-Private and inter-agency cooperation throughout the entire process or policy cycle
	Decision based upon the record of the hearing.	Administration may make rules based on information not obtained through procedure.	Inter-agency gathering, processing, and exchange of information are very intensive.

Table 20.1 (continued)

	FIRST GENERATION (Individual decisions)	SECOND GENERATION (Regulations)	THIRD GENERATION (Public Policies based on new governance models)
	APAs tend to establish rigid and limited channels of communication exchange between the administration and the citizenry. Citizen participatory duties and rights are formalized and strictly defined. The administration alone provides information on common interests and needs. Investigation and information gathering are carried out ex officio. Information may be selective for fear of liability. Administrative procedural requirements are rigid and hard. They establish fixed requirements regarding: – Who may participate, and when, – The means and channels of information exchange, – The ways and methods of decision-making.	There is no effective dialogue between agencies and citizenry.	Investigation and information gathering may be carried out by the private sector. Integrated approach: All information should be considered over a long period of time and shared. Regularized continuous reflection. APs offer flexibility and softness. Their requirements contemplate: – Open communication, – Fluid participation, – A deliberative process based on the exchange of experiences and good practices, leading to consensus.
Role of Private Actors	Individual is the object of the decision-can merely comply or not.	Individual is the object of the regulation-can merely comply or not.	Individuals are 'co-generators' of the norms, actively participating throughout the entire process.
Administrative procedure as a communication system	The flow of information within the internal structure of the administration used to be of little interest to the law.	The flow of information is very limited: input from the public or those affected is restricted to a late procedural phase and of scarce influence.	The exchange of information and communication is permanent and it extends throughout all phases of public policy.

	Interagency collaborative procedures are isolated exceptions in the system. The participation of other administrations in the procedure is infrequent and not of primary importance.	There is no effective dialogue between administrations and citizens.	Procedure exists as a medium of exchange of information between the administration and the citizen, and between the various administrations themselves.

processes are not closely regulated by statute, and courts do not intervene very actively to create extra-statutory public participation requirements.[23] The mainly classically orientated procedures of this second generation do not take into account many contemporary developments, such as soft law or negotiated rulemaking.

Generally speaking, rulemaking procedures have played a modest role in most countries. First, because administrative law usually establishes very few, if any, requirements and, second, because in most parliamentary systems, typical rules and regulations only aim to implement in detail statutes containing certain substantive standards which have been previously enacted by Parliament ('executive regulation' of law).

On the other hand, if the statute is silent and does not contain substantive standards, as will often be the case, there is traditionally considerable room for procedural discretion in rulemaking. Statutory and institutional structures of economic policy, for example, often vest enormous discretion in the government actors charged with implementing the regulatory schemes. In these cases, when regulatory bodies making rules enjoy greater leeway, procedural requirements to be followed – let's say by a central bank – may be fewer and less elaborate than those of executive regulations, whose task is simply to implement substantive standards previously enacted by parliament. Surprisingly, the greater the freedom for making substantive rules enjoyed by agencies, the fewer procedural requirements need to be followed.

There are many new approaches to rulemaking that place greater emphasis on more widespread participation or collaboration (Zaring 2006: 295). This can produce grey areas between this generation and the third. In our opinion, the deciding factor that determines the passage from the second generation to the next is the model of governance and administration on which rulemaking is mainly based.

2.4. Third-generation procedures

Command-and-control regulation has monopolized the field for many decades. As a result of dissolving frontiers, however, much administrative regulation and government must be done in a different way, because the administration's domestic and international policy is in a mutually dependent relationship with other regulatory bodies and the private sector, and lawmaking and implementation become part of a continuous regulatory process. Public-private and inter-agency cooperation and decentralized, participative, deliberative, bottom-up processes require new administrative law tools and procedures.

Third-generation procedures operate in a new, nonhierarchical and decentralized

[23] Something very similar occurred in the nations of Northeast Asia. See Ohnesorge (2006: 121).

environment that values public-private and inter-agency cooperation, national-supranational governance and administrative processes designed to *create* the best solution rather than find it in a previously enacted statute. They do not aim mainly to control, but to steer public and private actors.

The third-generation procedure is a new hybrid version of procedures that respond to the changing needs of the new methods or modes of governance. A wide range of policy innovations seeks to create more effective forms of participation, coordinate multiple levels of government, allow more diversity and decentralization, foster deliberative arenas, mutual learning and information gathering, permit more flexibility, monitoring and revisability, etc. Procedural rules are deeply involved in policy design and implementation: from simplification of procedures to ongoing information exchange between agencies at national, supranational and global levels, from assessing public policy options to monitoring and reviewing decisions, programs, plans or standards that are never definitive given the dynamic nature of some policymaking, etc. In the framework of new governance models, policymaking and implementation rely on new procedural components much more than the traditional command-and-control regulation did, given that those regulatory processes are much more complex, involve a variety of public and private actors and levels of government, and aimed at setting out substantive standards. Regulatory cooperation has exhibited a notable impetus towards proceduralization.[24]

In this context, third-generation procedures are applicable to the making of individual decisions, of rules and regulations and, above all, as a means to channel various emergent needs into modern public policies.

Some examples to better illustrate this:

2.4.1. Individual decision procedures

- Some third-generation procedures apply to individual decisions as a substitute for older first-generation processes. For instance, the EU has simplified administrative procedures and formalities that service providers need to comply with. The EU Services Directive of 2006 aims to achieve a genuine internal market in Europe by facilitating the cross-border provision of a wide range of services, that is, cases in which a business wants to supply services across the borders in another Member State, without setting up an establishment there.[25] The Directive obliges Member States to review and evaluate all their authorization schemes concerning access to a service activity or the exercise thereof and abolish them or replace them by less restrictive means (such as simple declarations), where they are unnecessary or otherwise disproportionate (Articles 5 and 15.3). To compensate for the 'liberalization' and simplification of domestic controls, the

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[24] See Coglianese (2002: 1112): 'For at least the past twenty years . . . some of the most prominent and persistent calls for regulatory reform have tended to be procedural ones'. For an example in the area of financial regulatory cooperation, see Zaring (2005: 578).

[25] See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0123:EN:NOT.

Directive will strengthen the soft law documents, self-regulation, privatization of information, information regulation and a sophisticated inter-agency partnership across Europe.[26]

- Procedures embedded in industrial emissions policies, such as those granting permits under the European integrated pollution prevention and control system constitute another example.[27] Integrated pollution prevention and control concern new or existing industrial and agricultural activities with a high pollution potential.[28] Among other procedural arrangements,[29] directives establish a consultation procedure that ensures that the public has a right to participate in the decision-making process and be informed of its consequences, by having access to permit applications in order to give opinions, results of the monitoring of releases and the like. The decision to permit or reject a project must be made public and sent to the other member States concerned.
- Environmental impact assessment procedures undertaken for individual projects such as dams, motorways, airports or factories are another example.[30] Procedures determine the information required from the developer, the breadth of public and government participation, the administrative duties to be taken into consideration in the development of compliance procedures, the results of consultations and the information gathered, etc. (Articles 3–8 of the EIA Directive).
- A very different case is what we might call 'private' as opposed to 'administrative' procedures: the procedural rules to be followed by private entities carrying out essentially public duties.[31] The issue here is not only to extend procedural controls to private actors when, for instance, they adjudicate claims or make individual

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[26] In order to function properly, administrative cooperation relies on a direct and fast communication system between the competent authorities of different Member States. See Handbook on Implementation of the Services Directive, available at http://ec.europa.eu/internal_market/services/services-dir/proposal_en.htm#handbook.

[27] See Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.

[28] The integrated approach means that the permits must take into account the whole environmental performance of the plant, covering, for example, emissions to air, water and land, generation of waste, use of raw materials, energy efficiency, noise, prevention of accidents and restoration of the site upon closure.

[29] Procedures for exchange of information on best available techniques (serving as a basis for emission limit values) are held regularly between the Commission, the Member States and the industries concerned.

[30] The EIA procedure ensures that environmental consequences of projects are identified and assessed before authorization is given. The public can give its opinion and all results are taken into account in the authorization procedure of the project. The public is informed of the decision afterwards. See Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (EIA Directive).

[31] See Aman (1999: 416): 'A separate procedural provision designed for private actors could be crafted, one which not only emphasizes flexibility, but public involvement and the basic public law protections of notice, participation, transparency, and some forms of accountability. Indeed, creative disclosure requirements designed to inform the public just how certain markets work would also further these goals.'

decisions,[32] but also to set out procedural positive guidance for nongovernment actors, as some private risk management procedures do.[33]

2.4.2. Rulemaking procedures

- As examples of third-generation rulemaking procedures might be considered all kinds of rules and regulations made by agencies based on the collaborative governance model; procedures to make soft law (Mendelson 2007), such as the European Aviation Safety Agency rulemaking process;[34] private procedures governing standard-setting by private bodies;[35] deliberative procedures of international governance (for example, the International Accounting Standards Board), etc.
- Cases in point are also some of the procedures under the 'Lamfalussy process', an approach to the development of financial service industry regulations.[36] The EU has been a pioneer in introducing and enforcing various regulatory principles, such as the bottom-up approach, open consultation, impact analysis, early and thorough participation of market professionals and consumer bodies plus national regulators.[37] This process divides the legislation into high-level framework provisions, voted on by the Council and Parliament (level 1), and implementing measures, led

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[32] For example, Article III (Transparency), Section 1 of the Bylaws for Internet Corporation for Assigned Names and Numbers (ICANN), a California Nonprofit Public-Benefit Corporation (as amended 30 September 2009, available at http://www.icann.org/en/general/bylaws.htm#I), establishes that ICANN shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. According to Article I, Section 2, it will make decisions by applying documented policies neutrally and objectively, with integrity and fairness.

[33] See, for example, Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), Articles 22, 123, etc. See also Article 43 (risk management) of the Proposal for a Directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance – Solvency II (Brussels, 10.7.2007. COM(2007) 361 final).

[34] The Agency's Rulemaking Directorate contributes to the production of all EU legislation and implementation material related to the regulation of civil aviation safety and environmental compatibility. See http://www.easa.europa.eu/ws_prod/r/r_main.php. See also a standard rulemaking procedure to be put in place by the Agency at http://www.easa.europa.eu/ws_prod/r/r_rps_documentation.php; according to this a set of internal procedures and work instructions was developed and adopted. See also Strauss (2006: 685).

[35] For instance, in the EU, procedures for private/public mechanisms of law-generation are 'an alternative approach to legislation': for co-regulation and self-regulation, the Inter-institutional Agreement on Better Law-making provides agreed definitions, criteria and procedures (Official Journal C321 of 31.12.2003). The principles governing the conditions of use for alternative instruments such as co-regulation and self-regulation are transparency and representativeness (Article 17).

[36] See the so-called 'Lamfalussy Directives', adopted on the basis of the so-called 'Lamfalussy approach' at http://ec.europa.eu/internal_market/securities/transposition/index_en.htm

[37] See Communication from the Commission, Review of the Lamfalussy Process – Strengthening Supervisory Convergence (Brussels, 20.11.2007. COM(2007) 727 final.) See also the working procedures of the CESR, an independent Committee of European Securities Regulators (http://www.cesr-eu.org/index.php?page=cesrinshort&mac=0&id), at http://www.cesr-eu.org/popup.php?ref=08-375d (Articles 5 and 6).

by the Commission (level 2). Open consultation procedures and greater transparency are central to these arrangements. The detailed level 2 legislation is prepared by the Commission on the basis of advice provided by representatives of national supervisory authorities, acting through committees (for example, the CESR).

2.4.3. Procedural arrangements that directly respond to the needs arising from new modes of governance The universe of administrative action does not divide into two general decision-making categories – rulemaking and individual decisions – as one might be led to deduce from APAs. As noted above (Section 1.2), there are many other actions to be considered by modern advanced societies.

Third-generation procedures thus not only aim to make individual decisions or regulations, but also to resolve policy needs deriving from new modes of governance, such as information gathering and exchange; deliberation among actors; preliminary agenda-setting consultations; collaborative processes between regulators, that is, supervisory cooperation facilitating the convergence of outcomes and providing informal guidance on implementation issues;[38] monitoring and review;[39] transparency policy;[40] periodical reconsideration and updating of policy choices or permit conditions;[41] the identification at an early stage of unforeseen adverse effects of the implementation of plans and programs;[42] assessing the potential impacts of policy options;[43] and the like. These processes are not necessarily decisional in nature, in that they do not focus on the outcome but on the process itself.

Most of these processes are singular procedural components that operate in a given stage of the policy cycle: problem identification (or agenda setting), policy formulation, adoption, implementation or evaluation. Examples of these components would be impact assessments, public consultations or the making of rules as temporary solutions subject to revision.

In some cases, however, these procedural arrangements cover several stages, as for example in strategic environmental assessment procedures (SEA): the EU Directive 2001/42/EC, on the assessment of the effects of certain plans and programs on the environment, is a framework law that establishes a common SEA procedure for major official plans and programs prepared for agriculture, forestry, energy, industry, transport, waste management, water management, telecommunications, tourism, town and

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[38] For example, level 3 under the Lamfalussy arrangements. See supra notes 36 and 37.

[39] See Guidance Document on improving the collection and submission of data for the review of the BREFs, IEF 20–4 (March 2008), available at http://eippcb.jrc.ec.europa.eu/ief/doc/IEF20-4_Guid_on_data_collec.pdf.

[40] For instance, ICANN will employ open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process (Article I, Section 2 of the Bylaws).

[41] See, for example, Directive 2008/1/EC concerning integrated pollution prevention and control (the IPPC Directive).

[42] Article 10.1 Directive 2001/42/EC.

[43] See, for example, European Commission, Impact Assessment Guidelines, 15 June 2005, with March 2006 update, SEC(2005) 791, 6–15; and the revised Impact Assessment Guidelines, 15 January 2009, SEC(2009) 92. On the Commission Impact Assessment Guidelines, see also http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm.

country planning, or land use (Article 3). The key role of the SEA procedure lies in the intense participation of the public and in the inter-agency cooperation in the phases of agenda setting, policy formulation, implementation and oversight. SEA procedures must involve all public bodies, even beyond the state,[44] which will be affected by the proposed plan or program, on both a horizontal and a vertical level. The agency responsible for environmental issues must be consulted and has particular formal functions at various stages in the assessment procedure (Articles 5 and 6).

Collaboration is therefore required during every stage of administrative procedure: (i) screening of plans and programs, to ensure that their overall characteristics fall within the requirements of the SEA Directive and to assess their environmental significance; (ii) scoping the SEA, to choose the main elements of the plans and programs, collect and report on relevant environmental standards at all levels, develop objectives, indicators and targets, etc.; (iii) identification, prediction, evaluation and mitigation of any potential environmental impact; and (iv) revision and post-adoption activities, to undertake 'fast-track' SEA on significant changes in plans and programs, to revise the monitoring program periodically, to report regularly on monitoring results, etc.

In other words, SEA procedures promote a holistic, cross-sectional approach to the achievement of sustainable development. An integrated view of the process of making significant choices entails both an integrated administration structure and collaborative governance methods. For that purpose, procedures are based on more flexible and open tools, such as focus groups, public meetings, intergovernmental fora, consensus conferences, advisory committees, or steering groups.

3. Conclusion

As new public policies expand into territories once hidden behind closed frontiers, new mechanisms must accommodate and respond to the need for extended participation and collaboration discovered there. New procedural arrangements are one response.

Our conception of what constitutes 'procedure' must change. Contemporary patterns of interaction between regulators and other actors in domestic and international life, and more generally in the new modes of governance, are no longer well captured by the standard legal typologies of administrative procedures. First, they differ in terms of structure; these new procedures are not linear but networked. The actors and their forms of engagement, the nature of the law, the use of knowledge and information, the models of administration and its functions are also different and have yet to be fully chartered.

One cannot say in the abstract which procedural arrangements will properly fulfill the needs of the new public policies, that is, of the new modes of governance (Zaring 2005: 578; Schepel 2004: 166–7). That is to say, the new methods of governance and regulation should be taken into account in order to set up a revised conceptual framework for administrative law and, as a consequence, for administrative procedure as well. Accordingly, each procedural component requires adjustment. For example, participation and supervision exercised by the public and other administrations tend to be internal and informal, not just external and adversarial, and also to be present at an early stage of

[44] See Article 7 (Transboundary consultations).

the public policy (that is, prior to the publication of a preliminary rule, or at the agenda-setting phase). If consultation is intended to maintain an effective dialogue between interested parties and agencies – consultation being not a one-off event but a dynamic process – procedures must be established to ensure contact with stakeholders throughout the process as well as opportunities for feedback.[45]

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[45] On the dimensions that the shift from rules to governance implies, see, for example, Karkkainen (2006: 237): 'The new governance arrangements are also characterized by an iterative, adaptive, and experimentalist management approach, driven by the complex and dynamic nature of the undertaking'.

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21 Participation and expertise: judicial attitudes in comparative perspective

Catherine Donnelly

Judicial review of administrative action requires courts to confront the tension between the values of public participation and expertise in administrative decision-making. This chapter examines these tensions from a comparative perspective, using the United States (US), the European Union (EU), and the United Kingdom (UK) as case studies. Of course, administrative decision-making is justified in many different ways (Frug 1984). The Weberian understanding of 'a hierarchical, professional and politically neutral public administration' with indirect democratic legitimacy (Weber 1978: 956–1005, Bugaric 2004: 483) probably has the earliest origins. More recently, notions of participation or 'open public administration' (Bugaric 2004), as well as expertise, have been advanced as bases for administrative legitimacy. Participation and transparency, it is claimed, advances direct democratic legitimacy and in certain circumstances, deliberative decision-making processes (Hunold 2001); while expertise implies that administrative decision-making is objective and rational, immune from political and special interest influences (Majone 1996, 2000). Each rationale has found favor with different commentators at different times and the question for consideration here is how the courts manage these competing claims to legitimacy.

Structurally, this chapter will be straightforward: each jurisdiction – the US, EU, and UK – will be considered in turn. These jurisdictions provide interesting comparative material because the background context in each arguably frames the interaction between participation and expertise in very different ways, a process that in turn influences how courts have managed the tension between the two. Attitudes to participation and expertise have also had an impact on the way the courts approach process review of administrative decision-making and substantive review of administrative decisions, a topic this chapter will consider as well.

Given limits of space, this chapter cannot engage in a comprehensive analysis of the tension between participation and expertise or the judicial response. The aim is, rather, to offer a few tentative observations that might serve as the basis of further comparative discussion. First, this chapter suggests that courts tend, perhaps unsurprisingly, to rigorously uphold any participatory obligations imposed by the legislature; however, they often show little interest in imposing such obligations themselves. Second, courts in the US and the EU have tended to be drawn to legitimacy claims which do not necessarily mirror those of the pre-existing jurisdictional framework. US courts operate in a statutory framework that provides for pluralist participation in administrative decision-making, yet often seem more attracted to expertise-based decision-making. Meanwhile, EU courts operate in what many consider to be an elite, neo-corporatist paradigm, yet they treat claims for expertise-driven decision-making with caution. Third, interestingly, although there are signals of change, the UK courts seem to regard neither participation

nor expertise as providing strong legitimization for administrative decision-making and continue to operate primarily within a Weberian understanding of administration as hierarchical, professional, and politically neutral.

1. The United States

1.1. Participation and expertise in context

As compared to the EU or UK, the background context for administrative decision-making in the US is most squarely premised on pluralist conceptions of participatory legitimacy (Craig 1990). Federal administrative law provides a number of examples (Craig 1990: 118–124), but for present purposes the most important is the informal rule-making procedure (notice and comment) under the Administrative Procedure Act of 1946 (the APA).[1] While 'formal' rulemaking requires trial-type proceedings and determinations based solely on the record of the proceedings,[2] the informal process requires publication of the proposed rule or its substance in the Federal Register; an opportunity for public participation through submission of written comments, with or without oral presentation; and publication of the final rule, incorporating a concise statement of its basis and purpose, thirty days before its effective date.[3] There are also a number of hybrid procedures, involving variations on notice and comment, operating pursuant to specific regulatory programs,[4] but the informal rulemaking procedure remains the default regime. Notice and comment reflects, one observer has suggested, 'an explicit embracing' of administrative decision-making as a 'deliberative-constitutive' process, in which answers to complex socio-political disputes are best found through participatory processes, rather than through a search for objective, scientific data (Fisher 2007: 33 and 95).

The nature of notice and comment rulemaking, however, has evolved over time. Originally conceived as an aid to agencies in gathering information, it became significantly more participatory over the late 1960s and 1970s onwards. This resulted from the establishment of a range of new regulatory agencies – such as the Environmental Protection Agency and the Occupational Safety and Health Administration – to protect the public from environmental and health risks (Fisher 2007: 98). The legislation establishing these agencies prioritized notice and comment rulemaking over formal rulemaking, albeit that the specific procedures were often hybridized (Fisher 2007: 99). This increased emphasis on public participation in administrative decision-making was linked to distrust of autonomous administrative expertise to achieve outcomes in the public interest, as opposed to the interests of powerful organized groups (Stewart 1975). In turn, however, there later emerged a backlash against the expansion of transparency and participation rights, which coincided with increasing calls for respecting the virtues of technocratic expertise. Specifically in the context of risk-regulation, for example, it has been argued that the public cannot prioritize risk rationally (Sunstein 2002). Leading proponents of this view include Justice Breyer, who has argued for the 'inherent' virtues

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1 5 USC § 553.
2 5 USC §§ 556, 557.
3 5 USC § 553.
4 See, for example, Occupational Safety and Health Act, 29 USC § 655(a); Federal Water Pollution Control Act, 33 USC § 1317(a)(2); Clean Air Act, 42 USC § 7607(d)(5).

of rationalization, expertise and insulation in the regulatory process (Breyer 1993: 60–63). However, the debate between participation and expertise has persisted. Certain commentators have pointed to empirical evidence that notice and comment can produce deliberative and informed regulatory outcomes (Cuéllar 2005), while others have argued in favor of greater politicization of administrative decision-making (Watts 2009). Meanwhile, others have argued that today, notice and comment merely serves the function of compiling a record for judicial review, not securing public input (Elliott 1992: 1492).

Regardless of the particulars of this debate, one thing is clear, at least from the perspective of the EU and the UK. By comparison with these jurisdictions, the American debate occurs within a framework for administrative decision-making that appears to be strikingly participatory, even if it is possible to locate certain legislative features and elements in the scholarly discourse that place greater emphasis on fostering administrative expertise.

1.2. Participation and expertise in the courts

1.2.1. Process review US courts have generally acknowledged notice and comment as having a twofold purpose, namely to ensure 'meaningful public participation in the rule-making process'[5] and to enable 'the agency promulgating the rule to educate itself'.[6] Ever since *Vermont Yankee*, courts in the US have tended not to supplement legislatively mandated procedures,[7] and consequently, courts will not impose requirements of participation in administrative decision-making which have not been imposed by legislation. However, rightly, courts have policed compliance with pre-imposed procedural requirements rigorously. The courts often find the timing of notice to be important, since '[t]he opportunity to participate is not meaningful unless it occurs reasonably close to the time in which the Secretary makes a decision'.[8] Moreover, US courts also require the agency to divulge adequate information to make participation meaningful, to demonstrate the factual basis for a rule, and to disclose the scientific basis of the proposed rule.[9]

1.2.2. Substantive review In terms of substantive review of the outcome of rulemaking, the courts in the US apply a number of standards, some derived directly from the APA (notably 'arbitrary and capricious' for informal rulemaking, and 'substantial evidence' for formal rulemaking).[10] They have also developed certain other standards, including most famously, so-called 'hard look' review, to scrutinize the quality of administrative decision-making.[11]

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[5] *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F. 3d 1392, 1404 (9th Cir. 1995); *Hanover Potato Products, Inc. v. Shalala*, 989 F. 2d 123, 130 n. 9 (3d Cir. 1993).

[6] *Texaco, Inc. v. Federal Power Commission*, 412 F. 2d 740, 744 (3d Cir.1969).

[7] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 US 519 (1978).

[8] 58 F. 3d at 1404.

[9] *United States v. Nova Scotia Food Prods. Corp.*, 568 F. 2d 240, 251 (2d Cir. 1977).

[10] 5 USC § 706.

[11] In certain of the hybrid schemes, however, a procedure modeled on notice and comment requires 'substantial evidence': 29 USC § 655(f) (OSHA); 15 USC § 2058 (CPSC); 15 USC § 2618 (EPA).

It is worth explaining the evolution of 'hard look' review. In the early years after the introduction of the APA, courts tended not to interfere with administrative decision-making. However, during the 1970s, various judges in the DC Circuit voiced competing understandings of the proper scope of 'hard look' judicial review (Fisher 2007: 101–107). For Judge Leventhal, an agency was required to show that it had not acted on the basis of 'inadequate data',[12] and that it had identified the crucial facts and taken into account the different expert opinions; what mattered was 'the reasonableness and reliability of the Administrator's methodology'.[13] Judge Leventhal openly articulated his concerns about informal rulemaking being a 'seed bed for the weed of industry domination'.[14] By contrast, for Judge Bazelon, also on the DC Circuit, what mattered was that '[c]omplex questions should be resolved in the crucible of debate through the clash of informed but opposing scientific and technological viewpoints'.[15] For him, for example, the concept of risk was 'inherently complex and required consideration of numerous different factors' (Fisher 2007: 104); and scientific uncertainty meant that administrators had to make 'judgment calls', and possibly even act 'in spite of uncertainty' (Bazelon 1981).

As is well-known, the Supreme Court effectively endorsed the 'hard look' approach in the *State Farm* decision, albeit in a way that reflected both Leventhal's and Bazelon's concerns.[16] In that case, the Court recognized that 'policymaking in a complex society must account for uncertainty', but stressed that 'substantial uncertainty' could not provide a justification for an agency's actions: rather, '[t]he agency must explain the evidence which is available, and must offer a "rational connection between the facts found and the choice made".'[17] A similarly expertise-driven focus had been evident in the earlier *Benzene* decision dealing with the Occupational Safety and Health Act ('the OSH Act'), one of the hybrid rulemaking schemes mentioned above. In *Benzene*, the Court interpreted the 'substantial evidence' test to require decision-making 'supported by a body of reputable scientific thought'.[18] Thus, the agency must take account of significant comments, either in writing or in a hearing,[19] and the courts have made it clear that they see it as part of their function to assess the adequacy of agency responses to comments.[20]

Since the *State Farm* decision, US courts require that 'agencies should explain their decisions in technocratic, statutory, or scientifically driven terms, not political terms' (Watts 2009: 5). This concern that expertise be demonstrated has not waned, and has even been extended recently to what has been described as 'expertise-forcing' actions on the part of the judiciary (Freeman and Vermeule 2007: 52). In *Massachusetts v. EPA*, the Supreme Court reviewed the US Environmental Protection Agency's (EPA's) denial of a rulemaking petition that asked the EPA to regulate certain emissions from new

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12 *Portland Cement Ass'n v. Ruckelshaus*, 486 F. 2d 375, 393 (DC Cir. 1973).
13 *International Harvester Co. v. Ruckelshaus*, 478 F. 2d 615, 643 (DC Cir. 1973).
14 *Walter Holm & Co. v. Hardin*, 449 F. 2d 1009, 1016 (DC Cir. 1971).
15 *International Harvester Co. v. Ruckelshaus*, 478 F. 2d 615, 652 (DC Cir. 1973).
16 *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.,* 463 US 29, 34, 50 (1983).
17 Id. at 51; see also at 42.
18 *Industrial Union Deprt AFL-CIO v. American Petroleum Institute*, 448 US 607, 656 (1980).
19 463 US at 42–44.
20 *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F. 3d. 1392, 1404–1405 (9th Cir. 1995).

motor vehicles that could contribute to global warming.[21] In a split five-four decision, the Supreme Court found that the EPA had failed to provide a 'reasoned justification for declining to form a scientific judgment'.[22] Rejecting the EPA's reliance on scientific uncertainty as a justification for not regulating, the Supreme Court stressed that, '[i]f the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so'.[23] The impact of this decision was, in effect, to *require* the EPA to make a scientific determination of the issue (Freeman and Vermeule 2007).

Such is the emphasis placed on expertise by the US courts that even scientific uncertainty will not necessarily result in latitude for the administrative agency to make a policy-based decision. In *Oregon Natural Resources Council v. Daley*,[24] an even split in expert opinion led a district court to accept the proposition that 'in the event of a scientific disagreement between experts, the [agency] is free to rely on the expert opinion of [its] choice'.[25] This is not always the case though. In *Stalcup v. Peabody Coal Co*.,[26] five equally qualified doctors had offered opinions on whether an individual had pneumoconiosis, and an administrative judge had opted for the majority view of the five. The Seventh Circuit rejected this 'mechanical nose count', and held that because a 'scientific dispute must be resolved on *scientific grounds*', the administrative law judge 'must have a *medical reason* for preferring one physician's conclusion over another's'.[27]

The Supreme Court's recent decision judgment in the *Fox Television* case[28] has been seen by some as potentially signaling a retreat from technocratic, expertise-drive legitimization (Watts 2009: 10–11). The case involved a change in a policy of the Federal Communication Commission which was, as Justice Scalia put it, based on 'significant political pressure from Congress'.[29] In a five-four split, the Court held that an agency need not always provide a more detailed justification for a policy change, thereby perhaps rendering it easier for agencies to justify a change of policy based on political, rather than expertise, considerations. The full implications of *Fox Television*, of course, remain to be seen.

In summary, faced with what is, at least from a comparative perspective, a heavily participatory decision-making framework, US courts have been generally very keen to emphasize the significance of expertise in legitimizing administrative decision-making.

2. European Union

2.1. Participation and expertise in context

Turning to the EU, a quite complex picture of the relationship between participation and expertise emerges. The Commission has heralded participation in decision-making

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21 549 US 497 (2007).
22 549 US at 534.
23 Id.
24 6 F. Supp. 2d 1139 (D.Or. 1998).
25 Id. at 1159.
26 477 F. 3d 482 (7th Cir. 2007).
27 Id. at 484.
28 *F.C.C. v. Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009).
29 Id. at 1816 (Justice Scalia).

as one of the principles of European governance (Commission Communication 2001: 10), building on demands in the European treaties that decisions be 'taken as openly as possible and as closely as possible to the citizen'.[30] However, the role of consultation in administrative decision-making in the EU is multi-faceted, not least due to the complex institutional arrangements through which administration is conducted in the EU, both 'horizontally' and 'vertically'.

Horizontally, at EU level, while the Commission might be regarded as the closest parallel to an executive in UK and US thinking, governmental power is in fact distributed between the Council, Commission and Parliament in accordance, not with the classic notion of separation of powers, but with what one commentator has called its 'substitute' (Jacqué 2004): the principle of 'institutional balance'.[31] Vertically, even though EU agencies have been on the rise recently (Kreher 1997), much of the implementation and administration of EU law and policy is not conducted by the EU itself, but through 'shared management', in which both the Commission and national administrations need to discharge their respective tasks in order to implement EU policy successfully (Committee of Independent Experts 1999, Craig 2007, Hofmann and Türk 2006: 90). Consultation by the Commission in its decision-making reflects these administrative complexities, operating both 'vertically' and 'horizontally'.

The primary mechanism engaging 'vertical' concerns of Member State administrations in EU decision-making has been the so-called Comitology process, the name given to the elaborate system of committees through which the Member States monitor normative power delegated by the Council to the Commission. The initial Treaty scheme did not foresee this system, which emerged as a consequence of practical need. On the one hand, Comitology has facilitated speed and the incorporation of scientific and technical considerations into EU law-making; on the other hand, it has ensured that Member States remained involved in the Commission's exercise of delegated normative power (Hofmann and Türk 2006: 77). Thus, the Council, through a 'parent' regulation, can authorize the Commission to enact more specific regulations within a particular area and the delegation can be made subject to the constraint of committees, comprised primarily of Member State representatives (Craig and de Búrca 2007: 118–23). There are three different types of committee – advisory, management and regulatory – and the procedures accompanying each type of committee involve increasing levels of supervision of the Commission by the Council and Parliament.[32] Whether the members of Comitology committees actually articulate Member State views or become 'Europeanized' has been the subject of intense debate (Joerges and Neyer 1997, Egeberg et al. 2006); but

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[30] Article 1, Treaty on European Union (TEU).

[31] See, for example, Case C-120/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC* [2008] ECR I-6513, para. 142; Case 10/56 *Meroni v. High Authority* [1957–8] ECR 157, 173 (the CJEU referring to 'the balance of powers which is characteristic of the institutional structure of the Community').

[32] See Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184/23 and Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission [2006] OJ L200/11.

in theory, these committees provide for a form of Member State participation in EU decision-making.

Horizontally, at the EU level, the Commission's engagement with civil society and expert groups also promotes participation. In part this occurs through treaty-mandated advisory bodies – such as the Economic and Social Committee (Bignami 2006) and the Committee of the Regions – which the Commission consults in the 'social dialogue' process that applies in those social policy areas where the EU's competences are generally limited.[33] Article 154 TFEU (formerly Article 138 EC) imposes duties to consult management and labor organizations about social policy, although the Treaty does not indicate which organizations should be consulted, and in practice, the Commission has opted to restrict access to those organizations which are organized at European level, integral to Member State social structures, and representative of all the Member States as far as possible (Commission Communication 1993, para. 24, Commission Communication 1998).

Participation of other groups and organizations has tended to be informal and unstructured (Obradovic and Alonso 2006). In 2002, the Commission published a Communication setting out standards for consultation, and emphasized that the organizations with which it would consult would have to demonstrate the qualities of independence and transparency (Commission Communication 2002: 11–12). Interestingly, while the Commission suggested that the consultation process would grant the *legislature* greater scope for scrutinizing the Commission's activities (Commission Communication 2002: 5) – for example, by making available documents summarizing the outcome of the consultation process and how it took account of the consultation responses (Commission Communication 2002: 19 – 22) – it stressed that it had no desire to create any legally enforceable obligations, *inter alia*, for the reason that it did not wish to create the possibility of legal challenge on the basis of inadequate consultation (Commission Communication 2002: 10). This provides a very sharp contrast with the situation we saw above in the US, where the consultation record is essential precisely for the purpose of facilitating judicial review.

The Commission engages in ongoing consultation with expert groups, and has even itself expressed the concern in its White Paper on European Governance as to the lack of clarity regarding 'who is actually deciding – experts or those with political authority' (Commission White Paper 2001: 19). According to a 'rough estimate', commentators have suggested that there are 'between 800 and 1300 groups' with a 'whole army of expert groups' assisting the Commission in initiating and drafting proposals (Larsson and Trondal 2006).

Clearly, therefore, the model of participation adopted by the EU is conceived differently from how it is in the US: it is closer to a neo-corporatist model (Falkner 1998, Smismans 2007), which exhibits concern about unregulated access to administrative decision-making (Bignami 2006). That said, Europeans frequently regard consultation as a means of addressing the renowned 'democratic deficit' in EU governance (Lee 2005). Particularly exemplified by Comitology or 'social dialogue', participation in

[33] See, for example, Article 13(4) TEU.

administrative decision-making in the EU tends to be a product of deeper underpinning institutional arrangements.

2.2. Participation and expertise in the courts

2.2.1. Process review Turning to the attitudes of the EU courts, judicial responses have varied depending on the particular type of participation at issue. Similarly to the US courts, EU courts have been very slow to impose a duty to consult where such a duty is not otherwise required by positive law.[34] Also like the US courts, the EU courts have required relatively strict adherence to any pre-imposed participatory obligations,[35] although they have tempered this approach by requiring that litigants show that the procedural violation would have made a difference to the outcome.[36]

Perhaps given background 'vertical' concerns around participation of Member States in EU administrative decision-making, the Court of Justice of the European Union (CJEU) has been broadly supportive of the Comitology process – despite its lack of an explicit Treaty basis.[37] In the 1970 *Koster* case, the CJEU reasoned that given that the relevant committee, a 'management committee', did not have decision-making power, it did not distort the principle of institutional balance in the Community and observed that the function of the committee was 'to ensure *permanent consultation* in order to guide the Commission in the exercise of the powers conferred on it by the Council'.[38] The CJEU's support for Comitology has included upholding decisions of the Council to use the more powerful regulatory Comitology procedure, even though the criteria for such use were not clearly satisfied.[39] To explain, as was noted above, the different Comitology committees – advisory, management, and regulatory – attract different levels of supervision of the Commission by the Council and Parliament. At one end of the spectrum, the Commission must take 'utmost account' of the opinion of an advisory committee.[40] By contrast, the support of a qualified majority of a 'regulatory' committee is required for

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[34] See, for example, Case C-104/97 P *Atlanta AG v. Commission* [1999] ECR I-6983, para. 38 (the 'only obligations of consultation incumbent on the Community legislature are those laid down in the article in question'); Case C-258/02 P *Bactria Industriehygiene-Service Verwaltungs GmbH v. Commission* [2003] ECR I-15105, para. 43.

[35] Case 2/54 *Italy v. High Authority* [1954-1956] ECR 37, paras 7 and 9; C-378/00 *Commission v. European Parliament* [2003] ECR I-937; Case 138/79 *Roquette Frères SA v. Council* [1980] ECR 3333; contrast Case C-241/95 *R. v. Intervention Board for Agricultural Produce, Ex p. Accrington Beef* [1996] ECR I-6699; Case 278/84 *Germany v. Commission* [1987] ECR 1, paras 12–13 (no procedural breach found in the circumstances). See also C-263/95 *Germany v. Commission* [1998] ECR I-441, para. 31.

[36] Case C-465/02 *Germany v. Commission* [2005] ECR I-9115, para. 37.

[37] Former Article 155 of the European Community Treaty provided that the Commission would exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter and enabled the Council to determine any detailed rules to which the Commission was subject in exercising the power conferred on it. The CJEU found that this provision could provide a basis for comitology: Case 25/70 *Einfuhr- und Vorratsstelle fur Getreide und Futtermittel v. Köster et Berodt & Co* [1970] ECR 1161, para. 9.

[38] Id. (emphasis added).

[39] Case 378/00 *Commission v. Parliament* [2003] ECR I-937, para. 43 ('the second comitology decision did not intend to make the criteria laid down in Article 2 binding in character').

[40] Council Decision 1999/468/EC, supra note 32, Article 3(4).

the Commission to adopt a measure. If such support is lacking, the measure must be submitted to the Council and the European Parliament must be informed.[41]

In the social dialogue context, in the *UEAPME* case, the EU's lower court, the General Court, was again very mindful of the role of this dialogue in promoting participation. It held that the Commission had an obligation to consider the *representativeness* of the parties to an agreement proposed for implementation via a Council decision, and that it was for the Council to check that the Commission had done so. Close scrutiny was explained as follows:

> [T]he principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process – that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council.[42]

The General Court added that where the required degree of representativeness did not exist the Commission and the Council should refuse to implement the agreement at the Community level.[43]

Turning to expertise, the EU courts have been active, even to the point of scrutinizing the qualifications of proposed experts to ensure the actual existence of expertise.[44] The General Court, in particular, has also sought to draw the distinction between political influence and expertise, holding for example that a political committee cannot be said to supply 'scientific advice based on the principles of excellence, transparency and independence'.[45] However, the EU courts have generally not engaged in the sort of 'expertise-forcing' activities that have characterized certain decisions of the US Supreme Court, or at least they have not done so as aggressively. In the *Angelopharm* case,[46] the CJEU did adopt what it subsequently characterized as a 'purposive' approach, finding a duty to consult a scientific committee where such a duty might be inferred from the legislation in question (the Cosmetics Directive).[47] The Court noted that the Directive asked that rules governing cosmetic products should be founded on scientific and technical assessments based on the latest international research.[48] The CJEU explained that, without consultation, the ban was neither 'fully informed' nor did it satisfy the Directive's requirements;[49] thus, the duty to consult arose from 'the nature of things'.[50] However, when considering *Angelopharm* in the later *Pfizer* case, the General Court

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[41] Id. Article 5.

[42] Case T-135/96 *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council* [1998] ECR II-2335, para. 89.

[43] Id. at para. 82.

[44] Case C-269/90 *Technische Universtät München v. Hauptzollamt München-Mitte* [1991] ECR I-5469, para. 22

[45] Case T-70/99 *Alpharma Inc v. Council* [2002] ECR II-3495, para. 236; Case T-13/99 *Pfizer v. Office for the Harmonisation in the Internal Market* [2002] ECR II-3305, para. 285.

[46] Case C-212/91 *Angelopharm GmbH v. Freie Hansestadt Hamburg* [1994] ECR I-171.

[47] Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products [1976] OJ L262/169.

[48] Id. at Article 11.

[49] *Angelopharm* [1994] ECR I-171, paras 31–4.

[50] Id. at para. 33.

confined its application to those circumstances in which a procedure is ambiguous about whether consultation of experts is required.[51] In *Pfizer*, the General Court refused to criticize the EU institutions for failing to wait for a formal scientific report on Denmark before making a regulatory decision. Most importantly however, in a statement marking a divergence of attitude from the US courts, the CJEU added that while the expert committee at issue in *Pfizer* had 'scientific legitimacy', this 'was not a sufficient basis for the exercise of public authority'.[52] For the CJEU, prior consultation sufficed, and as one commentator noted, the CJEU was satisfied that 'guarantees of scientific objectivity' were in place without additional involvement of experts (Corkin 2008).

2.2.2. Substantive review In their substantive review, the EU courts have tended to exercise deference. The courts will only intervene in complex decision-making where it has been 'vitiated by a manifest error or misuse of powers', or where the relevant institution has 'manifestly exceeded the limits of its discretion'.[53] Where scientific expertise was at issue, when faced 'with divergent appraisals', the EU institution was not required to provide a scientific reason (unlike for example the holding in the Supreme Court's *Massachusetts* decision) for deciding to ban hormones; rather this decision was 'within the limits of [the institution's] discretionary power'.[54] Moreover, where there are 'divergent appraisals', traders are not 'entitled to expect that a prohibition on administering the substances in question to animals could be based on scientific data alone'.[55]

It may be that the importance of scientific expertise is increasing for the EU courts (Fisher 2007). For example, in the more recent *Pfizer* case, the General Court accepted that a risk assessment could not be required to provide the Community institutions with 'conclusive scientific evidence of the reality of the risk',[56] but added that the risk must be 'adequately backed up by the scientific data available at the time when the measure [is] taken'.[57] However, in the same case, the General Court indicated that the role of expert advisory committees is 'restricted' to answering the questions asked by the competent institution, and providing a 'reasoned analysis of the relevant facts of the case in the light of current knowledge about the subject, in order to provide the institution with the factual knowledge which will enable it to take an informed decision'.[58]

Overall, faced with a neo-corporatist model of participation, the EU courts often try to emphasize that the EU's decision-making process provides a mechanism for participation with a democracy-enhancing purpose. Moreover, while the courts clearly value the

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[51] Case T-13/99 *Pfizer v. Office for the Harmonisation in the Internal Market* [2002] ECR II-3305, para. 262; *Alpharma* [2002] ECR II-3495, para. 207.

[52] [2002] ECR II-3305, para. 201.

[53] See, for example, Case C-331/88 *R. v. Ministry of Agriculture, Fisheries and Food, Ex p. Federation Européene de la Santé Animale (FEDESA)* [1990] ECR 4023, para. 8.

[54] *FEDESA* [1990] ECR 4023, para. 9; see also Case C-180/96 *UK v. Commission* [1998] ECR 2265, para. 99.

[55] *FEDESA* [1990] ECR 4023, para. 10.

[56] *Pfizer* [2002] ECR II-3305, para. 142.

[57] *Pfizer* [2002] ECR II-3305, para. 144; Case C-39/03 *Commission v. Artegodan* [2003] ECR I-4485, para. 192

[58] *Pfizer* [2002] ECR II-3305, para. 197.

role of expertise, they do not necessarily regard it as paramount; space is left for policy-based administrative discretion.

3. United Kingdom

3.1. Participation and expertise in context

The basis of administration in the UK has historically been heavily dependent on a generalist, rather than specialist, civil service, constituted as a 'permanent deliberative institution' to address 'complex problems' (Fisher 2007: 68). Meanwhile, UK administrative law is often described as embodying a 'pluralist tradition' (Harlow and Rawlings 1997, Arthurs 1979) because it is derived from many different sources: the 'political constitution' (Tomkins 2003), convention, policy, statute, and common law. Reflecting this tradition, duties of public consultation often arise as a matter of governmental policy or by 'convention' (Wade and Forsyth 2009) and in particular statutory contexts, rather than as a matter of judicially enforceable law. For example, the Cabinet Office Code of Practice on Written Consultation[59] – establishing standards rather than imposing obligations of consultation – does not have legal force, and cannot prevail over statutory or mandatory EU law requirements, but should generally be regarded as binding on UK government departments and their agencies, unless Ministers conclude that exceptional circumstances require a departure from it. The influences of international and EU law are increasingly apparent, with justiciable duties of consultation derived from supranational sources – such as the Aarhus Convention[60] which requires consultation in the context of environmental decision-making – arising with ever greater frequency before UK courts.[61] All in all, however, UK policy and legislation impose participatory obligations in an ad hoc manner, even if they are ever-more common.

3.2. Participation and expertise in the courts

3.2.1. Process review UK courts generally do not impose participatory obligations on administrative decision-makers outside the context of adjudicatory decisions. Moreover, UK courts only view the imposition of such obligations as within the judicial remit if the statutory framework clearly calls for them (Woolf et al. 2007, paras 7-026–7-030). There is, in other words, no free-standing common law duty to consult.[62] For example, there is no duty to consult either where a minister issues orders or directions[63] or policy is formulated in the administrative sphere (Ganz 1987). In addition, courts have frequently only

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[59] Revised edition, January 2004, *http://*www.*cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/annex3.pdf* (last accessed 30 December 2009).

[60] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998.

[61] See, for example, *Secretary of State for Environment, Food and Rural Affairs v. Downs* [2009] EWCA Civ 664 (Civ Div); *Environment Agency v. Inglenorth Limited* [2009] EWHC 670 (Admin) DC; *R. (on the application of Greenpeace Ltd.) v. Secretary of State for Trade and Industry* [2007] EWHC 311.

[62] *R. (on the application of Hillingdon LBC, Leeds City Council, Liverpool City Council, Norfolk City Council) v. Lord Chancellor, Secretary of State for Communities and Local Government* [2008] EWHC 2683; [2009] CP Rep. 13, [38].

[63] *Bates v. Lord Hailsham of Marylebone* [1972] 1 WLR 1373.

imposed a duty to consult to the *extent* that it is required by the statute,[64] even though, in other procedural contexts, they appear willing to supplement the requirements of the statutory scheme (Woolf et al. 2007, paras 7-012–7-015, 7-041). Similarly, where a statutory provision confers a degree of flexibility as to the conduct of consultation – for instance, framing the obligation as being to 'take such steps as [the decision-makers] consider sufficient' – 'the court should not place [decision makers] in a rigid straightjacket beyond that which the statute necessitates'.[65] Moreover, courts have not seized apparent opportunities to expand public participation: Paul Craig has observed, for example, that courts have used the relevancy ground of judicial review to refer only to the issues the administrator must consider, and not the range of the interests which should be consulted (Craig 1990: 162).

The only situation in which the courts have abandoned this approach has been where a legitimate expectation has arisen that consultation would take place.[66] A legitimate expectation that a decision-maker will consult arises in two situations.[67] In the 'paradigm case' of procedural legitimate expectation, the decision-maker has provided an unequivocal assurance, whether by means of an express promise or an established practice, to consult those affected or potentially affected and consequently, ordinarily, she must consult.[68] In the 'secondary case' of procedural legitimate expectation, the decision-maker has given an assurance that an existing policy would be preserved for a specific person or group who would be substantially affected by the change and again, ordinarily, she must consult before effecting change.[69] Interestingly, UK courts do not impose a requirement for consultation in these cases because of a concern to advance deliberation and democratic participation in administrative decision-making. Rather the focus of the courts has been on ensuring fairness and avoiding abuse of power: the legitimate expectation is thus judicially enforceable because good administration 'by which public bodies ought to deal straightforwardly and consistently with the public'[70] generally requires that where a public authority has given a 'plain assurance', the courts will hold it to that assurance.[71] Thus, the concern of the courts is with 'good administration', but not in the sense of participatory administration.[72]

In fact, UK courts have often exhibited skepticism about participatory rights. Some

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[64] *Hillingdon* [2008] EWHC 2683, at [38]–[39]. See also *R. (on the application of Edwards) v. Environment Agency* [2008] UKHL 22; [2008] 1 WLR 1587; *easyJet Airline Company Ltd. v. The Civil Aviation Authority, Gatwick Airport Ltd.* [2009] EWHC 1422.

[65] *R. (on the application of Breckland DC) v. The Boundary Committee* [2009] EWCA Civ 239, at [43].

[66] The jurisprudence has been evolving over a significant period of time and series of cases, most notably: *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149; *R. v. North and East Devon Health Authority, Ex p. Coughlan* [2001] QB 213; *R. (on the application of Bhatt Murphy) v. The Independent Assessor* [2008] EWCA Civ 755, at [30].

[67] *Bhatt Murphy* [2008] EWCA Civ 755.

[68] Id. at [29].

[69] Id. at [39].

[70] *R. (on the application of Nadarajah) v. Secretary of State for the Home Department* [2005] EWCA Civ 1363 [68]; *Bhatt Murphy* [2008] EWCA Civ 755, at [30].

[71] *Bhatt Murphy* [2008] EWCA Civ 755, at [30]; *Coughlan* [2001] QB 213, at [67]; *Ex p. Begbie* [2000] 1 WLR 1115.

[72] Consequently, counsel seeking to persuade the courts to impose a consultation duty usually

decisions suggest concerns over the potential scope of such a duty and the difficulty of drawing a line in terms of relevant consultees,[73] thereby clearly rejecting the model of open participation found in the APA. (Indeed, UK judges have posed a question which would be entirely alien to the US paradigm, namely, 'Are there interests which ought not to be consulted?'[74]) UK courts are also hesitant to impose duties to consult out of 'separation of powers' concerns flowing from 'the entitlement of executive government to formulate and reformulate policy, albeit subject to such constraints as the law places upon the process and the product'.[75] A system based on widespread consultation is regarded by the UK courts as potentially leading to a 'consequent industry of legal challenges [that] would generate in its turn defensive forms of public administration'.[76]

That said, where the statutory scheme has imposed an obligation of consultation, the courts have not hesitated in upholding that duty rigorously and demanding evidence of a deliberative process. In addition, regardless of whether there is a legal obligation to conduct consultation, once the public body in fact undertakes consultation, it is obliged to conduct the process properly.[77] Most of these cases involve planning decisions, the context in which the duty of consultation most often arises in UK statutory schemes. A leading example involved whether a court should mandate a full inquiry before granting planning permission to construct a thermal oxide reprocessing plant; the decision turned on the court's assessment of whether, without such an inquiry, the Secretary of State would be able to take account of the representations and to weigh the economic, health and environmental factors in deciding whether to grant the permission.[78] Courts have sought to ensure that competing relevant interests would be properly weighed and that the decision-maker 'will not have failed to take into consideration any matters which he ought to have taken into consideration'.[79] The fundamental requirements of the duty of consultation have been summarized by Lord Woolf:

> To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.[80]

3.2.2. Substantive review In terms of substantive review, UK courts have long regarded expertise as a justification for deferring to administrators;[81] however, courts

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frame their arguments in terms of the duty to act fairly: see, for example, *Hillingdon* [2008] EWHC 2683, at [22].

[73] *Hillingdon* [2008] EWHC 2683, at [42].

[74] *R. (on the application of BAPIO Action Ltd.) v. Secretary of State for the Home Department*, [2007] EWCA Civ 1139; [2008] ACD 7, at [44] (Sedley LJ) (not discussed in the same depth in the HL).

[75] *BAPIO* [2007] EWCA Civ 1139, at [43].

[76] *BAPIO* [2007] EWCA Civ 1139, at [44].

[77] *Coughlan* [2001] QB 213, at [108].

[78] *R. v. Secretary of State for the Environment, Ex p. Greenpeace Ltd.* [1994] 4 All ER 352, 383.

[79] *Bushell and another v. Secretary of State for the Environment* [1981] AC 75, 94 and *Binney v. Secretary of State for the Environment* [1984] JPL 871.

[80] *Coughlan* [2001] QB 213, at [108].

[81] *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] QB 728, at [87] (Laws LJ).

also define the term 'expertise' extremely loosely. UK courts, for example, have exhibited reluctance to intervene in the conclusions of 'a specialist tribunal',[82] and they have stressed that '[i]t is not the function of the court to enter the scientific debate'.[83] Unlike the US courts, the UK courts do not *demand* expertise-led decision-making, at least, not in the sense the US courts sometimes appear to do. Phrases such as 'risk', 'dangerousness' and 'safety' are not regarded as factual concepts capable of hard-edged proof.[84] Of course, the requirement to take into account all relevant factors in decision-making includes taking into account the advice of scientific experts; nevertheless, if there is disagreement between the experts, UK courts do not feel it is necessary to draw a Minister's attention to the fact that the dissenting expert is also the leading expert on the issue.[85]

There have been indications recently that judicial review in the UK is increasingly seeking a stronger rational basis for decision-making: review for error of fact arises in certain circumstances,[86] and requirements of proportionality beyond the context of human rights may be just over the horizon.[87] Overall though, the UK courts appear to be unconvinced about the merits of participation in administrative decision-making, and they do not seem particularly attracted to the idea of specialist expertise-driven decision-making when reviewing legitimate administrative decision-making.

Conclusion

This very short survey has highlighted both similarities and divergences in judicial attitudes to the tensions between participation and expertise in the three jurisdictions under review. Across jurisdictions, courts uphold pre-imposed participatory requirements, but show little enthusiasm for imposing these requirements themselves. Faced with a strong participatory legislative framework, US courts often demand expertise-led administrative decision-making. EU courts, by contrast, faced with what many regard as an elitist neo-corporatist framework, are keen to stress the participatory elements of EU decision-making in which expertise is an important though not a predominant requirement. Meanwhile, in the UK, while consultation duties are increasing in practice, and expertise is assumed on the part of administrators, courts appear to regard neither participation nor expertise (in the sense understood by US and EU courts) as paramount.

Without pretending to offer a comprehensive analysis of the tension between participation and expertise in the US, EU, and UK, the brief overview of this chapter does

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[82] *R. v. Parole Board, Ex p. Watson* [1996] 1 WLR 906, 917. See also *Napp Pharmaceutical Holdings Ltd. v. Director General of Fair Trading* [2002] EWCA Civ 796.

[83] *R. (on the application of Assisted Reproduction and Gynaecology Centre) v. Human Fertisiliation and Embryology Authority* [2002] EWCA Civ 20; [2003] 1 FCR 266 [15]; see also *R. (on the application of Campaign to End All Animal Experiments) v. Secretary of State for the Home Department* [2008] EWCA Civ 417.

[84] *R. v. Board of Trustees for the Science Museum* [1993] 1 WLR 1171, 1177, followed in *R. v. Chargot Ltd. (trading as Contract Services)* [2008] UKHL 73; [2009] 1 WLR 1, at [20], [21]; *Briscoe v. Shattock* [1999] 1 WLR 432, 438; *Bolton Municipal Council v. Malrod Insulations Ltd.* [1993] ICR 358, 359.

[85] *R. (on the application of National Association of Health Stores) v. Department of Health* [2005] EWCA Civ 154.

[86] *E v. Secretary of State for the Home Department* [2004] QB 1044.

[87] *Huang v. Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167.

point to a number of questions which are worthy of further examination. The first question is broad. Based on the evidence from the EU and US courts, it would be interesting to consider further whether courts seek to fill legitimacy lacunae that they perceive in the surrounding legislative framework. The EU courts have pressed the cause of expertise less forcibly than the US courts, in the context of a regime which is often criticized for its elitism. The US courts have pressed for expertise in a regime which has strong participatory input. It would be useful to understand these tensions further. Second, courts in all three jurisdictions seem generally reluctant to impose participatory requirements on rulemaking beyond those required by the legislature. It would be interesting to test whether this is due to general concerns about the appropriateness of judicial intervention or to specific doubts as to the value of pluralist participation. And a final question arises specifically with regard to the UK case. UK decisions suggest skepticism about both participation and expertise as compared to the US and the EU. It is doubtful whether this situation can continue: as already noted, participatory duties are increasing as a matter of practice. Moreover, a number of external influences are forcing UK courts to give greater attention to these issues. The EU exerts pressure on the UK to increase the role of expertise in administrative decision-making, most notably in the form of the precautionary principle; while as we saw above, the UK's participation in international agreements, such as the Aarhus Convention, means that, as one judge has observed, 'in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive'.[88] As such, the UK courts will inevitably have to address the tensions between participation and expertise. Understanding the comparative experience of the US and the EU will be invaluable to that endeavor.

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[88] *Greenpeace* [2007] EWHC 311, at [49].

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22 Administrative agencies as creators of administrative law norms: evidence from the UK, France and Sweden

Dorit Rubinstein Reiss

Administrative agencies are central sources of administrative law norms. Agencies are not just the recipients of legal norms; they are also important, sophisticated actors that create norms that are later accepted and adopted by other actors. To illustrate this claim, this chapter focuses on an important comparative case: the development of norms of transparency and consultation by the agencies regulating telecommunications and electricity in England, France and Sweden.[1] These norms bear some resemblance to notice and comment rulemaking procedures under the United States' Administrative Procedures Act,[2] but with a national flavor that supports Dominique Custos's discussion of Americanization in Chapter 17 of this volume.

1. Theoretical background

The copious literature on administrative procedures and their effects generally treats agencies as subject to procedures, that is, as recipients and not actors in setting the administrative law norms that apply to them (e.g. Galligan 1996, Lubbers 2008). Political scientists make the same assumption: they treat procedures as something imposed on agencies, not something agencies help to develop (e.g. McCubbins et al. 1987, Moe 1989, Majone 1999, Spence 1999).

American studies that treat agencies as independent actors in relation to their regulatory framework tend to focus on agencies' violations of administrative law norms, (Halliday 2004, Hickman 2007, Noah 2008) or on choices between preexisting frameworks – for example, choosing between rulemaking and adjudication (Citron 2008).

In contrast, public administration scholars know full well that agencies and bureaucrats play an important role in determining the statutes under which they make policy (Aberbach and Rockman 1988, Wilson 1989, Peters 1997). For example, in his thorough historical study, Daniel Carpenter (2001) demonstrated how certain administrative agencies achieved the passage of legislation that they preferred, occasionally against Congressional reluctance. Even so, these scholars do not focus on administrative law norms as one of the things that agencies create.

But there is a long history of agencies creating administrative law norms on their own

[1] The discussion in this chapter draws on semi-structured qualitative interviews conducted with over 100 actors in England, France and Sweden between September 2004 and February 2005. The interviewees included agency officials, government officials, industry members and consumer representatives. The full description of the findings in relation to network price setting can be found in chapter 4 of my dissertation, Rubinstein (2007: 348).

[2] Administrative Procedures Act, 5 USC §553.

– either de facto, by simply adopting certain procedures and sticking with them until deviation would be unthinkable and/or attacked by the courts, or de jure, by helping to enact rules that mandate the procedures they want. A few studies have studied this phenomenon. In England, a small group of scholars has documented the ways agencies adopted procedures that increased their transparency and gave voice to stakeholders (Prosser 1997, Graham 2000). In one comparative study of British, French, German and Italian regulators, Mark Thatcher found, among other things, that the agencies adopted procedural norms that significantly altered their decision-making activities (Thatcher 2002). Similarly, in a recent article from the United States, Elizabeth Magill pointed to agencies' 'self regulation' and suggested a tentative explanation for why they might explicitly bind themselves to follow certain procedures (Magill 2009).

My study contributes to this literature by demonstrating the ways in which six agencies – the regulators of telecommunications and electricity in England, France and Sweden – adopted norms of transparency and consultation in setting prices, and by addressing the reasons behind the agencies' adoption of such norms. It is thus comparative in two senses: across countries, and across sectors.

2. The case study

As part of the telecommunications package enacted in 2002,[3] the European Union adopted norms of transparency and consultation for the National Regulatory Authorities (NRA); Article 6 of the Framework Directive reads:

> . . . Member States shall ensure that where national regulatory authorities intend to take measures in accordance with this Directive or the Specific Directives which have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period. National regulatory authorities shall publish their national consultation procedures. Member States shall ensure the establishment of a single information point through which all current consultations can be accessed. The results of the consultation procedure shall be made publicly available by the national regulatory authority, except in the case of confidential information in accordance with Community and national law on business confidentiality.

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[3] Including Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) OJ L 108, 24.4.2002: 33; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) OJ L 108, 24.4.2002: 51; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) OJ L 108, 24.4.2002: 21; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) OJ L 108, 24.4.2002: 7; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) OJ L 201, 31.7.2002, 37–47 and Decision No. 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision). OJ L 108, 24.4.2002: 1. The directive came into force on July 25, 2003 – Article 28, the Framework Directive.

Interestingly, this article was a codification of practices that some telecommunications regulators had already adopted and were using routinely. The next sections will describe how regulators implemented such practices with regard to one issue – the control of network prices.

Utility prices in both the communication and electricity sectors include retail prices, wholesale prices, and network prices (i.e. charges for use of the network). Although other prices were deregulated and left to the market as competition increased, in all three countries examined – and elsewhere – network prices remain regulated, and an end to regulation is not anticipated, the rationale being that networks are a natural monopoly or, at least, a natural oligopoly.

Controlling network prices was a core concern of sectoral regulators, but two characteristics of network pricing made decision-making challenging, especially in a politically charged environment. First, network pricing requires substantial expertise. Under the regulatory framework, prices had to be based on costs, and evaluating the costs meant understanding the technical aspects of the network in order to assess the legitimacy of the owners' claims. All agencies used complex formulas or complex computerized models to set or evaluate the prices. This made the process appear opaque and did nothing to dispel concerns of capture. Second, network pricing is frequently contested. It involves high stakes: due to the volume of traffic passing over a network, a 1-cent difference in the network price could substantially affect a company's profits or losses. Therefore, most operators were ready and willing to fight any disadvantageous decision regarding network prices. Incumbents were anxious to protect their existing market share by making it harder for new entrants to establish themselves, and keeping network prices high helped; for new entrants, high network pricing could mean failure. As for customers, although they do not get billed separately for the network component of the service, network pricing can substantially affect prices to end users. In all three countries network pricing involved much litigation.[4]

In those circumstances, regulators were anxious to reduce contention and increase the legitimacy of pricing decisions. In all cases, they pursued that goal by increasing transparency and providing stakeholders with an opportunity to participate. I consider each country case in turn.

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[4] Even in Sweden, a country characterized by high levels of trust and consensus (Yates 2000), the level of litigation was very high, according to interviewees. In answering a survey conducted by the law firm Jones Day, used as a basis to compare European telecommunications regulators, the telecommunications regulator said that 'almost all decisions which negatively impact TeliaSonera are being appealed'. The answer to question 17, Annex IX, Sweden, can be found at: http://www.ocf.berkeley.edu/~drubinsi/mt/archives/services/http/users/d/drubinsi/mt/archives/Sweden%20-%20Jones%20Day%20Report.pdf. Similarly, in France, telecommunications agency members mentioned the large number of cases related to network pricing (interviews ART), and in England, where the number of cases was very low, numbering less than ten per sector (Scott 1998). One of the rare cases in telecommunications was about mobile termination prices, one set of network prices (*T-Mobile (UK) Ltd & Ors, R (on the application of) v Competition Commission & Anor* [2003] EWHC 1566 (Admin) (June 27, 2003) at: http://www.bailii.org/ew/cases/EWHC/Admin/2003/1566.html) and threats of litigation were common in the process (Interview BT, interview EDF).

2.1. Consultations and transparency in England[5]

This discussion examines three actions taken by the sectoral regulators in England. The first is the Office of Telecommunications (Oftel)'s[6] review of the price controls applied to British Telecoms – at this point known as BT – (the incumbent telecommunications company) in 2001.[7] The second case is Oftel's decision to regulate mobile termination prices, decided between 2000–2002. The final case is the Office of Gas and Electricity Markets (Ofgem)'s review of distribution prices in 2004–2005. (Although that case is chronologically later than the EU directives, the procedures used were 'business as usual' for Ofgem.)

In England, both in electricity and in telecommunications, price controls were subject to the famous Littlechild formula of RPI-X (Littlechild 1983, Littlechild 1991, Vass 1997, Graham 2000). The formula allows the incumbent to increase prices by no more than the retail price index (RPI) minus X per cent, with X determined by the regulator.[8] Professor Littlechild, commissioned by the UK government to suggest a system of pricing in the liberalized market, sought to avoid the problems of the rate of return system used in the United States, which he describes as '. . .burdensome and costly to operate, reducing] the incentive to efficiency and innovation, and distort[ing] the pattern of investment' (Littlechild 1983). The RPI-x formula, in turn, was criticized for, among other things, being no easier to administer than the rate of return idea and for not addressing the question of how to reset price controls (Graham 2000). Because there are no clear and objective guidelines for determining X, the struggles associated with the rate of return system occur here as well (Newberry 1997, Vass 1997). (For a defense of RPI-x see Littlechild and Beesley 1989.)

The processes used in these cases were broadly similar. All started with a consultation document published by the relevant agency.[9] The initial consultation was followed by additional rounds of consultation and public hearings. Respondents included operators,

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[5] The discussion of England is relatively short, since these behaviors by the English regulators have been the subject of several very impressive studies already. See Prosser (1997), Graham (2000), Thatcher (1999). The liberalization in France and Sweden had also been studied, of course, though not from this perspective. For France, see Bourreau (2003); and while the Swedish liberalization has been studied by Hjalmarsson (1996), Hultkrantz (2002), the regulators themselves were not studied.

[6] Oftel was replaced by Ofcom, the Office of Communications, in 2003 under the Office of Communications Act 2002.

[7] Price controls in telecommunications were set every four years; the 1997 price setting is described in detail by Hall et al. (2000) in their wonderful study of Oftel.

[8] In the more complex versions, the operator can then add a number, Y, reflecting investments the regulator wants it to make.

[9] The March 2000 consultation launched Oftel's 2001 price review. Oftel (2000) 'Price Control Review: A Consultative Document Issued by the Director General of Telecommunications on Possible Approaches for Future Retail Price and Network Charge Controls'. Found online at: http://www.ofcom.org.uk/static/archive/oftel/publications/pricing/pcr0300.htm. Last accessed by author July 12, 2009. Oftel's mobile termination prices review was initiated by customer complaints (interview, Oftel) but followed with consultations summarized in Oftel (2001), 'Review of Price Controls to Mobile', February 2001, found at: http://www.ofcom.org.uk/static/archive/Oftel/publications/mobile/ctom0201.htm, last accessed by author on July 12, 2009. Ofgem's 2004–2005 distribution prices reviews opened with Ofgem (2003), 'Electricity Distribution Price Control Review – Initial Consultation', July 2003, found at: http://www.ofgem.gov.uk/Networks/ElecDist/

the public utilities access forum, consumer associations, academics, and advisory committees for Scotland, Northern Ireland and Wales. Stakeholders could submit comments electronically and otherwise. In their consultation documents, the agencies responded to the main comments.

The consultation documents, the decision documents, and most comments were published on each agency's website.[10] In addition, the agencies, as a matter of policy, met with anyone who requested it, and initiated meetings with stakeholders individually or in groups.[11]

The agencies saw transparency and consultation as very important, and they devoted substantial efforts to explaining their actions and consulting intensively. For example, a senior official in Oftel and later in Ofcom explained, in relation to mobile termination prices, that:

> [we] put out a consultation document which all of these people then responded to. The essence of regulation is consultation and transparency. It is no good being a single regulator and doing things like that (claps his hands). You have to make sure that interest groups, companies, citizens, consumer bodies and indeed ministers are all consulted. . .[12]

In relation to Ofgem's 2004–2005 price controls, the final proposals in November 2004 were accompanied by a lengthy and detailed 137-page document that provided substantial amounts of information to anyone who wanted it.[13] Ofgem officials assumed that a dialogue with the actors was essential to their operation:

> My perception and my understanding of others' perception is that the companies have been very happy with the process that we have adopted, . . . they feel very involved and very engaged, and that's good. Because even if they don't agree with us at the end at least it's not on the basis of misunderstanding, it's on the basis of us having understood their arguments and understanding what they have got to tell us and then forming a different view. And that's, you know, what we have got to do. That's our job.[14]

What is clear is that the regulators in England – as demonstrated in previous studies (Prosser 1997, Graham 2000, Hall, Scott et al. 2000) – themselves determined the norms under which price setting was to operate, and they chose very specific norms. They voluntarily held extensive consultations, substantially beyond what was required under law. They published substantial amounts of information. They internalized and implemented norms of responsiveness and transparency that later served as a model for other regulators and for the EU articles.

Naturally, not everyone was happy with the agencies' procedures. A common complaint by consumer organizations was the complexity and difficulty of reading the

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PriceCntrls/DPCR4/Documents1/4037-DPCR_Main%20doc_july03.pdf, last accessed by author on July 12, 2009.

[10] There are, for each agency, protections against disclosure of business secrets which are seen as confidential information and not published.

[11] Interview, Oftel; interviews, mobile operators.

[12] Interview, Oftel.

[13] http://www.Ofgem.gov.uk/temp/Ofgem/cache/cmsattach/6584_Consultation_Final.pdf.

[14] Interview, Ofgem.

documents provided by the regulators. For example, in relation to Oftel's 2001 price review, one of the National Consumer Council (NCC)'s responses criticized the consultation document, saying:

> The ways in which the proposed new price controls are intended to work – and the rationale for them – are complex and frequently unclear and inaccessible. . . . Neither does the document contain any clear consumer impact assessment. The document is very disappointing in these respects, especially given the crucial nature of the proposals for domestic consumers.[15]

The NCC voiced a similar complaint against the 'impenetrability' of Oftel's consultation document on mobile termination prices.[16] The consultation document had 42 pages and seven annexes, totaling 109 pages, sometimes in highly technical language.[17]

Consumer organizations also complained that industry had substantially more impact on the process because it was conducted in a way that made it hard for consumer representatives to participate. For example, although Ofgem's review of distribution prices in 2004–2005 included a consultation process that was open to anyone, there was no input from consumer groups. When I asked a consumer group representative why, he said:

> . . . the distribution price controls were very abstract and we didn't quite get what it's about and then quite late on we realized it was actually quite important, . . . when that realization hit us we were all buried under a lot of other work so I'm afraid that's one we missed. But we will probably rue the day.[18]

In a review of the process conducted by Ofgem, the Friends of the Lake, another consumer organization, said that:

> However, often it felt like many of our comments were totally ignored. . . although we received invitations to the workshops. . ., due to the industry bias at these it made our presence seem irrelevant. . .With reference to the consultation documents, it might be beneficial to provide a Plain English Summary version to explain the main issues for those outside the industry who would like to respond.[19]

However, the agencies clearly did not see themselves as unresponsive and from their point of view, made substantial efforts to increase transparency and opportunities for input from external actors.

2.2. Consultations and transparency in Sweden

This discussion is based on price regulation in both electricity and telecommunications. In telecommunications, I examined regulation of TeliaSonera's interconnection offer by

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[15] 'Pricing and Competition in the Telephone Market: Protecting Consumers by Promoting Competition – Response to Oftel's Consultation', 2002, National Consumer Council, found at: http://www.ncc.org.uk/communications/pricing_competition.pdf.

[16] See: 'Review of Price Control on Calls to Mobile Phones: Response to Oftel Consultation', National Consumer Council, May 2001.

[17] Oftel, 'Review of Charge Control on Calls to Mobiles', September 26, 2001, found at: http://www.ofcom.org.uk/static/archive/Oftel/publications/mobile/ctm0901.htm.

[18] Interview, PUAF. Minor grammatical corrections inserted.

[19] http://www.Ofgem.gov.uk/temp/Ofgem/cache/cmsattach/11655_9105_Fld.pdf.

Post-och Telestyrelsen (PTS), the Swedish National Post and Telecom Agency. I also examined PTS's decision to regulate mobile termination prices (a process which started in 1999 and continued past the EU directives, at least until 2004). And in energy I examined Staten Energimyndigheten, the Energy Agency (STEM)'s adoption of a performance model rather than post-hoc 'reasonableness' review to regulate distribution prices.

Sweden is a special case in terms of norms of consultation and openness. Many of the tenets of the new governance movement, ideas of increased openness (Hood 2007) and increased deliberation in making policy (Fishkin 1991, Hendriks et al. 2007) have been part of government as usual in Sweden for years, if not centuries. Agencies with some degree of autonomy from the ministries have also existed in Sweden for centuries (Peters and Pierre 2004: 44).

Sweden adopted its first Freedom of Press statute in 1766 and updated it in 1949 and again in 1976 (Öberg 2000: 305–306, Gerven 2005: 70–71). Chapter 2, Article 1 of the Act sets the basic principle of transparency:

> In order to encourage the free interchange of opinion and the enlightenment of the public, every Swedish subject shall have free access to official documents.[20]

Most documents used by public officials are accessible unless they fit into one of a limited set of exceptions. This was certainly true for network pricing.[21] Swedish public officials have strongly internalized the idea that everything is public and that they have nothing to hide, as anyone interviewing civil servants in Sweden can testify.

Public decisions are made through consultation (Heclo and Madsen 1987, Yates 2000). The typical process for an important policy decision, as described by several of my interviewees, is that after a long process of research and thought, the agency prepares a written proposal that is then distributed to a range of actors, including government actors, the competition and consumer agencies, the ministry involved, and external actors such as employers' unions and workers' unions. The proposals are also placed on the agency's website, but the process, while heavily consultative, was not as inclusive as the British process, since it tended to include the 'usual suspects'. On the other hand, since labor unions included most of the workers, these actors represented a large percentage of the population. These actors comment on the proposal. Then the agency prepares another proposal, incorporating changes, the comments, and its response to them.[22]

In short, Swedish agencies were following norms of transparency and consultation long before liberalization; thus, adoption did not occasion a culture shock. In relation to price setting, their approach was to adhere to the existing norms but deepen them, using the internet to improve transparency and to increase the range of actors consulted.

Unlike other European countries, prices in Sweden were not set ex ante. Instead, the regulators evaluated prices set by companies ex post for reasonableness. The Swedish agencies eventually adopted computerized models to assess prices. They used

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[20] Freedom of Press Act, English translation found at: http://www.servat.unibe.ch/law/icl/sw03000_.html (last accessed by author July 14, 2009).

[21] Interview, PTS. Several documents were made available to me. The only limit is that the agency does protect trade secrets – which is a well accepted limit; the United States Freedom of Information Act also acknowledges the Trade Secrets exception. 5 USC §552(b)(4).

[22] Interview, PTS; interview, National Audit; interview, Competition Agency.

a collaborative process for development of both the telecommunications and energy models. In telecommunications, it was the former incumbent, TeliaSonera, that developed the various models in close cooperation with and with substantial input from the regulator, PTS.[23] In energy, the regulator initiated the model and developed it, but with substantial input from industry.[24] In both cases, what characterized the process was a dialogue between the regulator and the regulated industry, with other actors closely informed. After creating the models, the regulator was in charge of enforcing the price controls.

As mentioned, the regulators changed the process by making use of the internet to increase transparency and broadening the range of actors who could participate. The regulators now publish consultations on their websites.[25] They open them to comment from whoever desires even though legal norms do not require it.

Participation from the new operators had become a constant aspect of the consultations, and the result of liberalization was a permanent increase in the range of actors taking part in the decision.

However, in spite of the increased openness of the process, there is little consumer participation, directly or through proxy. Although the consumer agency – Konsumentverket – participates in some decisions by commenting on documents, it does not always participate in price setting. When I asked members of the consumer authority why they were not involved in these issues, I was told that they do not work on prices, which are left to the market. Their work in that area is to make sure that consumers know the prices, that is, to increase transparency.[26] I did not find any activity by private consumer organizations or associations in price setting. Nor was it mentioned by my interviewees, and when asked about it, they usually responded by commenting on the lack of involvement of consumer organizations.

2.3. Consultations and transparency in France

This discussion is based on three French cases that I elaborate on in my longer study. First, France Télécom (FT) issued an interconnection catalogue in 2004–2005 that was part of an annual catalogue of prices. The catalogue was submitted to the regulator, Autorité de Régulation de Télécommunications (ART),[27] to approve or disapprove.[28] The second case is ART's regulation of mobile termination prices, a series of decisions made between 2000 and 2003. Finally, I examined the setting of transmission prices by the Commission de Regulation d'Energie (CRE), the energy regulator.

In none of these cases was the agency legally required to publish information or consult

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[23] Interviews, PTS. Interviews, TeliaSonera.

[24] Interviews, STEM. Interview, Svenskenergi (Swedenergy – the industry association).

[25] PTS's website can be found at: http://www.pts.se/main.aspx?id=3&epslanguage=EN-GB; STEM's website can be found at: http://www.energimyndigheten.se/en/.

[26] Interview, Konsumentverket.

[27] ART was later changed to the Autorité de Régulation des Communications Electroniques et des Postes (ARCEP).

[28] Until the telecommunications law of 2004, this was one of the few cases where the authority had power; most other prices had to be approved by the minister; however, my interviewees pointed out that the minister accepts almost all of ART's avis (opinions), except some that are politically sensitive. The discussion here refers to the system existing before the law of 2004.

beyond a requirement for consultation with the Conseil de la Concurrence, the competition commission. Nonetheless, in all of them the agencies published substantial amounts of information on their websites and consulted with at least some of the stakeholders.

ART used working groups and roundtables to consult with other operators, with working groups starting before the initial submission of the catalogue and continuing to the end of the process. It consulted heavily with all operators and operator organizations. It published the consultations on the website.

Because France is a latecomer to the process and the agencies' commitment to transparency and participation may be more suspect, some examples are in order. In relation to mobile termination prices, in 1999 ART initiated a roundtable to discuss the anomaly that incoming rates (calls to a mobile phone) were higher than outgoing rates. ART concluded that prices needed to be lowered.[29] It then began negotiations on prices with the three main mobile operators, Orange (connected to France Télécoms), Société Française de Radiotéléphone (SFR – connected to Cegetel and later to Vodaphone) and Bouygues Télécoms[30], and with France Télécoms, the incumbent.

While these negotiations went on, the EU passed the second telecommunications package, setting up the new framework on April 24, 2002. Although the new framework did not go into effect until July 25, 2003, most of the member countries started implementing it earlier. ART was working on some market reviews as early as January 2003, well in advance of the enactment, on June 3, 2004, of the new law adopting the EU framework.[31]

Formal consultations for the mobile termination market started in April 16, 2004 (that is, before the passage of the French law adopting the EU framework). However, those consultations were not the first step; prior to it, ART conducted extensive discussions with mobile operators, FT, and other actors. There were many meetings and extensive email and telephone interchanges.[32] In addition, ART conducted an industry survey, seeking responses from telecommunications industry actors as well as important actors in French industry in general, such as the Banque de France and France Television.[33] For industry actors, therefore, the contents of the consultation documents came as no great surprise. Industry members responded in depth to the consultation.[34]

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[29] See ART's conclusion at: http://www.art-telecom.fr/communiques/communiques/1999/appentr.htm. This is a simplification of the process, which can be read in more detail in my dissertation, see supra, note 1. The main point is that a detailed review led ART to conclude that SFR and Orange had significant market power in the metropole, i.e., in France itself, as opposed to its overseas colonies. SFR and Orange's subsidiaries in the French Caribbean were also declared SMP operators during 2003; it therefore decided it was justified in regulating their prices and acted. See ART (1999), Décision No. 99-823 du 30 septembre 1999 complétant la décision No. 99-767 en date du 15 septembre 1999 etablissant pour 2000 la liste des opérateurs exerçant une influence significative sur un marché des télécommunications, J.O. 278, p. 17884, found at: http://www.art-telecom.fr/textes/avis/index-99-823.htm.

[30] OECD Review of Regulatory Reforms, Regulatory Reforms in France, at: http://www.oecd.org/dataoecd/36/35/32482712.pdf.

[31] Interview, ART.

[32] Interview, ART.

[33] Mentioned in the April 16, 2004 consultation, found at: http://www.art-telecom.fr/publications/c-publique/consult-16av04.pdf.

[34] The response to the consultation came from: 9Telecom, Afim, Bouygues Télécom Caraïbe,

After the consultation with the Conseil de Concurrence, the competition commission, ART, drafted a decision and began a public consultation.[35] It held extensive discussions with industry members, mobile and fixed operators and France Télécoms.[36] The consumer organization UFC-Que Choisir also participated.[37] In the end, price caps were imposed on the mobile operators which will lead to a gradual decrease in prices (in effect, continuing the previous trend of reducing prices slowly).[38]

This decision was unacceptable to the consumer organization UFC-Que Choisir, which contested the gradual nature of the reduction – UFC-Que Choisir wanted immediate and drastic reductions.[39] On February 14, 2005, the telecommunications person at Que Choisir filed an appeal against ART's decision with the Conseil d'Etat.[40] The appeal was rejected by the Conseil d'État in December 2005.[41]

Two things should be clear from this discussion. First, ART took the ideas of transparency and consultation very seriously. Its decisions, from 1999 onwards, were published on its website. It consulted with a range of actors, especially – but not only – after the European Directive came into force. Second, these transparency and consultation norms reflected only part of the actual process, and the fact that the agency did not respond to specific comments or explain what it did or did not adopt, left it open to allegations of improper decision-making.

In the energy sector, when the Commission de Regulation d'Energie (CRE) recommended transmission tariffs in an opinion prepared for the minister in charge,[42] it

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British Telecom, Colt, Coriolis, Dauphin Telecom, France Télécom, MCI, Orange Caraïbe, Orange France, Orange Réunion, Prosodie, SFR, Tele2 – all operators. See: http://www.art-telecom.fr/dossiers/termi-appel/tam.htm. The consultation itself was public, i.e., it was on the web and anyone could respond.

[35] November 2, 2004. See: http://www.art-telecom.fr/publications/c-publique/appelcom-tam-021104.pdf. ART also opened, a month later, a consultation about imposing a price cap on the French overseas departments: http://www.art-telecom.fr/publications/c-publique/appcom-tamdom-081204.pdf. In an interview with a member of Orange, I was told that this seems to them completely irrational because there is no dominant operator in the overseas departments.

[36] Interview, ART.

[37] UFC-Que Choisir had a small staff devoted to the issue of telecommunications, consisting of one full-time advocate focusing on telecommunications and the regular staff providing administrative assistance. In spite of that, it was relatively active in relation to the regulator. Interviews, ART; interview, UFC-Que Choisir; interview, Ministry.

[38] In numerical terms, ART decided to impose price caps on the mobile operators, lowering the price from 14.94 centimes to 12.79 centimes for SFR and Orange and 14.79 for Bouygues Télécoms during 2005, and to a further 9.50 centimes for SFR and Orange and 11.24 for Bouygues Télécoms in 2006, which should lead to an 11% reduction in retail mobile prices on January 2005. See Communique de Press, Analyze du marche, of December 10, 2004 at: http://www.art-telecom.fr/communiques/communiques/2004/index-c101204-2.htm. The Communique makes reference to all the opinions. A similar decision was made for the overseas departments on February 1, 2005. See: http://www.art-telecom.fr/communiques/communiques/2005/index-c05-07.htm.

[39] Interview, Que Choisir.

[40] See: http://www.comparatel.fr/news/dnews_id-5251_t-UFC,Que,Choisir,saisit,le,Conseil,d,Etat,pour,les,appels,fixe,vers,mobile,et,attaque,France,Telecom,sur,le,meme,sujet.htm

[41] Conseil d'État statuant au contentieux No. 277441 du 5 décembre 2005, found at: http://www.legifrance.gouv.fr/WAspad/Visu?cid=250026&indice=2&table=JADE&ligneDeb=1.

[42] Le Ministre délègue de l'industrie, i.e., the Minister of Industry in the Ministry of Economy, Finances and Industry.

engaged in extensive consultation and published substantial amounts of information on its website.[43] CRE consulted economists and went to great lengths to get expert opinions on the general principles of network pricing from French as well as foreign economists. The latter's involvement was important since they were more likely to be independent of influence by the incumbent, Electricité de France (EDF) and CRE was anxious not to be – nor appear to be – captured by EDF.[44] Politically, not all went smoothly. The powerful lobbies of the food and tourist industries objected that the initial tariffs were too high and put pressure on the minister to change them. The minister in turn put pressure on CRE by simply refusing to act – neither rejecting nor implementing their proposals.[45] In the end, CRE modified its proposals slightly, explaining that:

> Ce nouveau tarif reprend l'ensemble des principes rendus publics par la CRE en mai 2000, et qui ont fait l'objet d'une large consultation des utilisateurs de réseaux.[46]
>
> [The new tariff adheres to the principles published by CRE in May 2000 and that were the object of a broad consultation with users of the network. (my translation).]

The minister then accepted the proposals.[47]

There was clearly government involvement, but, nevertheless, the minister did not openly reject CRE's proposition in spite of the heavy political pressures on him, and he did no more than wait. His lack of active involvement shows the strength of the independent regulator in the process. Deviations from the CRE proposal would need to be explained to parliament. The regulator published its recommendation, which was phrased in neutral, professional terms, and conducted substantial consultations with experts and interested parties. These practices contributed to the legitimacy of the process, making it hard for the ministry to overturn CRE's proposal without seeming blatantly unprofessional and partisan.[48] In this case, the agency used the requirements for transparency and consultation to help protect it against pressure from strong political authorities.

3. Discussion and conclusions

As the previous cases demonstrate, all six agencies adopted norms of transparency and consultation that went beyond any legal requirement, norms that later served as the basis for the EU's regulatory framework. Several cross-cutting reasons help to explain this behavior.[49]

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[43] Interviews, CRE. See also CRE (2000), 'La Rapport, D'activité, Juin 2001'. Found on the CRE's site, under 'Rapports Annuel', at: http://www.cre.fr/fr/documents/publications/rapports_annuels, last accessed by author on July 13, 2009, 11–13. See also, CRE (2000), 'Avis sur le projet de décret relatif aux tarifs d'utilisation des réseaux publiques de transport et de distribution', found on CRE's website, www.cre.fr.

[44] Interview, CRE.

[45] 'Il metait le coude', put his elbow down on it, in the words of an interviewee.

[46] CRE (2002) 'Publication du tarif d'utilisation des réseaux de transport et de distribution d'électricité'. Found at: http://www.cre.fr/fr/ressources/communiquesdepresse/communiquesdepresse_consultation.jsp?idDoc=681.

[47] Interviews, CRE.

[48] Interview, Ministry. Interviews, CRE.

[49] This section will not address the reasons specific to each case. For example, in their study

Regulators, as non-majoritarian institutions, need a source of legitimacy as a substitute for the democratic legitimacy derived from elections (Majone 1994, Thatcher and Stone Sweet 2002). Open procedures could fulfill this need. However, convincing as it is, this does not address either the specific form of such procedures – a form reminiscent of United States notice and comment procedures – or the strong similarities between the norms adopted by regulators across different sectors and different states.

Another explanation fills that gap: the agencies adopted similar institutions mimetically (Campbell 2004). Several mechanisms seemed to have been at work. First, as suggested by Custos (see Chapter 17 of this volume), a process of Americanization seems to have been at work, with the agencies drawing on the ideas of US-style rulemaking to guide the procedures they adopted: that is, to publish, and provide an opportunity to comment. The Americanization may have been through direct copying; or it may, as Custos suggests, have been indirect, even though norms of consultation and transparency were adopted by the EU only *after* they were used by the independent agencies. Rather, a network process seems to have been at work (Slaughter 2004). The regulators in Europe are tied together through open network (Coen and Thatcher 2008), and in the case of these regulators, they also have informal email listserves. There is informal reputational competition between regulators concerning how well they regulate. Once the UK agencies adopted – relatively early – strong norms of transparency and consultations, and once the Swedish agencies weighed in with their existing norms, there seems to have been peer pressure to adopt such norms.[50]

However, the adoption of such norms by the agencies is not problem-free, as the cases above suggest. One real danger is that the consultation norms will give an advantage to the regulated industry in influencing the decision-making process – as the cases suggest they did. Industry tends to have more resources and to be more focused on regulatory issues than consumer organizations; they are better able to speak the language of economic rationality in which the discussions are conducted (Morgan 2003), and they often know the political system better. These advantages exist in any situation, not just in one of consultation, but the main policy recommendation that I draw from my research is that regulators should seek to counteract this bias in the consultation process. Because consumers face barriers to participation, and because their perspectives and reactions are extremely important to the regulation of utilities, regulators can and should make efforts to seek their participation. Examples of such efforts include Ofcom's and ART's direct solicitation of input from consumer organizations; Oftel's and Ofcom's initiation of an advisory 'consumer panel'; CRE's working group, with consumer representatives; ART's online chats on burning issues. However, all these agencies are taking steps to improve and strengthen consumer input, for example through simplified summaries of long, technical documents, by allowing longer comment periods to facilitate participation from resource-strapped consumer organizations, and by soliciting consumer

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of Oftel, Hall et al. (2000) demonstrate that the personality and preferences of Oftel's charismatic Director General, Don Cruikshank, from an industry background, led to Oftel's adoption of a 'meeting culture' and extensive involvement of stakeholders in decision-making. And one explanation for CRE's adoption of transparency and participation was to protect agency independence against political involvement.

[50] Interviews, ART.

feedback through surveys or through creating special departments to represent consumers.[51]

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[51] For an expanded discussion of consumer input, see Reiss (2009).

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PART 5

ADMINISTRATIVE LITIGATION AND ADMINISTRATIVE LAW

23 The origins of American-style judicial review

Thomas W. Merrill

American administrative law is characterized by a number of distinguishing features. Perhaps the most unique aspect is its adoption of an appellate review model for defining the role of courts in reviewing agency action. The model is borrowed from the understandings that govern the relationship between appeals courts and trial courts in civil litigation – which in turn build on the relationship between judges and juries. At their core, these understandings presuppose a division of functions grounded in the distinction between law and fact (Louis 1986). On issues of fact, the initiating institution is understood to have superior competence, and the reviewing institution will defer to its findings. On issues of law, the reviewing institution is understood to have superior competence, and will decide the matter independently.

The appellate review model has three salient features: (1) The evidentiary record on which the reviewing institution makes its decision is exclusively the record generated by the initiating institution. If the reviewing institution determines that additional evidence is critical to a proper decision, it will remand to the initiating institution for development of a new record, rather than take evidence itself. (2) The standard of review varies depending on whether the issue falls within the area of superior competence of the initiating institution or of the reviewing institution. (3) The division of competence is anchored in the distinction between law and fact. The exact line of division will often be disputed and will shift over time and from one context to the next (Levin 1985, Louis 1986: 1002–07). But the bedrock distinction is that the initiating institution has unique competence to decide questions of fact and the reviewing institution has unique competence to decide questions of law.

The Administrative Procedure Act (APA), adopted in 1946, codifies the appellate model of judicial review. The Act specifies in some detail how the record of decision will be compiled by the agency in any action 'required by statute to be determined on the record after opportunity for an agency hearing' (5 USC §§ 553(c), 554(a)). Final agency action is generally made subject to judicial review (id. §§ 702, 704). The review will ordinarily be based on the record compiled by the agency (id. § 706), except in unspecified circumstances (which have rarely been found to exist) where the facts are subject to trial de novo. The agency's fact finding can be set aside in a case decided on the record only if its decision is 'unsupported by substantial evidence' (id. § 706(2)(E)), the same formulation developed at common law for setting aside a verdict of a jury.[1] In contrast, the APA stipulates that the reviewing court shall decide all relevant questions of law (id. § 706).

Because it is enshrined in the APA, American lawyers take it for granted today that judicial review of agency action conforms to the template of appellate review. But the

[1] *Allentown Mack Sales & Service, Inc. v. National Labor Relations Board*, 522 US 359, 366–7 (1997).

APA's embrace of the appellate review model was no innovation. The model was thoroughly entrenched in American administrative law by 1946. Insofar as federal courts are concerned, the appellate review model first emerged in full-blown form in the context of judicial review of orders of the Interstate Commerce Commission (ICC) around 1910. The model spread from there to other contexts, including review of orders of the Federal Trade Commission.

The adoption of the appellate review model as the organizing principle of judicial review was by no means inevitable. In the nineteenth century, courts engaged in what Jerry Mashaw (2007: 1736) has characterized as 'bipolar' oversight of administrative action. Either courts would review administrators' actions de novo – for example through an officer suit or an original bill in equity – or there was no judicial review at all, with aggrieved claimants relegated either to filing complaints with the agency or to petitioning Congress for relief (Lee 1948, Mashaw 2006, Woolhander 1991). Quite conceivably, this bipolar mode of review could have evolved into jurisdictional or ultra vires review of administrative action, as in Britain. Nevertheless, peculiar political circumstances led the US Supreme Court to adopt the appellate review model in the second decade of the twentieth century, which had fateful consequences for the future evolution of American administrative law.

In this chapter, I advance several historical claims about the emergence of the appellate review model as a foundational principle of modern American administrative law. The most important precipitating event was the enactment of the Hepburn Act of 1906. The original Interstate Commerce Act, adopted in 1887, required the ICC to file a bill in equity in order to enforce its orders, and this was interpreted as permitting courts to engage in de novo review of ICC orders before they took effect. The result was widespread delay and uncertainty. Fueled by popular demand for more effective regulation of railroads, President Theodore Roosevelt, riding a crest of popularity after his election in 1904, called for reform. After lengthy debate, Congress passed the Hepburn Act, which made ICC orders self-enforcing. In a shift that prefigured the 'switch in time' of 1937 (Cushman 1998), the US Supreme Court read this legislative change as mandating greater deference to the ICC. In relatively short order, the Court began stressing that the reasonableness of rates and whether particular rates were discriminatory were 'questions of fact', and, as such, were for the ICC to decide. Without expressly invoking the conventions that govern judge-jury relations in civil litigation, the Court's rhetoric was indistinguishable from that used in civil litigation, and effectively implanted the appellate review model as the appropriate mode of court-agency relations.

I also offer some preliminary thoughts about why the appellate review model has been so remarkably successful as a basis for American-style judicial review of agency action. Created and nurtured by the courts, it soon won the acquiescence of Congress, and has become a fundamental norm of administrative law that Americans take for granted. Part of the reason for its success is its adaptability. The model has proven sufficiently flexible to permit either passive deference or aggressive substitution of judgment, depending on whether courts agree with an agency's policy judgments. It has also proven sufficiently capacious to accommodate significant shifts over time in the conception of the relevant functions of agencies and courts. Thus, as intellectual fashions about agency government have changed, the nature of judicial review has been able to change apace, without modifying the underlying architecture of court-agency relations.

In the Conclusion, I offer some thoughts about whether the appellate review model, although an unqualified success in terms of its capacity to survive, is in fact the best model for accommodating the respective roles of courts and agencies in the administrative state. With the benefit of a century of hindsight, I suggest that a model of review that built on the jurisdictional or ultra vires model associated with some of the prerogative writs in the nineteenth century – which became the foundation of administrative law in Britain and other commonwealth countries – might have served as a better foundational principle for American administrative law.

1. Nineteenth-century background

In nineteenth-century America, government at the federal, state and local levels unquestionably engaged in functions that today would be characterized as administrative (Mashaw 2006). The federal government enforced embargoes, disposed of massive quantities of public land, awarded invention patents, regulated trade with Indians, and collected tariffs and other forms of taxation. The states subsidized internal improvements, issued corporate charters, and regulated common occupations. Local governments prohibited nuisances and engaged in land use regulation. These administrative functions were subject to judicial review to one degree or another, but there was no distinctive jurisprudence of administrative law. American courts looked to isolated pockets of precedent bearing on judicial review of different types of executive action, rather than generalizing across areas in an effort to identify higher-order principles.

Administrative action could be reviewed only through certain forms of action. As then-Assistant Professor Antonin Scalia (1970: 885–6) observed, nineteenth-century judges had 'great[] reverence for the integrity of the pleadings'. Inherited English conventions as modified by American statutes and precedents often dictated the appropriate form of action. The form of action determined the nature of the 'review'. Most forms required full-blown trials, in which case the court would inevitably review the agent's action de novo – developing the record and applying independent judgment to all issues of law and fact. Some forms dictated relatively narrow inquiries into whether the agent was acting within the scope of his authority or had violated a nondiscretionary legal duty, in which case the court limited review to whether the agency was acting within its jurisdiction. Still other forms, for example, the use of ejectment in public land cases, required that the claimant establish the passage of title in order to bring the action. If this could not be shown, the matter corresponded to what Americans today would call unreviewable agency action (Scalia 1970: 896, n. 130).

Customs, revenue and prize cases tended to be reviewed by tort actions against the officer responsible for the taking.[2] The officer would defend on the ground that his action was authorized by law. The court would then take evidence and rule on the defense, thereby providing judicial review of the action. Because the officer suit was an original action filed in court, the record was necessarily the record developed by the court. The standard of review of both law and fact was one of independent judgment.

In other circumstances, claimants had to assert one of the prerogative writs inherited from English law. Mandamus is the best known. *Marbury v. Madison* (5 US (1 Cranch)

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[2] *Little v. Barreme*, 6 US (2 Cranch) 170 (1804). See Mashaw (2006: 1325–31).

137 (1803)), the most famous mandamus case of the nineteenth century, stressed that the writ would issue only when the claimant had a vested right and the officer violated a nondiscretionary legal duty. Executive action, in its nature political or otherwise discretionary, could not be challenged by mandamus. Significantly, mandamus was also an original action, and hence if any fact finding was required, the court would find the facts for itself. In *Marbury*, for example, the Supreme Court, presented with an original petition for mandamus, conducted a brief investigation into the factual circumstances behind the withholding of William Marbury's judicial commission before it concluded that it lacked jurisdiction to issue the writ. So mandamus, although it was a very narrow form of review, was also de novo, and the court exercised independent judgment in determining whether the government official had violated a nondiscretionary duty (Merrill 2004a).

Other prerogative writs played a role in nineteenth-century American administrative law, including prohibition, habeas corpus and certiorari. Only certiorari, under which the court was asked to review the record of the action taken by an inferior judicial tribunal, usually resulted in the court examining a record generated by an entity other than the court itself. Many states relied upon certiorari to review certain types of administrative action (Jaffe 1965: 165–76). But certiorari was never used in the nineteenth century to review federal executive branch actions (Young 1986: 802).

After Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action. They did so on the theory that federal courts needed only a grant of jurisdiction, not a statutory cause of action, in order to exercise the powers of a court of equity in ruling on a request to enjoin agency action.[3] These actions were also original actions in which the trial court developed the record. So review here was also de novo, in terms of both the record generated and the exercise of independent judgment by the court.

The creation in 1887 of the first major national regulatory agency, the Interstate Commerce Commission, did not break with the nineteenth-century model of judicial review of administrative action. The Interstate Commerce Act provided in Section 16 that the courts were to regard ICC orders as 'prima facie evidence of the matters therein stated' (Act of Feb. 4, 1887, ch. 104, § 16). This might suggest that courts should defer to the ICC's findings of fact. But the inference ran in the opposite direction: by making ICC findings only prima facie evidence, the Act was read as endorsing the practice of taking additional evidence in court and having the court determine whether the prima facie evidence had been rebutted.[4] The Act also denied ICC orders any self-enforcing effect. To enforce an order, the Commission had to go to federal court to secure an injunction compelling compliance with its order. American courts were conditioned to think of equity proceedings as original actions. Not surprisingly, the lower federal courts uniformly

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[3] *American School of Magnetic Healing v. McAnnulty*, 187 US 94, 97 (1902), Duffy (1998: 121–30).

[4] The principal consequence of this provision was that it prevented outright judicial ratemaking. The Supreme Court instructed that when an order of the ICC was reversed, either for errors of law or because new evidence presented to the Circuit Court suggested an error of fact, the proper course ordinarily was to remand to the Commission, not for the court to determine for itself whether rates were unreasonable or discriminatory (*East Tennessee, Virginia & Georgia Railway Co. v. ICC*, 181 US 1 (1900), *ICC v. Clyde Steamship Co.*, 181 US 29 (1900), *Louisville and Nashville Railroad Co. v. Behlmer*, 175 US 648 (1900)).

ruled that in such an injunction proceeding new evidence could be submitted by the carriers. This meant that often the record that determined the validity of the ICC's action was the record made in court, not the one made before the Commission. Review was de novo, at least with respect to the identity of the record on which review was based.[5]

As this brief survey suggests, the breadth of review of agency action in the nineteenth century varied, but the nature of the review was uniformly what we would now call de novo, certainly as to the development of the record. The understanding that courts would develop the record for review exerted a powerful pull on the standard of review, and so the tenor of review tended toward independent judgment. There was little rhetoric of deference, and even less in practice.

The decisional law, certainly in the federal courts, was sufficiently thin throughout the century that the cases produced no general jurisprudence of judicial review. American judges and lawyers thought primarily in terms of different forms of action that might provide an avenue for challenging particular agency action. The nature of judicial review, if any, was dictated by the form of action under which review was sought. If the action was in mandamus, the court looked to see if the agent had violated a nondiscretionary legal duty. If the action was an original bill in equity, the court held a hearing and took evidence in a manner, similar to what any court of equity would do.

In all cases, at least in the federal courts, the court based its decision on the record produced in court. This might include the record generated by the agency, but it could include supplemental evidence as well. Thus, all nineteenth-century review of agency action was, in effect, de novo. The only exception to this was review by certiorari, which was used in some state courts, but had virtually no presence in the federal system.

In keeping with the de novo nature of review, courts generally gave no deference to agency determinations, whether on issues of law or fact. Review was often *narrow*, as when the court applying the prerogative writs asked only whether the agency was acting within its jurisdiction or whether an officer had violated a nondiscretionary legal duty. But whatever the permitted scope of review, there was no understanding of a sharing of authority or division of functions between court and agency.

2. The emergence of the appellate review model

The appellate review model first emerged in federal administrative law in decisions of the Supreme Court reviewing ICC rate and service orders in the period 1907–10. Scholars of an earlier generation, most notably John Dickinson and Frederick Lee, observed an important shift in the tenor of judicial review of ICC decisions at this time (Dickinson 1927: 160, Lee 1948: 305). Yet, I believe it is worth examining this critical period in administrative law again, if only because it has largely been ignored by contemporary scholars. One factor that deserves closer attention is the relationship between doctrinal change and an upsurge in public dissatisfaction with aggressive judicial review of decisions of the ICC, culminating in the adoption of the Hepburn Act in 1906. In the course of a very few years immediately following the passage of the Hepburn Act, the Supreme Court jettisoned the nineteenth-century model of judicial review and stumbled onto the appellate review model.

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[5] *ICC v. Alabama Midland Railway Co.*, 168 US 144 (1897).

2.1. The ICC crisis

As the nineteenth century drew to a close, the federal regulation of railroads, centered on the ICC, was widely perceived to be broken, and the US Supreme Court was widely identified as the culprit which had brought the Commission down (Skowronek 1982, Rabin 1986: 1212–215). As Stephen Skowronek (1982) has noted, '[b]y 1896–97, the Court was openly declaring that it was not bound by the conclusions of the commission, that it could admit additional evidence, and that it could set aside the commission's findings altogether' (154–5). The Court's aggressive review threatened to reduce the ICC to the status of 'a mere statistics-gathering agency' (151). Yet by insisting that complainants had to begin before the Commission, the Court ensured that controversies were long drawn-out affairs. The average case coming before the ICC took four years to final judgment, which 'mocked the supposed economy and efficiency of the administrative remedy' (155).

When the Supreme Court ruled in the *Queen and Crescent Case* (67 US 479 (1896)), that Congress had failed to delegate authority to the ICC to prescribe maximum future rates, some type of Congressional action was widely thought to be imperative (Merrill and Watts 2002). Numerous proposals to revise the Commission's authority circulated. But a deep conflict of interest between shippers and railroads made reform difficult. The railroads, which were beginning to show signs of deterioration from underinvestment in new plant and equipment, wanted measures to legalize pooling and assure a rate structure that would allow them to raise new funds from investors (Martin 1971). They were in favor of maintaining vigorous judicial review of ICC decisions, but supported the establishment of a new specialized commerce court to expedite review proceedings and inject a larger element of expertise into the review process. The railroads' political champions were the Old Guard Republicans of the industrial North.

The small shippers, especially in the West and South, viewed the regulatory issue as 'a battle between the people and the corporations' (Skowronek 1982: 253). They opposed railroad consolidation and rate relief, and 'were enraged by any regulatory proposal that allowed the judiciary to check the will of the people's representatives' (ibid). As Skowronek notes:

> [D]uring the 1890s the judicial branch as a whole had become the archenemy of the forces of populism. The nullification of state regulatory laws in the 1890s and the nullification of the federal income tax law in 1895 identified the judiciary as the opponent of democracy upholding the plutocracy of eastern capital. The representatives of the South and West were determined to overthrow this judicial imperialism, and one way of doing so was the grant sweeping ratemaking powers to the ICC and radically restrict the scope of judicial review (ibid).

Standing between these factions was President Theodore Roosevelt, who had campaigned in 1904 on the need for regulatory reform. Roosevelt shared the progressive faith in administrative expertise, and to this end also sought to reign in judicial review (Roosevelt 1913: 473). Consequently, Roosevelt was strongly opposed to the creation of a specialized review court.

2.2. The Hepburn Act

Congressional consideration of reform began soon after Roosevelt's inauguration. The House quickly passed reform legislation, but it got nowhere in the more conservative

Senate. The next year, 1906, Congressman William Hepburn submitted a new reform bill, drafted by the ICC and fully supported by the President. It easily passed the House with no amendments. The matter proceeded to the floor of the Senate, where a four-month debate on the constitutionality of the Interstate Commerce Commission and the proper function of judicial review ensued.

The debate touched on many issues of far-reaching importance, such as the constitutionality of combining legislative, executive and judicial functions in a single agency, whether Congress could delegate the power to regulate interstate commerce to a subordinate body, and whether the power to regulate commerce includes the power to prescribe rates for the future.[6] As regards the issue of judicial review, the proposed legislation made one significant change in the original ICA: Commission orders were to be self-executing 30 days after they became final, unless 'suspended or set aside by a court of competent jurisdiction' (Hepburn Act of June 29, 1906, § 4). This change had far-reaching implications. The original Act had required the Commission to file a bill of equity in circuit court seeking judicial enforcement of its orders. So the burden of inertia worked in favor of the railroads and against the Commission. Under the proposed legislation, the burden would shift 180 degrees, and the railroad would have to muster the effort to persuade a court to enter a preliminary injunction against the Commission's order before it took effect (McFarland 1933: 115). Interestingly, this sea-change went largely uncontested, even in the Senate. Nearly everyone acquiesced in the notion that the Commission's orders should be made self-executing.

Nevertheless, the proposal to make Commission orders self-executing explains why the question of the standard of judicial review was perceived to be of such importance by the 'eloquent and circumlocutious lawyers in the Senate' (Kolko 1965: 133). Shifting the burden of going to court to the railroads would perhaps not be very consequential if courts were to continue to review ICC orders de novo and under a standard of independent judgment. However, shifting the burden to the railroads and narrowing the standard of review significantly would represent a fundamental change in the balance of power.

Modern historians such as Gabriel Kolko and Stephen Skowronek have failed to perceive the importance of making ICC orders self-executing, and thus have misunderstood what the debate in the Senate was about. Kolko dismisses the whole debate as a sideshow (Kolko 1965: 133). Skowronek, for his part, mistakenly focuses on a provision of the Hepburn Act that authorized the Commission to seek a court order imposing sanctions on a carrier for failing to obey an ICC order.[7] This was rarely mentioned in the Senate

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[6] Each of these issues was raised in the opening speech of Senator Joseph Foraker, who argued that the Hepburn bill was unconstitutional in each of these regards (40 Cong. Rec. 3102–20 (1906)). His comments elicited responses from many others, but it appears he stood virtually alone in condemning the Act outright on constitutional grounds.

[7] With respect to such enforcement actions, the Hepburn Act provided that 'if upon such hearing *as the court may determine to be necessary*, it appears that the order was *regularly made and duly served*, the court shall enforce obedience to such order' (Hepburn Act of June 29, 1906, § 16; emphasis added). Skowronek argued that the Old Guard and other proponents of vigorous judicial review could point to the clause authorizing the courts to decide what kind of judicial hearing was necessary. This left open the possibility that the courts would continue to insist on de novo review. The progressives and President Roosevelt, he said, could point to the clause requiring enforcement of ICC orders provided they were regularly made and duly served as suggesting

debate and for good reason. The Senators understood that the main battle would take place when the carrier went to court to obtain a preliminary injunction against an ICC order before it went into effect (40 Cong. Rec. 6675 (1906)). Once ICC orders became self-executing, the standard of review that would apply in the preliminary injunction action was what mattered, not the standard for deciding whether to penalize a railroad for defying a lawful order that had already gone into effect.[8]

The partisans in the Senate fell into two camps with respect to the standard for obtaining an injunction before an order took effect: those favoring 'narrow' and those supporting 'broad' review. Narrow review would have allowed the courts to engage in only as much review as necessary to save the Act from being declared unconstitutional. Drawing their cues from Supreme Court decisions on the constitutionality of state rate regulation, most notably the *Minnesota Rate Case* (134 US 418 (1890)),[9] proponents of this view conceded that carriers had to be afforded an opportunity to present evidence and argument to a court that rates were set so low as to be confiscatory. But the narrow review camp would not have allowed any more review than the bare minimum needed to secure Supreme Court validation. They would have achieved this result by acknowledging that carriers could bring an action in federal court to enjoin a rate order before it took effect, but by providing no statutory grounds upon which such a challenge could be based – and ideally by securing an amendment limiting challenges to constitutional claims only.

The broad review camp, in contrast, wanted to confer general jurisdiction on federal courts to enjoin rate orders before they took effect on any legal basis, including that the rate was set at an unreasonably low level. They would have secured this result by including an express provision authorizing carriers to file a bill in equity challenging rate orders as being unreasonably low. In effect, they wished to perpetuate the practice of allowing courts to relitigate rate controversies de novo.

President Roosevelt had hoped to finesse the issue. The original Hepburn bill passed by the House contained provisions that presupposed the existence of judicial jurisdiction in equity, but did not expressly convey jurisdiction, or even provide a statutory cause of action to review ICC orders. As the debate heated up, and the contending groups sought amendments that would clarify the ambiguity, Roosevelt sent conflicting signals of support to one side and then the other (40 Cong. Rec. 6685 (1906)). Taking note of these

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a highly deferential mode of rule similar to the ultra vires model. There is no evidence from the Senate debate that the respective factions invested any such significance in these phrases.

[8] The Hepburn Act imposed stiff penalties – $5,000 for each offense – for violating an order once it took effect (Hepburn Act of June 29, 1906, §5). Writing in 1931, Leo Sharfman noted that '[t]he penalties for disobedience of an order, which becomes operative from its effective date, are so severe, that the carriers do not await enforcement proceedings by the Commission, but themselves seek equitable relief, in initiating proceedings to enjoin, suspend, or invalidate the Commission's order' (p. 388).

[9] Minnesota had established a commission to regulate intrastate railroad rates, and the Minnesota Supreme Court held that its decisions were final and not subject to judicial review. The Court held that if rates were set so low as to deprive a carrier of the lawful use of its property, the failure to provide for any avenue of judicial review to redress this situation was a violation of the Due Process Clause of the Fourteenth Amendment (134 US at 458). The decision clearly implied that federal legislation authorizing the ICC to set interstate rates without any possibility of judicial review would violate the Fifth Amendment.

machinations, Senator Rayner argued that the difference could not be compromised, and in so doing succinctly described the crux of dispute:

> The President tells us that these two reviews which he has sent in here are one and the same thing, but, Mr. President, they are as widely different as it is possible for two divergent propositions to be. The one is the review under the Constitution, which you can not eliminate without invalidating your law; the other is the broad statutory review, which permits the courts to try the cases de novo and in the same manner as if no such body as the Interstate Commerce Commission had ever existed upon the face of the earth (40 Cong. Rec. 6685–6 (1906)).

The battle over the standard of judicial review raged in the Senate for nearly four months. In the end, all efforts in the Senate to adopt clarifying amendments were defeated, including amendments expressly conferring jurisdiction and amendments expressly limiting review to constitutional issues. The exhausted Senators voted overwhelmingly to approve a bill that, like Congressman Hepburn's original bill, said nothing about the applicable standard of review.

For present purposes, one thing is particularly striking about the Senate debate. No Senator advocated anything like the appellate review model as a basis for calibrating the proper degree of judicial review of ICC orders. Most of those who favored narrow review – populists like 'Pitchfork' Ben Tillman and progressives like Robert LaFollette – probably would have preferred no judicial review at all. But to the extent that the Constitution required some review, they envisioned that such review would be de novo. Courts would take evidence and determine for themselves whether rates had been set so low as to be confiscatory. Likewise, those who favored broad review, such as Nelson Aldrich, assumed that review would be de novo. After all, review would be by a bill of equity, which was understood to be an original action.

From the perspective of the Supreme Court, the message encoded in the Hepburn Act was twofold. First, the public and the politicians were deeply unhappy with the Court's existing practices regarding judicial review of ICC rate orders (40 Cong. Rec. 5722 (1906)). Second, Congress and the President had provided no directions about what to do about it (40 Cong. Rec. 6678 (1906)). The net effect was to delegate authority to the Court to decide on the new standard of review, with the implied threat that if the Court did not back off from its aggressive review practices, more drastic action, such as stripping the Court of jurisdiction over ICC matters or creating a specialized court, would be in the offing.

2.3. Strategic retreat

Shortly after the Hepburn Act was passed, the tenor of Supreme Court decisions in ICC matters changed dramatically (Dickinson 1927: 160, Ely 2001: 228, Lee 1948: 305, McFarland 1933: 120, Rabin 1986: 1234, Skowronek 1982). I will not provide a comprehensive review of the decisions but will only recount the highlights in what amounts to a rapid progression toward a new understanding of the judicial role.

Within a year of the signing of the Act, the Court rendered its landmark decision in *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.* (204 US 426 (1907)). The case did not concern the standard of review in an action to enjoin an ICC rate order. The question, rather, was whether the Interstate Commerce Act, as amended, preempted lawsuits grounded in the common law duty of common carriers to charge only reasonable

rates. Stressing the congressional objectives of assuring uniformity of rates and rooting out discrimination, the Court held that the Act preempted common law actions. The Court emphasized that the Act gave the power to determine the reasonableness of rates to the Commission, not the courts. If the power of hearing original complaints rested in both the Commission and the courts, 'a conflict would arise which would render enforcement of the act impossible' (204 US at 441). The implications of this for the standard of review, although not noted in the opinion, were far-reaching. If courts could not entertain original complaints charging unreasonableness, it would seem to follow that they could not substitute their judgment for that of the Commission on judicial review either. The Court would soon note those implications explicitly.

The occasion was a decision I will call *Illinois Central I*.[10] The case arose under the original Interstate Commerce Act, so it did not directly implicate the Hepburn Act. Counsel for the railroad, seeking to overturn an ICC rate order, made an elaborate presentation asking the Court to adopt a series of 'rules or principles' indicating circumstances in which railroad rates would be deemed reasonable. Considering each of the proposed rules or principles in turn, the Court, speaking through Justice McKenna, held that each fell peculiarly within the 'province of the Commission', not the courts (206 US at 456). Distinguishing the various precedents cited by counsel, the Court noted that in each case there had been 'a single, distinct and dominant *proposition of law* which the Commission had rejected, and the exact influence of which, in its decisions, could be estimated' (206 US at 457). In the present case, in contrast

> The question submitted to the Commission . . .turned on *questions of fact.* In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended for by them. Whether the Commission gave too much weight to some parts of it and too little weight to other parts of it *is a question of fact and not of law* (206 US at 466; emphasis added).

There was no question that the Court was in retreat, and that the path of retreat lay in emphasizing the law/fact distinction familiar to judges from the conventions associated with judicial review of jury verdicts. In another case decided at this time, the Court said the Commission should be reversed only because of 'clear and unmistakable error', invoking the language used to review factual determinations of judges sitting without a jury.[11]

Three years later, the Court decided another case by the same name but presenting different issues, which I will call *Illinois Central II*.[12] The case involved the impact of the Hepburn Act on the Commission's authority to allocate rail cars in periods of car shortages. The Court pointedly noted that the new Act made ICC orders self-executing, observing that in this and other respects the new law endowed the Commission 'with large administrative functions' (215 US at 470). The Court then described its review power as embracing (1) 'all relevant questions of constitutional power or right', (2) 'all

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[10] *Illinois Central Railroad Co. v. ICC*, 206 US 441 (1907).
[11] *Cincinnati Railway Co. v. ICC*, 206 US 142, 154 (1907).
[12] *Illinois Central Railroad Co. v. ICC*, 215 US 452 (1910).

pertinent questions as to whether the administrative order is within the scope of the delegated authority', and (3) whether the exercise of authority 'has been manifested in such an unreasonable manner as to cause it' to exceed the scope of delegated authority (ibid). These review functions, the Court remarked, 'are of the essence of judicial authority', and may not be curtailed by Congress (ibid). But the Court immediately said it was 'equally plain' that it could not, 'under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative order has been wisely exercised' (ibid). Here we see a clear articulation of a division of functions between court and agency based on relative competence. *Illinois Central II* quickly became the leading precedent on the standard of review of ICC rate orders (Ripley 1922: 538–45).

Two years later, in *ICC v. Union Pacific Railroad Co.* (222 US 541 (1912)), the Court reaffirmed its restrictive conception of the review function as laid down in *Illinois Central II*. The Court, in an opinion by Justice Lamar, went further, however, and spelled out in greater detail the standard of review that would apply when a carrier alleged that the Commission's application of law to fact was so defective as to amount to reversible error. Such 'mixed questions of law and fact', the Court said are

> subject to review, but when supported by evidence [are] accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof – but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order (222 US at 548).

Here we witness the birth of the famous 'substantial evidence' standard of review of agency findings of fact. The standard was borrowed – without citation of authority – from the common law understanding of the standard of review that American appeals courts applied in reviewing jury verdicts.

That same year the Court upheld a version of the appellate review model against a due process claim.[13] The State of Washington adopted by statute virtually the same scheme for review of orders of its railroad commission that the Hepburn Act had adopted for review of ICC orders. The commission's orders were self-executing unless enjoined before they went into effect. Unlike the Hepburn Act, however, the Washington statute specified that judicial review was to be based on the record produced before the commission (224 US at 515). The railroad claimed that this denial of any right to make a new record in the reviewing court denied it due process. The Court, speaking again through Justice Lamar, rejected the claim, analogizing the role of the Commission to a master in chancery, who makes a record and recommends conclusions of law, which are then reviewed by the chancellor (224 US at 527). The Court noted that the Washington law went further than the ICA cases, where in theory the record could be made de novo. But it observed that recent decisions had disapproved of the practice of allowing carriers to supplement the record on review, so Washington had merely 'enlarged' on the practice the Court had approved in federal proceedings (ibid).

It would be misleading to suggest that all Supreme Court decisions after the Hepburn

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[13] *State of Washington ex rel. Oregon Railroad & Navigation Co. v. Fairchild*, 224 US 510 (1912).

Act deferred to the policy judgments of the ICC, just as it would be an exaggeration to say that all review before the Hepburn Act applied pure independent judgment. The Court, perhaps inevitably, engaged in some backsliding.[14] Yet within a decade, whether rates were discriminatory or unjust and unreasonable were routinely said to present 'questions of fact that have been confided by Congress to the judgment and discretion of the Commission'.[15] Accordingly, the Commission's resolution of these matters was 'not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power'. Of particular significance, the Supreme Court strenuously lectured lower courts that they should decide injunction proceedings based on the record made before the Commission if at all possible. Although no language in the statute compelled such a practice, the Court expressly invoked the Hepburn Act as making it especially 'appropriate' that 'all pertinent objections to action proposed by the Commission and the evidence to sustain them shall first be submitted to that body' (246 US at 399–400).

As Skowronek has observed, the Supreme Court appears to have 'understood the volatile political nature of question at hand and the growing precariousness of its own political position'. The Court accordingly had embarked on a quest 'for a new and more secure position before the growing democratic attack on the judiciary got out of hand and caused some real damage to its prerogatives and its prestige' (Skowronek 1982: 260). More precisely, what seems to have happened is that the Court, facing a political crisis and attack on its own authority, looked into its doctrinal tool bag for something that would permit it to back off without losing face. The conventions governing judicial appellate review of trial court decisions seemed to fit, at least in the sense that they satisfied the immediate imperative for a strategic retreat.

2.4. The source of the appellate review model

So far, I have explained the timing of the adoption of the appellate review model, and the motivations that led the Supreme Court to embrace that model. What is missing is an explanation of where exactly the model came from. This, I must confess, remains something of a mystery. Two sources can be ruled out. Congress did not direct the courts to adopt the appellate review model. The Hepburn Act said nothing about the standard of review in injunction proceedings. And it carried forward the language of the original ICA for reparations cases, which had been interpreted as requiring de novo review. Nor did any academic propose the appellate review model during the relevant time frame. The handful of scholars who addressed the law of administration at this time had their thinking tightly locked in the bipolar model of the nineteenth century.

Clearly, the immediate source of the appellate review model was the Court itself. No one particular Justice played a critical role in developing the appellate review model. Justice White authored the two most important decisions that acknowledged the policy-making role of the ICC – *Abilene Cotton Oil* and *Illinois Central II*. But Justice Lamar's opinions drew most explicitly on the example and the linguistic conventions of civil

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[14] For example, *Penn Refining Co. v. Western New York & Pennsylvania Railroad*, 208 US 208 (1908), *ICC v. Chicago Great Western Railway Co.*, 209 US 108 (1908).

[15] *Manufacturers' Railway Co. v. United States*, 246 US 457, 481 (1918).

litigation, analogizing a regulatory commission to a master in chancery and introducing the phrase 'substantial evidence' into administrative law.[16] No Justice drew an explicit connection between the court-agency relationship and the judge-jury or appeals court-trial court relationships. The conventions developed in the one context were transposed to the other through a collective process of trial and error, albeit over a relatively brief period of time.

Professor Ann Woolhander (1991: 225–6) has insightfully pointed out that the practice in American equity appeals changed in the latter part of the nineteenth century. Originally, appeals courts applied a de novo-type review in equity appeals since the record was typically documentary. Later in the nineteenth century, however, appeals courts began using the much more deferential 'clearly erroneous' standard of review for findings of fact by judges sitting as chancellors in equity, in parallel with the use of this standard in appeals from decisions by judges sitting without juries in cases at law. So, we can surmise that appeals courts (such as the US Supreme Court) would increasingly find it anomalous to engage in de novo review in a case based on equity jurisdiction. But this still leaves unexplained where and how the spark jumped from the pure equity context, where the appeals court was reviewing another judge – the chancellor in equity – to the administrative review context, where the appeals court was reviewing a regulatory commission. But the spark did jump between 1907 and 1910, and the appellate review model of administrative law was launched.

3. Entrenchment of the appellate review model

If the Hepburn Act provided the catalytic event that brought the appellate review model into being, subsequent events quickly reinforced the US Supreme Court's gravitation toward this conception of judicial review. By the early 1930s the appellate review model was fully entrenched.

3.1. The Commerce Court

One episode that occurred shortly after the adoption of the Hepburn Act undoubtedly helped secure the status of the appellate review model in the context of review of ICC rate orders: the rise and rapid demise of the so-called Commerce Court between 1910 and 1913. The Commerce Court was a court enjoying the full status of an independent Article III tribunal but devoted exclusively to review of ICC decisions. Proponents argued that such a court, staffed by judges who devoted their energies exclusively to railroad matters, would 'prevent delay incident to the adjudication and prosecution of cases'; 'overcome the apparent inability of the Federal Judges to adequately meet the technical and conflicting evidence submitted'; and end 'the dissimilarity and contrariety of opinions issuing from different Federal Courts' (Baker 1911: 555). The creation of such a court was much discussed during the debate that led to the adoption of the Hepburn Act, and was omitted from the final bill only because of President Roosevelt's adamant opposition.

The idea of a specialized court did not die, however, and when a further round of reforms strengthening the powers of the ICC was considered in 1910, President Taft

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[16] *ICC v. Union Pacific Railroad Co*. (222 US 541 (1912).

threw his support behind the idea of the Commerce Court, leading to its creation in the Mann-Elkins Act adopted in that year. The Commerce Court 'experiment' lasted only three years. Shortly after Woodrow Wilson was inaugurated as President in 1913, the Court was unceremoniously abolished. The court had many failings, the chief of which was probably that Congress did not want controversial railroad rate matters settled by a tribunal insulated from its control (Dix 1964). But among the many sources of dissatisfaction with the court, one, not unexpectedly, was that it engaged in very aggressive review of ICC decisions. Martin Knapp, the Chief Justice of the Commerce Court, took the position that review would be on the record generated by the Commission, but under a standard of independent judgment (Dixon 1922: 45–51). Progressives and shipper constituencies were outraged. As one contemporary commentator put it, 'The Commerce Court was organized purely to review the law findings of this commission. . .and yet in the face of the plain wording of the law. . .this body of usurping judges upset the rulings of the commission in practically every important case. . .and this not on questions of law but purely on findings of fact' (Dix 1964: 257).

The Supreme Court, for its part, seemed to view the upstart tribunal as a rival. It overturned four of the first five Commerce Court decisions that came before it for review (Skowronek 1982: 266, Frankfurter and Landis 1928: 165 n. 95), and narrowly interpreted the scope of the court's jurisdiction. Democrats and progressive Republicans seized on the Supreme Court's sharp language as confirmation of the court's pro-railroad bias. When impeachment proceedings commenced against one of the five judges for using his office to promote his private interests in railroads, the court's fate was sealed.

The sudden collapse of the Commerce Court had two important effects in terms of securing the appellate review model. First, the Supreme Court likely saw its collapse as a vindication of its own strategy of accommodation between reviewing courts and agencies. The failure of the specialized court left the appellate review model as the only option on the table for reaching some solution midway between the 'bipolar' options of the nineteenth century. Second, complaints about the Commerce Court's aggressive review, and Congress's eagerness to end the experiment, no doubt reinforced the political message that some kind of judicial retreat from de novo review was imperative. The appellate review model was the only option on the table that offered the promise of a retreat with dignity.

By 1918, the Supreme Court's post-Commerce Court Act decisions had effectively congealed into the appellate review formula familiar to modern administrative lawyers. All judicial review of ICC orders, including those in which a claim of confiscation was advanced, was based solely on the record before the Commission.[17] Questions of fact, and mixed questions of law and fact, were for the Commission to decide, subject to review under the substantial evidence standard. The Court would decide independently only questions of constitutional right, whether the agency was acting within its jurisdiction, and pure questions of law.

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[17] The Court indicated in dictum that all challenges should be reviewed on the record in *Manufacturers Railway* in 1918; this was reaffirmed in the context of a confiscation claim in *St. Joseph Stock Yards Co. v. United States* (298 US 38, 53–4 (1936)).

3.2. The Federal Trade Commission

The early history of judicial review of decisions of the Federal Trade Commission (FTC) is also instructive because it shows how the appellate review model quickly spread beyond ICC review proceedings and how it could easily be adapted for offensive as well as defensive purposes. The Federal Trade Commission Act of 1914, which was drafted with significant input from Louis Brandeis, an advisor to President Woodrow Wilson and future Supreme Court Justice, contains a strong hint of congressional ratification of the appellate review model. Section 5, the cornerstone of the Act, sweepingly authorized the Commission to bring proceedings to determine whether particular firms were engaged in 'unfair methods of competition' in interstate commerce (Act of Sept. 26, 1914, § 5). An affirmative finding would result in a cease and desist order, which could only be enforced through an action by the Commission for an injunction in federal court; alternatively, a party against whom the order was directed could bring an action to have the order set aside. In either type of proceeding, the Act provided that 'the findings of the Commission as to the facts, if supported by testimony, shall be conclusive' (ibid). This was a rough paraphrase of the substantial evidence standard for reviewing facts found by an American jury. Nothing was said about the standard of review of questions of law, or of the application of law to facts in making a determination of whether a business practice was an 'unfair method of competition'.

In its first confrontation with this new Act, the Supreme Court wasted no time making clear that it had sole and final authority to determine what practices could be described as 'unfair methods of competition'.[18] This, the Court said, was a question of law, and thus for the courts, not the Commission, to determine (253 US at 427). The court of appeals had set aside the Commission's order on the ground that the Commission had produced no evidence that the conduct the Commission thought unfair – tying the purchase of steel cotton bale ties to the purchase of bagging cloth – was the *general* practice of the respondent (253 US at 424–5). Realizing, perhaps, that this was hard to square with the deferential standard of review of facts prescribed by the statute, the Court shifted the ground of decision to the legal definition of 'unfair methods of competition'. The Court then concluded, as a matter of law, that the respondents' tie-in scheme was not unfair.

Gratz set the pattern for judicial review of FTC cease and desist orders for the next twenty years. The Supreme Court repeatedly reversed the Commission, but never on the ground that facts of record failed to support the Commission's conclusion that a method of competition was unfair. Instead, the Court freely indulged in defining the scope of 'unfair methods' itself, sometimes with reference to parallel judgments reached by courts under the anti-trust laws,[19] but more often based on nothing more than its own intuitions about proper commercial practices.[20] The Court also seized on statutory language

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[18] *Federal Trade Commission v. Gratz*, 253 US 421 (1920).

[19] *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 US 441 (1922).

[20] *Federal Trade Commission v. Curtis Publishing Co.*, 260 US 568 (1923), *Federal Trade Commission v. Raladam Co.,* 283 US 643 (1931), *Federal Trade Commission v. Raymond Brothers-Clark Co*., 263 US 565 (1924), *Federal Trade Commission v. Sinclair Refining Co*., 261 US 463 (1923), *Federal Trade Commission v. Winstead Hosiery Co*., 258 US 483 (1922).

authorizing courts to 'modify' the Commission's order on review to significantly re-cast the Commission's remedial orders.[21]

In one case, in a passage that was probably dicta, the Court opined that it had the authority to 'examine the whole record' to ascertain whether there were 'material facts not reported by the Commission' that might support a different outcome, although even here it acknowledged that the ordinary course in such a case would be to remand to the Commission, 'the primary fact-finding body', to make additional findings (*Curtis Publishing*, 260 US at 580). This elicited a rebuke from Chief Justice Taft, who said he hoped the majority did not mean that 'the court has discretion to sum up the evidence *pro* and *con* on issues undecided by the Commission and make itself the fact-finding body' (260 US at 583). He reminded his colleagues that 'we should scrupulously comply with the evident intention of Congress that the Federal Commission be made the fact-finding body and that the Court should in its rulings preserve the Board's character as such' (ibid).

Taft's lecture was taken to heart. Never again during this formative period did the Supreme Court suggest that courts should engage in any meaningful review of the FTC's findings of fact. There was no need to – with an extraordinarily vague statute, and the understanding that courts had complete authority to interpret that statute as they saw fit, federal judges could reverse the Commission any time they saw an outcome they did not like.

The Supreme Court evidently regarded the FTC during this era with something approaching contempt. Whether this was because it was staffed with weak appointments, or suffered from undue meddling from Congress, or was seen as encroaching on judicial territory, or some combination of these, is unclear. What is clear is that the appellate review model was quickly and readily adapted to the end of supervising an upstart agency. A model that originated in the need for strategic retreat from oversight of railroads was quickly turned around and used as an instrument of aggression against the FTC.

3.3. The constitutionality of the appellate review model

Notwithstanding the entrenchment of the appellate review model as applied to the ICC and the FTC, there remained nagging doubts about the constitutionality of this conception of judicial review. The source of the doubts was the American understanding of separation of powers. According to the traditional view, separation of powers requires the establishment and maintenance of three separate and non-overlapping spheres of power: the legislative, executive and judicial. The 'judicial power', as one of the three spheres of power, can neither be reduced nor expanded at the expense of either the 'executive' or the 'legislative' spheres. This conception of the scope of the judicial power would be violated by taking a chunk of the business of the courts – say determining whether A is liable to B for breach of contract – and transferring that authority to an administrative agency. Such a transfer would reduce the sphere of the judicial power. But the traditional conception of separated powers would also be violated if courts had the authority to exercise powers which properly belonged to either the executive or the legislative sphere.

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[21] *Federal Trade Commission v. Curtis Publishing Co*., 260 US 568 (1923).

To see how this vision of separated powers might cause judges to question the appellate review model, one need go no further than the mid-nineteenth-century decision *Murray's Lessee v. Hoboken Land and Improvement Co.* (59 US 272 (1855)). At issue was the constitutionality of a seizure of property of Samuel Swartwout, a New York collector of customs who had stolen large sums of money owed to the United States Treasury and fled to England. The federal government, using a summary executive process, attached his property first; another creditor claimed this process was invalid and that its later-filed judicial attachment should have priority. The disappointed creditor argued that the attachment by the federal government was an inherently judicial act which required a proceeding before an independent court. Further, the creditor pointed out that Congress, by statute, had made the executive seizure subject to judicial review in court, which the creditor submitted as confirmation that the attachment was inherently judicial in nature.

Writing for a unanimous Court, Justice Curtis rejected the separation of powers objection to the use of an executive attachment of debtor property. He observed that there are some actions which Congress can assign either to the executive or the courts, as it sees fit. Included in this category are attachments of property to satisfy a debt owed to the government. The proceedings in court were fully compatible with the exercise of the judicial power because 'every fact upon which the legality of the extrajudicial remedy' turned could be drawn in question in the subsequent suit against the defending federal officer. In other words, judicial review would occur in a form in which all issues could be determined de novo.

Here we see both the influence of the separate spheres understanding, and the way in which the nineteenth-century judicial mind went about reconciling judicial review with the separate spheres assumption. Authority that can be exercised by either the courts or the executive, as Congress sees fit, does not represent an impermissible mixing of spheres, so long as the executive determination is complete and final and fully effective on its own terms, and the judicial consideration is by an original proceeding in which the court decides all facts and legal issues de novo. The constitutional underpinnings of the orthodox nineteenth-century conception of judicial review were clearly revealed (Wyman 1903: 321–41).

In dicta near the end of the separation of powers discussion, Justice Curtis made the separate spheres assumption explicit. He said, in part:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.

The first part of this dictum is an acknowledgement that reduction of the judicial sphere is not permitted. The second part, warning that Congress could not bring under the judicial power matters not fit for judicial determination, is a statement that extension of the judicial power into other spheres would also be impermissible.

Both concerns posed a potential difficulty for the appellate review model. If the matter under review was regarded as inherently executive or administrative, then review and potential reversal by a court might be regarded as injecting the court into matters reserved for other branches of government. If the matter under review was regarded as

inherently judicial, then the fact that the courts allowed the factual record to be developed by a nonjudicial tribunal and gave great deference to the findings of that tribunal might suggest that the courts had abdicated an important component of the judicial function.

The first concern – fear of inappropriate intrusion of the judiciary into executive or legislative affairs – was a recurring theme in early American jurisprudence. One clear example is the judicial response to schemes that placed the federal courts in a position of subordination to an executive or administrative agency.[22]

Fear of intrusion into nonjudicial matters also arose where it appeared that the courts were being asked to validate or revise administrative action. In public lands controversies, the Supreme Court refused to allow federal courts to hear appeals from land commissions. When Congress provided that certain decisions of the California Lands Commission could be challenged by an 'appeal' to the local federal district court, the Supreme Court insisted that the proceeding in the district court would be de novo.[23] As Justice Matthews explained, federal courts,

> [C]annot exercise any direct appellate jurisdiction over the rulings of the land officials, because such a function is not judicial; it is administrative, executive and political in nature. The abstract right to interfere in such cases has been uniformly denied by judicial tribunals, as breaking down the distinction so important and well defined in our system between the several, separate, and independent branches of our government.[24]

Similar concerns were reflected in decisions refusing to permit independent federal courts to hear appeals from the 'legislative' courts, such as court of customs appeals,[25] or the courts of the District of Columbia reviewing patent and trademark decisions.[26] In each case, it was held that an independent federal court could not review by appeal a judgment of a non-Article III court without impairing the independence of the judicial authority.

Even after the appellate review model became established, courts continued to be concerned that they would be injected into matters that were 'administrative' rather than 'judicial' in nature. In one particularly revealing episode, we also see how the appellate review model – when properly applied – came to be seen as a solution to this concern. The controversy involved the judicial review provisions of the Radio Act of 1927. That Act authorized a disappointed party to appeal from decisions of the Radio Commission (the forerunner of the Federal Communications Commission) to the Court of Appeals for the District of Columbia, and permitted that court to 'alter or revise the decision appealed from and enter such judgment as to it may seem just' (44 Stat. 1169). In *Federal Radio Commission v. General Electric Co.* (281 US 464, 467 (1930)), the Court held this provision unconstitutional, reasoning that it converted the court into 'a superior and revising agency', and rendered its decision administrative rather than judicial in nature.

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[22] *Hayburn's Case*, 2 US (2 Dall.) 409 (1792), *Gordon v. United States*, 69 US (2 Wall.) 561 (1864).

[23] *United States v. Ritchie*, 58 US 525, 533–4 (1854), *Grisar v. McDowell*, 73 US 363, 375 (1867).

[24] *Craig v. Leitensdorfer*, 123 US 189, 211 (1887).

[25] *Ex parte Bakelite Corp.*, 279 US 438 (1929).

[26] *Butterworth v. Hoe*, 112 US 50 (1884), *Keller v. Potomac Elec. Power Co.*, 261 US 428, 442–4 (1923), *Postum Cereal Co. v. California Fig Nut Co.*, 272 US 693, 700 (1927).

In other words, the division of authority contemplated by the appellate model – at least in this particular formulation – threatened the independence of the judiciary by entrusting it with too much policymaking discretion.

Congress responded to this decision by revising the statute to conform to the precepts the Court had upheld in reviewing ICC and FTC decisions. The revised statute authorized the court of appeals to review only 'questions of law' and provided 'that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary and capricious' (46 Stat. 844). The Supreme Court sustained the amended law against a renewed separation of powers challenge in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.* (289 US 266 (1933)). The new version of the Act, the Court reasoned, confined the Court of Appeals to performing 'judicial, as distinguished from administrative, review'. The Court explained:

> Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary and capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it – an arbitrary and capricious finding – does violence to the law. It is without sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings and thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action (289 US at 276–7).

For good measure, the Court held that it was immaterial that the review was denominated an 'appeal', as long as the function was judicial rather than administrative in nature. According to Frederick Lee, this was the first time the Supreme Court expressly sanctioned the use of the word 'appeal' to describe a mode of review based on the appellate model (Lee 1948: 300).

Nelson Brothers thus articulates the critical understanding that served to resolve any doubts about the constitutionality of the appellate review model – insofar as the problem was thrusting the judiciary into matters of administration. As long as the function of a court is truly appellate in nature, that is to say, as long as the court reviews a record and resolves the same kinds of questions it would resolve in reviewing a record generated by a trial court or jury, the reviewing court is acting in a perfectly judicial manner. The theory had been anticipated several years earlier in the tax context,[27] and would later

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[27] In *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 US 716 (1929), the Supreme Court had upheld a statute permitting a petition for review to the DC Circuit Court of Appeals, an Article III court, from rulings of the Board of Tax Appeals, an 'executive or administrative board'. The Court said '[i]t is not important whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which

be extended by the Supreme Court to justify its appellate review of decisions of other administrative tribunals and non-Article III courts.

The appellate review model also potentially raised the opposite concern under the separate spheres understanding of separation of powers – that certain functions would be 'withdraw[n] from judicial cognizance' that rightfully should be performed only by courts.[28] In particular, the appellate review model allows administrative agencies to determine the facts of particular cases and controversies, and instructs courts to uphold these findings of fact as long as they are supported by substantial evidence. This might be viewed as an impermissible subtraction of judicial authority in violation of the separate spheres assumption.

For whatever reason, there is little evidence of judicial concern with this potential constitutional infirmity during the period when the appellate review model was becoming solidified. The issue was not explicitly addressed until 1932, when *Crowell v Benson* was decided (285 US 22 (1932)). The case involved an award of compensation to an injured worker under the Longshoremen and Harbor Workers Compensation Act of 1927. The statute provided that an award could be set aside by a reviewing court if not 'in accordance with law' (44 Stat. 1424, § 18). The Court interpreted this as incorporating the appellate review model. A reviewing court would have complete authority to determine questions of law. Although the statute said nothing about findings of fact, the Court observed that '[a]n award not supported by evidence in the record is not in accordance with law' (285 US at 48), and hence the statute was construed as authorizing some review of questions of fact, although under the familiar deferential standard associated with civil appeals. All Justices participating in *Crowell* assumed the validity of the resulting appellate review model as applied to review of ordinary questions of fact.

As to why the appellate review model was permissible with respect to 'ordinary' facts, the Court had relatively little to say, since the point was not in dispute. Chief Justice Hughes suggested that allowing agencies to find such facts was no different than allowing masters in chancery or juries in trials at law to resolve contested issues of fact (285 US at 51–3). In other words, the agency was functioning simply as an 'adjunct' to the court, and hence there was no impermissible dilution of judicial authority. This characterization of the role of the agency had some plausibility as a description of the early ICC or the FTC, neither of which had authority to enforce its own orders. But it had no plausibility as a description of the most important agency of the era – the post-Hepburn Act ICC – which could issue rate prescription orders on its own authority that became legally binding unless a carrier could persuade a court to issue an injunction staying them. No 'adjunct' to a court has such power.

The actual point of controversy in the case concerned whether courts should independently develop the factual record with respect to questions of fact supporting the agency's jurisdiction. Chief Justice Hughes, for the majority, adopted a modest carve-out from the appellate review model for so-called jurisdictional facts. He reasoned that the record

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jurisdiction has been conferred by law' (279 US at 722). The original Radio Act failed to satisfy this standard, according to the *General Electric* case decided the following year, because it gave the court discretionary power to revise the administrative order as it saw fit (*Federal Radio Commission v. General Electric Co.*, 281 US 464 (1930)).

[28] *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 US 272 (1855).

supporting these facts should be developed in the reviewing court, rather than before the agency, in order to assure impartiality in policing the scope of the agency's activities. Justice Brandeis penned a lengthy dissent, in which he argued that the agency could develop the record itself on all issues, including those going to the agency's jurisdiction.

In retrospect, many have found *Crowell*'s answer to the concern about dilution of judicial authority with the adoption of the appellate review model unsatisfactory (Young 1986). In any event, *Crowell*'s suggestion that the record for reviewing jurisdictional facts must be developed by the court proved to be short lived. Justice Brandeis position on this question quickly prevailed (Monaghan 1985: 256).

The important point for present purposes is that by 1933 the constitutional anxieties about the appellate review model had been laid to rest. *Nelson Brothers* explained how appellate review of agency decisions did not represent impermissible judicial intrusion into matters of administration. *Crowell* explained how appellate review did not represent an impermissible dilution of judicial authority. The future of the appellate review model was secure, some thirteen years before the adoption of the APA.

4. Accommodating change

Given its inauspicious beginnings in an improvised retreat from intrusive review of Interstate Commerce Commission decisions, it is truly remarkable how the appellate review model has flourished in the century that followed. In the evolutionary struggle for survival among legal doctrines, this one is a clear winner. What accounts for its remarkable staying power in American administrative law?

Part of the explanation has already been hinted at. Judges created the appellate review model – not Congress, the executive branch, or American academics. And the appellate review model, not surprisingly, casts judges in the powerful role of 'senior partner' in the court-agency relationship. Judges anxious to maximize their influence over policy, and to minimize their need to engage in dreary review of evidentiary records, should naturally be drawn to a conception of judicial review in which agencies find the facts and judges get to declare whether the agency's policy initiatives are consistent with 'the law' (Dickinson 1927).

Another explanation for the enduring power of the appellate review model is its flexibility at both the micro and macro levels. Insofar as the reviewing institution wants to overturn an agency decision on an issue within the sphere of competence of the agency, it can usually find a way to do so that suggests it is exercising its own competence. Thus, for example, the reviewing institution will overturn a fact-based decision by the agency by describing that decision as so lacking in evidence as to be 'contrary to law'. Alternatively, insofar as a court wants to uphold the decision of an agency, it will frame the issue in terms of the competence of the agency, for instance, by positing that whether a carrier's practice is discriminatory is a 'question of fact' for the agency to determine in its 'sound discretion'.

The appellate review model has also proven to be flexible at the macro level. For example, in the late 1940s, control of Congress shifted from the Democrats to the Republicans, and Congress began criticizing the pro-labor decisions of the National Labor Relations Board. No clear legislative directive emerged, but Justice Frankfurter was able to announce in *Universal Camera Corp. v. National Labor Relations Board* (340 US 474 (1951)), that Congress had 'expressed a mood' requiring more searching judicial

review of the Board's decisions (340 US at 487). That 'mood' could be vindicated by tinkering with the way courts implemented the appellate review concept. Specifically, courts were directed to consider the weight of the evidence based on the entire record, not merely by looking at select evidence supporting the Board's decision. No reconsideration of the framework of review was required.

Even greater capacity for adaptation was revealed in the 1970s, as Congress encouraged a shift from adjudication to rulemaking as the dominant mode of policymaking. This posed a potentially serious problem for the appellate review model, given that rulemaking, as originally conceived, did not produce the closed record presupposed by the traditional appellate review model. But American courts and agencies were able to adjust to overcome this difficulty, essentially by developing a new conception of the record for purposes of review of rulemaking (Pederson 1975).

Similarly, when concern about agency capture became fashionable in the late 1960s and early 1970s, American courts tinkered with the appellate review model along another dimension (Merrill 1997). They construed the role of the courts to include much more aggressive review of the agency's explanations for significant new policies. Thus was born 'hard look' review (DeLong 1979: 301–09, Garland 1985: 525–42). Again, this approach required no fundamental alteration in the appellate review model. Courts simply layered a more aggressive monitoring of the quality of agency reasoning on top of the standard review of the factual record from the original model.

Later, in response to the deregulation movement, the model was sufficiently elastic to permit a further modification in the appropriate division of authority in resolving questions of law, most prominently with the *Chevron* decision in 1984.[29] *Chevron*'s two-step formula for reviewing questions of law can be seen as a re-working of the tried and true appellate review model. As Edward Rubin has observed, the formula

> is reminiscent of the standard that an appellate court uses when reviewing a bench trial: the appellate court will review questions of law de novo, but will recognize a zone of discretion for matters that lie within the special expertise of the trial court, and will reverse only if the trial court's decision is 'clearly erroneous' (Rubin 2003: 142).

Indeed, as John Dickinson explained in 1927, judicial deference to agency determinations of law can be reconciled with the appellate review model, as long as the issues of law on which the court defers are sufficiently narrow and technical as to fall into the sphere of superior competence of the agency rather than the court (Dickinson 1927: 286–7). This understanding of the deference doctrine is consistent with the commonsense understanding of *Chevron* shared by most judges, even if the theoretical grounds of that decision would authorize a much greater transfer of authority over questions of law to agencies.

These and other transformations in administrative law were made possible only because the appellate review model rests on the general idea of a division of functions. As long as the model is understood at this level of generality, particular understandings of institutional functions and the line of demarcation between institutions can change over time, all the while permitting a basic continuity in the identity of the relevant institutions

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[29] *Chevron v. Natural Resources Defense Council*, 467 US 837 (1984).

and the sequence with which they discharge their functions. Thus, the model has permitted courts to respond to a variety of political imperatives and intellectual fashions without surrendering their position of dominance in the development of regulatory policy.

Conclusion

The adoption of the appellate review model for ordering the relationship between agencies and courts was one of the most far-reaching developments in the history of American administrative law. The model had two great virtues, one political, the other conceptual. The political virtue was that it allowed courts to back off from engaging in intensive de novo review of the nation's most important regulatory agency, the ICC. By 1906, the Supreme Court had gotten itself into hot water over micromanagement of the ICC. The appellate review model allowed the Court to increase the ratio of affirmances to reversals and develop a rhetoric of deference while at the same time purporting to maintain continuity with its past practice. Conceptually, the model permitted a genuine specialization of functions between courts and agencies, which reduced friction, delay and duplication of effort. Agencies would specialize in the nitty-gritty of their particular regulatory programs: developing records, making findings of fact, crafting dispositional orders, initiating enforcement actions. Courts would review the record to assure that agencies were acting in a reasonable fashion, and they would concentrate on conclusions of law in order to harmonize the agency regulatory program with broader principles of law, including constitutional rights, such as the protection against confiscation.

All this seems familiar and uncontroversial. But it is worth asking whether the division of functions generated by the appellate review model is in fact optimal, given the characteristics of the institutions involved. As between judge and jury, few would argue that the jury should find the law and the judge should find the facts. But it is not self-evident that the same holds between court and agency. Finding the law is closer to making policy than finding the facts, at least most of the time. And agencies, for reasons both of expertise and democratic accountability, are today generally regarded as the preferred policymaker. Kenneth Culp Davis (1951: 33 n. 103) made the point with characteristic bluntness: 'Who can best determine what the law should be as to the maximum amount of poison spray on fruit – a judge. . .or the appropriate expert of the Department of Agriculture?'

One problem is that the appellate review model emerged during a time when agencies primarily engaged in adjudication and only rarely ventured into rulemaking. Agencies looked like the proverbial 'Article I court'. Today, the pattern is close to the reverse, as many of the characteristic modern agencies, like the EPA, the FCC, and FERC, do most of their business through rulemaking and rarely engage in adjudication. Agencies today look more like a 'junior-varsity Congress'.[30] In light of this evolution in roles, one could argue that the independent and impartial judiciary should be assigned the primary task of determining the facts – at least adjudicative facts that pertain to particular parties in enforcement actions – and that agencies should be assigned the task of developing legal principles through notice and comment rulemaking. Of course, the *Chevron* doctrine, if

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[30] *Mistretta v. United States*, 488 US 361, 427 (1989).

taken seriously, gets us at least part way to this result. But *Chevron* is a kind of patchwork solution jiggered on top of the appellate review model, and seems to be in constant war with the underlying premises of that model. The appellate review model tells courts to decide all questions of law independently, whereas *Chevron* interposes and instructs the courts to hold off if there is reason to think that Congress has given the legal issues to the agency to decide.

As a thought experiment, it is at least worth considering whether some other model for judicial review, such as the ultra vires or jurisdictional model, might have offered a superior architecture for allocating authority between American agencies and courts. Much nineteenth-century review, especially under the prerogative writs, adopted this premise. Courts would not review an agency decision like a judge supervising a jury, but would ask whether the agency was acting within the scope of its jurisdiction as authorized by law. This reinforced the principle of legislative supremacy, in the sense that the courts enforced the decisions of the legislature about the basic mandate and scope of authority of any agency created by statute. But oversight of individual decisions, including policy choices made within the scope of the agency's authority, was left to internal agency review mechanisms and the legislature.

To be sure, the ultra vires review model, like the appellate review model, can expand and contract to reflect judicial confidence about the need for intervention. Some early American courts following this mode of review, for example, held that a decision based on erroneous factual assumptions was beyond an agency's 'jurisdiction' (Dickinson 1927: 44–7, 309–13). And the British courts, in the late twentieth century, superadded review for procedural regularity and so-called *Wednesbury* review for reasonableness onto the basic model of ultra vires review, thereby reducing the distance between British and American courts in matters of administrative law.[31] The potential for expansion of judicial authority is inherent in any system that authorizes judicial review.

Different models, however, orient courts in different ways, and have a broad conditioning effect on the nature and direction of judicial review. An ultra vires model focuses the attention of the reviewing court on questions of boundary maintenance. The basic question is always whether the agency has remained within the zone of discretion given to it by the legislature (Merrill 2004b: 2171–5, Monaghan 1983: 25–34). The appellate review model invites courts to substitute their judgment for that of the agency on any matter that can be characterized as a question of 'law'. It is certainly plausible that the ultra vires approach would leave more 'policy space' for agencies than the appellate review model. As experience with agency government accumulates, powerful arguments can be made that, on the whole, this would have been a good thing.[32] If some Senator in 1906 had made an impassioned plea for amending the Interstate Commerce Act to incorporate an ultra vires standard of review, the American administrative state might look very different today, and regulatory policy might arguably be a good deal more coherent.

This, of course, is wistful conjecture. Today, the appellate review model is so deeply

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[31] *R. v. Hull University Visitor, ex parte Page* (1993) 682 AC 701.

[32] Although the initial reaction to *Chevron* deference by law professors tended to be skeptical, recent books on statutory interpretation that adopt a more systemic, consequentlist perspective are united in their endorsement of strong *Chevron*-style deference to agency interpretations of statutes, albeit for different reasons (Cross 2009, Elhauge 2008, Vermeule 2006).

entrenched in American political culture that it is impossible to imagine wrenching free from its influence. The best that can be expected is that courts, especially the Supreme Court, will continue to whittle away at the scope of judicial authority over questions of policy, leaving courts the function of policing the boundaries of administrative action. The dominating influence of the appellate review model has made it extremely difficult to arrive at this position. But having chosen that fork in the road, it is almost certainly impossible to go back and take another.

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24 The powers and duties of the French administrative judge

*Jean Massot**

To explain the specificity of the 'office of the administrative judge' in a country like France, it is necessary to look both to history and to geography. History allows us to understand how this Napoleonic creation, whose original aim was in no way the protection of the citizen against the administration (rather, it was the protection of the latter against interference by citizens and ordinary judicial courts),[1] progressively became both an extremely powerful judge and an institution at least as independent as its judicial counterparts. Geography helps to explain how specialized administrative courts have long since ceased to be a specifically French or even continental European institution (they exist, in some form, in Austria, Belgium, Germany, Italy, Luxembourg, and the Netherlands). One also finds similar judges in countries as various as the majority of francophone African states, Egypt, Lebanon, Turkey, Thailand, and Colombia, to name just a few.[2]

There must be a reason that an independent administrative judiciary on the French model exists in numerous democratic countries or in countries transitioning to democracy. In this chapter, I will try to show that it is precisely in the way the powers and duties of the administrative judge have developed that one finds a good deal of the justification for the institution's existence. On the level of mission (Section 1 below), I will show that the French system of administrative justice has all the powers needed to fulfill its role, but that its judicial duties are not quite like those of other courts. And on a more functional level (Section 2 below), I will show that the French administrative judiciary has never lost sight of its responsibilities, even as it has also understood how to develop its powers in new ways.

1. The mission of the administrative judge: independence in service of the general interest

1.1. Independence: the first duty and the basis of the administrative judge's powers

A court will never merit the confidence of litigants, so necessary in the administration of justice, unless the parties understand that the court issues its rulings in complete

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[1] The paralysis of the royal administration of the *ancien régime*, caused by the *Parlements* (which were, in fact, judicial bodies), is often considered one of the causes of the French Revolution and was a prime impetus for the French conception of separation of powers, in which the judicial courts lack jurisdiction over administrative acts of the State.

[2] At the ceremonies in 1999 celebrating the bicentennial of the founding of the French *Conseil d'Etat*, nearly fifty countries were represented.

independence. In the case of the French system of administrative justice, this requirement has given rise to a number of developments over time, some deeply historical, others more recent. As a consequence of these developments, it is less and less common to see challenges to the independence of the French administrative judge.

1.1.1. Development of the duty and its legal guarantees The oldest guarantees of the duty of independence concern the status and career of the French administrative judge. The system of administrative justice in France benefits from several guarantees that have insulated it from political pressure except perhaps during the most severe historical crises (like the Nazi occupation, the upheaval following the Liberation, or in the atmosphere of near civil war at the end of the Algerian War in 1962). One can cite in this regard rules governing competitive recruitment (the *concours*),[3] which precludes political authorities from influencing the power of selection of judges; rules mandating promotion by seniority as well as control by the administrative judges themselves of the nominations to the most important positions within the *Conseil d'Etat*; and, for the inferior administrative courts, promotion overseen by an independent body, the *Conseil supérieur des tribunaux administratifs et des cours administratives d'appel* (the High Council of Administrative Tribunals and Administrative Courts of Appeal).[4] The law also prohibits the reassignment of lower administrative judges and magistrates without their consent,[5] and their discipline is under the jurisdiction of the same High Council.

Among the traditional rules intended to protect independence in the French administrative justice system are those relating to collegial decision-making and the strict respect for the secrecy of deliberations. Admittedly, as to collegiality, there has been a recent trend toward allowing single judges to issue decisions in certain contexts, generally in the simplest cases. But the so-called *juge unique* can also act in more sensitive contexts where emergency procedures are invoked (a topic to which I return below), and the overall effect is to interfere somewhat with the normal requirement of collective decision-making. Fortunately, only the most experienced judges may serve as a *juge unique*.[6]

Independence and impartiality have long been qualities of French administrative justice. But recently there have been efforts to reinforce not merely the *reality* of these qualities, but also their *perception*. This effort has been in response to a concern often expressed by the European Court of Human Rights (ECtHR), drawing upon English

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[3] This is subject to the exception that, for certain superior ranks, the government has at its disposal a right of nomination (known as the *tour extérieur*), whose proportions are progressively limited and under conditions that are increasingly precise.

[4] This body is chaired by the Vice-President of the *Conseil d'Etat* (the de facto head of the CE), but the inferior judges themselves are well represented on it, with five out of the thirteen members. Moreover, together with these five, a majority of this body is drawn from the ranks of administrative judges themselves (in addition to the Vice-President of the CE, two additional councilors of state).

[5] Article L231-3 of the French Administrative Court Code (the *Code des juridictions administratives*, or CJA).

[6] For example, in the case of the *Conseil d'Etat*, the vast majority of single-judge rulings are rendered by presidents of judicial sub-sections; that is, among the highest-ranking members of the CE (councilors of state) with at least twenty years of experience as administrative judges.

law: 'Justice must not only be done, it must be seen to be done'.[7] There has been a long-standing tension between the ECtHR and various councils of state throughout Europe (for example, in Luxembourg, the Netherlands, and France) that has flowed from the dual role these bodies generally play as both legal advisors to their governments and judges of the legality of their governments' administrative acts. Insofar as France is concerned, a decree of March 6, 2008 largely resolved this tension by explicitly codifying existing custom as well as prior case law. Henceforth, members of the *Conseil d'Etat* may not participate in judging claims that challenge the legality of a text upon which they, as participants in one of the *Conseil d'Etat*'s administrative sections, previously 'took part in the deliberation of the advisory opinion (*avis*)' to the government on the same text. This decree has consequently led to the recomposition of certain judicial formations within the *Conseil d'Etat*. Fortunately, in a unanimous decision of June 30, 2009, the ECtHR ruled that if no member of the relevant judicial section of the *Conseil d'Etat* had previously participated in the deliberations on an *avis* on the legal text at issue in the case, 'the concerns [of the challenging party] as to the independence and impartiality of the judicial section . . . cannot be considered objectively justified'.[8] It goes without saying that, even without this ruling, the French *Conseil d'Etat* has always tried to ensure the respect of independence and impartiality by those courts which are subject to its oversight, either by 'appeal' or 'cassation'.[9]

1.1.2. The consequence of independence: the extensive powers of the French administrative judge This independence, long established in practice and more recently embodied in texts, has allowed the French administrative judge, over time, to develop its powers in more and more extensive terms. Indeed, as compared to its counterparts elsewhere in Europe, the French administrative judge has perhaps some of the broadest range of powers. The administrative judge in France not only has authority to hear actions for damages (so-called *plein contentieux*) but also actions seeking annulment of administrative acts as ultra vires (the *recours pour excès de pouvoir*), something that in other

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[7] This adage is usually traced to Lord Chief Justice Hewart in the *McCarthy* decision of 1924.

[8] *Union fédérale des Consommateurs Que Choisir de Côte d'Or v. France*, no. 39699/03, ECtHR (Fifth Section), June 30, 2009, available online (in French only) from http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/ (accessed January 14, 2010). It is interesting to note that the decision of the CE under challenge here had been issued long before the decree of March 6, 2008 came into effect, thus confirming that the CE respected the now-codified rule as a matter of custom and practice.

[9] The CE's jurisdiction on 'appeal' is roughly equivalent to what Americans would call 'de novo' review on all questions of fact and law, though in France this power is also limited to review of the determinations of a very limited number of specialized jurisdictions. More typical is the CE's 'cassation' jurisdiction, which applies more broadly and extends only to 'quashing' decisions below for errors of law. Hence, 'cassation' is more analogous to what Americans call 'appeal' (for example, in the sense described by Tom Merrill in Chapter 23 of this volume). Regardless of the scope of review, the CE's oversight of impartiality and independence has given rise to a very significant jurisprudence, less with regard to ordinary administrative tribunals (where challenges on this point are rare), than with specialized jurisdictions, particularly those responsible for discipline cases within the civil service and professional orders. See, for example, the *Didier* decision of December 3, 1999, reprinted in *Les Grands arrêts de la jurisprudence administrative* (ed. 2009) (hereafter 'GAJA 2009'), no. 104, p. 759.

European countries is often limited to certain categories of acts, whether to those of an exclusively individual or an exclusively regulatory character depending on the system. Moreover, in ruling on these various types of claims, the French administrative judge has at its disposal a broad range of remedial powers often not available to other European judges.

This authority is subject to three broad limits flowing from the hierarchy of norms. First, the French administrative judge is subject to the supremacy of legislation and therefore must yield to a so-called 'validation law' (*une loi de validation*) by which the Parliament renders retroactively legal what the administrative judge had previously held to be illegal. Second, in explicit cases of conflict, the *Conseil d'Etat* recognizes that the constitution necessarily prevails over treaties and acts of the European Union.[10] Finally, the *Conseil d'Etat* does not have authority to control the conformity of legislation with the constitution. But even this last limit, as a consequence of judicial innovation,[11] has lost a good deal of its force in the European integration context. Since 1989, the French administrative judge has followed the approach established a few years previously by the judicial courts, which permit the non-application of otherwise valid domestic legislation on the basis of its nonconformity with international agreements, most importantly the European Convention on Human Rights (ECHR) and the EU treaties, whose provisions often include demands of a constitutional nature.[12] A constitutional amendment of July 23, 2008, will authorize a further curtailing of these limits, once the necessary implementing legislation is brought into effect.[13] This legislation will permit lower judicial and administrative courts to make, in effect, preliminary determinations regarding the possible nonconformity of legislation with the constitution. If a litigant raises such a question, the lower court may disregard the challenge if the court finds that it is not of a sufficiently serious character. If the court concludes, however, that the question is indeed serious, the legislation will require the lower court to refer the matter to one of France's two supreme courts (the *Conseil d'Etat* for the administrative courts, and the *Cour de cassation* for the judicial courts). If one of these supreme courts, once again exercising a filtering function, also finds that the question is serious, then it will refer the matter to the *Conseil constitutionnel*.

1.2. Safeguarding the general interest: the specific duty of the French administrative judge

To understand the responsibility of the administrative judge with regard to the general interest, it is good to recall here a celebrated passage from one of the seminal rulings in French administrative jurisprudence: the *Blanco* decision of *Tribunal des conflits*, issued

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[10] See the decision of the highest judicial formation in the CE, the *Assemblée du contentieux* (Ass.), Octobre 30, 1998, *Sarran, Levacher et autres* (GAJA 2009), no. 102, p. 738. The scope of this jurisprudence was recently limited in the context of European integration in CE Ass., February 8, 2007, *Sté Arcelor atlantique* (GAJA 2009), no. 116, p. 892.

[11] CE Ass., October 20, 1989, *Nicolo* (GAJA 2009), no. 93 p. 656.

[12] This permits, for example, the disregard of validation laws that the CE judges are insufficiently of a general interest character.

[13] It was indeed on March 1, 2010 and in mid-June 2010 that the *Conseil constitutionnel* had already given eight decisions on a question *prioritaire de constitutionnalité*.

February 8, 1873.[14] 'The State's responsibility is neither general nor absolute; it has its special rules that vary according to the service [that the State is providing to the public] and the need to reconcile the State's rights with the rights of individuals.'

It would take a complete course in French administrative law to describe how the administrative judge, by way of judicial decision and in the absence of precise texts limiting its creative powers, has constructed a body of rules that seeks to strike a proper balance between the rights of the administration and individual rights. I will only mention a few doctrines that have emerged out of this jurisprudential construct. In the first place, of course, there is the doctrine of *service public* ('public service'). This seeks to protect the rights of *puissance publique* ('public authority') by affirming the principle of 'continuity' while also protecting private rights through the principles of 'equality' and 'neutrality' of public services. From this doctrine others have developed that reflect a similar concern for reconciliation and balance. One example is the doctrine of 'public markets', which holds that the administration may unilaterally modify public contracts, subject to protections for private contractors on the basis of unforeseeability, competition law,[15] and above all legal certainty (a topic to which I will return below). We could also illustrate the point by referring to the doctrine of public property or that of civil service (*la fonction publique*), the latter with the now famous distinction between the wrongs of the public service generally (*une faute de service*) and wrongs of an individual member of the service committed under color of law (*une faute personelle*). This distinction found a particularly vivid illustration in the *Papon* decision of the *Assemblée du contentieux* (the highest judicial formation in the French *Conseil d'Etat*) issued on April 12, 2002.[16] One could also point to the notion of administrative liability flowing from the *Blanco* decision of 1873, which has recently seen a spectacular development as a consequence of the recognition of State liability for simple negligence in cases involving certain kinds of judicial malfeasance.[17]

This creative power (or duty?) of the administrative judge does not consist solely in unilaterally protecting the administration, but also in reconciling the general interest with the interests of individuals. By way of evidence, one could usefully recall the administrative judge's development of so-called 'general principles of law' as an additional basis for controlling the legality of administrative acts. These principles are a strong illustration of the ambition of the French administrative judge to protect private interests while also respecting the general interest. For example, the manner in which the administrative judge applies the principle of equality, or how the court permits derogations from that

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[14] TC, February 8, 1873, *Blanco* (GAJA 2009), no. 1, p. 1. The *Tribunal des conflits* is composed of an equal number of members from the CE and the *Cour de cassation* and is charged with protecting the particular character and jurisdiction of the administrative judge.

[15] Regarding the role of competition law in public markets, see the decision of the second highest judicial formation of the CE, the *Section du contentieux* (Sect.), November 3, 1997, *Sté Million et Marais* (GAJA 2009), no. 101: 727; see also CE Ass., July 16, 2007, *Sté Tropic travaux signalisation* (GAJA 2009), no. 117: 908.

[16] This decision held that, by participating in the deportation of Jews during the German occupation, the defendant, an eminent civil servant, committed a *faute personnelle* that built on a *faute de service* (GAJA 2009), no. 111: 837 .

[17] These cases generally involve claims of excessive delay, a question to which I will return below. See, for example, CE, February 27, 2004, *Mme Popin* (GAJA 2009), no. 113: 858.

principle only for reasons of the general interest, would itself merit an extensive discussion.[18] It is precisely here that one finds perhaps the best justification for the existence of a specialized administrative jurisdiction, though it is not possible, within the confines of this brief chapter, to spell out the reasons in greater detail. Rather, let me now turn more specifically to the functioning of administrative justice in France, which will allow us to better understand the continuing, symbiotic relationship between the powers and duties of the French administrative judge.

2. The operation of the administrative courts: affirming new duties through the extension of powers

2.1. Classical duties and powers

I will pass quickly over the most classical duty belonging to any judge, the French administrative judge included, namely the obligation to fully address the arguments of the parties before the court, with firmly supported reasoning, respecting the adversarial principle. Rather, allow me to address three further questions: How easy is it for claimants to gain access to administrative justice in France? Should the administrative judge confine him or herself only to the arguments raised by the parties? And must the court respond to all arguments when only one need be addressed in order to dispose of the case?

2.1.1. Access to justice Access to administrative justice in France manifests itself above all in the reasonably flexible conditions for admissibility ('justiciability' in American parlance), as well as in the relatively low costs to the parties to maintain an action. We need not dwell in detail on the conditions for admissibility. Beyond respecting certain relatively strict time periods and certain somewhat more flexible formal requirements whose evolution is not of great import, broad access to justice is generally reflected in the progressive liberalization of the law of standing (*intérêt à agir*). Once again, this entails a purely judicial construction. The majority of leading decisions date from the beginning of the twentieth century. They recognize, for example, taxpayer standing against local acts as well as the standing of users of public services and that of trade unions. They exclude, however, taxpayer standing against national acts, as well as the standing of civil servants challenging organizational measures that do not injure one of their legal prerogatives. In effect, the administrative judge has sought to prevent the transformation of the *recours pour excès de pouvoir* into what the ancient Romans called the *actio popularis*.

Accessibility is further reinforced by the right of claimants to bring many actions without retaining a lawyer (at least in the jurisdiction of first instance) or, for meritorious claimants, for bringing actions without incurring any court costs. On the other hand, to avoid the risk of overwhelming the docket of the *Conseil d'Etat*, and in the interest of the 'sound administration of justice', the supreme administrative jurisdiction requires representation of counsel when it is serving in its capacity as the judge of errors of law (*juge de cassation*) – that is, only after two lower levels of review have been exhausted. It is a

[18] Normally one traces the recognition of the general principles of law to the decision of the CE of March 9, 1951, *Sté des concerts du conservatoire* (GAJA 2009), no. 65: 413, which focuses primarily on the principle of equality.

historical particularity of French justice that a limited, specialized bar of supreme court litigators (*avocats aux conseils*) has the exclusive right to represent clients before the *Conseil d'Etat* and the *Cour de cassation*.[19] As for costs, the law requires that the judge always impose them on a losing administrative body but then gives the judge discretion not to impose them on a good faith plaintiff who nevertheless did not prevail in its claim.

2.1.2. Consideration of the grounds raised (or not raised) by the parties Of course, the adversarial principle requires that the grounds raised by a party be communicated to the opposing party and that a reasonable time be allowed for response. More delicate, however, is the question of whether the judge may raise issues of its own motion, in effect coming to the aid of the parties. In French law, these are called grounds raised ex officio (*moyens soulevés d'office*) or more often grounds of public policy (*moyens d'ordre public*). These grounds implicate issues of such great importance that the court, by failing to take them into account, would itself undermine the rule of law, which it is of course the judge's primary mission to uphold.

The doctrine of *moyens d'ordre public* is old and well-settled. First, it requires that the judge consider all possible admissibility arguments even if the defendant administrative body has failed to raise the particular issue. Second, the doctrine requires the court to consider all possible arguments regarding the lack of legal authority (*l'incompétence*) of the administrative body. Finally, it requires the court to determine for itself the scope of any pertinent legislation, whose misinterpretation might lead the judge to apply a legal text that is in fact inapplicable.[20] However, since a decree of January 22, 1992, the judge must, out of respect for the adversarial principle, communicate to the parties any argument that it raises of its own motion.

2.1.3. Decisional economy Traditionally, the French administrative judge has practiced what is called *l'économie de moyens*, or 'decisional economy'. That is, if the court determines that one ground is sufficient to decide the case, even a ground raised of its own motion, then it need not reach the other grounds raised by the parties. In addition, the administrative judge combines this practice with a standard approach to considering the legal issues raised in the complaint: first any claims of *incompétence*, then any assertions of formal or procedural invalidity (*vice de forme*), and finally any substantive grounds warranting reversal. That said, the court remains free to choose the grounds it regards as dispositive of the case and can rule on the substance without pronouncing on the admissibility of the complaint, the legal authority of the administrative actor, or its respect for formal or procedural requirements. The only thing prohibited to the court is the misinterpretation of its own jurisdiction in the matter.

From all this often results such a brief decision that, although it meets the minimum requirements for reason-giving, often leaves the parties unsatisfied. The recent trend has in fact been toward more didactic decisions that rule in depth and explain in a very

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[19] In this regard, see the decisions, CE, December 21, 2001, *M. et Mme Hofmann*, and CE, December 17, 2003, *Meyet et autres*.

[20] There is, however, disagreement between the CE and the *Cour de cassation* as to whether the judge must raise of its own motion the noncomformity of domestic law with EU law. The CE says no, the *Cour de cassation* says yes.

thorough fashion the appropriate conduct of the administration, thus breaking with the tradition of '*imperiatoria brevitas*'.[21]

2.2. New duties and powers

2.2.1. Rulings within reasonable time periods French administrative justice has long been fairly accused of excessive delays in issuing its rulings. This practice is increasingly untenable, particularly given the increasingly severe demands imposed by the ECtHR in Strasbourg as to the interpretation of the requirements of Article 6(1) of the European Convention of Human Rights.[22] France, like other European states, has found itself regularly condemned under Article 6(1) for excessive delays, not just in administrative justice but also in the ordinary judicial courts.[23] In addition, in a decision of June 22, 2002, *Minister of Justice v. Magiera*, the *Conseil d'Etat* has itself taken the initiative to create a new cause of action for State liability based in simple negligence for excessive judicial delay, whereas the normal basis for liability in the context of judicial malfeasance is gross negligence.[24] Indeed, the second highest judicial formation of the *Conseil d'Etat*, the *Section du contentieux*, recently extended this jurisprudence to a case where the victim of excessive delay[25] was a local government and not a private government contractor.[26] However, to prevent this new cause of action from itself precipitating excessive delays, a decree of July 28, 2005 gave the *Conseil d'Etat* original jurisdiction to hear liability claims arising from the conduct of the inferior administrative courts.

Numerous reforms have been adopted to address the slow pace of administrative justice in France. The first and most important was the 1987 legislation establishing the intermediate Administrative Courts of Appeal (the *Cours administratives d'appel*, CAA) between the Administrative Tribunals (the *Tribunaux administratifs*, TA) and the *Conseil d'Etat*. (As of this writing, we were celebrating the twentieth anniversary of CAA's entry into operation in 1989.) The 1987 legislation also permitted the *Conseil d'Etat*, in its supreme court role, to avoid getting itself enmeshed in the merits of each and every petition for review by giving the high court the power to select only those matters that raise significant questions of law. This filtering function is important because it breaks from the traditional obligation of the *Conseil d'Etat* to fully examine all issues brought before it by the parties.[27] This new filtering function brings the French practice closer to that of

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[21] In this regard, compare the length of the major decisions reported in GAJA (2009), often cited in this chapter. The early ones at the beginning of the volume are generally only a half-page, those toward the end generally reach three pages.

[22] Article 6(1) provides in pertinent part: 'everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law' (emphasis added).

[23] For an example involving French administrative justice, see the judgment of the ECtHR (Third Section), November 9, 2006, *Sacilor Lormines*, no. 65411/01, available online (in English) at http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/ (accessed January 15, 2010).

[24] Another exception is in the context of a violation of EU law. See CE, June 18, 2008, *Gestas*.

[25] More than eleven years, including all levels of jurisdiction, in a matter that was admittedly very complex.

[26] CE Sect., July 17, 2009, *Ville de Brest*.

[27] In practice, this new approach allows the CE to eliminate, as soon as they are filed, nearly half of the petitions for review because they do not raise serious questions of law.

other national supreme courts, which often allow even more rigorous triage of the petitions heard on the merits.[28] However, to the extent that remanding a case to the CAA might itself raise too great a risk of delay, the 1987 law also wisely allows the *Conseil d'Etat* to proceed directly to final judgment, disposing of all aspects of the matter 'if the sound administration of justice justifies it'.

A second line of reform has involved creating more judicial formations composed of ever fewer judges, reserving only the most delicate matters for the traditionally larger formations within the various administrative courts. Within the *Conseil d'Etat* itself, for example, of the 10,000 cases before it in 2008, the high court disposed of half by an order of a *juge unique*, just over a third by smaller colleges of three judges, leaving only the remainder to be handled by the larger formations (primarily nine-judge panels taken from two of the ten judicial subsections, as well as the larger *Section du contentieux* and the *Assemblée du contentieux* for the most sensitive and important matters). When I joined the *Conseil d'Etat* some forty-five years ago, in fact, the nine-judge panels handled nearly all the cases, four times less numerous than today.

Finally, from the perspective of speed, surely the most important change has been legislation adopted June 30, 2000, largely at the urging of the *Conseil d'Etat* itself, which created emergency procedures truly worthy of the name. On the one hand, this legislation permits the administrative judge to suspend the execution of a challenged administrative decision upon an emergency application where there is serious doubt about the measure's legality. On the other hand, this law allows the court to prescribe emergency measures enjoining grave and manifestly illegal violations of a fundamental liberty. An example of the first category (the *référé suspension*) is the ruling of February 15, 2006 preventing the decommissioned aircraft carrier *Clemenceau* from leaving the French port for asbestos removal in India; this proceeding took less than three weeks. Examples of the second category (the *référé liberté*) are particularly numerous in the context of immigration and asylum litigation.[29]

By 2008, with delays in France generally reduced to one year for each level of review, the administrative justice system could be said to have broadly satisfied the requirement of issuing its rulings within a reasonable time period. The situation is slightly less satisfactory if one focuses exclusively on so-called 'ordinary' administrative cases, that is, those not handled by an order of a *juge unique*. In those contexts, delays can still reach as much as eighteen months in the *Conseil d'Etat*, sixteen months in the CAAs, and twenty-six months in the TAs.

2.2.2. Moderating the effects of rulings in the interest of legal certainty Increasing attention to concerns over legal certainty have prompted the French administrative judge to change two traditional principles: first, the retroactive effect of an annulment of administrative acts under the *recours pour excès de pouvoir*; and second, the immediate application, in other pending disputes, of newly announced judicial rules that constitute a change in the law.

As to retroactivity, the key development was the decision of the *Assemblée du*

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[28] The prime example, of course, is the United States Supreme Court.

[29] See the commentary following the decisions CE. Sect., January 18, 2001, *Commune de Venelles*, and CE, March 5, 2001, *Saez* (GAJA 2009), no. 107: 786.

contentieux of May 11, 2004, in *Association AC! et autres*.[30] The principle of retroactive effect in an annulment action is itself rooted in judicial decision. The challenged act, once nullified, is understood never to have existed, with the consequence being that any actions taken pursuant to the invalidated act also become illegal. It has long been recognized, however, that this retroactivity could have devastating effects. For example, it might render illegal, sometimes three to five years later, a cascade of regulatory measures including those relating to the collection of taxes. Or it might nullify an individual decision that had long previously taken force, like the selection of a civil servant for a new position. It is retroactive effect, incidentally, that has given rise to the practice of so-called 'validation laws'. To address these concerns, the *Conseil d'Etat* drew inspiration from the approach of the European Court of Justice in its application of provisions of the Treaty of Rome,[31] which allow the ECJ to limit the retroactive effects of its declarations of annulment, as well as from similar approaches in Germany, Austria, and Italy. Consequently, since the decision of 2004, the *Conseil d'Etat* has recognized that it has the power, even without a textual basis, to moderate the effects of an annulment through a balancing of interests, whether of the administration or of private parties.[32]

As to the application of new judicial rules in pending litigation, the key development was the recent decision of the *Assemblée du contentieux* of July 16, 2007, in *Sté Tropic travaux signalisation*.[33] Prior to this decision, where there was a change in the case law, the new rule announced by the judge would apply immediately. This meant that it would also apply in any pending litigation, thus potentially taking by surprise the parties who had never contemplated the possibility of this modification in the state of the law. Henceforth, 'having due regard for the imperative of legal certainty', the administrative judge,[34] notably to avoid excessive interference with existing contractual relations, will be able to decide that a newly announced rule will apply to past contracts only prospectively.

Conclusion

Old age does not always make innovation impossible. This is what I hoped to show with this brief overview, not with regard to my own advanced age, but rather with regard to that of the institution which I have had the honor of serving for over forty years and which is itself over two hundred years old. Guided by an often slight legislative and regulatory framework, judges on the *Conseil d'Etat*, and later those on the other French administrative jurisdictions, have been continuously attentive to the emergence of new duties and the need to develop new powers in response. The ever increasing number of filed cases – in 2008, 170,000 in the thirty metropolitan TAs,[35] 28,000 for the eight CAAs, and 10,000 for the *Conseil d'Etat* – show that the confidence of litigants persists

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30 CE Ass., May 11, 2004, *Association AC! et autres* (GAJA 2009), no. 114: 865.

31 Ex Article 174, which became Article 231 of the EC Treaty (and is now Article 264 TFEU).

32 For example, a decision of March 3, 2009 delayed until September 1 the effects of an annulment for *vice de forme* of a regulatory text requiring that public transportation vehicles be made accessible to the handicapped. The purpose was to not render illegal the measures that had already been taken in the course of implementing this text.

33 CE Ass., July 16, 2007, *Sté Tropic travaux signalisation* (GAJA 2009), no. 117: 908.

34 The *Cour de cassation* had similarly ruled a year earlier. See Ass. Plén., December 21, 2006.

35 There are also ten TAs in French overseas territories, but they receive only 6,000 cases.

unabated, something which the increasing and often successful use of emergency procedures also confirms.[36]

References

GAJA. 2009. *Les grands arrêts de la jurisprudence administrative*, 17th edition, Marceau Long, Prosper Weil, Guy Braibant, Pierre Delvolvé, and Bruno Genevois, eds., Paris: Dalloz.

[36] In 2008, the TAs and the CE have rendered more than 12,000 and nearly 700 emergency orders (*ordonnances de référé*) respectively.

25 Judicial review and merits review: comparing administrative adjudication by courts and tribunals

Peter Cane

1. Introduction

Administrative adjudication is a mechanism for resolving disputes between citizens[1] and the government that arise from decisions of officials and agencies. There are two main modes of administrative adjudication: judicial review and (adopting the Australian term) merits review. Judicial review, as its name implies, is conducted by traditional courts. Merits review is conducted by bodies that are commonly referred to – in the common law world outside the US, anyway – as administrative 'tribunals'. The term 'tribunal' is used in various senses; but for present purposes, it suffices to define a tribunal as an adjudicatory body that is not a court. In the US, the equivalent institution is the independent or executive agency and, in particular, officials within agencies whose allotted task is adjudication in the sense in which that term is used in the Administrative Procedure Act 1946 (APA). Such officials are known as administrative law judges (ALJs) and administrative judges (AJs) – the former, unlike the latter, being appointed under the APA. For convenience, I will often use the term 'tribunal' to refer to such officials as well.

Whereas the term 'judicial review' expressly refers to the institution that conducts the review, the term 'merits review', by contrast, refers to the basis of review. However, the former also implicitly refers to the grounds of review that define its basis; and the grounds of review are the primary concern of this chapter. In other words, this chapter discusses the juridical nature of judicial review and merits review, respectively. My analysis is comparative in two dimensions: first, it compares the two modes of review, and secondly, it compares the two modes of review in three jurisdictions – the US, the UK and Australia.

The jurisdictional comparison pivots on Australia for two reasons. First, understanding administrative adjudication requires an analysis of its constitutional foundations; and Australian federal constitutional law is a complex amalgam of British and American elements. Secondly, the concept of 'merits review' – in the sense of administrative adjudication conducted by non-courts ('non-judicial review' we might say) – has a complex and highly developed technical meaning in Australian law that it lacks in the law of either the US or the UK. As a result, we can gain a much more sophisticated understanding of the juridical nature of non-judicial review by analysing Australian law than by studying the law of either the US or the UK.[2] Although the analysis in this chapter proceeds by

[1] Or, as often in the case of immigration disputes, non-citizens.

[2] The most comprehensive account of merits review in Australia is Pearce (2007). The research on which this chapter is based was generously funded by the Australian Research Council. It draws on material in Cane (2009).

way of a comparison between judicial review and non-judicial (merits) review, its main aim is to elucidate the juridical nature of non-judicial review.

Outside Australia, there is surprisingly little literature about the nature of non-judicial review. Administrative lawyers in all three of our comparator jurisdictions tend to focus on judicial review and to marginalize tribunals and merits review. Discussion of tribunals tends to be concerned primarily with issues such as procedure and independence. It is generally acknowledged that tribunals are of great practical significance, if only because they resolve many more disputes between citizen and government than do courts; but they are rarely considered to be of much theoretical interest. This is partly because of the high status and the constitutional significance of courts; and partly because of the fact that in the US and the UK tribunals are commonly (but often unthinkingly) thought to perform a function essentially similar to that of courts. In Australia, by contrast, tribunals are understood to be essentially different institutions from courts and to perform an essentially different function than courts. However – as we will see – in Australian law, there are significant similarities between the two modes of administrative adjudication; and in US and UK law, there are significant differences between them. Exploring such similarities and difference is a major aim of this chapter.

The remainder of the chapter is divided into four sections. Section 2 examines the development and meaning of the Australian concept of merits review. Sections 3 and 4 deal with the UK and the US respectively, and section 5 draws together the discussion in the previous three sections and suggests that the characteristic function of tribunals in all three of our comparator jurisdictions is intense review of bureaucratic fact-finding.

2. Australia

2.1. The development of merits review

Like much else, Australia borrowed the basic model of the administrative tribunal from England. The model administrative tribunal is a free-standing adjudicatory body that reviews decisions made by the executive branch of government that adversely affect citizens. Unlike the English constitution, however, the Constitution of the Commonwealth of Australia (the federal level of government) is contained in a single document and embodies, like the US Constitution, a formal separation of powers: Chapter I deals with the legislature, Chapter II with the executive and Chapter III with the judiciary. However, the Constitution also establishes a system of responsible government in which ministers of state are required to be members of parliament (s 64); and for historical and pragmatic reasons, the High Court of Australia has held that delegation of legislative power to the executive is consistent with the Constitution.[3] However, the Court has also held that the Constitution requires a rather strict separation of judicial power. The 'dominant principle of demarcation'[4] is that only Chapter III courts can exercise judicial power, and that Chapter III courts cannot perform non-judicial functions except those that are incidental to the exercise of judicial power.[5]

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[3] *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

[4] *New South Wales v The Commonwealth* (the '*Wheat* case') (1915) 20 CLR 54, 90 (Isaacs J).

[5] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; affirmed on appeal

In a series of cases in the 1920s – commonly called 'the taxation cases'[6] – the High Court (and the English Privy Council on appeal from the High Court) confronted challenges to the constitutionality of the system for adjudicating disputes between taxpayers and the tax authorities. Taxpayers originally had the choice of challenging determinations of the Commissioner of Taxation either in a Chapter III court or before a Taxation Board of Appeal, which was not a Chapter III court. The High Court held that various features of this arrangement involved unconstitutional conferment of judicial power on the Board of Appeal. The relevant legislation was subsequently amended to replace the Board of Appeal with a Board of Review. In reviewing determinations of the Commissioner, the new Board was said to have 'all the powers and functions' of the Commissioner, and a decision of the Board was deemed to be a decision of the Commissioner. Partly on this basis, it was held by both the High Court and the Privy Council that in adjudicating disputes between taxpayers and the Commissioner, the Board of Review was exercising non-judicial power with which, being a non-judicial body, it was validly invested.

The taxation cases cleared the way for the use of non-judicial tribunals to adjudicate disputes between citizens and the government. As acknowledged by Isaacs J who was, ironically, the chief architect of the dominant principle of demarcation,[7] the rapid growth of government involvement in economic and social life in the early twentieth century (coupled with an unwillingness to swell the ranks of the Chapter III judiciary by creating new courts) made recognition of the constitutionality of arrangements for non-judicial administrative adjudication a practical necessity.[8]

The decisions in the taxation cases were based on the principle that judicial functions cannot be conferred on non-judicial bodies. The corollary (and more controversial) principle, that non-judicial functions cannot be conferred on judicial bodies unless incidental to the exercise of judicial power, was not established until 1957.[9] The latter principle underpinned reasoning central to the 1971 Report of the Commonwealth Administrative Review Committee (the 'Kerr Committee'). The Committee was established primarily to consider a proposal for a new federal court to review 'administrative decisions'. Its recommendations led to the creation of the Federal Court of Australia in 1976 and the enactment of the Administrative Decisions (Judicial Review) Act 1976, which created a statutory regime of judicial review alongside the existing common law regime. However, the Committee also concluded that because judicial review was concerned only with the 'legality' of administrative decisions, it needed to be supplemented by provisions for review of decisions 'on the merits'. In the Committee's opinion, reviewing the merits of administrative decisions (as opposed to their legality) would typically involve the exercise of non-judicial power. It followed that the function of merits review could not be

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by the Privy Council: *Attorney-General (Commonwealth) v R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529.

[6] *British Imperial Oil Co Ltd v Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153; *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530.

[7] See n 4 above.

[8] See particularly Isaacs J's judgment in *Federal Commissioner of Taxation v Munro*.

[9] See n 5 above.

conferred on a judicial body. The Committee therefore recommended the creation of a (non-judicial) general administrative appeals tribunal, which would have the power to review the merits of a wide range of administrative decisions. Although the Committee did not explicitly recognize the fact, it had invented a new adjudicatory function – merits review – which, being a non-judicial function, was to be understood as categorically different from judicial review, a judicial function.

The model adopted for the proposed general tribunal – which was eventually named the Administrative Appeals Tribunal (AAT) – was the Taxation Board of Review, approved by the High Court and the Privy Council 50 years earlier. On review, the AAT has the power to affirm or vary a decision or to set it aside. If it sets aside a decision, the AAT can either make a substitute decision or remit it to the decision-maker for reconsideration (Administrative Appeals Tribunal Act 1975 (Cth) ('AAT Act'), s 43). The AAT 'may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision'; and when the AAT varies a decision or makes a substitute decision, its decision is deemed to be the decision of the original decision-maker. Out of these sparse provisions the AAT and the Federal Court have developed a complex concept of merits review that describes the main function of the AAT and other federal administrative tribunals that operate in areas such as social security and immigration. The AAT exercises a mix of first-tier and second-tier merits review jurisdiction. The former involves reviewing decisions of bureaucrats and the latter involves reviewing (on their merits) decisions of first-tier (merits review) tribunals (such as social security appeal tribunals but not, notably, immigration tribunals). Decisions of the AAT can be appealed to the Federal Court on a point of law, and the AAT is subject, in theory at least, to judicial review by the Federal Court.

2.2. The concept of merits review

The concept of merits review has three elements, which might loosely be called substantive, procedural and remedial. Substantively, the role of the merits reviewer is to ensure that the 'correct or preferable' decision is made.[10] The review process is colloquially captured in the idea that the merits reviewer 'stands in the shoes of the primary decision-maker'. The remedial element concerns the powers of the merits reviewer when it reviews a decision.

2.2.1. The substantive element of merits review Although the Kerr Committee invented the concept of merits review, it said very little about its nature beyond contrasting review on the merits with legality-based review. Similarly, the AAT Act contains no indication of the criteria according to which the AAT should exercise its various remedial powers. The 'correct or preferable' standard of merits review – which is a judicial invention – refers, in abstract terms, to norms of good decision-making. Departure from these norms triggers the remedial jurisdiction of the AAT and their application underpins exercise by the AAT of its various remedial powers, and in particular the powers to vary a decision and to make a substitute decision. 'Correct' in this formula refers to situations in which

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[10] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68 (Bowen CJ and Deane J).

the reviewer considers that there is only one acceptable decision; and 'preferable' refers to situations where it considers that there is more than one acceptable decision.

In an early decision, the first President of the AAT (Brennan J) said that '[t]here is no dichotomy between the administrative standards upon which the Tribunal must insist. . . and the principles of law which are applied by a court: administrative action which exceeds the power conferred is not only ineffective in point of law, but it constitutes unacceptable administrative conduct'.[11] A merits reviewer may intervene if it considers that the primary decision was not the correct or preferable one as a result of procedural unfairness, or of some defect of reasoning – such as taking account of an irrelevant consideration or exercising a power for an improper purpose, or because the decision-maker made an error of law or fact, or because the decision was unreasonable. Because in Australian law these are all grounds of judicial review as well as triggers for the exercise of the remedial powers of a merits reviewer, the question that inevitably arises is whether there are any substantive differences between judicial review and merits review. Three issues deserve attention: review of government policy, review for error of law and review for error of fact.

2.2.1.1. POLICY REVIEW In this context, policies are non-statutory decision-making norms. In Australian judicial review law, a decision may be illegal if it is based on a policy that is inconsistent with a rule of law, or on application of a policy without proper regard to the facts of the particular case,[12] or on refusal to apply an announced policy without good reason.[13] A decision may also be held illegal if it is based on a policy that the court considers to be 'so unreasonable that no reasonable decision-maker could apply it'. This is known as '*Wednesbury* unreasonableness', and it sets a very high threshold for judicial intervention. In Australian merits review law, it is clear that such defects may justify the conclusion that a decision is not the correct or preferable one. The more difficult question is whether a merits reviewer may intervene when, in the opinion of the reviewer, the policy, although not *Wednesbury*-unreasonable, is nevertheless not the preferable one. In other words, how free is a merits reviewer to depart from government policy in deciding whether a decision is correct or preferable? The doctrine of the separation of judicial power is taken to permit courts to reject government policy only in extreme cases. However, merits reviewers exercise non-judicial power, and this fact could arguably support greater freedom to judge the merits of government policy.

Brennan J addressed such issues in one of the Tribunal's earliest decisions. The AAT's powers, he said, are wide enough to 'permit the sterilization or amendment of policy. . .in point of law, the Tribunal is as free as the Minister to apply or not to apply policy. . .[it] is at liberty to adopt whatever policy it chooses, or no policy at all'.[14] On the other hand, Brennan J said, the Tribunal is essentially a 'curial', not an 'administrative' body,[15] and its basic responsibility is to apply policy, not make it. 'The detachment which is desir-

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[11] *Re Brian Lawlor Automotive and Collector of Customs* (1978) 1 ALD 167, 177.

[12] Policies, lacking the force of law, must be applied flexibly.

[13] At least, without giving the affected person a chance to argue for the application of the policy.

[14] *Re Drake and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634, 642.

[15] Ibid, 643.

able for adjudication', he added, 'is not in sympathy with the purposiveness of policy formation'.[16] In other words, although merits review tribunals are non-judicial bodies, their function is basically adjudicatory. Therefore, it is inappropriate for a tribunal to pronounce upon the merits of a policy itself as opposed to an application of the policy in an individual case. In practice, Australian merits reviewers are no more willing than courts to question government policy. Indeed, in some of the Australian states, statutory provisions limit the freedom of merits reviewers to depart from government policy.

2.2.1.2. ERROR OF LAW In Australian law, 'merits review' has become a highly technical concept. However, there is also a less formal and more basic sense in which the 'merits' of a decision are contrasted with its 'legality'. Legality is the province of judicial review; the merits (in this less formal sense) are the province of merits review. Theoretically, a decision that is lawful and, as a result, immune from judicial review, may nevertheless not be the correct or preferable one. In that case, a merits reviewer may vary the decision or make a substitute decision. Conversely, it might seem to follow that if a decision is unlawful, the question of whether it is the correct or preferable one would never arise: if a decision is illegal, whether it is good or bad is of no concern. So does a merits reviewer have jurisdiction to review a purportedly illegal decision and to set it aside on the ground that it is contrary to law (regardless of its merits)? This was one of the first questions that the AAT was required to answer; and the Tribunal's decision[17] established that although merits reviewers can review administrative decisions 'on the merits', this is not all they can do: they can also decide questions of law.[18]

More generally, the AAT's decision established that judicial review and merits review are, in their substantive dimension, overlapping rather than mutually exclusive functions. Merits review is enhanced judicial review in the sense that departure from the norms of good decision-making, which can render a decision illegal, can also prevent it being the correct or preferable decision. Of course, it does not follow from the fact that a decision is lawful that it is also the correct or preferable decision.

2.2.1.3. ERROR OF FACT This distinction between judicial and merits review is best illustrated in the case of errors of fact that result from giving too little or too much weight to the available evidence. In general, in Australian law, such errors do not provide a ground for judicial review, whereas failure to give appropriate weight to the evidence is an important and common justification for holdings by merits reviewers that a decision was not the correct or preferable one. Indeed, one of the reasons why courts are relatively unwilling to review fact-finding by administrators is precisely that doing so is a prime function of merits review tribunals.[19] Moreover, when the courts review decisions on

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[16] Ibid.

[17] *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167; affirmed *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1; reaffirmed *Secretary, Department of Social Security v Alvaro* (1994) 34 ALD 72.

[18] However, merits review tribunals cannot answer questions of law 'conclusively', this being a judicial function. The exact meaning of this term is unclear, but its practical effect is that statements of law by merits review tribunals are a form of soft law.

[19] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 340.

questions of fact, the tests used to determine whether the decision is lawful tend to leave the decision-maker considerable discretion and to justify holdings of illegality only in extreme cases. By contrast, the 'correct or preferable' formula of merits review gives the reviewer much more freedom to reassess the evidence and its weight. We saw above that merits reviewers appear just as unwilling as courts to review bureaucratic policy-making. By contrast, review of bureaucratic fact-finding is understood to be their core business.

To summarize, it is in the area of review of fact-finding that merits review differs most from judicial review and involves much greater external scrutiny of bureaucratic decision-making.

2.2.2. The procedural element of merits review Central to the concept of merits review is the idea that the reviewer 'stands in the shoes of the primary decision-maker'.[20] This colloquialism paraphrases statutory provisions that allow the reviewer to exercise (any and all of) the powers and discretions vested in the primary decision-maker and that deem the reviewer's decision – when the reviewer varies the primary decision or makes a substitute decision – to be the decision of the primary decision-maker. These provisions mark a fundamental difference between merits review and judicial review. Whereas the main function of judicial review is to examine the decision for defects and to invalidate the decision if it is defective, the main function of merits review is to bring about the correct or preferable decision. Like the judicial reviewer, the merits reviewer may do this by affirming the original decision or remitting it to the primary decision-maker for reconsideration. But very commonly (indeed, typically), the merits reviewer will achieve the required outcome by doing something that judicial reviewers typically have no power to do – namely varying the original decision or making a new decision in substitution for it. In doing so, the reviewer may exercise any relevant power available to the primary decision-maker whether or not the latter purported to exercise that power in making the original decision.

Nevertheless, despite its beguiling simplicity, the idea that the reviewer stands in the shoes of the primary decision-maker is complex and problematic. For one thing, when a merits reviewer affirms the primary decision or sets it aside and remits it to the primary decision-maker for reconsideration, the reviewer exercises a power of its own, not a power of the original decision-maker. More significantly, a tribunal typically has much more time and many more resources to devote to reviewing the decision than bureaucrats can typically devote to individual cases. Moreover, merits review is conducted not on the basis of the relevant facts as they were at the date the primary decision was made but on the basis of the relevant facts as at the date of review. In other words, the record remains open until the date of review, and the reviewer can receive new evidence that was not available to the primary decision-maker. Under certain circumstances, the merits reviewer can even take account of changes in the law since the original decision was made.

2.2.3. The remedial element of merits review As we have seen, a merits reviewer may affirm or vary the decision under review, or set the decision aside and either make a

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[20] *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 143 (Smithers J).

substitute decision or remit the decision to the primary decision-maker for reconsideration. In practice, the archetypal remedy is to set the decision aside and make a substitute decision. Merits reviewers rarely remit decisions for reconsideration, and in principle should do so only if they believe that the primary decision-maker is in a better position than the reviewer to make the correct or preferable decision. By contrast, the archetypal judicial review remedy is setting aside and remittal to the primary decision-maker. This difference reflects the fact that courts are judicial bodies exercising judicial power while merits review tribunals are non-judicial bodies exercising non-judicial power. The power to make a decision in substitution for that of an executive officer or agency (as opposed to a lower court) is, in theory, a non-judicial power, and so could not (in principle, at least) be conferred on a court.[21]

In Australian federal law, an important difference between courts (judicial reviewers) and tribunals (merits reviewers) arises from the fact that the power to make enforceable decisions is considered to be judicial. It follows that tribunals, being non-judicial bodies, cannot be given the power to enforce their own decisions; and also that in enforcement proceedings before a court, the tribunal's decision must be 'reviewed' by the court.[22]

2.3. Merits review and judicial review

To summarize, because of the strong principle of separation of judicial power that the High Court has read out of (or into) the Australian Constitution, there is a categorical distinction between judicial review and merits review. This distinction is clearest in the procedural and remedial elements of merits review. The archetypal judicial review remedy is setting aside and remittal, while the archetypal merits review remedies are varying the decision and making a substitute decision. In dispensing the characteristic merits review remedy, the reviewer exercises by proxy powers available to the primary decision-maker, whereas in dispensing the characteristic judicial review remedy, courts exercise inherent judicial power. Judicial review is typically based on the material available to and the reasons for decision given by the primary decision-maker, and on the law as it stood at the time the original decision was made.[23] By contrast, merits review can take account of material available at the time of review, even if it was not available at the time of the initial decision, and of changes in the law since that time. Moreover, in reconsidering the decision, the merits reviewer is not limited to the powers actually exercised by the primary decision-maker or to the matters raised before or the reasons given by the primary decision-maker. The basic function of the judicial reviewer is the negative task of identifying defects in the decision, whereas the basic function of the merits reviewer is the positive task of assuring that the correct or preferable decision is made. The merits reviewer is a decision-*maker* in an important sense in which the judicial reviewer is not.

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[21] There is a right of appeal 'on a question of law' from the AAT to the Federal Court. Such an appeal is functionally equivalent to a judicial review application and engages the original, not the appellate, jurisdiction of the court. The Federal Court has no express power to make a decision in substitution for that of the AAT, and it rarely does so. Since 2005 it has had the power to make findings of fact that are consistent with the findings of the AAT and, for that purpose, to admit new evidence. The constitutionality of these provisions and of the Federal Court's occasional practice of making a decision in substitution for that of the AAT have not been tested.

[22] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

[23] *Kavvadias v The Commonwealth Ombudsman (No 2)* (1984) 6 ALD 198, 206.

In what I have dubbed the 'substantive' respect, however, the relationship between the two modes of administrative adjudication is rather more complex. Because the basic task of the judicial reviewer is the negative one of determining whether the decision under review is defective in some sense (or, in other words, of policing limits on decision-making power), the 'grounds' of judicial review are expressed negatively – illegality, procedural unfairness, unreasonableness and so on – even though they imply positive criteria of good decision-making which judicial review can be thought to promote – legality, procedural fairness, reasonableness and so on. Although the function of the merits reviewer is positively to secure the correct or preferable decision, it is an implicit precondition of the exercise of the reviewer's remedial powers that it must decide whether or not the decision under review is the correct or preferable one. It cannot avoid this (negative) step in the review process because its power to affirm the decision can be exercised only if it is the correct or preferable one, and its other powers can be exercised only if the decision is not the correct or preferable one. In other words, the merits reviewer has the dual task of negatively deciding whether the decision under review is the correct or preferable one and, if it is not, of positively bringing it about that the correct or preferable decision is made.

Unsurprisingly, the criteria of good decision-making that determine whether the merits reviewer should affirm the decision, on the one hand, or vary it or set it aside on the other, are the very same criteria that inform the reviewer's own process of making the correct and preferable decision (if it decides to vary the decision or make a substitute decision) and which should guide the primary decision-maker's reconsideration of the decision (if the reviewer decides to remit the decision). As we have seen, the criteria of good decision-making that perform this dual function in merits review are essentially similar to those implied by the negatively framed grounds of judicial review – legality, procedural fairness, reasonableness and so on. Although the distinction between the 'merits' of a decision and its 'legality' is central to the concepts of merits review and judicial review, nevertheless each promotes the same foundational criteria of good decision-making. Hence, the substantive distinction between legality and merits can be, at most, one of degree, not one of kind. Legality and merits are merely points on a continuum representing the degree to which bureaucratic compliance with norms of good decision-making is subject to external scrutiny and the extent to which non-compliance with such norms is remediable.

3. The UK

In ninteenth-century England, non-judicial administrative adjudication was commonly undertaken within non-departmental, multi-functional agencies charged with responsibility for administering statutory programmes of regulation and welfare (Stebbings 2006). Adjudicators 'embedded' in this way within agencies were seen to be better suited than courts to resolving disputes between citizens and government. In the course of the century, the rule-making and administrative functions of many such agencies were transferred to government departments, leaving adjudication of disputes either to a court or to a non-judicial body. One effect of this process was to make more obvious the similarities between judicial and non-judicial administrative adjudicators (courts and tribunals). In short, courts and tribunals came to be understood as performing essentially similar functions.

By the early twentieth century the model of the free-standing, mono-functional administrative tribunal was firmly established. In the 1920s and 1930s, there were vigorous debates about the principles for allocating the task of administrative adjudication respectively to courts, tribunals and government agencies. Scholars such as William Robson (Robson 1928)[24] and lawyers such as Lord Chief Justice Hewart (Hewart 1929) argued strongly in favour of external adjudicators. The Donoughmore Committee, by contrast, proposed a division of functions, primarily between courts (external) and departmental ministers (internal), on the basis of an unsatisfactory distinction between judicial, quasi-judicial and administrative functions, which was in turn based on a difficult contrast between law and policy (Committee on Ministers' Powers 1932). Only in exceptional cases were tribunals to be preferred to courts, on the one hand, and ministers, on the other. A quarter of a century later, the Franks Committee reaffirmed the Donoughmore Committee's preference for courts over tribunals as external administrative adjudicators (Committee on Tribunals and Enquiries 1957). By this stage, the model of internal, embedded adjudication was more-or-less limited to public inquiries associated with the land-use planning process, where it continues to operate in a manner not dissimilar to adjudication within US agencies. So far as tribunals were concerned, the Franks Committee made the crucial conceptual move of asserting that they should properly be understood as part of the judicial process, not part of the administrative process. On this basis, the Committee's main concern was to ensure that tribunals displayed and promoted the (essentially judicial) procedural virtues of 'openness, fairness and impartiality'.

The association of tribunals with the judicial branch was taken a large step further by the Review of Tribunals chaired by Sir Andrew Leggatt. The provisions of the Tribunals, Courts and Enforcement Act 2007 (TCE Act) dealing with tribunals are based on the 2001 report of the Review, *Tribunals for Users: One System, One Service*. A major thrust of these provisions is to reinforce the identification of tribunals with courts. For instance, legally qualified members of tribunals are now called 'judges'; a disparate collection of subject-specific tribunals are being amalgamated into a two-tier structure in which the main function of the Upper Tribunal is to hear appeals from the lower, First-tier Tribunal; and the Upper Tribunal has been given limited judicial review jurisdiction in addition to its appellate jurisdiction. It is not going too far to say that in this new regime, tribunals are effectively a species of court or, perhaps, that tribunals and courts are two species of the genus of adjudicator.

Tribunals, in one form or another, have been the subject of vigorous debate in the UK for the best part of two centuries. Nevertheless, discussion has tended to focus on procedure, the institutional aspects of administrative adjudication and the structure of the tribunal 'system'. Much less has been said or written about what tribunals actually do or, in the language used earlier in this chapter, about the juridical nature of non-judicial administrative adjudication. One of the catalysts for the development of the Australian concept of merits review was the establishment of a general (as opposed to a 'specialist' or subject-specific) administrative appeals tribunal (the AAT), which now has jurisdiction to review decisions made under more than 400 statutes covering a very wide range

[24] A second edition of Robson's book was published in 1947 and a third in 1951.

of government activities. Importantly, too, significant decisions of the AAT are reported, as are significant decisions of the Federal Court on appeal from the AAT. The TCE Act has now established such a tribunal in the UK, but the Act itself says very little about the juridical nature of the new tribunals' tasks – indeed, it contains no provisions describing the function of the First-tier Tribunal in making initial decisions (although it does say something about its role when reviewing its own decisions). In relation to decisions of the First-tier Tribunal, the Upper Tribunal is, in some respects, cast in the role of a merits reviewer – for instance, it has the power, on appeal, to make a decision in substitution for that of the First-tier Tribunal. In other respects, however, it looks like an appellate court – for instance, its jurisdiction is limited to points of law, and it has the power to make findings of fact.

It might be expected that the Upper Tribunal will, in the years to come, make significant contributions to our understanding of what UK tribunals do and how this relates to what courts do. In the meantime, however, since the jurisdiction of existing subject-specific tribunals has been transferred to the new tribunals, we need to look at the legislation relevant to those particular tribunals and to their decisions for an appreciation of pre-TCE Act understandings of the role of tribunals in the UK. Here I will deal with social security and immigration tribunals, two of the most important sets of tribunals in the UK system.[25]

Appeals to social security appeal tribunals are governed by s 12 of the Social Security Act 1998. This provision says almost nothing about the powers of the tribunal. However, the leading decision of the Social Security and Child Support Commissioners (SSCSCs) (the highest tribunal in the social security adjudication system) establishes that an appeal to a social security appeal tribunal is by way of a complete rehearing of issues of fact and law.[26] The 'appeal tribunal is designed to be a superior fact finding body'.[27] Its basic task is to make what it considers to be the correct decision, and in doing so it 'may make any decision which the officer below could have made'.[28] The 'appeal tribunal's jurisdiction is not limited to affirming [the decision under appeal] or alternatively setting aside the decision' and remitting it to the decision-maker.[29] The tribunal 'in effect stands in the shoes of the decision-maker'.[30] Moreover, its jurisdiction is 'inquisitorial or investigatory' in the sense that it may consider issues relevant to making the correct decision even if they are not raised by the parties to the appeal.[31] Unlike an Australian merits review tribunal, however, a social security appeal tribunal may not 'take into account circumstances not

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[25] Purely for ease of exposition, the discussion is cast in terms that ignore the impact of the TCE Act – that is, as if the jurisdiction of the various tribunals had not been transferred to the new tribunals.

[26] SSCSC Case R(IB) 2/04. See also SSCSC R(IS) 17/04, [26].

[27] Ibid, [14].

[28] Ibid, [24].

[29] Ibid, [15]. By contrast, under s 120 of the Enterprise Act 2002 (UK), the Competition Appeal Tribunal, in hearing appeals from decisions of the Office of Fair Trading, the Secretary of State or the Competition Commission, may only quash the whole or part of a decision and refer the matter back to the original decision-maker. In deciding appeals, the Tribunal is to 'apply the same principles as would be applied by a court on an application for judicial review'.

[30] Case R(H) 3/04, [25].

[31] Ibid, [31]–[32].

obtaining at the time when the decision appealed against was made' (Social Security Act 1998 (UK), s 12(8)(b)).

A social security appeal tribunal is a 'purely judicial body' that cannot entertain appeals against exercises of discretion that involve consideration of 'non-justiciable' issues. Any appeal against such a discretionary decision is limited to 'points of law' understood in terms of the grounds of judicial review.[32] In principle, there is an important distinction here between a UK social security appeal tribunal and an Australian merits review tribunal. The main reason given by the Kerr Committee for classifying merits review as a non-judicial function was that review of discretionary decisions would typically involve the consideration of 'non-justiciable' issues. The clear implication is that merits review tribunals have the power to decide non-justiciable issues. In practice (as we have seen), the AAT takes a very cautious approach to reviewing the exercise of administrative discretions and government policy. Nevertheless, in principle, the distinction between justiciable and non-justiciable issues does not mark the boundary of the AAT's competence. Indeed, to the contrary, there is no technical bar to the AAT considering non-justiciable issues in the course of reviewing decisions. The substantive essence of merits review, in the Australian sense, is precisely that it extends beyond law and legality.

An appeal lies from a decision of an appeal tribunal to an SSCSC on a point of law. On appeal, if the decision is set aside, the Commissioner may make fresh or further findings of fact and make a substitute decision or, alternatively, refer the case back to the tribunal with directions for its determination (Social Security Act 1998 (UK), s 14(8)). Decisions of the SSCSCs on matters of law are binding on appeal tribunals and on primary decision-makers. This reflects the fact that tribunals in the UK are understood to be exercising judicial power.[33] By contrast, binding precedent has no place in the Australian merits review system not only because merits review tribunals – at the federal level, at least – cannot conclusively decide questions of law (this being a judicial function),[34] but also because it is considered to be inconsistent with the basic task of such a tribunal – namely to bring it about that the correct or preferable decision is made in the individual case before the tribunal.

The understanding of the role of the SSCSCs as judicial is also reflected in the fact that they 'often' set aside decisions because they are based on flawed reasoning and substitute a decision to the same effect but based on sound reasoning (Bonner 2007: 245, 247).[35] By contrast, in Australian merits-review law, a sharp distinction is drawn between the decision and supporting reasoning. The merits reviewer only reviews the decision. Its remedial powers do not extend to flawed reasoning unless it has led to the making of an incorrect decision.

Under s 82 of the Nationality, Immigration and Asylum Act 2002 (UK) (as amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004), 'where an immigration decision is made in respect of a person he may appeal to' the Asylum

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[32] SSCSC Cases R(H) 3/04 and R(H) 6/06.

[33] On the concept of precedent as it applies to tribunals generally, see Buck (2006).

[34] See n 18 above.

[35] This practice raises important and difficult issues, and its legitimacy may be open to question in the light of the decision in *Office of Communications v Floe Telecom Ltd* [2009] EWCA Civ 47.

and Immigration Tribunal (AIT), which is a first-tier reviewer staffed by 'Immigration Judges'. As its name indicates, the AIT deals with both asylum and other immigration matters. The grounds of appeal are set out in s 84 of the 2002 Act. They fall into three categories: (a) inconsistency with the Immigration Rules; [36] (b) inconsistency with domestic or EC law; and (c) incompatibility with rights under the European Convention on Human Rights (ECHR). The AIT's powers are to 'dismiss' or 'allow' the appeal. The grounds on which an appeal can be allowed are (1) that the decision was not in accordance with the law (including the immigration rules) and (2) that a discretion exercised in making the decision should have been exercised differently. In addition to the ECHR, domestic and EC law, and the Immigration Rules, immigration decision-making is also regulated by extra-statutory 'policies' under which immigrants may be allowed to enter the UK even if not otherwise entitled to do so. By statute, the AIT has no power to review an exercise of discretion if the decision in question is in accordance with the Immigration Rules. In other words, discretionary application, non-application or misapplication of an extra-statutory policy is not a ground of appeal, although such conduct may be relevant in deciding whether some other ground of appeal (such as unlawfulness or incompatibility with a Convention right) has been made out.[37]

It follows that the basis on which the AIT may allow appeals on the basis of application, non-application or misapplication of departmental policies is the same as that on which a court, conducting a judicial review, may quash a decision for a policy-related reason, namely, that application or non-application of the policy, or the way the policy was applied, was inconsistent with some legal rule or principle. Unlike the AAT, the AIT may not – even in theory – consider the merits of the policy. Only if a policy in 'absolute terms' leaves the decision-maker with no discretion or where, 'on the facts of the case there is no proper opportunity, by application of the policy, to make a decision unfavourable to the claimant',[38] can the AIT allow an appeal on the ground of non-application or misapplication of the policy (and in such circumstances, the basis of the AIT's decision would be unlawfulness).

The characteristic function of the AIT is to decide, on the basis of a full reconsideration of the facts,[39] whether either of the grounds on which an appeal can be allowed has been established. Although the AIT's power is to 'allow' or 'dismiss' the appeal, in practical terms the effect of allowing an appeal will typically be substitution of a decision in favour of the appellant. However, the AIT may remit the matter for reconsideration by the primary decision-maker.

In *Huang v Secretary of State for the Home Department*, the House of Lords considered the task of the AIT, when deciding appeals alleging incompatibility with Article 8 of the European Convention on Human Rights (ECHR).[40] That task, the House said, was not

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[36] The Immigration Rules are a form of soft law, although not as soft as departmental 'policies'.

[37] *AG and others (policies; executive discretions; Tribunal's powers)* [2007] UKAIT 00082, [44].

[38] Ibid, [48].

[39] For example, *AA v Entry Clearance Officer (Nigeria)* [2004] IKIAT 00019, [5].

[40] [2007] 2 AC 167.

> a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it.[41]

The House went on to contrast the role of the appellate immigration authority (for present purposes, the AIT) with that of a court reviewing a decision on the ground of incompatibility with Art 8 of the ECHR. Such review requires the court (like the AIT when deciding an appeal on this ground) to determine the legality of a decision by applying a test of proportionality, as opposed to the less intrusive test of *Wednesbury* unreasonableness. The House quoted a statement to the effect that although more intrusive than the unreasonableness test, the proportionality test does not require the court to engage in 'merits review'.[42] This was interpreted to mean that in applying the proportionality test, the court does not act as a 'primary decision-maker' with the task of deciding what decision ought to have been made; rather it reviews the decision of another decision-maker. By contrast, in exercising its appellate function, the AIT does not review the decision of another decision-maker but rather decides 'whether or not [the decision] is unlawful. . .on the basis of up to date facts'.[43] Moreover, like the AAT, the AIT is 'much better placed [than the primary decision-maker] to investigate the facts'.[44]

Like appeals on the ground of incompatibility with Art 8 of the ECHR, the AIT also decides asylum appeals on the basis of the facts as they are at the time of the appeal. By contrast, immigration (as opposed to asylum) appeals are generally dealt with on the basis of the facts as they were at the time of the decision appealed against.[45] In this respect, an appeal to the AIT is, in some cases, functionally equivalent to judicial review and in others to merits review as understood in the Australian system.

Like the SSCSCs, the AIT can make binding decisions on questions of law. In asylum cases, the AIT has a practice of issuing 'country guidance' (Thomas 2008). The purpose of such guidance is to promote consistency and efficiency in decision-making by the AIT. Senior judges formulate the guidance as a by-product of a particular appeal that raises issues common to a significant number of cases coming before the tribunal. Country guidance purports to provide authoritative factual information, relevant to deciding asylum appeals, about conditions in a particular country. Although country guidance has been described as 'factual precedent',[46] it is better understood – as the word 'guidance' implies – as establishing relevant considerations to be taken into account by Immigration Judges in deciding individual asylum appeals.

The phenomenon of factual guidance (which, it seems, is not limited to the asylum context, and apparently has the approval of both the higher judiciary and the government) has very significant implications for understanding the role of tribunals – especially second-tier tribunals. In Australia, country information is provided to tribunals either by

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41 Ibid, [11].

42 For an early explicit recognition in the UK of the distinction between review for legality and merits review, see JUSTICE (1988: 211–12).

43 2007 2 AC 167.

44 Ibid, [15].

45 *R v Immigration Appeal Tribunal, ex parte Rajendrakumar* [1996] Imm AR 97.

46 *S v Secretary of State for the Home Department* [2002] INLR 416, 435 (Laws LJ).

the executive or by research units within the tribunal itself. By contrast, the AIT has no information-gathering resources of its own and is dependent on the parties to a 'country guidance appeal' to provide relevant information. Moreover, as in the normal asylum appeal, the burden of proof rests on the appellant. In Australia, country information is an input to the tribunal decision-making process and lacks authoritative status. In the UK, by contrast, country guidance constitutes an authoritative (though not strictly binding) output of the process; and acceptance that tribunals (unlike courts) may appropriately make authoritative general statements of fact (as opposed to law) is apparently based on the assumption that tribunals have relevant 'expertise' (that courts lack). This suggests a very different understanding of the role of tribunals from that prevalent in Australia (for instance). The assumption of expertise may also encourage courts to show heightened deference to tribunals by interpreting the concept of an appealable 'error of law' very narrowly (Carnwath 2009: 56–64).

A losing party may apply to a court (in England, the High Court) for an order requiring the AIT to reconsider its decision on the ground that the AIT made an error of law (Nationality, Immigration and Asylum Act 2002 (UK), s 103A).[47] A party may appeal from the reconsidered decision to a court (in England, the Court of Appeal) on a point of law (s 103B). On that appeal, the court may (*inter alia*) affirm the decision, make any decision the AIT could have made, or remit the case to the AIT. In substantive terms, such an appeal is functionally equivalent to judicial review and in remedial terms, functionally equivalent to merits review in the Australian sense of those terms.

This brief consideration of social security and immigration tribunals shows that compared with Australian law, UK law embodies a significantly less clear, uniform and developed understanding of the role of tribunals. It remains to be seen what effect the newly created First-tier and Upper Tribunals will have on the juridical concept of administrative adjudication. For instance, it is unclear how the practice of giving factual guidance will be reconciled with the limitation of appeals to the Upper Tribunal to points of law, especially if courts interpret the concept of 'law' narrowly in order to maximize the freedom of 'expert' tribunals from judicial control.

4. The US

In the American system, ALJs and AJs are traditionally and typically embedded within the agencies whose decisions they review. The modern history of administrative adjudication in the US is commonly traced back to the establishment of the Interstate Commerce Commission (ICC) in 1887, which was a non-departmental regulatory agency.[48] To understand this history it is necessary, first, to distinguish between two senses of the word 'adjudication'. The first is that adopted in this chapter – namely resolution of disputes between citizen and government. The second meaning is that adopted in the Administrative Procedure Act 1946 (APA), which contrasts adjudication with 'rule-making'. In this sense, adjudication – like rule-making – is a procedure for making 'law' or 'policy' of general application, but one that differs from rule-making in that it involves making law or policy in the context of and incidental to deciding individual

[47] But 'decision' for these purposes does not include 'procedural, ancillary or preliminary decisions'.

[48] Classic accounts of the early history are Landis (1938); Cushman (1941).

cases: adjudicatory as opposed to legislative policy/law-making. From the establishment of the ICC until the 1960s, adjudication in this latter sense – that is, making case-by-case decisions about applications for licences, enforcement proceedings against individuals, and so on – was the chief method by which regulatory agencies in the US performed their regulatory functions. The decision of individual cases and the making of general policy were integrated into a single process. Technically, the power of decision in the individual case resides in the agency (i.e. the head of the agency). But from early on, as the volume of work increased, the ICC began[49] delegating the fact-finding element of the decision-making process to officials who were originally called 'hearing examiners' and later 'administrative law judges'. The basic idea was that a 'factual record' would be generated by a court-like process and would form the basis for a decision by the agency concerning whether, for instance, to issue a licence or impose a penalty. In time, it became increasingly common for the whole decision-making process to be delegated in the first instance to a hearing examiner, subject to review by or appeal to the agency. This is the model of adjudication embodied in the APA.

There were two important developments of present relevance in the decades following the enactment of the APA. One was the expansion of mass social security programmes, and the other was a wholesale shift by agencies from adjudication to rule-making as the preferred mode for making policy (and law). The second of these developments greatly reduced the importance of adjudication in the policy-making process, while the first greatly increased the incidence of adjudication in the sense of resolution of disputes between citizen and government. Although decisions about entitlement to social security benefits were technically made by the Social Security Administration (SSA), in practice they were initially made by officers in local social security offices.[50] The task of reviewing contested decisions was delegated by the SSA to ALJs, subject to review by or appeal to the agency. At the time when the APA was enacted, most ALJs were engaged in adjudication in regulatory contexts, where it was understood as a mode of policy-making. By the 1980s, most non-judicial administrative adjudicators were engaged in adjudication in contexts, such as social security and immigration, where it functioned as a mode of reviewing primary decisions made by front-line officials.

To the outside observer of the US system, it is striking that administrative adjudication – in the sense of review of primary administrative decisions – is commonly undertaken by officials employed by the agency responsible for making the decisions being reviewed.[51] This arrangement reflects the fact that administrative adjudication was originally an integral part of the process of making regulatory policy and only later became

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[49] At first informally, but after 1906 with statutory authority.

[50] The APA scheme, under which the initial decision is made by an ALJ subject to review by or appeal to the agency, only applies to decisions which, by statute, are required to be made after a 'hearing on the record'. Typically, social security benefit decisions do not have to be made in this way.

[51] In some cases, however, reviewing officials are employed by a different agency. For instance, review of immigration decisions is undertaken by officials employed by the Department of Justice, not the Immigration and Naturalization Service (INS). Moreover, the process of recruiting ALJs (which is based solely on merit) is handled by the Office of Personnel Management, an independent agency. Proceedings for removing and disciplining ALJs are handled by the Merit Systems Protection Board, which is also an independent agency.

predominantly a method of reviewing decisions and resolving disputes between citizen and government. As we saw earlier, in nineteenth-century England, resolution of disputes arising out of implementation of statutory programmes was similarly 'embedded' within multi-functional, non-departmental agencies. However, such dispute resolution was not understood as part of the policy-making (let alone the law-making) process. This helps to explain why the shift of implementation from non-departmental agencies to departments in England was not accompanied by a similar shift of adjudication. From the start, administrative adjudication in England was understood as essentially judicial in nature, whereas in the US it started life as a component of the administrative process.

Although the APA established an internal separation of powers within agencies in order to limit agency control over individual decisions and to establish the 'independence' of adjudicators, none of the many and various proposals to establish a separate 'corps' of adjudicators or to create an administrative court, external to the agencies whose decisions were under review, has borne fruit – at the federal level, anyway. By contrast, as we have seen, the basic model of the administrative tribunal in the UK and Australian systems is that of a free-standing, external reviewer of decisions made by a government department or agency from which the tribunal is more or less 'independent' and separated. Only in the context of the land-use planning system in the UK does the model of embedded adjudication continue to operate.

However, the basic US understanding of what embedded administrative adjudicators do is closer to the UK understanding than to the Australian – and this despite the fact that the formal separation of powers embodied in the Australian Constitution mirrors that embodied in the US Constitution. In Australia, tribunals and courts are categorically different types of institution, and merits review is categorically different from judicial review, the former being a non-judicial function and the latter a judicial function. By contrast, in the UK, tribunals and courts are understood to be essentially similar institutions performing an essentially similar function. Likewise, in the US, although the typical administrative adjudicator is embedded within an agency forming part of the executive branch of government, administrative adjudicators (and hence, in respect of their adjudicatory functions, agencies) are understood to exercise judicial power delegated to them by Congress – even if not 'the judicial power of the United States'.[52] As (now) in the UK, non-court administrative adjudicators in the US are typically called 'judges', whereas in Australia they are called tribunal 'members'. This difference between the US and the Australian understandings of the nature of tribunals and non-judicial administrative adjudication reflects the different interpretations of separation of powers by the US Supreme Court and the High Court of Australia.

Because non-judicial administrative adjudication in the US occurs within agencies, discussion of the role of ALJs typically focuses on the relationship between adjudicators and agencies (i.e. agency heads) rather than on that between the adjudicator and primary decision-makers. Put differently, accounts of non-judicial administrative adjudication concentrate more on the role of agencies in reviewing decisions of ALJs[53] than on the role of ALJs in making or reviewing initial decisions. In the model of administrative

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[52] *Federal Maritime Commission v South Carolina Ports Authority* 535 US 743; 122 S Ct 1864 (2002).

[53] And of courts in reviewing decisions of agencies.

adjudication that underlies the provisions of the APA, the characteristic function of the ALJ is to develop a factual record on the basis of which the agency can decide relevant issues of law and policy. It is true that unless 'the agency requires. . .the entire record to be certified to it for decision', the ALJ has power to make an initial decision; but the agency has power to review that decision *de novo* either on its own motion or in response to an appeal (APA, s 557(b)). Because the APA model of administrative adjudication focuses on regulatory decision-making – licensing, enforcement and so on – rather than on decision-making about entitlement to welfare and other benefits, administrative adjudication is understood as the fact-finding stage of a single, integrated decision-making process. By contrast, as I have defined it in this chapter, administrative adjudication is understood in terms of review of a decision made by a primary decision-maker (to whom decision-making power has been delegated by the agency). This is now the dominant mode of adjudication in the US, and this chapter primarily deals with the nature of this activity.

Although there is little explicit discussion in the US literature of the juridical function of administrative adjudicators in reviewing contested primary decisions, it seems clear that adjudicators undertake *de novo* review of the initial decision and decide whether the original decision should be affirmed, varied or set aside and replaced by a substitute decision. That role is elaborated primarily in terms of developing a factual record, and the characteristic of *de novo* review (as opposed to an appeal) is that the record 'remains open' until the review is complete. In Australian terms, *de novo* review is undertaken on the basis of material available at the time of the reviewer's decision, not on the more limited basis of material available at some earlier time. Under the APA, if and when an agency reviews a decision by an ALJ, the agency 'has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule'.[54] In other words, agency review is merits review in the procedural sense. In the APA model, the main purpose of agency review is to enable the agency to exercise control over 'policy' by having the last word (subject to judicial review) on issues of statutory interpretation and the development, application and interpretation of extra-statutory decision-making norms. In crude terms, the APA establishes a division of labour between ALJs and agencies, the former being responsible for fact-finding and the latter for law and 'policy'.

However, in significant respects, this last statement is too crude. First, although the prime responsibility of ALJs is fact-finding, the power to make an initial decision that, in the absence of review, stands as the decision of the agency, necessarily imports the power (and the duty) to decide relevant issues of law and 'policy'. However, just as Australian merits reviewers cannot conclusively decide questions of law, so (it is said) the principle of *stare decisis* does not apply to decisions of ALJs. In other words, decisions by ALJs on issues of law do not create precedents that are binding on ALJs or primary decision-makers. In this respect, the most that can be said of ALJs (as of Australian merits review tribunals) is that they have a legal obligation of consistency in decision-making both in relation to their own earlier decisions and in relation to decisions of other ALJs (and of their agency when reviewing decisions by ALJs). Regarding 'policy' – in the sense of

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[54] Ibid. In the APA model, the power of initial decision resides in the agency, and ALJs make initial decisions as delegates of the agency.

extra-statutory norms –although ALJs are performing essentially judicial tasks, they are embedded within agencies, and their decisions are ultimately subject to *de novo* review by the agency. Thus the function of ALJs is to apply and give effect to extra-statutory policies developed by the agency. Whereas the AAT (at least in theory) has the power to question and to act inconsistently with government policy, ALJs have no such power.

The APA model assumed that any particular agency would undertake a relatively small number of adjudications, and that it would be practicable for agencies to control the 'policy' element of initial decisions by reviewing individual decisions by ALJs. However, the enormous increase since the 1950s of administrative adjudication in areas such as immigration and social security made it impractical for agencies to police compliance by ALJs with agency policy in this way. The large volume of adjudications also made it impractical for agencies to control policy through the internal review of ALJ decisions by a second-tier reviewer (such as the Appeals Council in the social security context). An alternative strategy was to make rules that legally bound ALJs and to establish extra-statutory norms to guide their decision-making. In the 1970s and early 1980s, the Social Security Administration utilized various management techniques (such as performance monitoring), but these were eventually abandoned in the face of opposition from ALJs.

In this area of policy review we find a fundamental difference – in principle anyway – between administrative adjudication in the US and merits review by the AAT in Australia. Although the AAT is technically part of the executive branch, its ethos is essentially judicial. The institutional separation of the AAT from the agencies whose decisions it reviews and its status as an 'external' reviewer provide the foundation for this assertion of 'independence'. Ironically, however, the judicial ethos of the AAT explains not only why it technically has the power to question government policy, but also why, in practice, it is very unwilling to do so. Nevertheless, there is a significant contrast between the AAT and the specialist merits review tribunals in such areas as social security and immigration. Although technically 'external' reviewers of agency decisions, the specialist tribunals seek just and consistent implementation of agency policy in individual cases. In this respect, there is a closer analogy between the specialist Australian tribunals and US non-judicial administrative adjudicators than between the latter and the AAT. The fact that US adjudicators are embedded within agencies reinforces their role as implementers of agency policy. Although ALJs exercise an essentially judicial function, their administrative ethos distinguishes them not only from Article III (constitutional) courts but also from Article 1 (legislative) courts (Koch 2005, Moliterno 2006, Scalia 1979–80: 61–2).

Fact-finding is central to the APA model of administrative adjudication, and the concept of a 'hearing on the record' triggers the application of the procedural provisions of the APA to administrative adjudication. These sections of the APA apply only if some other statute requires a hearing on the record.[55] The prime function of the

[55] The APA (ss 554, 556 and 557) lays down a set of trial-type procedures for hearings on the record. Administrative adjudication to which the APA does not apply is generically known as 'informal adjudication'. However, 'adjudication' in this phrase has a much wider meaning than that adopted in this chapter, covering primary decision-making as well as review. Informal adjudication affecting 'liberty' and 'property' interests is subject to constitutional due process requirements that typically fall short of those applicable to a hearing on the record under the APA.

ALJ, when reviewing primary decisions, is to develop the record of the decision under review by an inquisitorial fact-finding process. So long as the record remains open to development, the administrative decision-making process continues. In principle, when and if an agency reviews a decision of an ALJ, it can develop the record in the same way as the ALJ can. However, in practice, agency review is based on the record developed by the ALJ; and factual issues at this stage normally concern inferences to be drawn from the facts rather than the primary facts themselves. Whether administrative adjudication is undertaken by an ALJ or by the agency itself, the decision is technically that of the agency. When a court reviews a decision of an administrative adjudicator, technically it reviews the decision of the agency, regardless of who actually made the decision.

A problem may arise where an agency reaches a factual conclusion different from that reached by an ALJ.[56] Although the power to decide factual issues ultimately resides in the agency, the main function of the ALJ is to find the facts (Breyer et al. 2006: 214–15, Mashaw et al. 2003: 830–38). Under the APA, the relevant test to be applied by a court in reviewing fact-finding by an agency is whether the decision is supported by 'substantial evidence' taking into account 'the whole record' of the hearing.[57] The ALJ's decision will, of course, be part of the record. As a result, the formal freedom of an agency to reject findings of fact by an ALJ is – to some undefined extent – constrained by the requirement that the ALJ's decision be given some weight. Moreover, to the extent that the disagreement between the agency and the ALJ relates to factual inferences rather than primary facts, the ability of the agency to develop policy by resolving the disagreement in a particular way may be limited. Although the formal task of ALJs is only to implement policy, the limited freedom of agencies to disagree with ALJs about the proper inferences to be drawn from agreed facts confers on ALJs a degree of *de facto* power to develop policy without interference from their agencies.[58]

As in the case of administrative adjudication in the US, fact-finding lies at the heart of the Australian concept of merits review. Like ALJs, the AAT and other merits review tribunals have the power to develop the record – in other words, merits review is based on material available at the time of review whether or not it was available to the original decision-maker. In the Australian system, when a second-tier tribunal reviews a decision of a first-tier tribunal on the merits, it reviews its findings of fact. However, the decision-making agency cannot review findings of fact by merits review tribunals (whether first or second tier). The power of US agencies to review factual decisions by ALJs marks a significant difference between administrative adjudication as understood in the US and the Australian concept of merits review.

The APA requires a hearing before the decision in question is made, whereas due process may be satisfied by a post-decision hearing (by way of review of the decision). See generally Strauss (2002: 199–218).

[56] In high-volume areas, an intermediate review body may be established, the decisions of which, like those of ALJs, are technically decisions of the agency. Factual disagreements between an ALJ and an internal review body may give rise to the same problem.

[57] Fact-finding in cases of 'informal adjudication' not falling within the APA is reviewed under an 'arbitrary and capricious' standard: *Citizens to Preserve Overton Park, Inc v Volpe* (1971) 401 US 402; Strauss (2002: 348–9).

[58] I am grateful to Jerry Mashaw for discussion on this point.

5. Conclusion

This chapter provides an account of what 'tribunals' do that provides a counterpart to existing, highly developed and theorized accounts of what courts do when they engage in 'judicial review' of bureaucratic decision-making. I have used the Australian concept of 'merits review' as the starting point for this project because Australian federal law embodies a much more explicit and hard-edged account of non-judicial review of administrative decision-making than the law of either the UK or the US. In Australia, tribunals are categorically different from courts, and what tribunals do – merits review – is categorically different from what courts do – judicial review – when they entertain challenges by citizens to government decisions that adversely affect them. However, to say that judicial review and merits review are categorically different is not to say that they are entirely dissimilar. For instance, both are concerned with enforcing the legal limits of decision-making powers; and neither concerns itself with the desirability of government policy, except in extreme cases.

At the risk of oversimplification, we can identify three differences between the Australian concepts of merits review and judicial review as most significant. First, the characteristic judicial review remedy is to set aside the decision and remit it to the primary decision-maker for reconsideration, whereas the characteristic merits review remedy is to set aside the decision and to make a new decision in substitution for it. Secondly, judicial review mainly focuses on issues of 'law' and the 'legality' of the decision, whereas merits review mainly focuses on issues of 'fact' and the evidentiary foundation of the decision. Thirdly, the characteristic function of a court undertaking judicial review is the negative one of scrutinizing the decision for defects, whereas the characteristic function of a merits review tribunal is the positive one of making the correct or preferable decision.

In the UK, to the extent that there exists a general understanding of what tribunals do – as opposed to an understanding of what particular tribunals do – it is couched in terms of a distinction between 'appeal' and 'review'. Courts review bureaucratic decisions, whereas tribunals hear appeals from administrative decisions. 'Appeal' in this context covers both law and fact, and 'allowing' the appeal effectively involves making a substitute decision in favour of the appellant. Courts also exercise appellate jurisdiction, and this explains why courts and tribunals are understood to perform an essentially similar function. Because of the lack of a strong separation of powers, there is no bar in UK law – as there is in Australian law – on courts entertaining appeals from decisions of the executive branch of government; and this reinforces the functional association between tribunals and courts. However, control by appellate courts of fact-finding by trial courts and bureaucrats is generally less intense than the control exercised by tribunals over fact-finding by bureaucrats.

Moreover, the creation of the Upper Tribunal has greatly complicated the UK position. The general understanding that tribunals exercise a broad appellate jurisdiction covering both fact and law may provide the basis for an account of the role of the First-tier Tribunal; but it does not fit the Upper Tribunal. The Upper Tribunal's appellate powers are limited to points of law, and it also has (limited) powers of judicial review. However, when hearing appeals from decisions of the First-tier Tribunal, the Upper Tribunal has the power to make a substitute decision. It is, I think, very uncertain whether the appellate function of the Upper Tribunal will develop into a form of broad, second-tier tribunal appeal or into an analogue of judicial review. It also remains to be seen whether the

Upper Tribunal and the Court of Appeal will develop a unitary concept of the tribunal function analogous to the Australian concept of merits review. In Australia, the concept of merits review applies regardless of the subject matter of the decision under review; and it also equally describes the role of second-tier and first-tier reviewers.[59]

Uncertainty about how UK law will develop is partly a function of the fact that the TCE Act regime is very new, but also of the fact that historically, the jurisdiction of the typical tribunal was limited to a particular statutory regime. In this sense, it was a 'specialist', not a 'generalist' adjudicatory body. In the US, administrative adjudication is similarly organized along specialist lines. However, the APA embodies a general model of 'adjudication' that permits a unitary understanding of what 'tribunals' do. The core of that understanding is *de novo* reconsideration of decisions, focusing on the facts and keeping the record open until the reviewer decides to affirm the decision or to make a substitute decision.

It would seem, then, that making due allowances for the many differences between our three comparator jurisdictions, two elements are common to all understandings of what tribunals do: (1) full reconsideration of the facts of individual cases, commonly on the basis of all relevant material available to the reviewer and (2) the power to make a decision in substitution for the decision under review. The intense review of fact-finding characteristic of tribunals contrasts not only with the approach by courts to judicial review of bureaucratic decision-making but also with the typical judicial approach to controlling fact-finding by inferior courts. When the Kerr Committee said that judicial review needed to be supplemented by general provision for 'review on the merits', what they primarily meant by 'the merits' (it seems) were 'the facts'.

If my conclusion is correct that the characteristic function of tribunals is intense review of fact-finding, many questions suggest themselves. For instance: why should fact-finding by bureaucrats be subject to more intense scrutiny than fact-finding by inferior courts? Why should this task be thought unsuitable for courts? What equips tribunals to undertake a task that courts do not? Is intense scrutiny of fact-finding more appropriate or necessary in relation to some categories of government decisions compared to others? If 'merits review' by tribunals is an enhanced form of 'judicial review' by courts, why has the former not superseded the latter? And so on. As the comparative analysis in this chapter has demonstrated, the answer to each of these fundamental questions is likely to vary from one jurisdiction to another. I hope that the analysis has also shown the value of supplementing the voluminous administrative law scholarship on courts and judicial review with a careful look at tribunals, their functions and their place among the institutions of government.

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[59] Thus, when the AAT reviews the decision of a first-tier merits review tribunal, it conducts a full review of that decision on the merits.

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26 Judicial review of questions of law: a comparative perspective

*Paul Craig**

All systems of administrative law must face and resolve a remarkably similar set of issues. They will have to elaborate tests for review of law, fact and discretion. Comparative law enables us to analyze diverse approaches to the same issue, while being properly mindful of legal/cultural reasons for those differences. It is possible through comparative discourse to consider whether doctrinal variations across legal systems are relatively minor, so that the respective regimes, in effect, do the same thing in slightly different ways, or whether doctrinal variants reflect a deeper normative divergence.

With that question in mind, this chapter focuses on the test for judicial review of questions of law in the UK, USA, Canada and the EU. The topic is an important aspect of judicial review and is fertile for comparative analysis. The analysis reveals the divergences between the legal systems, and sets out the four principal judicial strategies used. They are judicial substitution of judgment over jurisdictional legal issues; substitution of judgment by the reviewing court on all issues of law; substitution of judgment on certain legal issues and rationality review on others where the principal criterion for the divide is legislative clarity in defining the disputed term; and, finally, substitution of judgment and rationality review where the criterion for the divide is a broader range of functional considerations.

Exigencies of space preclude detailed treatment of the kind found in the relevant domestic literature. However, the comparative analysis, drawing on this literature, will, I hope, inform the debate over judicial review of law and shed light on the normative differences between the systems, as well as the efficacy of the tests for review of law enshrined in each regime.

1. United Kingdom

1.1. The early jurisprudence: collateral fact doctrine

The courts of the United Kingdom have exercised judicial review over issues of law for at least 300 years (Henderson 1963, Rubinstein 1965). The dominant approach until the latter part of the twentieth century was the collateral fact doctrine,[1] which was also known as the preliminary or jurisdictional fact doctrine. It was, notwithstanding its nomenclature, used to determine reviewability of questions of law as well as fact.

The essence of the approach was as follows. There were certain preliminary questions that a tribunal or agency had to decide before it could proceed to the merits, such as whether the tribunal or agency was properly constituted and whether the case was

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[1] It was also known as the preliminary or jurisdictional fact doctrine.

of a kind referred to in the statute. The tribunal made an initial determination on such matters, but its decision was not conclusive. If the court believed that the determination was legally erroneous then the tribunal's conclusion was a nullity.[2]

The key issue, which was never satisfactorily resolved over three centuries of case law, concerned the range of legal issues that would be held to be jurisdictional/preliminary/collateral questions for the purposes of this test. The rationale for this difficulty is not hard to divine. All statutes granting power to the initial decision-maker will be predicated on the existence of certain conditions. The statute will state that if X1, X2, X3 etc. exists, then the tribunal or agency may or shall do Y: if an employee is injured in the course of employment then compensation may or shall be given. This statute contains three 'if X' conditions that involve legal issues concerning the meaning of employee, injury, and course of employment. More complex statutes will contain a longer list of such conditions. The collateral/preliminary/jurisdictional fact doctrine was premised on the assumption that certain X conditions would be regarded as jurisdictional, with the consequence that the court would substitute its own judgment on the meaning of the disputed term, while other X conditions would be regarded as non-jurisdictional and hence non-reviewable unless the error of law was on the face of the record.

The fundamental problem was that the constituent legal elements of all the X factors could be said to condition jurisdiction. This difficulty was reflected in judicial behaviour: the courts repeatedly applied the test, but with little explanation as to why a legal factor was regarded as jurisdictional/collateral in one case but not another (Gordon 1931). The most sophisticated judicial attempt to solve the conundrum was unconvincing. Thus Diplock LJ[3] distinguished between two situations. The first was where the tribunal's misconstruction of the enabling statute related to the *kind* of case into which the tribunal was meant to inquire. This error would go to jurisdiction and the reviewing court would substitute its own judgment on the meaning of the disputed legal term. The second situation was where the tribunal misconstrued the statutory description of the *situation* that the tribunal had to determine. This would, at most, be an error of law within jurisdiction, and would only be reviewable if the error of law was on the face of the record.

It was, however, impossible to draw this line with any certainty, because the definition of 'kind' or 'type' was inevitably comprised of statutory descriptions of the 'situation' which the tribunal had to determine. The former represented the sum, the latter, the parts. Thus any summary of the *kind* of case into which the tribunal was intended to inquire required consideration of the *situations* the tribunal had to determine, consisting primarily of the statutory terms in the legislation. The distinction between *kind* or *type* on the one hand, and *truth* or *detail* or *situation* on the other, proved illusory (Craig 2008). There was no predictability *ex ante* before the court's decision and little, if any, *ex post facto* rationality by juxtaposing cases to see why they were decided differently.

1.2. The early jurisprudence: tensions within the case law

The early jurisprudence was rendered more complex by tensions in the case law. The difficulties inherent in the collateral fact doctrine were compounded because the courts

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[2] *Bunbury v Fuller* (1853) 9 Ex 111, 140.

[3] *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862, 887–905. Cf. Lord Diplock's view in *Re Racal Communications Ltd* [1981] AC 374.

appeared in some cases to be applying a more limited test of review. Thus while most cases applied this doctrine, some decisions adopted what became known as the commencement theory of jurisdiction, whereby the question of jurisdiction was said to depend not on the truth or falsehood of the charge, but upon its nature, and was determinable at the commencement not at the conclusion of the inquiry (Craig 2008).[4]

Attempts at reconciliation were said to turn on differences in the legislative instrument. Thus in *R v Commissioners for Special Purposes of Income Tax*,[5] Lord Esher MR distinguished between two types of tribunal. There were tribunals which had jurisdiction if a certain state of facts existed but not otherwise; it was not for the inferior tribunal to rule conclusively on the existence of such facts. There could, however, be a tribunal which had jurisdiction to determine whether the preliminary state of facts existed; here it would be for the inferior tribunal to decide upon all the facts.

This reconciliation was, however, one of form rather than substance. It was impossible by juxtaposing the relevant legislation to determine why a case should fall within one category rather than the other. All statutes say if X1, X2, X3 etc. exists, you may or shall do Y. The answer as to who was to determine the meaning of X was dependent upon the theory of jurisdiction. The two groups of cases reflected different answers to that question. Lord Esher's analysis simply reiterated *ex post facto* that divergence, but did not provide an *ex ante* tool to determine which group a case should fall into. A statute might, in principle, assign the relative meaning of 'if X', between courts and tribunals differently in diverse areas, but whether it did so could not be determined by asking whether the statute required a certain state of facts to exist before a decision was reached, since statutes always did this.

1.3. The modern jurisprudence: substitution of judgment for error of law

The modern jurisprudence dates from the House of Lords' decision in *Anisminic*.[6] It did not formally consign the collateral fact doctrine to history, but nonetheless broadened significantly the scope of judicial review. It held that the courts could intervene where the tribunal should not have entered upon the inquiry, and also where having correctly begun the inquiry the tribunal misconstrued the enabling statute so that it failed to deal with the question submitted to it, failed to take account of relevant considerations, or asked the wrong question. These criteria gave the courts far-reaching tools for judicial intervention.

The full potential of *Anisminic* was brought to the fore in *Page*,[7] which is now the leading authority. Lord Browne-Wilkinson held that *Anisminic* had rendered obsolete the distinction between errors of law on the face of the record and other errors of law, and had done so by extending the *ultra vires* doctrine. Thenceforward, it was to be assumed 'that Parliament had only conferred the decision making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision *ultra vires*'.[8] In general, therefore, 'any error

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4 *R v Bolton* (1841) 1 QB 66, 72–4.
5 (1888) 21 QBD 313.
6 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
7 *R v Hull University Visitor, ex p Page* [1993] AC 682.
8 *Ibid* 701.

of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law'.[9] The constitutional foundation for the court's power was said to be the *ultra vires* doctrine: the law applicable to a decision made by a tribunal etc. was the general law of the land, and hence it would, therefore, be acting *ultra vires* if it reached a decision that was erroneous under the general law.[10] It was, however, only relevant errors of law which would lead to nullity. The error of law had to affect the challenged decision. It seems, moreover, that differing presumptions exist for administrative bodies and for inferior courts. The presumption that any error of law will lead to substitution of judgment by the court can more easily be overcome in relation to inferior courts. This distinction is questionable, given that it is often fortuitous whether an institution is called a 'court' or a 'tribunal', and because many tribunals possess significant expertise in their assigned area.[11]

The general proposition that all errors of law are reviewable and that the reviewing court will substitute its own judgment was subject to some qualification in *South Yorkshire Transport Ltd.*[12] The reviewing court will still substitute judgment on the meaning of the disputed legal term, even where it is open to a range of possible meanings, and even where the primary decision-maker has real expertise over the issue. However, where the legal meaning chosen by the reviewing court is itself open to a spectrum of possible meanings, the court will only intervene if the decision being reviewed is irrational.

1.4. The modern jurisprudence: normative assumptions

Few will shed tears over the demise of the jurisdictional/preliminary/collateral fact doctrine. It is nonetheless important to consider why the courts persisted with it for so long. No ready answer is forthcoming in the modern case law. The implicit message is that the earlier jurisprudence failed to realize that the distinctions between jurisdictional and non-jurisdictional legal error were unnecessary/illogical. This comforting picture of modern superiority over dated formalism is misleading. It is clear from the older case law that the courts adopted the collateral fact doctrine or the commencement theory in part at least because they believed that these best incorporated a balance between judicial control and tribunal autonomy (Craig 1995). The courts did not believe that that they should substitute judgment on every issue of law, since determination of some legal issues had been assigned to the initial decision-maker by Parliament, and the courts, moreover, did not feel comfortable deciding the precise meaning of all statutory conditions in the enabling legislation. They also realized that some judicial control was required. The collateral fact doctrine and the commencement theory were the tools used to preserve control, while giving some leeway to tribunal autonomy. These tests were defective, but in discarding them we should not forget their underlying rationale. We do not have to accept the balance between judicial control and tribunal autonomy adopted in an earlier age, but we should not forget that there is an issue here that cannot be ignored.

The modern concept that the reviewing court should substitute judgment on all issues

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[9] *Ibid* 702.

[10] *Ibid* 702.

[11] This point has added force in the light of the Tribunals, Courts and Enforcement Act 2007.

[12] *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23; *R (on the application of BBC) v Information Tribunal* [2007] 1 WLR 2583.

of law has been defended academically (Gould 1970), but a number of scholars have challenged the cogency of the argument (Beatson 1984, Williams 2007, Craig 2008). The suggestion that such a broad scope of review is logically demanded is unconvincing. There is no *a priori* reason why the courts' view on the legal meaning of a statutory term should necessarily and always be preferred to that of the agency. It is not demanded by constitutional theory, nor is it supported by judicial practice. For 300 years the collateral fact doctrine was premised on the existence of non-jurisdictional errors of law that were not reviewed by courts, unless the error was manifest on the face of the record. The modern approach is based upon the presumption that the courts' interpretation of phrases such as 'employee', 'course of employment', 'boat' or 'resources' is necessarily to be preferred to that of the agency, and that substitution of judgment is the only way to control agency interpretations. Neither assumption is well founded. The courts' interpretation may not necessarily be better than that of the agency, and adequate control may be maintained through a rationality test rather than substitution of judgment.

The *ultra vires* principle provided the conceptual justification in *Page* for the proposition that all issues of law are subject to review and substitution of judgment. However, Sir John Laws has cogently argued that this was a 'fig-leaf' to conceal the reality of judicial intervention (Laws 1992). It is moreover clear that there was a duality latent in the meaning given to the *ultra vires* principle in *Page* (Craig 1998). On the one hand, it connoted the idea of presumed legislative intent, in the sense that Parliament intended that all errors of law should be open to challenge. On the other hand, it was equated with the general law of the land, including the common law. It was no longer based exclusively on legislative intent, and simply became the vehicle through which the common law courts exercised control over the administration.

The rigours of the modern approach might be ameliorated through the law-fact distinction, whereby characterization as fact is reflective of the judicial view that greater weight should be accorded to the agency's view.[13] There is no doubt that, in principle, the definition of 'law' for judicial review could be used to capture the suitability of an issue for substitution of judgment by the reviewing court (Endicott 1998), and it is also apparent that the courts have on some occasions assigned the labels 'law' and 'fact' depending upon whether they wished to intervene or not. The preponderant judicial approach is nonetheless to take an analytic as opposed to a functional or pragmatic definition of 'law' for the purposes of judicial review, with the assumption that the interpretation of statutory terms constitutes an issue of law on which the courts will substitute judgment.

2. United States of America

2.1. Chevron

The decision in *Chevron*[14] is the modern foundation of US law in this area, even though it was not considered especially novel by the bench or bar at the time (Merrill 2006). It has nonetheless been cited over 7,000 times and has generated scholarship, which if it were all

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[13] *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929.
[14] *Chevron USA Inc v NRDC* 467 US 837 (1984).

cited here would exhaust the word limits assigned for this chapter.[15] The case established a two-part test for judicial review.[16]

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question in issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The conceptual foundation for the two-part test provided by Justice Stevens was cast primarily in terms of delegation.[17]

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute. Sometimes the legislative delegation to the agency is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Justice Stevens also made reference to agency expertise and accountability in addition to delegation. Thus 'considerable weight' should be given to agency interpretation when a decision as to the meaning of a statute involved the reconciliation of conflicting policies, where the competing interests had not been fully resolved by Congress, and where the agency had particular expertise in the matters subjected to its regulatory remit.[18]

Prominent administrative law scholars who later became justices of the Supreme Court rationalized *Chevron* in terms of Congressional intent, that is, courts deferred to agencies because of instruction from Congress. They nonetheless recognized that the legislative intent was largely fictional, based on what a hypothetical reasonable legislator might have wanted (Breyer 1986, Scalia 1989), but they felt that *Chevron* provided a background rule of law against which Congress could legislate (Scalia 1989).

Chevron has appeal when viewed from a comparative law perspective. It recognizes that issues may be characterized as 'law' for the purposes of judicial review, but that this does not always demand substitution of judgment by the reviewing court. The recognition of some agency interpretive autonomy over statutory terms, subject to control through rationality review, is an attractive feature of US law, irrespective of whether one accords primacy to delegation, expertise or political legitimacy as the rationale for the two-part test.

It must nonetheless be acknowledged that *Chevron* has proven problematic, and that the difficulties have been exacerbated in the last decade. This section will therefore focus on the two most difficult aspects of the test.

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[15] For valuable overviews: Sunstein (1990), Merrill and Hickman (2001).
[16] *Chevron*, n 14, 842–3.
[17] *Ibid* 843–4.
[18] *Ibid* 844, 865–6.

2.2. The relation between Parts 1 and 2: intentionalism v textualism

The relationship between the two parts of *Chevron* is central,[19] since the court is the decider under part one and the overseer under part two (Strauss 2008). This relationship will be determined primarily by part one of the test because if Congress is deemed to have spoken to the precise meaning of the disputed term, that is, in the words of the court, 'the end of the matter'. The agency's decision will be overturned if it does not conform to that meaning, and the court will not consider rationality review. There has, however, been persistent disagreement concerning the way to decide if Congress has addressed the precise meaning of the term at issue.

Those who subscribe to intentionalism build on Justice Stevens's brief footnote in *Chevron* where he said that the judiciary was the final authority on issues of statutory construction: if a court employing traditional tools of statutory construction ascertained that Congress had an intention on the precise question at issue then that intention was the law and must be given effect.[20] Justice Stevens viewed the 'traditional tools of statutory construction' broadly: he reached the conclusion that Congress had not spoken to the meaning of the disputed term after consideration of legislative history broadly conceived, the history of the particular legislation before the court, and its textual wording. This approach to *Chevron* step one was opposed by textualists, who contended that it should be limited to construction of the legislative text, to the exclusion of matters such as legislative history, and broader policy debates. Thus whereas intentionalists focus on resolvability through consideration of a broad range of factors to decide whether Congress has spoken to the precise question in issue, textualists seek to confine step one to clarity as determined by the wording of the salient legislative text (Scalia 1989). The tension between the contending views is exemplified by the following cases.

Cardozo-Fonseca[21] was concerned with whether the burden of proof standards in two different statutory provisions concerned with immigration and asylum were in substance the same, as the government contended, or whether they were different. Justice Stevens delivered the Court's opinion. He resolved the case under *Chevron* step one and concluded that the tests in the two statutes were different. He reached this conclusion by taking account of the legislative texts of the two statutes and legislative history. Justice Scalia concurred, based on the wording of the respective statutes, but disagreed with Justice Stevens's approach to step one. This approach would, said Justice Scalia, lead to substitution of judgment whenever traditional tools of statutory construction enabled the court to give some meaning to the disputed term, but this approach would make 'deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue'.[22] Justice Scalia concluded that 'this is not an interpretation but an evisceration of *Chevron*'.[23]

The approach in *Cardozo-Fonseca* can be contrasted with that in *Rust*.[24] The case was

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[19] For debate as to whether *Chevron* is best conceived in terms of a two-part or one-part test, see Stephenson and Vermeule (2009) and Bamberger and Strauss (2009).

[20] *Chevron*, n 14, fn 9.

[21] *Immigration and Naturalization Service v Cardozo-Fonseca* 480 US 421 (1986).

[22] *Ibid* 454.

[23] *Ibid* 454.

[24] *Rust v Sullivan* 500 US 173 (1991).

concerned with whether legislation prohibiting the use of federal grants for programmes where abortion was a method of family planning prevented counselling of pregnant women as to their options, including abortion. Chief Justice Rehnquist, speaking for the Court, took a narrow view of *Chevron* step one. He held that there was no need to dwell on the plain language of the statute, since it was clearly ambiguous and did not speak directly to the issues of counselling or referral. The case should therefore be decided on *Chevron* step two, and Chief Justice Rehnquist concluded that the agency's interpretation was permissible under step two. Justice Stevens dissented. He reached this conclusion on the basis of *Chevron* step one, taking account of the wording of the statutory provision, the statute as a whole, and the importance of free speech within US society.

The battle between intentionalists and textualists continued through the 1990s and into the new millennium. The preponderant view is that textualism is in the ascendancy (Pierce 1995, Jellum 2007), although one study found that legislative history was commonly used (Eskridge and Baer 2008). The interpretation accorded to *Chevron* step one shapes the relationship between courts and the executive. The greater the judicial role within step one, the less opportunity there will be for agency interpretation within step two. Conversely the less the judicial role within step one, the greater the opportunity for agency interpretation at step two. It might be thought that, insofar as textualism is in the ascendancy, the latter scenario will prevail, fewer cases will be decided at step one, the corollary being greater agency interpretative autonomy within step two. There has been academic concern that textualism would cede too much interpretative authority to agencies (Popkin 1993). Some, however, voice contrary concerns. They worry that textualism has undermined agency autonomy because the Court will regularly conclude that the meaning is clear from the text itself and thus resolve the case at step one, even where linguistic precision does not exist (Pierce 1995). Justice Scalia in his extrajudicial writing made clear that he would normally find statutory meaning apparent from the text and its relationship with other laws, thereby rendering *Chevron* deference less common. As a consequence, it would be less likely that he would have to accept an interpretation, even if it were reasonable, that he would not personally have adopted (Scalia 1989). The picture is rendered more complex because much will also depend on the intensity of scrutiny within step two if the case gets to that stage. Truth to tell there are paradoxes and tensions within both the intentionalist and textualist approaches to *Chevron* step one.

The tensions inherent in intentionalism can be exemplified by *Brown and Williamson Tobacco*.[25] The issue was whether the Food and Drug Administration (FDA) could denominate nicotine as a drug and regulate it. The majority opinion, delivered by Justice O'Connor, ruled against the FDA and adopted a broad view of *Chevron* step one. Thus in determining whether Congress had spoken to the precise question, the court should not confine itself to considering the particular statutory provision in isolation. It had to be construed within the overall statutory regime. The court should also consider: the fit between the statute under review and other related statutes; the history of tobacco-specific legislation over the previous decades; prior agency practice that had denied regulatory authority over tobacco; and the likelihood that Congress would have delegated

[25] *FDA v Brown and Williamson Tobacco Corporation* 529 US 120 (2000). Compare *Massachusetts v EPA* 549 US 497 (2007).

such a significant issue to the agency. Justice Breyer spoke for the dissent, which also decided the case on *Chevron* step one. The factors taken into account were not significantly different from those used by the majority. They included the statutory language, its purpose, legislative history, related statutes, and the import of prior agency denial of authority over tobacco. The premise of *Chevron* is that where there is no unambiguously expressed legislative intent on the precise question, the case is to be resolved at step two. To be sure, the majority and dissent both believed that Congress had unequivocally addressed the precise question, but they reached sharply divergent conclusions as to the answer. There is no recognition by majority or dissent that given their divergent views of the same materials Congress might not have had an unequivocal view of the issue, with the consequence that the case should have been decided at step two. There is a significant tension at the heart of the decision. Insofar as intentionalism leads the judiciary to consider a broad range of factors to decide whether Congress addressed the precise meaning of the term, there is, other things being equal, greater potential for disagreement as to what those factors, individually or collectively, indicate. Judicial resolvability is not therefore indicative of Congressional clarity.

There are also tensions inherent in textualism. This is, in part, because the very meaning of the textualist approach can vary. Thus, although its proponents deprecate resort to legislative history, narrow textualist approaches seek to divine the precise meaning of the term from the linguistic/dictionary meaning of the term, while broader textualist approaches consider also the language and design of the overall statute. The tensions inherent in textualism also arise because statutory language will often be open to varying interpretations, depending upon one's view of the overall legislative purpose and more general precepts that color statutory interpretation (Pierce 1995).[26] These tensions are exemplified by *Sullivan*.[27] The case concerned construction of the Secretary of Health's powers under social security legislation that entitled him to make 'proper adjustment or recovery' where a beneficiary had received 'more or less than the correct amount of payment'. The Secretary of Health adopted 'netting' regulations whereby over- and underpayments in subsequent months were treated cumulatively. The claimants argued that this method of calculation was inconsistent with legislative provisions mandating that waivers of overpayment could, on certain conditions, be made. Justice Scalia wrote the majority opinion. He took a narrow textualist/dictionary approach to the statutory terms, concluded that the legislative text did not speak unequivocally to the precise question, and held that the netting technique was reasonable pursuant to *Chevron* step two. Justice Stevens, speaking for the dissent, disagreed. He considered the provisions concerning waiver of overpayment in the context of the overall statutory purpose, and concluded that the netting regulations would defeat that purpose.[28]

> In this case it is clear beyond peradventure that Congress intended to ensure that needy citizens would receive their full monthly benefit checks, even if that policy sometimes means forgoing any opportunity the Government might have to recoup an earlier overpayment. The Secretary's reading of the statute puts an unreasonable strain upon both its words and its purpose. If

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[26] See, for example, *Environmental Defense v Duke Energy Corp.* 549 US 561 (2007).
[27] *Sullivan v Everhart* 494 US 83 (1990).
[28] *Ibid* 107.

> context were ignored entirely, I suppose that a student of language could justify the Secretary's interpretation of 'adjustment' and 'payment,' and his duty to find historical facts. Perhaps that is what the majority means when it says that the statutory language 'reasonably bears,' . . . the Secretary's argument. But I find it inconceivable that wise judges can conclude that regulations in which the Secretary delegates to himself the power to rewrite history are 'based on a permissible construction of the statute.'

2.3. Step zero: additional complexity

The new millennium has witnessed further complexity, through a step zero that has to be satisfied before *Chevron* deference can be engaged (Sunstein 2006).

In *Mead*,[29] the Court held that *Chevron* deference was not applicable to a tariff classification ruling by the Customs Service because there was no indication that Congress intended it to have the force of law, although it might be entitled to respect according to its persuasive weight.[30] An agency determination qualified for *Chevron* deference only when Congress delegated authority to the agency to make rules carrying the force of law, which could be shown by an agency's power to engage in formal adjudication, or notice and comment rulemaking, or by some other indication of comparable congressional intent.

Justice Scalia dissented, arguing that the majority's ruling constituted a major change in judicial review: whereas there had hitherto been a general presumption of agency authority to resolve ambiguity in their governing statutes, there was now no such presumption of authority, which the agency had to overcome by showing some affirmative legislative intent to the contrary. The new doctrine was, said Justice Scalia, unsound in principle because there was no necessary connection between the formality of the procedure and the power of the agency administering it to resolve questions of law authoritatively, and because it created an artificial incentive to engage in rulemaking. It was also, in his view, unsustainable in practice, because the inclusion by the majority of 'some other indication of comparable congressional intent' so as to trigger *Chevron* deference would engender confusion in lower courts.

Mead must be seen in the light of *Barnhart*.[31] The plaintiff contested a Social Security Administration regulation stipulating that a claimant for disability benefits did not suffer 'impairment' if the problem was not expected to last at least twelve months. The agency adopted the twelve-month rule after notice-and-comment, but the agency had initially taken this view through less formal means. The Court held that the less formal measures did not preclude *Chevron* deference. *Mead* was construed as saying that *Chevron* deference would depend on 'the interpretive method used and the nature of the question at issue'.[32] Justice Breyer, giving the opinion of the Court, concluded that,[33]

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time

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[29] *US v Mead Corporation* 533 US 218 (2001).
[30] Pursuant to the ruling in *Skidmore v Swift & Co* 323 US 134 (1944).
[31] *Barnhart v Walton* 535 US 212 (2002). See also *Gonzales v Oregon* 546 US 243 (2006).
[32] *Ibid* 222.
[33] *Ibid* 222.

> all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Step zero has generated practical problems, and its principled foundations are questionable. In practical terms, the case law has created problems for lower courts, which have struggled to decide whether *Chevron* deference is warranted, more especially given the interpretation accorded to *Mead* in *Barnhart* (Bressman 2005, Sunstein 2006). It is not evident that the complexity is warranted, given that the outcome will often be the same irrespective of whether the decision is reached through *Chevron* deference, or through independent judicial assessment tempered by according due weight to the agency under *Skidmore* (Sunstein 2006). These concerns have been voiced within the Supreme Court, where, for example, Justice Kennedy in dissent was critical of the majority for purporting to apply *Skidmore*, while reasoning in a manner indistinguishable from *Chevron*.[34] There is, moreover, the further problem that the Supreme Court has used versions of deference in addition to those enunciated in *Chevron* and *Skidmore* (Eskridge and Baer 2008).

In terms of principle, there are difficulties with the criterion in *Mead* under which *Chevron* deference only applies to agency determinations with the force of law. The historical meaning of 'force of law' has been superseded in recent years (Sunstein 2006, Merrill and Watts 2002). Formal agency adjudication and notice and comment rulemaking are now regarded as the primary exemplars of this test, the best explanation being that such modes of agency decision-making ensure some measure of formal agency deliberation, transparency and participation. It is nonetheless problematic. The criteria for formal adjudication are limited,[35] with the consequence that an agency might feel compelled to use rulemaking where it would not otherwise do so. Moreover, the interpretation of *Mead* in *Barnhart,* holding that *Chevron* deference would depend on the interpretive method used and the nature of the question at issue, marked a shift to functional criteria, cast in terms of agency expertise, the interstitial nature of the legal inquiry, etc., and away from the form through which the agency decision was made.

3. Canada

There is extensive judicial analysis of the standard of judicial review in Canada. The case law is rich and complex, and the Supreme Court 'ebbed' and 'flowed' on the test for review of error of law (L'Heureux-Dube 1997, Brown and Evans 1998, Mullan 2003). There were remnants of reasoning in terms of jurisdictional error, but the general approach was to use varying intensities of review: correctness, reasonableness *simpliciter*, and patent unreasonableness. The Supreme Court in *Pushpanathan*[36] identified factors that would be taken into account when deciding on their applicability, including: the existence or not of a privative clause and its nature; the relative expertise of the decision-maker; the purpose of the legislation and of the particular contested provision; and the nature of the problem, more especially, whether it was law, fact or involved elements of

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[34] *Department of Environmental Conservation v EPA* 540 US 461, 517–18 (2004).

[35] *Dominion Energy Brayton Point, LLC, v EPA* 443 F 3d 12 (2006).

[36] *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982; *Dr Q v College of Physicians and Surgeons of British Columbia* [2003] 1 SCR 226; *Voice Construction Ltd v Construction & General Workers Union* [2004] 1 SCR 609.

both. The Canadian approach was, therefore, 'functional and pragmatic'. Insofar as the term jurisdictional was used, it was as a label for a provision that a court determined must be answered correctly, in accord with the preceding approach (Huscroft 2006). The precise balance and admixture of the functional and pragmatic criteria could however be problematic (Mullan 2003, Keyes 2006). It was also apparent that individual judges approached the test with differing views of the latitude allowed for agency interpretation, and this coloured application of the correctness/rationality criterion.

The leading decision is now *Dunsmuir* (Mullan 2008).[37] It reduced the tests for review to correctness and reasonableness, abolished the distinction between reasonableness *simpliciter* and patent unreasonableness, and renamed the test the 'standard of review analysis' rather than the 'pragmatic and functional analysis'. The correctness test connoted judicial substitution of judgment with no deference accorded to the tribunal. Rationality review embraced process, how the decision was reached, its transparency and intelligibility; and substance, that is, whether it was within the range of reasonable outcomes. Deference, construed as respect for the primary decision-maker, informed the rationality test on fact and law.

The following criteria were held to be relevant to the choice between correctness and rationality. The correctness test was applicable to 'true' jurisdictional issues, whether the tribunal had authority to make the inquiry, and questions of law that were of central importance for the legal system and outside the agency's area of expertise, such as issues of constitutional interpretation or the jurisdictional divide between two agencies. Rationality review would normally be appropriate where there was a privative clause; there was a discrete administrative regime and the tribunal had expertise; the review was of fact or discretion; or there was an issue of law that did not warrant correctness review, more especially where the factual and legal issues were closely intertwined, and/or where the agency was interpreting its own statute. The Court thereby affirmed that while some legal issues were subject to correctness review, there was nothing unprincipled about the application of rationality review to other legal issues. The Court also made it clear that the preceding factors did not have to be considered afresh in every case, since precedent would often be determinative.

The *Dunsmuir* decision is to be broadly welcomed, but there are nonetheless issues that are unresolved or uncertain, as is apparent from the separate judgment by Justice Binnie (Mullan 2008). The resurrection of jurisdictional error is likely to create problems, notwithstanding the Court's asseveration that it only covered 'true' or 'narrow' jurisdictional issues as to whether the tribunal had authority to enter the inquiry. UK law reveals the real difficulty in maintaining this distinction, as does the earlier Canadian jurisprudence. The impact of statutory rights of appeal on the *Dunsmuir* approach to standards of review is moreover unclear. The majority's decision is framed in relation to administrative tribunals, and hence its application to other forms of administrative decision-making remains uncertain. Last but not least, the decision is equivocal as to whether there might still be differentiation within the rationality standard, dependent upon the more particular degree of deference that the court believes is appropriate in the instant case.

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[37] *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

4. European Union

EU law provides an interesting contrast to US and Canadian law. There has been almost no analysis of the meaning of law in the context of judicial review, nor has there been discussion of the appropriate test when the courts undertake such review. This is so even though there is much judicial review, both direct and indirect, and issues of law frequently require resolution.

The initial decision-maker, normally the Commission, will be accorded authority on certain conditions, derived from a Treaty article or Community legislation. A claimant will contend that the Commission has erred in the interpretation of these conditions. It might argue, for example, that financial assistance given by a Member State to a firm does not constitute 'state aid'; or contend that the Commission misconstrued the legal meaning of 'concerted practice' in competition law; or claim that the term 'monetary measure' cannot cover an economic measure. There are thousands of such cases in EU law.

The Community courts decide on the test for review, and their general approach is simply to substitute their own judgment on questions of law. They lay down the meaning of the disputed term, and if the Commission interpretation is at variance with this, it will be annulled. Substitution of judgment on questions of law is, therefore, the cornerstone of judicial review in the EU, and the general assumption is that the meaning of a term in the Treaty or in Community legislation is a question of law for these purposes (Craig 2006).

The Community courts have sometimes tempered the force of this proposition. They have on occasion characterized language in a Treaty article or in Community legislation as involving discretion rather than pure questions of law. The Community courts have also on occasion characterized the contested issue as the factual application of a legal concept to an individual case. They will then focus on the factual and evidentiary basis for the Commission's finding and will accord some discretion to the Commission when determining whether the facts justify the application of the legal concept. However, review of both fact and discretion has become more intensive over time (Craig 2006).

It might be argued that the approach of the EU courts to review for error of law is not fundamentally different from that in the other systems discussed above and that the European Court of Justice (ECJ) is simply 'doing pretty much the same thing, in slightly different ways'. On this view, although the Community courts' default position is substitution of judgment for errors of law, the force of this is ameliorated by classifying an issue as fact or discretion when they wish to accord greater autonomy to the initial decision-maker. This remains different from the position in the US and Canada, but the variation is less significant than might at first appear.

There is some force in this view, but it does not tell the whole story. This is, in part, because reclassification is not very common. It is, in part, because in reality there are contrasting normative assumptions that render the contrast between the legal systems more marked. All but two of the EU Member States are based on civil law not common law. There is, of course, diversity within civil law legal systems. Notwithstanding this, there is a general approach as to the present topic.

The normative assumptions underlying the US and Canadian approaches would not generally be accepted by those schooled in the civil law, nor, as we have seen, have they been accepted in modern UK law. For those of a civil law persuasion it is axiomatic that

courts decide issues of law, irrespective of whether the terrain is inhabited by an agency or administrative body. The conceptual premise of US and Canadian law that some latitude for interpretative autonomy over legal issues should be accorded to agencies, whether on grounds of delegation, expertise or accountability, would in general 'not compute' for those of the civil law tradition.

The rationale for this position is almost certainly eclectic. An admixture of reasons may well resonate within a particular legal regime. The rationale may be based on interpretation of the country's constitution, which entrusts resolution of legal issues to courts. It might be thought to be axiomatic that courts decide all questions of law. Courts may be unwilling to accept that administrators could possibly be better placed by training to interpret legal issues than courts. Positivist conceptions of law may incline judges against the conclusion that there can be diverse, reasonable interpretations of the same legal term. There may well be countries where for historical reasons less trust is placed in the executive, which leads to strong control through substitution of judgment on issues of law. Institutional considerations may reinforce the same conclusion, as in the case of the French *Conseil d'Etat*, where the judges spend time within the administration and are, therefore, less likely to be swayed by arguments of relative expertise.

It is therefore unsurprising that the ECJ, composed of a judge from each Member State, has taken the same position. They come to the ECJ with their civil law training, which inclines them, for the admixture of reasons given above, to conclude that the ECJ should substitute its own judgment on issues of law. Even if a particular judge were to find the US or Canadian approach attractive, there would be strong constraints against its adoption. The ECJ does not give separate named judgments, but a single ruling, and hence the particular judge would be unlikely to persuade others to adopt his or her approach. Equally important is the fact that ECJ judgments are binding on all national courts. Thus even if the judge could persuade his fellow judges of the merits of the US or Canadian approach, he would rightly be cautious about issuing an ECJ judgment that would be regarded by national courts as at variance with civil law tradition.

5. Conclusion

5.1. One test or two: contending arguments

The contrasting approaches to review for error of law discussed in this chapter cannot be explained by some simple civil law/common law divide. The modern UK approach, based on the common law, is very similar to that taken by the EU, where the major influence is the civil law tradition. It might be argued that the UK and EU approach is to be preferred, either because courts should, as a matter of principle, substitute judgment on all issues of law, and/or because of the difficulties evident in US and Canadian jurisprudence.

There are many reasons why a legal system may feel that it should substitute judgment on all questions of law. It is, however, equally clear that not all legal systems share this view. The premise underlying the US and Canadian law is that judicial control over issues of law does not always demand substitution of judgment, and that interpretative autonomy should be afforded to the primary decision-maker in some circumstances, subject to control through rationality review. There have undoubtedly been difficulties in deciding upon and applying the criteria to determine the divide between substitution

of judgment and rationality review. This does not, however, undermine the soundness of the premise itself.

In certain respects, the UK/EU approach renders life 'easier' because there is only one test, substitution of judgment. Thus if courts treat all errors of law as susceptible to review, define 'law' analytically to cover the meaning of any statutory term and substitute judgment, then a claimant would know that the courts would use that standard. This is, however, to say no more than that the presence of only one arbiter on the meaning of such issues produces greater certainty than a division of responsibility. This 'certainty', however, comes at a price. The agency would be reduced to a mere fact-finder, no weight would be accorded to its opinion on the legal interpretation of the statutory terms, the courts would be embroiled in the minutiae of all legal issues and the law/fact/discretion distinction would be manipulated as an escape device when the court wished to accord greater latitude to the agency. Certainty concerning the legal test for review should not be confused with certainty of outcome, since it can be difficult to predict whether the reviewing court will find that the agency's interpretation was correct.

5.2. Two tests: the criteria for the divide

Legal systems that eschew the approach discussed above have used differing criteria to determine when courts should substitute judgment and when some interpretative autonomy, subject to rationality review, should be accorded to the initial decision-maker.

The Canadian approach is still pragmatic and functional, notwithstanding the disavowal of this label in *Dunsmuir*. The line between substitution of judgment and rationality review is demarcated through consideration of a range of factors: whether the legal question is 'truly' jurisdictional; whether it relates to interpretation of the agency statute or broader issues of constitutional or common law; the existence of a privative clause; and the expertise of the agency. These are sensible considerations, with the caveat that the first factor should be dropped. UK law provides 300 years of history to show that it is impossible to demarcate between 'true' or 'narrow' jurisdictional inquiries as to whether the agency had authority to make the inquiry and other statutory conditions in the enabling legislation. The distinction is unsustainable in theory (Craig 2008), nor is it justified in normative terms (Craig 2008, Sunstein 2006).

The principal thrust of the US approach in *Chevron* has, by way of contrast, been on legislative clarity as to the disputed term. This is the criterion for substitution of judgment within step one, the rationale for proceeding to step two being express or implied delegation to the agency to decide on the meaning of ambiguous terms, subject to judicial control through rationality review. This is so notwithstanding the differences between intentionalists and textualists, and notwithstanding the fact that expertise and accountability also featured in the *Chevron* reasoning.

There is an interesting contrast with the pre-*Chevron* case law, where the court sometimes substituted judgment, and sometimes used rationality review. Commentators pre-*Chevron* rationalized the jurisprudence by adverting to factors that might be influencing the test for review. The list included the nature of the disputed statutory term, the statutory language, purpose and context, agency expertise, and the cogency of the agency's explanation for its interpretation (Davis 1972, Jaffe 1965). These explanations, therefore, included statutory clarity, but also broader functional considerations. There are some hints of a revival of this approach within US law, most markedly in the judgments of

Justice Breyer in *Barnhart*,[38] and more recently in *Long Island Care Homes*,[39] which echo his earlier academic writing (Breyer 1986).

It might be argued that this broader functional approach would engender greater uncertainty concerning the appropriate test for review, but certainty has not been a conspicuous feature of the US jurisprudence. Indeed the most detailed empirical study of Supreme Court decisions concluded that the existing deference regime was complex in theory and unpredictable in practice; the Court applied a plethora of doctrines concerning deference in addition to *Chevron*; individual Supreme Court Justices differed over the inter-relation of these different deference doctrines; and that in over 50% of cases studied, the Supreme Court applied no deference doctrine at all, reaching the decision through independent judgment (Eskridge and Baer 2008). The same authors proposed criteria to decide when deference ought to be afforded to agencies that are close to, although not identical with, the approach adopted in Canada.[40]

There will inevitably be differences of view as to the criteria that should determine the divide between substitution of judgment and rationality review. The *Chevron* focus on legislative clarity as to the disputed term has, however, been problematic, and it is not self-evident that this should be the primary or sole criterion. The reality is that other factors appear to underlie the Court's rulings, as attested by the fact that agency success rates are positively correlated with agency expertise, statutory subject matter, and consistency in agency interpretation over time (Eskridge and Baer 2008). A better approach would be one that ceases to make the legal criterion for the two-part test turn predominantly on the search for legislative clarity to the exclusion of other functional considerations. This would accord with past academic discourse, and it might better capture the reality of judicial decision-making.

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[38] *Barnhart*, n 31.

[39] *Long Island Care at Home, Ltd v Coke* 551 US 158, 165 (2007).

[40] Whether the agency interpretation is made pursuant to a congressional delegation of law-making authority; whether the agency is applying special expertise and using its understanding of the facts to carry out congressional purposes; and whether the agency interpretation is consistent with larger public norms, including constitutional values.

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27 Judicial deference to legislative delegation and administrative discretion in new democracies: recent evidence from Poland, Taiwan, and South Africa

*Cheng-Yi Huang**

The tension between judicial control, legislative delegation, and administrative discretion is an ever-contested issue in administrative law. Many administrative law doctrines address this question, either directly or implicitly, especially in the area of rulemaking. Whether approached from the perspective of common law ultra vires doctrine or from that of the continental *Rechtsstaat*, courts must ensure that an agency, in exercising its discretion, does not go beyond the scope of legislative delegation. Constitutional limits on delegation, in turn, go to the ultimately democratic nature of the system: only where the administrative body can claim to exercise authority flowing from a *constitutional* delegation of power from the legislature does that administrative body enjoy ultimate democratic legitimacy. However, as shown in the experience of Germany in interwar Europe in the twentieth century, overbroad delegations can pose a danger for democracy. The flood of vague enabling laws of the 1920s ultimately culminated in the Nazi's *Ermächtigungsgesetz*, or Enabling Act, of March 24, 1933, providing the legal foundation, if not the political and cultural cause, for the National-Socialist dictatorship (Lindseth 2004: 1341–71). As a consequence, the post-World War II German Constitution clearly required the legislature to specify the 'content, purpose, and extent' (*Inhalt, Zweck und Ausmaß*) of the legislative authorization in the statutes (Currie 1995: 126), as a means of preventing future legislative abdications.[1] This doctrine has become a constitutional paradigm for new democracies in dealing with the dilemma of legislative delegation and administrative rulemaking.

New democracies, the subject of this chapter, have usually suffered from the abuse of administrative power and excessive legislative delegation in the past. After

* This chapter is a much condensed version of a set of case studies examined in my JSD dissertation, 'Judicial Deference and Democratic Governance in Nascent Democracies: Self-restraining Courts in Post-Transitional South Africa, Taiwan, and Poland' (University of Chicago, 2009). For further analysis of these cases and their implications in post-transitional democratic politics, please refer to the dissertation. I would like to thank Susan Rose-Ackerman, Peter Lindseth, Tom Ginsburg, Cass R. Sunstein, Eric Posner, John Comaroff and Daphne Barak-Erez for their valuable comments and suggestions on previous drafts. The pagination of the constitutional judgment of the Polish Constitutional Tribunal refers to online publication of the *Journal of Constitutional Judgments*, available at: http://www.trybunal.gov.pl/wydawn/wyd_TK.htm. Tytus Mikolajczak helped with the English translation of Polish judgments.

[1] In the following discussion, I use 'the German style of intelligible principle' or simply 'the intelligible principle' to refer to the German principle of determinacy (*der Grundsatz der Bestimmtheit*) that flows from this constitutional requirement.

democratization, these countries were understandably cautious about broad legislative delegations of rulemaking power to the executive branch, as well as about the exercise of unbounded administrative discretion. Some of the post-transitional countries have enshrined the postwar German constitutional principles into their own constitutions, as in Poland.[2] A more groundbreaking step can be seen in South Africa's attempt, in its 1996 Constitution, to elevate the right to administrative justice to the level of a constitutional requirement, mandating that administrative action be reviewed by the court so as to ensure its lawfulness, reasonableness and procedural fairness.[3] On the other hand, constitutional courts in some new democracies have developed new jurisprudence to constrain the executive power. For example, the Council of Grand Justices in Taiwan frequently applies the 'statutory reservation principle' (*Prinzip des Gesetzesvorbehalt*), a constitutional doctrine derived from Article 80(1) of the German Basic Law, in administrative cases. With enhanced legal institutions (administrative courts), rights-oriented legislation (Administrative Procedure Acts) and newly adopted constitutional cannons (for example, the German style of 'intelligible principle' requirement, known as *der Grundsatz der Bestimmtheit*), the judicial power in new democracies often asserts itself as a constraint on the executive power in order to prevent democratic breakdown during transition. Indeed, many of these courts have exercised extensive power over administrative policymaking in the last two decades (Tate and Vallinder 1996, Ginsburg 2003, Ginsburg and Chen 2008).

Nevertheless, what might intrigue scholars of comparative administrative law is the recent trend in certain post-transitional countries toward a kind of judicial self–restraint over both legislative delegation and administrative discretion.[4] These courts seem to credit the discretionary power of the executive branch to a sometimes surprising extent, given the recent experience with authoritarian rule. This chapter explores evidence of this recent tendency in the cases of post-transitional Poland, Taiwan, and South Africa. All three countries experienced democratic transitions since the late 1980s. In the process, their constitutional courts have all struggled to establish judicial supremacy over constitutional interpretation. However, between 2004 and 2006, a series of cases in these countries suggest that constitutional courts are prepared to defer to legislative decisions delegating broad amounts of regulatory power to the administrative sphere, as well as to administrative agencies claiming expertise in the exercise of that power. By focusing on these three cases, this chapter addresses a puzzle: why have constitutional courts in post-transitional countries exhibited increasing deference in administrative law cases over the last several years?

I begin by examining each particular case in greater detail. The first two cases focus

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[2] Section 1, Article 92 of the 1997 Constitution of the Republic of Poland.

[3] Article 33 of the 1996 Constitution of the Republic of South Africa.

[4] By 'post-transitional contexts' or 'post-transitional countries', I refer to nascent democracies that have recently shifted from political regimes of communism, fascism, authoritarianism, military dictatorship, apartheid, genocide and massive racial conflicts etc. and have already entered a relatively stable and enduring political condition which may enable these countries to initiate their state-building processes. I use this minimalist term to avoid the ambiguous notion of 'democratic consolidation', since there is no stable criterion to judge whether a country has consolidated its democratic regime or not. A stage of 'post-transition' starts when a country has been able to run popular elections nationwide and a democratic constitution is in use.

on the degree of deference owed a legislature in choosing to delegate broad regulatory power to administrators; the third one deals with judicial deference to administrative decision-making. The intensity of judicial deference escalates over the three cases. The first one, the Polish Constitutional Tribunal, presents a less deferential case among the three courts, though it did loosen its rigid standard for legislative delegation in the judgment discussed. The strongest deference can be seen in the South African Constitutional Court's performance, which expressly addresses the merits of judicial deference and fully upholds the agency's policy choice. After the case studies, I try to provide some tentative explanations for the deferential turn, focusing on the historical heritage of administrative law from the authoritarian regime and the political function of courts in post-transitional democracies. I argue that judicial review of administrative action before democratization bestowed on courts some credibility to retreat from judicial intervention. Meanwhile, the needs of political and socio-economic restructuring also prompted courts to refine their degree of control over administrative action. The courts were, in effect, responding to a greater challenge: defining the extent and manner of their participation in the process of democratic governance in post-transitional contexts.

1. Poland: vacillating deference and the freedom of economic activity

The Polish Energy Law (*Prawo energetyczne*) of 1997 obliged energy companies to purchase electricity generated from renewable sources as well as 'combined heat and power' (CHP) (Nilsson et al. 2006: 2269). If a company did not comply with the purchase obligation, the Energy Regulatory Office (*Urząd Regulacji Energetyki*, URE) would ask the company to pay a 'compensation fee'.[5] On December 15, 2000, the Minister of Economy issued a directive concerning the obligation to purchase energy from unconventional renewable resources (Oniszk-Popławska et al. 2003: 101). In fact, the EU also issued a directive regarding the promotion of renewable energy sources in 2001 (2001 Directive), which was based on its 1997 White Paper on renewable energy (European Commission 1997).[6] Although Poland was not a member state of the EU at that time, it was already in the process of negotiating its accession. Scholars therefore argue that Poland's ambitious renewable-resource policy was a response to Poland's bid for EU membership (Wohlgemuth 2003 and Wojtkowska-Łodej: 112). Nevertheless, the Polish electricity industry was dominated largely by state-owned companies. One such company, PSE (Polskie Sieci Elektroenergetyczne S.A.), in fact played a leading role in the process of

[5] Article 9 (3) of the Energy Law stipulated that '[t]he Minister of Economy shall, by way of a regulation, impose upon energy enterprises engaged in the trade in, or transmission and distribution of, electricity or heat an obligation to purchase electricity from unconventional and renewable energy sources, as well as electricity co-generated with heat, and heat from unconventional and renewable sources; and specify the detailed scope of this obligation, including, taking account of the technology applied in energy generation, the size of the source and the method by which the costs of the purchase are to be reflected in tariffs'. This translation is taken from the English summary of the Constitutional Tribunal's Judgment of July 25, 2006, p. 24/05.

[6] Directive 2001/77/EC of the European Parliament and of the Council of September 27, 2001. The EU's 2001 Directive provided that all member states should set their national indicative targets for future energy consumption of renewable sources in the next ten years. The European Commission would thereafter evaluate whether these national quotas had been consistent with the 'global indicative target' of 12 percent of gross national energy consumption by 2010.

reform (Wohlgemuth and Wojtkowska-Łodej 2003:116-17). As a transmission system operator, PSE was also a state-owned company controlled by the Ministry of Treasury. It was also obliged to purchase electricity generated from renewable sources under the Polish Energy Law.

However, PSE did not comply with the requirement and was therefore charged a 'compensation fee' by the URE. PSE then challenged the URE's decision in the Regional Court for Competition and Consumer Protection in Warsaw, but the Regional Court ruled in favor of the agency. PSE then appealed the case to the Warsaw Court of Appeal, arguing that the purchase-quota requirement was unconstitutional because it violated the constitutionally protected freedom of economic activities. Article 22 of the 1997 Constitution provides: 'Limitations upon the freedom of economic activity may be imposed only *by means of statute* and only for *important public reasons*' (emphasis added).

In June 2005, the Court of Appeal decided to stay the proceeding and referred the case to the Constitutional Tribunal on the question of the constitutionality of the authority granted under Article 9(3) of the Energy Law, which provided the legal basis for the obligation to purchase CHP. At issue in this case was whether Article 9(3) of the Energy Law was a constitutional delegation of the legislative power to the Ministry of Economy in view of the fact that the purchase obligation might constitute a limitation upon the freedom of economic activity, which seemingly could only be imposed directly by statute. The Tribunal heard the case and summoned the Attorney General, members of the Sejm (the national parliament), and the Minister of Economy to present their opinions before the Tribunal. It rendered its judgment on July 25, 2006.[7]

The PSE seemed to have a recent, favorable precedent on its side. In 2004, the Constitutional Tribunal had decided a very similar case in which legislation obliged fuel producers to add certain levels of bio-components to fuels and set forth the pecuniary punishment for non-compliance.[8] The Ombudsman challenged the statute on the same grounds of freedom of economic activity. Although the Tribunal had found that it was not competent to decide whether the policy of bio-energy was sound or reasonable, it held that the provisions in dispute were unconstitutional because they could not be justified on the ground of public interest and because they were not the least burdensome measure by which to achieve the goal of environmental protection. The Tribunal's judgment constituted a major setback to the government's bio-energy development agenda (Nilsson et al. 2006: 2268).

The case regarding the Energy Law, however, presented a narrower question of law. PSE argued that, because the purchase obligation restricted economic freedom, it needed to be specified in the statute, rather than in a directive issued by the Ministry of Economy.

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[7] Judgment of July 25, 2006, OTK ZU no. 7A, entry 87, ref. P. 24/05. Original document: http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2006/P_24_05.pdf; English summary available at: http://www.trybunal.gov.pl/eng/summaries/documents/P_24_05_GB.pdf (last accessed: April 16, 2009.)

[8] Judgment of April 21, 2004, OTK ZU no. 4A, entry 31, ref. K 33/03. Original document: http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2004/K_33_03.pdf; English summary available at: http://www.trybunal.gov.pl/eng/summaries/documents/K_33_03_GB.pdf (last accessed April 16, 2009.)

Bolstering the argument drawn from Article 22 of the constitution was the language of Article 31(3), which states: 'Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute'. Given its prior decision in the Bio-fuel case, the Tribunal could easily have held Article 9(3) unconstitutional. Indeed, from its birth in 1986, the Constitutional Tribunal had applied a strict standard to cases involving delegated legislation (Brezezinski and Garlicki 1995: 30). Whenever the executive branch took regulatory action that interfered with people's fundamental rights, the Tribunal had required that the regulation be based on express legislative delegation, whose scope and content should be clearly defined in statute.[9]

Notwithstanding its earlier decision in the Bio-fuel case, the Tribunal ruled for the Ministry of Economy in the Energy case. Citing several legal treatises on economic law, the Tribunal reasoned that the freedom of economic activity must be balanced against other constitutional values, like energy security, the principle of sustainable development (Article 5), as well as environmental protection (Article 74). The court further argued that although the language of Article 22 is very similar to that of Article 31(3), they are not identical. According to Article 31(3), any limitation on constitutional freedoms and rights must be imposed *only by statute* (*tylko w ustawie*). However, the limitation on freedom of economic activity, according to Article 22, should be imposed '*by means of statute'* (*w drodze ustawy*). According to the Tribunal's explanation, the phrase 'by means of statute' indicates a 'limitation on freedom may be achieved by using statute. In the absence of statute, the construction of limitation cannot take place at all. Only a statute can legitimize limitations introduced by way of administrative directive issued thereunder.'[10] In contrast, the Tribunal noted that 'the term "only by statute" represents the will of constitutional framers, which expressly excludes the [interpretive] possibility one can find in the term of "by means of statute"'.[11] The scope of the limitation should also be intelligible so that one can easily conceive of the limitation through statutory language. However, in the case of freedom of economic activity, Article 22 of the Constitution does not set the same requirement. In other words, 'by means of statute' allows the parliament to delegate regulatory power to the executive via legislation. Accordingly, the government can issue a directive to limit freedom of economic activity on the basis of statutory delegation.

The Constitutional Tribunal confirmed that the purchase obligation satisfied the criteria for public interest in that the decision reflected an effort to balance environmental development, energy security, and sustainable development, and further accorded with an earlier EU directive from 2001. The Tribunal also found that the law presented clear instructions essential to issuing an executive directive on the issue of purchase obligation.[12] In addition, Article 9(3) of the Energy Law required the Minister to consider the technology of energy generation, the size of the energy source, and the methods by which costs of purchase are to be reflected in tariffs. The Tribunal reasoned that, in terms of state-controlled markets like the energy industry, these legislative considerations had

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[9] Judgment of June 26, 2001, OTK ZU no. 5, entry 122, ref. U 6/00, p. 8, original document: (http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2001/u_06_00.pdf).

[10] Judgment of July 25, 2006, OTK ZU no. 7A, entry 87, ref. p. 24/05, see supra note 7.

[11] Ibid.

[12] Ibid.

fulfilled constitutional requirements of 'essential elements reservation'. Moreover, the Constitutional Tribunal indicated that '[i]t is up to the legislator to decide whether the delegation clauses should be more specific (detailed)'.[13] According to the Tribunal, it is the legislature's job to evaluate whether it is possible and in accordance with constitutional understanding to specify the delegation, which would further shape the content of this regulation. As long as Article 9(3) covered the essential elements of obligation, it passed constitutional scrutiny.

2. Taiwan: dejudicialization of environmental regulation

Judicialization of governance is an emerging phenomenon in post-democratization Taiwan. Since its political liberalization in the early 1980s, the Council of Grand Justices (Taiwan's analogue to a 'constitutional court') has worked the authoritarian state by recourse to the German concept of the *Rechtsstaat*, especially its component relating to legislative delegation. The Council's effort arguably culminated in its Interpretation No. 443 (1997),[14] introducing the German doctrine known as *System des Abgestuften Vorbehalts* (literally, the 'differentiated system of reservation' of power belonging to the legislature, which cannot be delegated). To some extent, the Council's full-fledged application of the *Rechtsstaat* in the realm of administrative law has facilitated Taiwan's democratic transition based upon the rule of law (Chang 2001). However, twenty years after democratization, the Council began to articulate an approach of self-restraint in the judicial review of administrative action. The most important decision in this regard was its Interpretation No. 612 (2006),[15] which gives more deference to the environmental agency's regulatory power.

Handed down five and a half years after Taiwan brought into effect a new Administrative Procedure Law, Interpretation No. 612 concerned governmental supervision over waste management companies. The threshold question was the constitutionality of the delegation of power contained in Article 21 of the Waste Disposal Act. This question, however, in fact merged with the more detailed question of how much deference the administrative actor should properly receive in the interpretation of gaps and ambiguities in the statute. Article 21 provided in pertinent part that 'the regulatory authority shall prescribe the regulations concerning the supervision of and assistance to public and private waste cleanup and disposal organs, as well as the qualifications of the specialized technical personnel'. A technician in a cleanup company whose license was revoked, Mr Hung, brought the case to the Council challenging the administrative rule promulgated by the Environmental Protection Administration, which listed several conditions regarding the revocation of professional licenses. According to the rule, the illegal and undue operation of a waste disposal company constitutes the reason to revoke the company's operating

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[13] Ibid., 'Do ustawodawcy należy rozstrzygnięcie, czy upoważnienie powinno być bardziej szczegółowe'.

[14] Judicial Yuan, Constitutional Interpretation No. 443 (December. 26, 1997), English translation is available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03_01.asp?expno=443.

[15] Judicial Yuan, Constitutional Interpretation No. 612 (June 12, 2007) (Taiwan); English translation is available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=612.

license as well as the technician's professional license. Mr Hung's company was found to have wrongfully operated in the process of waste disposal, leading to toxic materials polluting the soil around the storage facility. Mr Hung argued that he was not a manager at the factory and that, consequently, he should not bear the responsibility of the wrongful operations of the factory's managerial personnel. Mr Hung cited the Council's decisions in Interpretation No. 313, 394, 402, 443, and 570, arguing that administrative rules which set limitations on freedoms and rights should be based on a clear legislative delegation.[16] Nevertheless, the Council found that 'although the said enabling provision did not specify the content and scope of the qualifications of the specialized technical personnel, it should be reasoned, based on construction of the law as a whole that the lawmakers' intent was to delegate the power to the competent authority to decide [. . .]'.

In arriving at this conclusion, the Council reconfirmed the approach of purposive interpretation that it had articulated in an earlier case (Interpretation No. 538 of January 22, 2002).[17] This case had recognized the need to defer to administrative expertise in a modern state, especially in the arenas of environmental, technological, and health regulation, where uncertainty and risks are high. In the Council's view, the Waste Disposal Act was designed to protect the health of citizens from unforeseen environmental pollution. Therefore, the public interest constituted the main purpose of this legislation. The enabling clause in Article 21 should therefore be construed in accordance with the legislative purpose. The Council thus regarded the existing mechanism of supervision provided in Article 21 as sufficiently satisfying the need of protecting the public interest because its aim was control of waste disposal companies and the deterrence of potential law-breakers. Therefore, even though its past precedents indicated that Article 21 implicated a fundamental right (the 'right to work', in this case in the waste disposal field) and therefore, the regulatory power it authorized should belong within the 'reserve' (*Vorbehalt*) that must be retained by the legislature, the Council held that the Legislative Yuan could delegate to the Environmental Protection Administration the power to revoke the technician's professional licenses.

This seemingly trivial case inflamed a fierce debate among the justices. On the basis of textual analysis, Justice Liao Yi-nan and Justice Wang He-hsiung, the two specialists of administrative law on the bench, criticized the majority opinion for its confusion regarding delegated administrative rules. The two justices argued that by holding the *general delegation* under Article 21 of the Waste Disposal Act to be constitutional, the majority risked jeopardizing the well-established statutory reservation doctrine and the need, in effect, for a German-style 'intelligible principle' (*der Grundsatz der Bestimmtheit*)[18] to guide the judiciary in the interpretation of the statute. According to their dissenting opinion, the rule in dispute infringed upon the right to work and went far beyond the limited function of general delegation. They seriously warned the majority that this interpretation essentially overruled the Council's earlier approach (articulated in

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[16] Mr. Hung's Constitutional Petition (January 7, 1994), see supra note 15, Constitutional Interpretation No. 612, pp. 71–7.

[17] Judicial Yuan, Constitutional Interpretation No. 538 (January 22, 2002) (Taiwan), English translation is available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=538.

[18] See supra note 7.

Interpretation No. 313 of February 1993)[19] and that the current interpretation would definitely invite severe criticism from legal academia.[20] Meanwhile, Justice Hsu Yu-hsiou, a criminal law scholar, in her dissenting opinion, denounced this interpretation as 'a judicial review without any review'. She disagreed with the majority's purposive approach and criticized the majority's use of public interest as writing a blank check for arbitrary and capricious administrative action. In her view, human-rights protection trumps any other principle of rule of law. Her libertarian conception of human rights called for a coherent interpretation based on the Council's precedents.[21]

In contrast, Justice Pong Fong-zhi and Justice Hsu Bi-hu, two experienced judges, argued in their concurring opinion that the Waste Disposal Act was in fact a policy choice made by the Legislative Yuan. The Legislative Yuan had deliberated collectively and had therefore decided to authorize the Environmental Protection Agency to adopt appropriate regulations regarding waste-disposal issues. The justices went on to argue that this general delegation was a *value choice* of the legislative branch that the Council should not displace with its own judgment. Meanwhile, pursuant to the proportionality test that the Council had previously adopted (in Interpretation No. 522 of March 9, 2001),[22] the two justices argued that this rule's negative effect is not greater than the public interest protected by the rule. This concurring opinion implied that the Council neither is better suited than the executive branch to make policy decisions nor has legitimate reasons to challenge the policy judgment of the legislative branch. In short, the concurrence argued that it is the political branches that should be held accountable for their environmental policy.[23]

Following Interpretation No. 612, the Council upheld six administrative rules in ten cases in respect of agencies' discretion and policy choices (as of 2009).[24] This series of interpretations may mark the beginning of a new age in the judicial approach to the regulatory state in Taiwan, though at this point it is hard to predict because the transformation is ongoing. If this approach holds, the authority of the executive branch will gain more strength and the power relationship between the judiciary and the executive would significantly change. There would be a reconfiguration of state power, which would bring administrative authority back on the stage of state-building, with the judiciary applying

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[19] Judicial Yuan, Constitutional Interpretation No. 313, February 12, 1993. English translation is available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=313.

[20] Justice Liao's and Wang's Joint Dissenting Opinion, supra note 16, Constitutional Interpretation No. 612, pp. 31–40.

[21] Justice Hsu's Dissenting Opinion, supra note 15, Constitutional Interpretation No. 612, pp. 40–71.

[22] Judicial Yuan, Constitutional Interpretation No. 522, March 9, 2001, English translation is available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=522.

[23] Justice Pong's and Justice Hsu's Joint Concurring Opinion, supra note 15, Constitutional Interpretation No. 612, pp. 6–31.

[24] The six constitutional cases include Constitutional Interpretation No. 614 (July 28, 2006), No. 615 (July 28, 2006), 628 (June 22, 2007), 629 (July 6, 2007), 643 (May 30, 2008), 648 (October 24, 2008). The unconstitutional cases include Constitutional Interpretation No. 619 (November 10, 2006), 636 (February 1, 2008), 638 (March 7, 2008), 658 (April 10, 2009). All these cases' English translation are available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03.asp.

judicial review of reasonableness rather than that of textual and formalistic control over an agency's rulemaking. A new paradigm of administrative decision-making grounded on judicial deference would replace the rights-oriented paradigm that took root in the aftermath of democratization.

3. South Africa: delivering transformation through judicial deference

Bato Star Fishing v. Minister of Environmental Affairs ('*Bato Star*'),[25] a 2004 decision of the South African Constitutional Court ('Constitutional Court'), is one of the most influential cases in South African administrative law since that country's return to democracy in 1994.[26] The case concerns regulatory policy with regard to the deep-sea hake fishing industry, one of the most lucrative sectors of the South African fisheries. White South Africans had long dominated this capital-intensive business. After democratization, however, the Marine Living Resources Act (MLRA) of 1998 required the government to address the need to 'restructure the fishing industry' so as to transform its historical imbalances. Pursuant to the MLRA, the Fisheries Transformation Council (FTC) has initiated a program to reallocate fishing rights for the benefit of previously disadvantaged communities. However, as summarized later by Horst Kleinschmidt, the Deputy Director-General of the Marine and Coastal Management: 'The FTC's first ever attempt to allocate hake longline fishing rights to predominantly black fishers and black owned fishing companies was set aside by South African courts due to various procedural flaws committed by the FTC. The FTC was also dogged by rumors and accusations of maladministration and corruption' (Kleinschmidt et al. 2006: 3).

In the deep-sea sector, the number of rights holders rose from 29 in 1994 to 58 in 1999 (Japp 2001: 121–2). However, the years between 1998 and 2000 also witnessed the most turbulent days in the fishing industry (Kleinschmidt et al. 2006: 4). At that time, the total allowable catch was allocated on an annual basis to allow new entrants to join this industry, but this method destabilized capital investment and long-term projects for the deep-sea hake fisheries. The nature of deep-sea hake fisheries entails complex technology and financial investment, which is drastically different from the corresponding investment for labor-intensive inshore trawling. It is undisputed that the South African deep-sea hake industry ran the risk of 'becoming less and less internationally competitive' during the initial stage of transformation.[27]

In 2000, the Department of Environmental Affairs and Tourism (DEAT) disbanded the oft-criticized FTC and established a new branch of Marine and Coastal Management (MCM). The Deputy Director-General of the MCM announced in early 2001 that 'the government would no longer allocate fishing rights on an annual basis' (Kleinschmidt et al. 2006: 5–6). It then invited applications for commercial fishing rights across all sectors regarding specifically bids on four-year quota allocations. The department also issued policy guidelines regarding the allocations, declaring that '[t]he policy on transformation is broadly to reward those ex-rights holders who have performed and taken steps

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[25] 2004 (4) SA 490 (CC).

[26] Hugh Corder once commented on *Bato Star*, 'This is the most influential judgment since 1994 as regards the meaning to be given to review for reasonableness' (Corder 2006: 339).

[27] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* (1) (40/2003) [2003] ZASCA 47, 16 May 2003, para 18.

to transform and to admit suitable new HDP entrants that demonstrate both a capacity to catch, process and harvest the right applied for and a willingness to invest in the industry'.[28] More than 5,000 applicants applied for the quota allocations, and overall the applications would entail a harvest of up to 1.1 million tons of hake per annum, more than nine times the total allowable catch.

To balance the need for industrial restructuring with stabilization, the department turned down all applications from new entrants. The Chief Director of the MCM then used the tonnage allocation in 2001 as the starting point and deducted 5 percent from each applicant's original quota. These deducted tonnages were placed in an 'equity pool' and distributed among quota-holders according to their scores in the comparative balancing assessment. According to the department, the assessment criteria included the degree of transformation, the degree of involvement and investment in the industry, past performance, legislative compliance, and degree of paper quota risk. In so doing, the department regarded itself as having achieved redistribution mandated by the MLRA by reducing a large portion of tonnages from the bigger companies and allotting these quotas to the smaller ones.[29]

Two medium-sized 'black empowerment' fishing companies brought their cases to challenge the government's quota allocation for deep-sea hake fishing, focusing their challenge on the legislative purpose of MLRA.[30] They won in the Cape Provincial Division of the South African High Court, but lost in the Supreme Court of Appeal. One of them, Bato Star Fishing (Pty) Ltd, then appealed the case to the Constitutional Court. The Constitutional Court, however, deferred to the expertise of the Ministry of Environmental Affairs in its administration of the statutory scheme. Although lower courts had previously adopted an approach of self-restraint in an administrative context,[31] *Bato Star* was the first instance in which the Constitutional Court clearly expressed a preference for judicial deference in such circumstances.

In *Bato Star*, Justice Kate O'Regan, writing for the court, confronted two central issues. The first was whether the Chief Director had misconstrued his legal obligations under the MLRA, namely in Sections 2(j) and 18(5). The second was whether the Chief Director's decision was reasonable.

Section 2(j), which is contained in the section of the MLRA setting forth legislative

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[28] 2004 (4) SA 490 (CC), para 12.

[29] (1) (40/2003) [2003] ZASCA 47, para 37.

[30] Bato Star entered the deep-sea hake fishery industry in 1999, with a moderate quota of 1,000 tons. It sought a new allocation for 12,000 tons in this four-year period. But it only got 856 tons. Dissatisfied with the result, Bato Star sought to appeal this decision to the Minister. After the appeal process, the department granted Bato Star 17 more tons, which made for a total of 873 tons. Phambili Fisheries (Pty) Ltd was another medium-sized company that completed a review application in the Cape Provincial Division of the South African High Court.

[31] *Logbro Properties CC v Bedderson NO and Others,* 2002 ZASCA 135. In fact, the Constitutional Court had previously issued some judgments mentioning the self-constrained role of the judiciary in a democratic government. Please see *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*, 2002 (3) SA 265 (CC); *Du Plessis and Others v De Klerk and Another*, 1996 (3) SA 850 (CC); *S v Lawrence*, 1997 (4) SA 1176 (CC). These judgments have been cited by the Supreme Court of Appeal in *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* (1) (40/2003) [2003] ZASCA 47, May 16, 2003.

objectives, points to 'the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry'.[32] Section 18(5) further specifies that, '[i]n granting any right referred to in subsection (1), the Minister shall, in order to achieve the objectives contemplated in section 2, have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society'.

In dealing with the first issue, Justice O'Regan took a pragmatic approach to the interpretation of the statute. She did not regard the objectives stated in Section 2 as merely advisory or functioning like a policy guideline, as the Supreme Court of Appeal had done. Rather, she emphasized that the objective of transformation is informed by the Constitution and should be given legal effect. Therefore, while making his decision on quotas, the Chief Director was 'obliged to give special attention to the importance of redressing imbalances in the industry with the goal of achieving transformation in the industry'.[33] However, Justice O'Regan noted that there are other goals critical in the MLRA, such as environmental protection, which also corresponded to constitutional commitments. Therefore, though she recognized that the statute stressed the need for transformation in the industry, she came to a conclusion that 'there is no simple formula for transformation' and that '[t]he manner in which transformation is to be achieved is, to a significant extent, left to the discretion of the decision-maker'.[34]

But the question remains: what should be the test to determine whether the Chief Director took into consideration these statutory objectives? The test laid out by Justice O'Regan focused on practical examination of official records generated by the Director. She pointed out: 'At the very least, some practical steps must be taken in the process of the fulfillment of these needs each time allocations are made if possible'.[35] It is held that 'so long as the importance of the practical fulfillment of these needs is recognized and a court is satisfied that the importance of the practical fulfillment of sections 2(j) and 18(5)

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[32] The other objectives under Section 2 are:
(a) The need to achieve optimum utilisation and ecologically sustainable development of marine living resources;
(b) the need to conserve marine living resources for both present and future generations;
(c) the need to apply precautionary approaches in respect of the management and development of marine living resources;
(d) the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;
(e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;
(f) the need to preserve marine biodiversity;
(g) the need to minimise marine pollution;
(h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;
(i) any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law . . .

[33] 2004 (4) SA 490 (CC), para 34.

[34] Ibid, para 35.

[35] Ibid, para 40.

has been heeded, the decision will not be reviewable'.[36] Therefore, if the Chief Director could show that he had taken certain practical steps in relation to the objectives in the decision-making process, he would have fulfilled his obligation and thus had neither ignored nor misapplied the empowering statutes. After examining documents about the policy guidelines, the evaluation of applicants' capacity, and the allocation process, Justice O'Regan concluded that the Chief Director had taken into consideration the topic of transformation while deciding quotas, so the first challenge could not succeed.

The court then turned to the even more difficult second question: what constitutes a reasonable administrative decision in the application of these objectives? Justice O'Regan found that this determination 'will depend on the circumstances of each case'. Justice O'Regan enumerated several factors to be considered: 'the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected'.[37] However, except for reason-giving, all these factors are second-order inquiries, in that they facilitate the characterization of the decision-making, but provide no criteria to evaluate whether the reasons of the decision itself are in accordance with constitutional values. In responding to the key issue about reasonableness, Justice O'Regan remained vigilantly faithful to her view that '[t]he court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution'.[38]

Though approving the idea of judicial deference, Justice O'Regan addressed this issue from an institutional perspective: '[T]he need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself'.[39] In her opinion, the question of deference is a question of law that the court must confront to demarcate the scope of its decision-making power. Furthermore, she argued:

> [I]t is clear from this that Parliament intended to confer a discretion upon the relevant decision-maker to make a decision in the light of all the relevant factors. That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium.[40]

In a difficult policy issue like the allocation of hake quotas, which involves technological knowledge, multiple political values, and administrative expertise, the Justice reasoned, 'If we are satisfied that the Chief Director did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him', the court should give due respect to the agency's decision and not interfere with the administrative decision-making process.[41] In this vein, Justice O'Regan reasoned that it is not the courts' job

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36 Ibid.
37 Ibid, para 45.
38 Ibid.
39 Ibid, para 46.
40 Ibid, para 49.
41 Ibid, para 50.

to decide whether an increase of 25 percent or 40 percent will give effect to the purpose of transformation specified in Section 2(j) and 5 percent will not. Instead, from Justice O'Regan's perspective, the courts should simply make sure that by adopting 5 percent, the Chief Director acted in a reasonable manner in light of the statutory objectives. The Court concluded that the Chief Director had taken into account the need to restructure the deep-sea hake industry after examining the policy guidelines, the screening reports, and the final decisions issued by the department.

4. Conclusion

In the first two cases (Poland and Taiwan), the constitutional courts deferred to the legislature rather than to the executive. However, in the third case (South Africa), it is clear that the constitutional court deferred to the executive branch. Justice O'Regan elaborated a functional approach to judicial deference in her opinion, which recognizes the competency of the executive branch under the framework of separation of powers. Nevertheless, Justice O'Regan also emphasized Parliament's intent while explaining why the executive has the power to make decisions.[42] She characterized the question of deference as a question of law, which depends on the purposes of the legislation. In this regard, the concern of the first two cases merges with the third, because the courts in Poland and Taiwan also employed legislative intent as the ground to justify the constitutionality of administrative rules delegated by statutes whose languages were vague and broad (that is, Article 9(3) of the Polish Energy Law and Article 21 of Taiwan's Waste Disposal Act).

Because legislative intent or purpose is often uncertain or vague, this can provide courts with the basis to intervene in administrative policymaking through judicial construction of the 'legislative intent'. However, courts in new democracies, at least at the outset of the transition, often seem eager to expand their power by actively seeking to constrain executive power, or at least that is the conventional wisdom. People might therefore regard deferential judgments as a failure on the part of the courts to safeguard the new constitutional values of a democratic *Rechtsstaat*. But one could just as easily conclude that the emergence of deferential judgments is a product of an increasingly more self-confident court in the world of post-transitional politics. Deferential judgments suggest a judiciary unafraid of being criticized as executive-minded or as a rubber-stamp of the legislature or the government. They suggest further a judiciary that does not regard a deferential judgment as in tension with their constitutional role. Rather, as seen in the three cases, the courts have also recognized the vital role of administrative agencies in the regulatory process in post-transitional societies.

Why? To answer this question would take us well beyond the scope of this brief chapter. What I propose instead is to offer a set of tentative explanations rooted in the development of judicial review of administrative action in these countries.

First of all, in each of the countries considered here, a tradition of judicial review of administrative action predates democratization. For example, in 1980, the Polish Parliament established the High Administrative Court (Brezezinski 1993: 153, 172). Before the establishment of the Constitutional Tribunal in 1986, the High Administrative

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[42] 2004 (4) SA 490 (CC), para 49.

Court played a critical role in controlling governmental action. Some of its judgments would provide the foundation for future rulings of the future Constitutional Tribunal establishing its jurisdiction over administrative power.[43] Later, in 1986, the Constitutional Tribunal came into operation, which was the first of its kind in the former Communist bloc.

In Taiwan, on the other hand, the Council of Grand Justices reclaimed its constitutional power incrementally over the course of the 1980s (Ginsburg 2003: 140–42). To expand its jurisdiction, the court first struck down administrative actions, especially those in the field of tax administration, where the risk of an authoritarian backlash was somewhat diminished (Chang 2001: 290–305). The court then gradually built a series of judicial criteria by which it could examine the constitutionality of administrative rules since the early days of democratization.

Finally, in pre-democratic South Africa, the judiciary was not always timid in confronting the apartheid regime (Baxter 1984: 329). Admittedly, the courts upheld apartheid legislation in cases like *Lockhat*, which recognized the Group Area Act as a legitimate 'colossal social experiment'.[44] Nevertheless, they also overruled racially discriminatory administrative decisions in cases like *Komani* and *Rikhoto*.[45] As Haysom and Plasket pointed out: 'One of the peculiar features of South African society is that the courts allow an impoverished black employee to call his or her white employer to account, and a voteless resident to summon a white cabinet minister before court' (Haysom 1998: 307).

This background suggests that the pre-democratic jurisprudence of these courts not only reinforced judicial power but also popular trust in the judicial system. Without the historical heritage of trust in the judiciary, the courts may not have the leverage to render deferential judgments in the future. Moreover, there is a considerable doctrinal heritage from the pre-democratic era. The courts' pre-democratic jurisprudence often emphasized the formality of statutory delegation as a basis to strike down administrative regulations and decisions. In addition, the courts claimed to rely on implicit constitutional principles like the 'democratic state based on the rule of law' doctrine in Poland or the adopted *Rechtsstaat* doctrine in Taiwan. After democratization, this approach also helped the court to shape its professional image as a neutral, non-political arbiter in the fragmented politics.

There have indeed been significant governance challenges in post-transitional countries. As Jon Elster and his colleagues argued, post-communist countries in Central and Eastern Europe were usually left with institutionally weak governments after democratization (Elster et al. 1998), something also true in South Africa. Moreover, in post-transition Taiwan, fierce partisanship in the political sphere often tended to ossify the everyday administration. By their celebrated metaphor, Elster and his colleague described state-building in these nascent democracies as 'building a ship in the open sea' from the

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[43] In this regard, some scholars maintain that the High Administrative Court 'developed an area of legality in communist Poland, creating a gateway for democratic institutions' (Brezezinski and Garlicki 1995: 21).

[44] *Minister of the Interior v Lockhat*, 1961 (2) SA 587 (A)

[45] *Komani NO v Bantu Affairs Administration Board, Peninsula Area*, 1980 (4) SA 448 (A); *Oos-Randse Administrasieraad en'n ander v Rikhoto*, 1983 (3) SA 595 (A).

wreckages of former authoritarian regimes (Elster et al. 1998:27). Over time, this may well have tempered the inclination to judicial activism. For example, after the adoption of the 1997 Constitution in South Africa, a prominent administrative law professor, Cora Hoexter, assailed 'a highly interventionist or "red-light" model of judicial review', which has been embraced by anti-apartheid liberal lawyers for a long time, because it had impeded the well-functioning of the democratic administration (Hoexter 2000: 488).

Fears of an abusive executive power are popular in transitional societies, but they do not guarantee a quality of life that people expect to lead in a well-functioning democracy. A dynamic democracy cannot rely solely on the courts' fulfilling gatekeeper duties. Stringent judicial scrutiny of administrative action might hinder a healthy political process of policymaking. By mechanical application of legal doctrines, this situation could foster a highly legalized culture opposed to reason and argumentation within the technical domains of administration. In fact, a self-restraining court does not necessarily signify a retreat from effective control of state power. Rather, deference can sometimes enhance the capacity of the administrative organs and effectuate an institutionally capable government. The examples from Poland, Taiwan and South Africa considered here may simply reflect how courts may be liberating themselves from anachronistic fears and are further prepared to reinvigorate the dynamic interaction among different political and administrative actors. In this regard, judicial deference is not a surprise but an incremental reform responding to the competing needs of state-building and accountability in post-transitional democracies.

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28 Where too little judicial deference can impair the administrative process: the case of Ukraine

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Questions concerning the degree of deference that courts owe decisions of the executive permeate discussions of administrative justice systems. Although at least some deference is the norm in the developed world, in one post-authoritarian system – that of Ukraine – the emerging response has been to give executive decision-making little or no deference at all. The recently enacted Code of Administrative Adjudication of Ukraine (2005) emphatically prescribes both the authority and the responsibility of the courts to protect the rights of people against the power and authority of the state and, in doing so, weights the system heavily against the executive. This may be understandable as a reaction to both the authoritarianism of the former Soviet regime and the widespread corruption of the post-Soviet government. Nonetheless, it serves as a major impediment to development of a mature administrative justice system in Ukraine, which is the topic of this brief contribution.

Upon becoming independent following the break-up of the Soviet Union, Ukraine had to establish its own governance structure, including new courts and judicial procedures. The country has been slow to develop its administrative justice system during this period, failing repeatedly to enact an administrative procedure law, and only creating administrative courts and adopting a judicial review law in 2005. However, this code made it abundantly clear that in Ukraine, the system of administrative justice aligned the courts and the citizens against the powers of the state.

To appreciate the approach Ukraine has taken, it is helpful to look at the context in which its administrative justice system emerged. Integrated for several centuries into first tsarist Russia and then the Soviet Union, Ukraine did not have independent legal institutions, but rather those common to the other republics of the former Soviet empire. This meant that in the area of administrative law, the most prominent features were the procuracy and its general supervisory powers, and the administrative violations codes (Fenton 2000). Until the declining years of the USSR, the judiciary played no meaningful role in the administrative justice system.

Even the most authoritarian regimes require some system to monitor and control the actions of the bureaucracy. Historic non-judicial solutions have included the Chinese censorate (Rucker 1951) as well as the Russian and Soviet procuracy, which provided the principal means of administrative control in pre-1991 Ukraine. Founded by Peter the Great in 1722, and then revived by Lenin in the 1920s, the procuracy exercised general supervisory powers over government bodies, providing the principal means of formal recourse against abuses by the bureaucracy during the majority of the Soviet period (Christian 1982). During the period of *glasnost* under Gorbachev in the late 1980s, the courts gained authority to review actions of government bodies, a move towards the more Western approach to administrative constraints (Solomon 2008: 74).

It is noteworthy that, at that time, one of the conditions for securing judicial review of government action was the requirement to exhaust administrative remedies before the bureaucracy. While this is a core element of US and most European administrative justice systems, it became viewed as an impediment to administrative justice by many of the former Soviet republics and was rather quickly eliminated as a requirement in Russia shortly after the break-up of the Soviet Union (Solomon 2008: 275).

In Ukraine, following independence in 1991, the reform of the administrative justice system proceeded fitfully. The 1996 Constitution of Ukraine provided for direct recourse to the courts for redress of abuses by the state (Article 55). Without the creation of a comprehensive law on administrative justice, the courts of general jurisdiction, as well as the economic or commercial courts, heard appeals against administrative actions under the standard rules of civil procedure. The government initially indicated its opposition to the creation of administrative courts, primarily on economic grounds. Efforts to enact an administrative procedure law to govern the decision-making process of government agencies in both individual cases and in the adoption of regulations have been under way since at least 1996 but, as of 2009, had been unsuccessful. In 2005, however, the Verkhovna Rada (the Ukrainian parliament) reconsidered the question of administrative courts and adopted a comprehensive judicial review statute (the Code of Administrative Adjudication of Ukraine). This law not only established a three-tier national system of administrative courts but also procedures designed to enhance the rights of private persons against the state with the assistance of the new administrative courts.

This new law included a variety of provisions in defining the role and authority of the administrative courts that enhanced their powers to protect the rights of Ukrainians against the state. Two elements central to this authority are the right of a person to seek judicial review at any point following an adverse government action without exhausting available administrative remedies (Articles 8 and 104), and the requirement that a government body bear the burden of proof in any challenge to the legality of its action or inaction (Article 71). There are other, more nuanced elements of the law that similarly reflect this bias against the state as well, but these two aspects of judicial review alone, at odds with most Western administrative justice systems, reflect a highly diminished status of the government agency before the administrative courts in Ukraine.

Requiring exhaustion of administrative remedies serves a variety of useful purposes in administrative litigation, including reducing the need for judicial review in many cases and permitting the government agency to police itself and reach the most considered final decision. In post-Soviet states, it has been somewhat controversial. Russia eliminated it as a requirement for judicial review in the early 1990s (Solomon 2008), while Georgia adopted a new set of administrative procedure laws in 1999 that, among other things, expressly provided that exhaustion was not necessary (Article 178, Administrative Code of Georgia). By 2004, however, the experience of Georgian courts with administrative litigation convinced the parliament that exhaustion of administrative remedies was necessary, and the law was changed to add that requirement (2004 amendment to Article 178 of the Administrative Code of Georgia). Ukraine, however, rejected exhaustion in its 2005 enactment, reflecting the original argument of the Georgian drafters that the constitutional requirement of access to judicial redress for abuses by the state precluded exhaustion.

The result has been an outpouring of litigation before the administrative courts (28

first instance courts and seven appellate courts). In 2008 there were 568,996 cases filed in the courts of first instance and 117,312 in the courts of appeals. That is over 20,000 cases per first instance court and over 16,700 for each appellate court. The courts appear to have been working hard, but a backlog must be developing. The courts of first instance decided 406,955 cases, and the courts of appeal decided 57,773 cases, some of which were surely holdovers from previous years.[1] We do not know what proportion of litigants failed to exhaust their remedies inside the government agency or whether this caseload represents a steady-state rate of litigation or is the result of pent-up demand. At the very least, however, these data suggest severe strains on the administrative court system.

The problem is not simply a large caseload but the future development of administrative law as well. Because Ukraine has not adopted a law governing administrative procedures (as opposed to one for administrative justice), there is no standard for government decision-making, including procedures for further review of an administrative decision within the agency. Depending on the level of sophistication and professionalism of the government body, the economic value of the decisions, and other legitimate and illegitimate factors, review at a higher level may or may not be available. The State Tax Administration developed a formalized, three-tier review process culminating in review by an appeals body within the agency, and the anecdotal assessment by tax officials is that approximately half of the tax disputes go directly to court, while the others proceed through the agency appeals process.

An appeal taken from the final decision of a higher-level government body will look very different from an appeal taken from a decision at the lowest level, whether in terms of the documentation and record developed or the reasoning and explanation of the agency for its decision. In administrative justice systems with any degree of judicial deference to the agency decision, this might present a problem, but in Ukraine it appears to matter very little. Once the decision is appealed to court, the agency must establish the original basis for its decision without regard to any proceeding or result it previously reached.

American administrative lawyers tend to think of judicial review as review on the record before an appellate court. Although this is the predominant model for federal administrative law cases, it is not true for many of the US states where administrative appeals are taken to the trial courts, and certainly not the standard for most European administrative justice systems. Outside federal administrative law in the US, it is more common for the first instance reviewing courts to be able to supplement the record from the government body with additional facts than the limited record review permitted under the US Administrative Procedure Act.

In Ukraine, this process has been pushed much further, however, with the burden of proof assigned to the government agency rather than the plaintiff in the court of first instance. The government body is required to prove, in a *de novo* proceeding, the legality of its action (or inaction), after the plaintiff has asserted its claim. This burden remains with the government through all three tiers of the judicial review as well, regardless of which party prevails in the previous instance. Thus, in an appeal to the High

[1] The information is from the website of the State Court Administration of Ukraine: http://court.gov.ua/sudova_statystyka/345345457.

Administrative Court for cassation review, the government body, which may have prevailed in both lower courts, is still compelled to demonstrate the lawfulness of its action. The Georgian administrative adjudication law also shifts the burden to the government body throughout judicial consideration of the matter (Article 17, Administrative Procedures Code of Georgia). These former Soviet republics, where for so long the courts played virtually no role in constraining the state, have vested their new courts with the power and obligation to force state bodies to justify their actions against private persons.

There are other elements of the Ukrainian law that also reflect this weighting in favor of private parties. The law provides that plaintiffs have a right to free legal representation in administrative cases if they need it (Article 16), and requires first instance courts to provide plaintiffs with assistance in preparing their complaints against the government (Article 105). These provisions are particularly important for individuals seeking review of public benefits or employment decisions who would not ordinarily have access to legal assistance. First instance courts have struggled with the requirement to provide help in preparing administrative complaints, and many have relied on written materials and standard forms to meet this requirement of the law. Nonetheless, it stands as an obligation of the court adjudicating a claim against the government to assist the plaintiff in crafting its claim.

Two other elements of the judicial review process stand out in Ukraine's approach to administrative justice. The first is the augmentation of the courts' powers to develop the facts and law of a claim on their own. Although Ukraine adopted the adversarial system for litigation at the time of its independence, in enacting the administrative adjudication code it added inquisitorial powers to the administrative courts to supplement their role in the adversarial process (Article 11). Although these powers can be used to further develop the case for either the private party or the state body, they are clearly meant to allow the courts to more closely probe the actions and reasoning of the government. In a similar vein, the code also reintroduces the role of the procuracy in administrative adjudication, permitting the office to intervene on either side of an administrative dispute in the courts (Article 53). This followed a constitutional amendment in 2004 that restored some of the general supervisory powers of the procuracy, in the context of assuring that government bodies respected the human rights and freedoms of the citizens of Ukraine (Centre for Political and Legal Reforms 2005). Although it does not appear that the procuracy has taken an expansive role in administrative cases, the office nonetheless can now add its voice to a dispute against a government body in the courts.

The Ukrainian administrative justice system has some serious weaknesses. The absence of a set of administrative procedures for agencies to follow in reaching their determinations makes it difficult for the courts to assess the regularity or legality of the proceedings the agency used. The fact that the High Administrative Court has no control over its docket, and there is little coordination among the decisions of the panels drawn from the more than 50 judges of the court, means there is little emergent guidance or law from this court. But at the heart of the difficulties with the administrative justice system is the conscious decision of lawmakers to tilt the judicial review process against the government.

The statute articulates the protection of the rights of private parties against the state as its objective. This is undoubtedly a continuing reaction against the abuses by the state during the Soviet period, and a fundamental distrust of the bureaucracy. Although

understandable, the process of democratization and implementation of the rule of law also calls for the development of a transparent, effective and accountable administration that can earn the confidence of the population it serves, not just the establishment of judicial power to restrain or control the administration. The elements of the Ukrainian judicial review process designed to guarantee private rights have the effect of retarding the development of the administrative practices within the agencies that far more broadly affect these rights than the actions of the courts.

By failing to require the exhaustion of administrative remedies, the law deprives the government agency of the ability to routinely monitor decisions from its lowest level as they advance through the agency's review process, or to correct improper determinations made at a lower level. The courts may often hear cases from the least competent levels of the agency, where the government body seeks to justify a determination that was not fully or effectively developed or about which the agency itself might have misgivings. Equally important is the effect the absence of exhaustion has on the court docket, where cases that might have been resolved within the agency are now before the courts, increasing the number of disputes the courts are required to hear.

A corollary effect that is less concrete but still serious is the message the law communicates about the relevance of the administrative agency's determination. By according the private parties access to the courts at any time, the law diminishes the importance, or indeed the relevance, of the agency process. Although the absence of an administrative procedure law denies the private parties certain procedural guarantees, this absence is not the motivating factor for the lack of the exhaustion requirement. Rather it reflects the underlying distrust of the agency process.

Similarly, by placing the burden of proof on the agency at all levels of judicial review without regard to the prevailing party, the law reinforces the fundamental distrust of the bureaucracy. Only the courts can decide the correctness, the legality of what the agency determined, and they must be convinced by the agency. The private party has no obligation to demonstrate the abuse; it is in effect presumed once the complaint is filed. The tools the law gives the courts to assist the private party, in preparing the complaint, using its inquisitorial powers, and entertaining the intervention of the procuracy, all reinforce the notion of an alliance between the courts and the private party.

There is some indication that the judges in the administrative courts continue to have difficulties in applying these procedures designed to protect the rights of citizens against the state. Most of the judges, having been trained as lawyers either during the Soviet period, or in the years thereafter when the law faculties were among the last bastions of socialist thinking, still operate with a bias towards the government. Although a central part of the training that the new administrative court judges receive focuses on the paradigm shift from support to skepticism of the state, traditions of hierarchical and authoritarian deference are difficult to undo.

These attitudes might argue for a system specifically designed to advantage the plaintiffs against the government in administrative litigation as a way to overcome them. However, in terms of constructing a system of administrative justice that encourages development of a professional, competent and non-corrupt administration, this approach is far more likely to disadvantage Ukrainians. By diminishing the importance of the bureaucracy and its decision-making processes, the Ukrainian judicial review approach will likely delay for some time the maturing of a modern administrative state.

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PART 6

ADMINISTRATIVE LAW AND THE BOUNDARIES OF THE STATE

Section A

The Boundary between Public and Private

29 Three questions of privatization

*Daphne Barak-Erez**

Privatization cuts through borders and cultures and is driven by a complex set of factors, partly ideological and partly economic. It can lead to new forms of government action and should therefore be a major focus of public law, both constitutional and administrative.[1] Privatization decisions are policy choices, but these choices also have legal relevance. Its opposite, nationalization, has always been discussed not only as a matter of public policy but also as a matter of law, due to its impact on property rights. This understanding should serve as a catalyst for further study of the public law of privatization.

The current financial crisis has reinvigorated discussion of nationalization initiatives in the form of bailout programs or partial government takeovers. Nevertheless, nationalization is still perceived as an exception, which retains as its long-term goal a return to private ownership. The current crisis is yet another illuminating example of the importance of regulating private activities, a central issue to any discussion of the public law of privatization.

Legal scholarship has already begun discussing the implications of privatization for public law but, so far, without offering a general framework for analysis. By contrast, I argue that, rather than meriting some merely doctrinal adjustments, privatization is a fundamental process that calls for the re-evaluation of public law, leading to the development of a new sub-area focusing on the public law of privatization.[2] This chapter offers an initial outline of a public law of privatization. Specifically, it presents a model for analyzing questions of privatization from a public law perspective, which aims to reflect the complexity of the social and economic challenges posed by privatization processes. It deals with the social and distributive implications of privatization decisions as well as with their potential effect on human rights, rather than only with managerial-utilitarian aspects.

My approach rests on the distinction between three different questions raised by privatization decisions. The first question considers the boundaries of privatization: are there any limitations on the types of actions or types of powers that can be privatized? The second question relates to the administrative process of privatization: what are the constraints that should apply to the implementation of a privatization decision? For

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[1] Obviously, privatization may also be of interest in the context of other legal fields, such as labor law, concerning the rights of employees whose workplaces have been privatized, or private law, given that the growing role of private entities in the public sphere may lead to increasing demands for businesses to assume social responsibility.

[2] Such sub-specialties have been developed in other areas of government activity, for example, government procurement.

example, is there a duty to set a privatization policy before proceeding with a concrete privatization initiative, or is there a duty to disclose information regarding privatization initiatives? The third question refers to the outcome of privatization and its regulation: which legal regime should apply to privatized activities, and will these activities be subject to special regulation or special duties?

The chapter does not assess the proper scope of privatization, which is usually determined by ideologies and political philosophies. Accordingly, decisions on the scope of privatization are usually left to the public arena. The distinction between privatization policy and the law of privatized entities should thus be carefully preserved although, as explained below, deferral to the political arena may also have its limits.

I proceed as follows. Section 1 explicates the different meanings of the term 'privatization'. Section 2 summarizes the traditional public law approach to privatization. This approach recognized that privatization might raise specific legal questions, but it generally supported limited judicial intervention in this area, focusing mainly on equality in the competition for business opportunities created by privatization. Section 3 points out the 'blind spots' in the traditional discussion, and highlights additional legal questions that need to be examined. The chapter concludes by suggesting directions for developing a new public law of privatization.

1. Privatization's many faces

A comprehensive framework for a discussion of privatization must be preceded by a description of its characteristics and its scope. Traditionally, privatization has been identified by the transfer of government assets – land or holdings in government-owned companies – to private hands. Although such transfers have usually been the first expressions of privatization policies,[3] privatization is a far more complex phenomenon, and consequently lacks a universally accepted definition (Starr 1988). Generally speaking, privatization aims to reduce government intervention in social and economic life. This aim may be reached through diverse means, including contracting with private companies for the supply of public services that the state believes it is obliged to supply[4] and leaving room for private activity in new sectors through government passivity.[5]

Awareness of the multivalent nature of privatization is essential for several reasons. First, defining a phenomenon and identifying its scope in the social and public reality are necessary for developing suitable forms of legal regulation. Second, non-standardized terminology, with different authors using the same term for different actions and disregarding relevant distinctions, makes analysis difficult. In some cases, privatization involves the complete withdrawal of the government from certain areas, based on the

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[3] See, for example, in Israel: Chapter 8-1 of the Government Companies Law 1975.

[4] Views on government obligations to supply services vary in accordance with one's political philosophy as well as with the economic categorization of some services as 'public goods'. In fact, even the latter categorization may be controversial. For instance, a lighthouse is a classic example of a public good, yet some criticize this classification by pointing to examples of privately operated lighthouses (Coase 1974, Van Zandt 1993).

[5] This categorization of privatization formats is based on a report prepared by the author for the XVI Congress of the International Academy of Comparative Law held in 2002 (Barak-Erez 2006), and a recent revision (Barak-Erez 2009). Due to the pace of developments in the field of privatization, the present analysis differs from former writings in some of the details.

recognition that citizens would be better served by the free market. In others, responsibility and even management remain in the government's hands, and privatization merely means that a private entity supplies a social service under government oversight. In yet other cases, privatization entails the government's withdrawal from the obligation to supply services on an equal and universal basis and an undertaking to provide them only to those who can afford to pay for them.

The analysis that follows points to a wide range of cases, which reveal privatization's many faces. Some of these cases are closer to the core case of privatization, and others are more peripheral. All, however, share a number of similarities: all entail a broader role for private bodies in social and economic life, intensive cooperation between the government and private bodies and the application of private market logic to government action. The discussion takes as a starting point existing traditions regarding the scope of government involvement in different sectors. Government withdrawal from areas where it has been active in the past will be included as acts of privatization.[6]

1.1. Establishing and selling government companies

The first signs of a privatization policy are usually government efforts to establish state-owned businesses – be they corporations owned by the central government or municipal companies under local government control. Historically, the establishment of government-owned corporations was a form of government involvement in economic life, channeled through a business activity. At a later stage, however, the activities of these companies became the basis for further privatization initiatives. First, the very existence of these companies represents a constant temptation to transfer areas of operation from the authorities to the companies they control. When an operation is shifted to a company, it is restructured so as to accrue profits.[7] Often, the way to achieve this goal is to charge for services that had been supplied for free in the past. Second, when the policy of selling assets to private bodies becomes acceptable, the most convenient form of implementation is to sell the shares of government-owned corporations to private investors. If a government activity selected for privatization does not already operate through a company, an expedient first step is to set it up as a government-owned corporation;[8] and the selling of the company's stock is the next phase. The policy of selling companies owned by public authorities is probably one of the best known indications that privatization has occurred.[9]

1.2. Government activity through private contractors (outsourcing)

Another pattern of privatization is the gradual reduction of the administrative functions performed by the authorities, which are replaced by private contractors hired for

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[6] Accordingly, the analysis is not based on a normative assumption concerning the proper scope of government action.

[7] Profit-making is the dominant ethos of corporate management. In this spirit, Israel's Government Companies Law 1975 clarifies that a government company, unlike an administrative authority, should usually conduct itself in light of commercial considerations.

[8] This was the model adopted in the privatization of British Petroleum.

[9] For example, in Britain, the government sold its shares in Cable & Wireless, British Petroleum, Jaguar Motors, and Rolls-Royce.

this purpose. Outsourcing is currently a major form of privatization (Harden 1992, Stevenson 2008). It began with the transfer of technical activities in such areas as construction, garbage collection, school bussing, and computer services. In time, contracting with external entities gradually expanded to matters that are technical by definition but also contain discretionary elements, such as tax collection services. The next stage involved a transfer of government functions by devolving a significant measure of discretion to private entities, such as the operation of welfare-to-work programs (Diller 2000: 1128, 1198–9) and the establishment of privately owned and privately operated prisons. Occasionally, this type of privatization also has the potential to influence public service indirectly, for instance, when the training of public service professionals is privatized.

1.3. Construction of public infrastructure projects by private investors (BOT initiatives)
Governments frequently contract with private entrepreneurs to build new infrastructure projects. The private firms undertake not only to build the project but also to operate it, and they are granted special concessions during the period that follows the construction phase. Government collaboration with private entrepreneurs stems mainly from a desire to secure private funding for the initial stages of construction. The concession-owners, who bear the costs of the project, ensure a profitable return on their investment through its long-term operation, during which they charge a fee for its use. In this model, known as build-operate-transfer (BOT), private investors build the infrastructure at their own expense, operate it over a period of time granted to them in advance and, at the end of it, transfer ownership or control of the project to the state. This type of privatization has been used for transportation and water infrastructure projects among others (Malinsky 1996).

1.4. Licensing and granting permits in new sectors
When private activity replaces government action, the public sector often accomplishes this by granting licenses to private service providers. In the area of education, for example, a growing tendency to privatize is evident in the licensing of new private schools and universities, thus partially avoiding the need to establish more public schools and public universities. In the area of telecommunication, many governments licensed private companies to operate cellular phone networks as this new technology became available. This is an example of privatization, although no transfer of shares or other assets was involved.

The central difference between privatization through outsourcing and privatization through licensing is that, when outsourcing, the authorities still recognize a basic responsibility to supply the service, unlike the case of privatization through licensing.

1.5. Privatization by omission through limited government activity
At times, the state contributes to the privatization of certain activities by failing to act effectively in a particular area, thereby making room for private initiatives. Areas such as education and health illustrate this particular process. Thus, for example, when the public education system provides limited hours of study or a poor quality of teaching, more parents opt for private education (Gillette 1996). In some cases, the missing government operation is not due to the withdrawal of a service that had been supplied at a better level in the past, but rather to the government's failure to respond to a new public need.

1.6. Providing services for fees

Privatization also occurs when the relevant agency continues its activity but starts to collect a fee for the services it supplies – a growing phenomenon in public facilities such as parks and museums.[10] Sometimes this happens when an activity is shifted from the government to a government-controlled company that operates as a separate, profit-making budgetary unit. Privatizations of this type, however, can also be effected through the agencies' direct collection of fees. Generally, fees are levied for services provided at a level higher than the usual public standard.

1.7. Commercialization of the public space

Traditional government activity created an area free from commercial activity, but in conditions of budgetary restraints commercial elements are gradually entering the public space. For instance, when the authorities collect fees for advertising on signs, they privatize the public space. Consequently, the face of the public space is determined, *inter alia*, by the wishes and preferences of bodies that can afford to pay for advertising. Similarly, when advertising is permitted in educational institutions in exchange for a fee, the public space of the school that had been immune to the commercial market is partially privatized.

1.8. Cooperation with third-sector bodies

Another type of privatization is the institutionalized cooperation between the government and third-sector funds and associations known as non-governmental-organizations (NGOs). This cooperative arrangement permits the performance of tasks that the government would have fulfilled had it not been pressed by budget limitations. Examples include cooperation with private associations that help the poor. Although cooperation between the third sector and the authorities may not always be perceived as privatization, it should be viewed as such when it is institutionalized and part of the agencies' standard operation (Minow 2000).

1.9. Voucher systems

Under a voucher system, the government provides services also by subsidizing their purchase from private suppliers, such as private schools or private health-care providers (Trebilcock et al. 2000, Alexander and Alexander 2004). Rather than a direct income transfer, the voucher is tied to the purchase of particular goods and services and may cover a proportion of the market price or allow beneficiaries to obtain free services subject to dollar limits or other constraints.

2. The traditional approach to privatization

The traditional starting point for the debate on privatization has been to view it as a policy matter that provides only a limited role for public law. The legal discourse on privatization has accordingly been confined to 'islands' of limitations, without addressing it

[10] See, for example, the Israeli case of HCJ 8676/00 *Adam Teva V'din-Israel Union for Environmental Defense v. Municipality of Raanana* 59(2) PD 210 (2004) (henceforth the *Raanana Park* case).

as a central challenge for public law. This section introduces this 'narrow' perspective on privatization in order to expose its limitations.

2.1. The boundaries of privatization: loose limitations

The prevalent view used to be that the decision to privatize does not raise legal questions. The few limitations applied to privatization decisions addressed specific concerns, such as purchase of assets by hostile bodies.

2.1.1. Constitutional neutrality The traditional baseline assumed that privatization does not raise constitutional concerns. In Israel, Chief Justice Barak contended that the Basic Laws of the state could live with both a capitalist and a socialist system,[11] a viewpoint that seems reasonable as long as privatization refers only to the sale of assets. The sale of many government companies indeed lacks any constitutional meaning, and although decisions on such issues may be the subject of disputes, these should be confined to economic and ideological issues. But when privatization changes its nature and is extended to include social services and even core government functions, the assumption that constitutional law is extraneous should be reassessed.[12]

Furthermore, constitutional law has sometimes been used to encourage privatization. An illuminating example is the Canadian case of *Chaoulli*,[13] in which the Supreme Court of Canada held that the prohibition on private health insurance in Quebec violated the basic rights of the petitioners, who sought private insurance because of the unsatisfactory level of public health care.[14] European law also has not been neutral concerning privatization trends and, in fact, has served as a driving force that encouraged member states to introduce privatization initiatives (Verhoeven 1996).

2.1.2. The ultra vires principle and anti-delegation presumptions Theoretically, the *ultra vires* principle could act as a potential limitation on the scope of privatization, assuming that privatization decisions require legislative authorization. In practice, however, the *ultra vires* principle has not functioned in this fashion because the power to contract out was assumed to be implied in the provisions empowering agencies to act

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[11] According to Chief Justice Barak: 'the Court applies judicial review. It checks the legitimacy of the law, not its wisdom. The question is not whether the law is good, efficient, or justified. The question is whether it is constitutional. A "socialist" legislator and a "capitalist" one might legislate different and contradictory laws, which will all fulfill the demands of the limiting paragraph. Indeed, the basic laws are not a plan for concrete policy. Privatization and nationalization could both exist in their framework. Market economy or central management of the economy can both find a living space, as long as the economy activity – which harms the human rights – will fulfill the demands of the limiting section.' HCJ 1715/97 *Bureau for Inv. Advisors v. Minister of Finance* 51(4) PD 367, 386 (1997).

[12] In the past, when the forms of privatization were more limited, I shared the view that, as a rule, constitutional law should not limit decisions to privatize but focus only on the consequences of privatization. (Barak-Erez 1999b, 2001). However, the new patterns of privatization have led me to reconsider this view.

[13] *Chaoulli v. Attorney General of Quebec* [2005] 1 SCR 791.

[14] More specifically, the Canadian Supreme Court held that the prohibition infringed the rights protected by the Quebec Charter of Human Rights and Freedoms, which protects the rights to life and security of the person.

in their specific areas of concern. The courts did not require an express authorization to engage in privatization. In any event, the *ultra vires* principle cannot function as a significant barrier when the legislature authorizes administrative agencies to contract out, as is the case in many countries.[15]

2.1.3. Limitations on the transfer of rights to foreign entities Other limitations have originated from concerns about transferring ownership of assets vital to the economy or the security of the state (electric infrastructure, for example) to foreign entities or to corporations that might be controlled by citizens of foreign countries. The initial phase of the sale is easier to control because the authorities can subject it to specific terms (such as the purchaser's citizenship). Controlling later transfers is harder, however, because ownership is no longer in the state's hands. For this purpose, special mechanisms were developed, designed to limit the transfer of assets with a bearing on national interests to third parties, even when ownership is already private. These mechanisms are either 'golden shares', which give the state (or one of its agencies) the right to veto future business transactions,[16] or legislation that defines conditions for the transfer of ownership in the stock of the privatized company.[17]

2.2. The decision-making process in privatization: equal opportunity and fairness

The traditional discourse about privatization focused on issues of equal opportunity and fairness. The key question in this context used to be how to ensure the optimal allocation of the new opportunities created through privatization, concerning both the right to equality and the maximization of economic benefits. The recognition that the decision to privatize creates a temptation to rely on irrelevant and inappropriate considerations, from favors to close associates and up to the taking of bribes, intensified the debate (Rose-Ackerman 1999: 35–8). Accordingly, the main emphasis used to be on the development of mandatory bidding rules (or at least mandatory competition between several potential contractors)[18] and on rules concerning conflicts of interest (in order to prevent the involvement of interested parties in the selection of the winner).[19]

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[15] In Britain, the Deregulation and Contracting Out Act 1994 allows for many functions of ministers or office holders to be exercised by others, including non-civil servants such as private contractors, though this does not apply to judicial or legislative functions or to powers affecting personal liberty or the search or seizure of property. A similar act applies also to local government – Local Government (Contracts) Act 1997.

[16] 'Golden shares', however, restrict the free movement of capital and are therefore liable to be struck down in the context of European law unless justified on grounds of security or public policy. See: Case C-98/01 *Commission v. UK* (2003) ECR I-4641 (golden share in British Airport Authority held a breach). The British government frequently held 'golden shares' in privatized companies. It later dispensed with them in most cases, but refrained from doing so in the area of electricity (Prosser 1997).

[17] See, for example, in Israel: Security Corporations Law (Protection of Security Interests) Law 2005.

[18] See, for example, in Israel: Mandatory Tenders Law 1992. See also Hansen (2003) (addressing the focus on competition and discussing competition in government procurement in New York, while pointing to the limits of the focus on competition rules).

[19] Accordingly, many attacks on privatization decisions focused on issues of corruption and on the preference of associates. For challenges to privatization on this basis in India, see: *Delhi*

2.3. The regulation of privatized functions and activities

Traditionally, privatization policies went hand-in-hand with ideologies resisting state involvement, neglecting the importance of accompanying privatization with appropriate regulation not only of the economic aspects of the privatized activity but also of the norms that private bodies should follow in performing quasi-governmental functions.

Accordingly, private agents substituting for public authorities were only partially subject to norms of public law, and regulation remained ambiguous. In the US, the 'state action' doctrine has been interpreted narrowly and was limited only to activities that substitute the state's 'traditional functions'. Specifically, it was applied to private prisons but not to private housing for the elderly and other privatized social services (Barak-Erez 1995).

In other jurisdictions as well, the courts have tended to be hesitant in the application of public law norms to private bodies, in varying degrees. In Israel, these bodies were defined as hybrids in order to express their combined character, comprising private and public aspects simultaneously. The first decision of the Israeli Supreme Court in this area related to a government-owned corporation, the Israeli Electric Corporation.[20] According to the precedents of the Israeli Supreme Court, however, the rationale for implementing public law in such cases was not government ownership but other substantive considerations, such as the nature of the function fulfilled by the company (a vital activity such as the production and supply of electricity) or its monopolistic status.[21] In Britain, the public law standards of the Human Rights Act of 1998 apply only to entities that meet the criteria of a 'public authority' according to this Act, which include 'any person certain of whose functions are functions of a public nature'.[22] In practice, this definition was narrowly interpreted, leaving outside the Act a private care home under contract with a local authority that provided accommodation to elderly residents.[23]

3. The new public law of privatization

The discussion so far shows that public law doctrines address privatization only partially – they do not offer a comprehensive approach to privatization and deal only with specific aspects. Traditionally, the focus of attention has been the relationship between the privatizing agency and the participants in the privatization process, while the public aspects of privatization have been relatively neglected. In other words, the most important questions have remained on the periphery.

This chapter proposes a more comprehensive approach that follows the three issues presented above – limitations on privatization decisions, the process of privatization, and the regulation of privatization. My analysis will recognize the contributions of scholars who have begun to address the substantive questions raised by privatization, and will also locate the discussion within the broader picture that emerges from the distinction between the three stages described.

Science Forum v. Union of India AIR SC 1356 (1996); *Public Interest Litigation v. Union of India* 8 SCC 606 (2000).

[20] See HCJ 731/86 *Microdaph Ltd v. The Electricity Corporation* 41(2) PD 449 (1987).

[21] See CA 294/91 *The Burial Society 'Jerusalem Community' v. Kastenbaum* 46(2) PD 464 (1992)

[22] Section 6(3)(b) of the Human Rights Act 1998.

[23] *YL v. Birmingham City Council* [2008] 1 AC 95.

3.1. The boundaries of privatization

3.1.1. Constitutional boundaries The traditional premises of the public law of privatization warrant reconsideration. Privatization decisions are unquestionably a matter of policy and, normally, should not be shifted from the political arena to the constitutional sphere. Nevertheless, I challenge the convention that a decision to privatize is solely a matter of policy.

The public/private boundary should be addressed through two forms of analysis – an institution-based analysis and a rights-based analysis. The institution-based analysis asks whether certain activities ought not to be privatized because they are an integral part of the state. The rights-based analysis asks whether the privatization initiative includes safeguards against infringements of fundamental rights by private agents that assume responsibility for functions formerly performed by public officials.

INSTITUTION-BASED ANALYSIS There is no universal definition of a state's core activities. Views on this matter differ widely, ranging from the 'night-watchman' conception of the state, whose primary task is to ensure personal safety (Nozick 1992) to notions of a developed welfare state, with a wide spectrum of approaches in-between: identifying the state with the use of violent force, with activities that signify sovereignty, with supplying public goods, and so forth.

The difficulty of formulating a legal position on this matter also reflects the different understandings of the public tasks that are being privatized. In the area of education, for instance, advocates of privatization insist that educational services can be supplied by private entities under state supervision because they perceive education as a product.[24] In contrast, opponents of privatization assert that the values of equal and democratic civil education are likely to be eroded if educational services are supplied by private entities, even under state supervision.[25] Given the diversity of traditions in this regard,

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[24] Milton Friedman, who endorsed the application of free-market principles to education, outlined a plan for running private education: 'Governments could require a minimum level of schooling financed by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on "approved" educational services. Parents would then be free to spend this sum and any additional sum they themselves provided on purchasing educational services from an "approved" institution of their own choice. The educational services could be rendered by private enterprises operated for profit, or by non-profit institutions. The role of the government would be limited to insuring that the schools met certain minimum standards, such as the inclusion of a minimum common content in their programs, much as it now inspects restaurants to insure that they maintain minimum sanitary standards' (Friedman 1962: 89).

[25] Realizing the civic-democratic objectives of education is contingent on the way schools are run. Integration, for example, cannot be achieved only by supervising the registration stage, but rather through the ongoing management of the school, including the way it divides students into classes and learning groups (Gutmann 1987: 66–8). According to this approach, state intervention cannot be limited to the prevention of harm or fraud in the quality of the service provided, contrary to Friedman's example of state regulation of restaurants. As Gutmann explains, 'Were our public interest in regulating schools as analogous to our interest in regulating restaurants as Friedman suggests, it would be hard to explain why we should subsidize schooling for every child. A necessary condition for justifying public subsidy of schools – but not of restaurants – is the fact that citizens have an important and common interest in educating future citizens' (ibid: 67).

the definition of core government functions that cannot be privatized under any circumstances would thus be relatively narrow, and most privatization initiatives would not be constitutionally precluded. Some constitutional provisions may be interpreted as ruling out the privatization of certain activities, but even they may leave room for experiments. Constitutional texts usually include provisions defining the main branches of government – the executive, the legislature and the judiciary. One can read these provisions as implying that a complete privatization of their functions would simply not be possible. In the American context, for example, the Constitution probably implies that Article III courts cannot be privatized,[26] and that the power to legislate cannot be delegated to private professionals.[27] At the same time, these general provisions do not define the scope of executive functions. For example, should the government provide education through a public education system, or can it also rely on private schools?[28]

The privatization of prisons illustrates the relatively opaque nature of constitutional texts on these matters. Do constitutional texts on executive power imply that the executive branch must perform functions traditionally associated with sovereignty? This argument was raised in Israel in a petition seeking to challenge the first attempt to establish a private prison in the country.[29] In the US, the question of what functions are 'inherently governmental' is not asked at the constitutional level but in the context of applying Circular A-76, which uses this terminology to define limits on contracting-out (Verkuil 2007: 125–7). In any event, this argument is obviously relevant only to some 'core' activities (such as policing and intelligence services), but not to many others that are at the center of current privatization initiatives, such as education, health, and welfare. Defining a 'core' of executive actions risks indirectly legitimizing the privatization of all the functions that do not fall within the definition. In the US, a constitutional analysis of this sort is problematic in the area of corrections because the privatization of prisons is already a living reality.[30]

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[26] Despite his capitalistic approach, which espouses minimal state intervention in social and economic life, Milton Friedman maintained that one of the state's most prominent functions is to define and interpret property rights. Coordinating economic activity through a free exchange is based on the premise that we have ensured, through the government, 'maintenance of law and order to prevent coercion of one individual by another, the enforcement of contracts voluntarily entered into, the definition of the meaning of property rights, the interpretation and enforcement of such rights, and the provision of a monetary framework' (Friedman 1962: 27). This view implies that limitations should be imposed on the privatization of judicial functions.

[27] The non-delegation doctrine (*A.L.A. Schechter Poultry Corp. v. United States*, 295 US 495 (1935)), may apply here.

[28] Scholars have attempted to interpret constitutional texts to infer limitations on privatization, despite the lack of specific provisions. See Beermann (2001: 1509–19, discussing the US Constitution); and Mullan and Ceddia (2003, discussing the Canadian Charter of Rights and Freedoms).

[29] HCJ 2605/05 *Academic Center for Law and Business, The Human Rights Section v. The Minister of Finance* (unpublished, 19 November 2009). The Israeli Supreme Court refrained from deciding on this aspect of the petition, since the majority justices were willing to accept it based on arguments that addressed the alleged infringement of the human rights of prisoners. Even so, Chief Justice Beinisch, in the leading opinion of the court, expressed sympathy with the argument stating that the power to detain constitutes part of the 'hard core' of executive power, which cannot be privatized.

[30] For an overview of the history of the privatization of prisons in the United States, see Gold

RIGHTS-BASED ANALYSIS From a human rights perspective, one should ask if privatization initiatives are liable to infringe fundamental rights. Thus, for example, the privatization of enforcement and punishment powers has significant potential to infringe liberty and dignity, because these powers would be exercised by corporations guided by economic incentives against people removed from, and possibly even despised by, society. Arguably, the state could allay this concern with effective administrative supervision over the operation of the private prison or of other privatized endeavors in this area.[31] However, effective supervision over actions conducted on a daily basis and involving a high degree of discretion and immediacy, such as policing, is not easy to devise.[32]

3.1.2. The ultra vires principle and anti-delegation presumptions Because privatization is an important policy choice, privatization initiatives should be based on explicit legislative authorization, ensuring that they have resulted from a democratic decision-making process.[33] The traditional application of the *ultra vires* principle did not insist on specific authorization for privatization decisions. This view should be reassessed for actions that outsource policy-making and administrative discretion. At the same time, requiring legislation is not sufficient because major privatization decisions have often been based on legislative schemes.[34] The privatization process needs to build in additional democratic checks at an early stage, as explained below.

(1996: 359). See also: Hart et al. (1997: 1151). The privatization of prisons is based on the distinction between the allocation of punishment (through the judicial process), which is not privatized, and its administration, which has been privatized. Even the administration of prisons, however, involves discretionary decisions that affect prisoners' daily life and discipline.

[31] On supervision as a condition for the constitutionality of privatization, see Metzger (2003).

[32] A noteworthy example is the failure of the American authorities to supervise the administration of the Abu Ghraib prison in Iraq, which was operated by a private contractor (Schooner 2005). The Israeli Supreme Court has accepted an even more radical view and argued that, in and by itself, the operation of the power to detain by private actors constitutes an infringement of the constitutional rights to human dignity and liberty, even barring specific concerns about effectiveness of supervision. See *supra* note 29. In other contexts, privatization may affect social rights. For example, when privatization entails charging fees for certain social services, it could affect social rights in systems that recognize such rights. Thus, it may be necessary to examine whether, after privatization, health or education services still guarantee universal access and prevent discrimination. Nevertheless, privatization of a social service will not necessarily result in a constitutional violation (as when the service is supplied by a private entity that is funded or subsidized by the state). In some 'mixed' examples, the potential for rights infringement involves both a civil rights and a social rights aspect, as when the police wish to charge demonstrators for the expense of policing their demonstration. See HCJ 2557/05 *Majority Headquarters v. Israeli Police* (12 December 2006).

[33] Israeli law, for example, maintains a presumption against the delegation of powers to private contractors. See: HCJ 2303/90 *Filipovitz v. The Registrar of Companies*, 46(1) PD 410 (1992). At the same time, the Israeli Supreme Court was willing to accept administrative initiatives aimed at developing market activities, even when these initiatives were not based on an express legislative authorization, when they were presented as additions to the authority's ordinary public activity (for example, collecting entrance fees for a new municipal park built as an addition to the regular parks operated in the city). See the *Raanana Park* case, *supra* note 10.

[34] The Israeli law enabling the establishment of a private prison was enacted with hardly any public debate, as was the legislation in the area of workfare.

3.2. The decision-making process in privatization

The process preceding the decision to privatize is highly significant. It is vital to develop legal doctrines able to guarantee that privatization decisions include public debate, broad participation, and public access to relevant information. The decision-making process resulting in a privatization decision should take into account its effects on the quality of the services provided to the public and should enable public scrutiny. Discussions of privatization decisions have usually focused on the issue of competition, that is, on ensuring that not only top politicians and their close associates are benefited. From this perspective, rules of bidding and contracting are important.

By contrast, I argue that reformers should also scrutinize the process preceeding the decision to privatize. Generally speaking, privatization decisions should be grounded in a pre-formulated policy shaped by processes marked by public participation and freedom of information rights.

3.2.1. A duty to formulate policy Informed decisions regarding privatization ought to require the administration to formulate a general policy on privatization before promoting specific initiatives. Thus, for instance, before entering into a contract with a private education network for the privatization of a specific school, the agency should formulate a policy on the very idea of transferring public schools to private management. The duty to formulate a policy on privatization shifts the focus from the question of the 'minimum' that the state must do; to a duty to justify the change, even when the state continues to provide the required minimum.[35]

3.2.2. Participation rights Requiring public participation in the decision-making process that leads to privatization is consistent with the global trend of reinforcing the democratic dimensions of the administrative process.[36] To guarantee meaningful participation, privatization initiatives should be publicized long before their implementation, to enable the public to submit comments and objections.

Public participation at the formal stage of rule-making, however, is not enough. Privatization initiatives often involve outsourcing. In those cases, many significant details are set out in the contract with the private entity or even in the tender that preceded it, and not in regulations. Therefore, besides guaranteeing meaningful participation, the

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[35] The need for this development in Israeli case law emerged in the debate surrounding a decision to hand over the management of the only public high school in the city of Sderot to a private school network. From the petitioners' perspective, this decision was especially problematic because of the religious character of the private network. The Israeli Supreme Court rejected the petition in a highly contextual manner, referring to the respondents' declaration of their intention to maintain the school's secular character. At the same time, it also added in a more general fashion that 'Great caution is required when a municipal education authority hands over its responsibilities and the management of an educational institution to an association. . . In this issue, it is appropriate for the ministry of education to formulate a principled stance regarding the policy that guides the authorities in this issue.' HCJ 7947/05 *The Chairman of the City of Sderot Parents' Committee v. Ministry of Education, Culture and Sports* (unpublished, 28 August 2005). A caveat is in order: the obligation to formulate a policy does not necessarily contradict the option of including in it gradual and exploratory steps regarding, for instance, beginning with a limited and experimental framework. The objectives and the monitoring process, however, must be defined at the start.

[36] For the potential of privatization to curtail participation, see Smith (1993: 213–16).

tender and the proposed contract must also be suitably publicized, because at least some of their terms are likely to include matters of public significance such as, for example, the terms that define the living conditions of inmates in a privatized prison or the training and professional background of the guards.

3.2.3. Administrative transparency and information rights Meaningful participation must be based on information. To promote the democratization of the privatization process, guaranteeing the public's formal ability to present views and objections is not enough. Privatization law must also ensure access to information on the details of the privatization tender and of the contract signed with the private agent (both the formal contract and the details of the transaction as carried out in practice). Disclosure of these details is crucial in order to evaluate whether the payment offered for the privatized assets and other business opportunities was appropriate, as well as to monitor both the execution of the contract by the private party and the supervision of the services it provides to the public (when the privatization initiative does not only involve the sale of assets). For example, the quality of the diet that the privatized prison operator is obliged to provide the prisoners is an issue suitable for public debate. The democratization of privatization initiatives must thus be based on the full disclosure of, or at least the guaranteed access to, all details of the contractual relationship with the private entity, including the terms of the proposed contract and the terms of the final deal.[37]

Information on privatizations must be provided both at the government's initiative and in response to specific requests for disclosure. Agencies may be reluctant to disclose details of their contracts with private entities, in order to protect trade secrets or confidential public information, such as the details of the security system in a private prison. In most cases, however, these contracts ought to be open to public scrutiny in order to facilitate public debate and supervision of the privatization initiative. The presumption should always be in favor of disclosing the contracting details. Therefore, if the government seeks to prevent disclosure, it should be required to provide detailed reasoning in support of its position.[38] Just as transparency is the accepted norm in commercial transactions involving a broad public interest, such as the issuing of stock, it should also prevail in privatization projects.

3.2.4. Judicial review of privatization tenders and contracts Some worry that privatization transactions will not provide governments with adequate compensation, especially because political decisions tend to prioritize short-term revenues. If the

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[37] Compare Feiser (1999: 55–62, offering to expand the implementation of the Freedom of Information Act (FOIA) to 'private entities controlling information of interest to the public'). To some extent, corporate law may also serve as a basis for disclosure (insofar as publicly traded companies are concerned) (Beermann 2002: 1721–24).

[38] One example relates to an Israeli tender for establishing a privatized prison. The Association for Civil Rights in Israel requested access to the tender documents but was only allowed to see some of them at the tenders' committee offices without receiving a copy. A petition was submitted on this issue, but the litigation led to a compromise and ended without a principled ruling. See Adm. Pet. App. 3637/05 *The Association for Civil Rights in Israel v. The Finance Ministry* (19 December 2005, unpublished).

transaction is competitive, as in a tender, suitable remuneration is at least partially guaranteed, unlike the case of transactions negotiated in the absence of competition. In addition, courts must be willing to review the value of the consideration, at least in extreme cases, and to apply relaxed standing rules that permit private petitions because identifying those directly affected by inappropriate consideration in privatization transactions may not be easy. Judicial review should also address the question of whether the privatization contract guarantees adequate wages and sets appropriate standards of service.

3.2.5. Securing competition The privatization process should also guarantee competition in the market, either through legislation specific to the privatized market, such as legislation on electricity production and supply, or through the application of the general antitrust law.

The goal of promoting competition in the privatized market may conflict with the interests of the government as an asset owner interested in obtaining the highest price. If the sale of government assets is accompanied by monopoly powers, revenues from the sale are expected to rise, but the result can be low level and expensive services. Rules should therefore seek to counterbalance the government's incentive to sell without making provisions for competition. One option might be a duty to obtain professional assessments of the effects of the planned privatization on the market. Although this procedure may not, and perhaps should not, prevent the sale of monopolies, the state should take the implications of such a transaction into account. Any decision regarding the sale of a government company that enjoys aspects of exclusivity, be they few or many, places the government in an obvious conflict of interest between its ambition to maximize profits and the public interest in competition.[39] In these circumstances, the government should not decide this matter alone, and the power to define the applicable competitive aspects of the proposed privatization should be vested in an independent antitrust agency.

3.2.6. Privatization by omission and its unique hurdles Privatization by omission – meaning privatization that derives from administrative passivity and leaves the ground open to private operators – raises special questions. Inaction is harder to review than action, despite their similar implications. For instance, in a decision to privatize a public hospital, one might ask what would happen if the government, rather than selling the hospital, instead closed the only public hospital in the area while simultaneously enabling a private hospital to start operating. An even more complex case would be one where the government intentionally abstains from building new schools given the adequate supply of private schools. Judicial review is thus vital, even in situations of administrative passivity, and the court might find that the government has refrained from inquiring whether the available public institutions meet the needs of the public.

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[39] A potential conflict of interests exists even when the company is owned and operated by the government. However, it is exacerbated by privatization if the government wishes to maximize profits from the sale of its assets. An additional fear is the private body's future exploitation of its monopoly power.

3.3. The regulation of privatized functions and activities

Finally, the ongoing regulation and supervision of privatized bodies and functions is of paramount importance.[40] Cumulative experience shows that the success or failure of privatization initiatives correlates with the quality of the regulation that accompanied them (Prado 2008). Assuming that many areas of public activity will be privatized notwithstanding the controversy surrounding privatization, long-term regulation is a crucial issue.[41] Regulation should set standards for the operation of privatized activities. The potential for criminal sanctions[42] and tort actions[43] in cases of grave infringements of rights is important, but not sufficient, and regulation should take various forms: direct application of constitutional duties, statutory regulation, and regulation through conditions in the tender and in the contract. The objective of this part of the analysis is to examine the potential of 'publicizing' privatized bodies, that is, subjecting them to public norms and public supervision (Freeman 2003).

3.3.1. Regulation through constitutional standards When private actors function as *de facto* substitutes for the government in fulfilling important public functions, they should be subject to duties similar to those that would have applied to the government had it performed the same activities. The doctrinal way to achieve this goal may vary among legal systems, in accordance with their views on the application of constitutional principles to private actors. In the US context, the way to achieve this goal could be based on the state action doctrine, which applies, in principle, also to private actors that perform traditional functions of the government or work in close connection with it (Barak-Erez 1995). However, the relatively narrow interpretation of this doctrine in the case law, which applies it only to a relatively small core of governmental activities, poses a problem. Although this narrow interpretation would not be a barrier to the application of constitutional standards to private actors performing traditional military functions, this would not be the case with respect to many other privatized activities (Barak-Erez 1999a).[44] Substantively, a private corporation should be considered a government-

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[40] As Justice Zamir of the Israeli Supreme Court explained: 'The state's abdication of the duty of supplying services and necessities must be followed by supervision of the private sector's supply of services and necessities. The open market gives the private sector an opportunity to accumulate great economic power. Economic power can also corrupt. . . and especially in free market conditions, the state is required to protect the weak.' See HCJ 7721/96 *Union of Insurance Assessors v. the Inspector of Insurance* 55(3) PD 625, 650 (2001).

[41] For an argument in favor of focusing on the supervision of privatized bodies in the US context, see Minow (2000).

[42] An interesting question in the context of criminal law is whether special offenses that have traditionally applied only to public officials, such as bribery, are pertinent to employees of private corporations who perform public functions. See, for example, in Israel: Crim. F. H. 24/08 *Barak Cohen v. The State of Israel* (unpublished, 2 March 2009).

[43] For an action involving a privatized prison, see *Richardson v. McKnight*, 521 US 399 (1997). In this case, the US Supreme Court declined to apply to employees of a private prison the qualified immunity that would have applied to employees of a government prison in similar circumstances.

[44] See, for example, *Blum v. Yaretzky*, 457 US 991, 1008–12 (1982) (holding that a private nursing home's decision to discharge or transfer Medicaid patients to a lower level of care without notice and without opportunity for a hearing did not constitute state action, despite state funding, licensing, extensive regulation of facilities, and specific regulations requiring periodic reassessment

affiliated entity when, *de facto*, it serves as a replacement for a public operation (for instance, when it is the only private school in a locality without a public school)[45] or when the extent of the authorities' intervention in the management of the private body is significant (for instance, through meaningful funding of the private operation). This definition will enable the application of public law to private bodies that replace the government and will do so without infringing on the freedom of corporations that operate alongside the authorities rather than instead of them (such as, for instance, afternoon complementary education in private frameworks).

3.3.2. Statutory regulation Statutes that enable privatization should include provisions stating the duties and the supervising mechanisms incumbent on private actors. Effective review of decision-making processes in privatized bodies must be a significant factor when evaluating the constitutionality of a privatization initiative. A detailed statutory regulation is also a valuable investment because the drafting process is likely to expose the difficulties of effective supervision and may even lead to a reconsideration of the decision to privatize. Another factor arguing for a statutory framework law is that privatized activities are often operated by large multinational corporations that may be relatively insensitive to public criticism unless bound by legal rules.

Statutory provisions should also address decision-making processes within privatized bodies. It may be appropriate to apply public law norms to such matters as granting the right to a hearing to those dependent on the company's decisions and the right to receive information (to enable public debate regarding its operations).[46]

A further issue requiring regulation is the management of public databases by computer systems and private information technology companies. Although assistance from private bodies for database management belongs to the technical and allegedly non-problematic sector of privatization, control of information has significant consequences for the public sphere. First, the private operation of government databases could limit public access to information. Second, citizens must be guaranteed the right to correct possible inaccuracies in their files when managed by private contractors.[47]

3.3.3. Contractual regulation The privatization contract should also play a central role in the regulation of the privatized activity.[48] The duties of the private entity,

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of patients' needs); *Rendell-Baker v. Kohn*, 457 US 830, 840–43 (1982) (finding no state action on the part of a private high school to which almost all students had been referred from public schools, despite extensive state regulation and funding of the private school). Only rarely does the US Supreme Court treat private parties as state actors. See: *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 US 288, 291 (2001) (holding that a private association incorporated to regulate an athletic competition between public and private secondary schools can be considered a state actor for First Amendment purposes).

[45] This standard requires one to decide whether to define certain services as public. One option is to ask whether the private operation substitutes for a public operation by providing a service that is considered a basic social right, such as health or education.

[46] In other contexts, such as the privatization of utilities, regulation may concentrate on other issues such as, for example, equal access and universal provision (Prosser 2000).

[47] See also O'Harrow Jr. (2005: 125–9; addressing the problem of unreliable private databases in the US).

[48] For an analysis of privatization contracts as relational contracts, see Davidson (2006).

especially with regard to the protection of human rights, should be defined both in the tender and later in the actual contract. Concerning the tender, broad standing in court should be established to permit challenges to decisions that ignore the original terms of the tender. Concerning the contract, several points bear emphasis. First, the privatization contract can set the terms of employment and the wages of workers employed by the private contractors. The contract should ensure that the efficiency of the privatization project does not result from the violation of employees' rights or from the employment of staff lacking proper skills and training. Second, the privatization contract should include provisions on equal access to the privatized services, making non-compliance with any of these conditions a breach of contract. In some cases, the privatization contract should also create a supervision mechanism for the prices charged by the private entity. The privatization endeavor is often intended to release the government from the need to set prices, by transferring this process to the market. Some privatized activities, however, are not subject to market competition, or at least not to a sophisticated one. Moreover, the supply of vital services should be guaranteed even for those who cannot afford to pay. In the context of social and welfare-related services, the contract should also include detailed provisions regarding the procedural rights of the privatized services' recipients, such as hearing rights, rights to examine information, and so forth.

The privatization contract should also regulate the compensation due to the private contractor if and when the government decides to terminate the contract. This is a point of crucial importance, because the danger of incurring significant costs in the event of withdrawal from a privatization initiative may lead the government to refrain from action even when it concludes that the initiative has failed to achieve its goals or has led to other unwanted consequences.[49]

Conclusion

Privatization is likely to continue to be a central phenomenon in the economic and social life of many countries, and public law must address it as such. This chapter attempted to do this by distinguishing between three spheres: the boundaries of privatization, the privatization process, and the regulation of privatized actions. It also called for an analysis that extends beyond the commercial and efficiency aspects of privatization policies to include their impact on full citizenship and on government-citizens relations. This expanded focus should be the core of the 'new' public law of privatization.

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[49] This consideration jeopardizes, for example, the possibility of effective supervision of a private prison. In principle, privatization contracts in this area may grant the state a step-in right, but the government might be deterred from relying on this provision if the expected compensation to the private concession holder is excessive.

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30 Contracting out and 'public values': a theoretical and comparative approach

Jean-Bernard Auby

When 'public tasks' are entrusted to private actors through contracts – be they 'Private Finance Initiative' (PFI) contracts in Great Britain, *'concesiones de obras publicas*' in Spain, *'délégations de service public*' in France, public-private partnerships of various kinds elsewhere – how can we ensure that these tasks are performed in ways that respect 'public values'? By that, I mean, of course, the core legal principles that public bodies must themselves respect when they act directly. These principles are both substantive (such as respect for fundamental rights, transparency, non-discrimination, or proportionality) and procedural (such as due process, or notice and comment rulemaking). This question is neither quite new nor particularly old. It raises intellectual and legal conundrums that administrative law must confront if it is to respond to current developments in state/society relations. It is, one might say, a characteristically post-modern administrative law question.

The chapter is organized as follows. Section 1 defines the basic, generic risks inherent in contracting out, so that my comparisons can really focus on comparable matters. Section 2 argues that one must distinguish between two different – although related – problems: those that concern applicability and those that concern enforcement. Section 3 then claims that all legal systems, and, most importantly, all systems of administrative law, find these problems difficult to solve effectively. In conclusion, Section 4 sketches out some hypotheses that could explain why administrative law systems have that difficulty.

1. Contracting out: the risk of public values avoidance

1.1. The concept of contracting out

Can lawyers coming from different jurisdictions agree on the meaning of 'contracting out'? Perhaps, but only if they acknowledge that the concept refers to all types of situations in which the state contracts for public functions with entities that are not themselves public authorities.

Of course, in any particular system at any one time, drawing a clear line between what is, and what is not, a public function can be difficult. Nevertheless, all major legal traditions permit private entities to perform some 'public' functions. Thus, the common law tradition includes an old case-law on regulation of public utilities (Guttman 2000) and some civil law systems have long incorporated concession mechanisms (Cossalter 2007).

As long as one does not equate contracting out with privatization, no major disagreement remains about what the phenomenon entails. In most legal systems, privatization refers to the asset sale of state-owned industries. By contrast, contracting out mechanisms entrust a private entity with a task that remains under public supervision and is not purely left to the market.

That said, public authorities externalize some of their duties using a range of legal forms, and these forms can vary significantly even within a particular system.[1] But in using the term 'contracting out' here, I restrict myself to arrangements that are based upon a contract. I thus exclude externalization based on legislation or a unilateral governmental decision.[2]

Another definitional difficulty remains: distinguishing between the contracting out of public duties and pure procurement contracts. As Alfred Aman (2005) puts it, the latter entails 'contracting for commercial services necessary to carry out agency duties', whereas the former includes 'outsourcing the very duties the agency was created to undertake or fundamental responsibilities that flow from these duties', Making this distinction is not always an easy task, as is very well shown by the difficult problems faced when courts seek to separate contracts subject to the European law on procurement from other contracts – often of the 'contracting out' type (Bovis 2006).

1.2. The rise of contracting out

Even if contracting out existed in earlier periods,[3] it has flourished since the 1970s and 1980s in connection with new public management policies that became widespread in all industrialized countries in the second half of last century.

In the United States, for example, outsourcing as well as contracting out expanded in such areas as social services, health services, education, water provision, power provision and, as is well known, in prison management (Freeman 2000). In Australia and New Zealand, the same kind of policy was applied to prisons, health services and education (Domberger and Hall 1996, Saunders and Yam 2004).

In Great Britain under Thatcherism and continuously afterwards – even if with noticeable interruption – governments have followed a firm policy of promoting, and even in some cases requiring, public entities to externalize any activities susceptible to more efficient performance by private agents. Local governments were particular targets. They were obliged by a 1988 statute to weigh the respective benefits of direct service provision versus contracting out each time they undertook a new activity. Legislation soon followed concerning the outsourcing of various state activities, such as prisons, roads and bridges. The central government attempted to provide overall economic and legal shape to these various forms of externalization, most prominently through the framework called the 'Private Finance Initiative' (PFI) (Auby 2007a).

In France, from the 1980s on, a similar trend of contracting out public duties was discernible, particularly apparent, once again, at the local government level. In the early 1980s, France adopted significant decentralizing reforms, giving local authorities full responsibility for public services that previously were only partly under their

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[1] The forms also evolve over time. For example, in Europe the new forms of public-private partnerships that are developing are often significantly different from the more traditional concession-type forms of externalization.

[2] The concept of 'contracting out' also excludes situations in which a particular public duty is entrusted to a specialized public agency. Even though this situation does not remove the duty in question from the public apparatus, in some systems it is still understood as a form of externalization.

[3] In the United States, Daniel Guttman (2000) traces some examples from the first decades of the 20th century.

responsibility, if at all. Quite often, local governments opted not to operate these activities directly, but instead to entrust private companies with their provision, most importantly in fields such as water provision, transport and waste management. In the late 1980s, central governmental authorities attempted to extend externalization to certain of their own public services, although with more limited success (Richer 2008).

What is striking is that these contracting out practices did not exclude core functions of the state, including duties normally understood as characteristic of sovereignty. This includes security missions as well as, as previously mentioned, prison management. As Donald Kettl (1993) has noted, almost all types of services have been subject to contracting out somewhere in the world.

One must also realize that the contracting out has not been limited to the domestic sphere; it has also developed at the international level. Laura Dickinson (2006), in particular, has given a remarkable account of the evolution of contracting out in the international realm, in two major respects. First, some states contract out portions of their foreign aid policies, as well as some diplomatic functions, and even core military functions. The United States thus entrusted private companies with certain key security functions in Iraq. And Sierra Leone has even used private contractors to engage in direct combat. Second, international institutions also have begun to outsource some of their duties. A prime example is the United Nations High Commissioner for Refugees (UNHCR), which has entered into partnerships with hundreds of NGOs around the world for services including refugee protection, community services, field security, child protection, engineering and telecommunications in emergency relief situations.

At the regional level, the European Union provides another important example. The EU frequently externalizes the implementation of some of its policies, in particular in the development area (Craig 2006: 52 ff., Auby 2007b, Péraldi-Leneuf 2009). It often channels its aid to developing countries through local entities, termed 'non-state actors' in the EU jargon.[4] A recent regulation on food-aid policy and food-aid management and special operations in support of food security defines the conditions that non-profit-making non-governmental organizations must meet in order to be eligible to obtain Community financing for food-aid operations.[5]

1.3. Public values?

Obviously, the concept of 'public values' is subject to debate, especially in comparative terms. For purposes of this discussion, let us understand the concept as referring to general legal limitations that govern public bodies when they act to protect the rights of the citizens and the interests of the society as a whole. Public values are not, however, just about limitations but also about privileges. A problem could arise, for example, if a contracted-out entity seeks to claim the privileges and immunities that public officials enjoy (Guttman 2000). That is not, however, the issue we consider here.

Public values may be either substantive or procedural. Procedural values relate to the way public authorities must decide or the processes through which they must act.

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[4] See Communication from the Commission of 7 November 2002 on participation of non-state actors in EC development policy, COM(2002) 598 final.

[5] Council Regulation (EC) no. 1292/96 of 27 June 1996.

Due process and reason-giving are prominent examples. Substantive values relate to the content of public decision-making: proportionality and respect for human rights, for example. Obviously, there is some degree of overlap between the two categories. Some fundamental rights may interfere with administrative procedures and act as limits to the possible content of decisions: freedom of speech, for example. Nevertheless, the distinction gives one an idea of the range of limitations encompassed within the concept of public values.

Because domestic public law has a longer history, one can find a wider consensus regarding the meaning of public values at the domestic level. The inventory varies from one system to another, but along some rather constant lines. On the procedural side are rules concerning due process, fair hearing, reason-giving and the like, as well as transparency, access to information, limits on conflicts of interest and corruption (Freeman 2000, Guttman 2000). On the substantive side are rules regarding respect for the fundamental rights of citizens, proportionality, non-discrimination, respect for pluralism, perhaps even subsidiarity (Minow 2002).

In the international realm, until quite recently, public values of the type we are discussing would have been confined to humanitarian law, complemented by treaties concerning crimes of war, genocide and so on. Today, a vast array of international rules concerning human rights provides an additional source of public values. Furthermore, a trend is progressively revealing itself whereby international bodies submit themselves to principles similar to those that apply to internal administrative bodies, and not only those concerning human rights. It is one of the purposes of the 'Global Administrative Law' movement to explore and promote the application of such principles (Kingsbury et al., 2005).

At the regional level, it is now broadly recognized that European Union law includes an administrative law dimension, with principles very similar to the public values that apply to domestic public bodies (Schwarze 2006, Auby and Dutheil de la Rochère 2007).

1.4. The threat to public values

Contracting out can be, and sometimes effectively is, a means of extending the application of public values to privatized service-providers, Public contracts are sometimes used as a regulatory tool to impose some public principles on private bodies where these principles would not normally apply. Respect for public values is simply included in the contractual obligations (Freeman 2000, McCrudden 2007). This possibility does not mitigate the reverse problem: unless the contract is specific, contracted-out public duties and the entities which are entrusted with delivering them tend to escape the application of public values.

Strikingly, it is in those countries where recourse to contracting out has been most widespread that scholars have raised the threat to public values most vigorously. The collective volume edited by Michael Taggart (1997) exploring 'the province of administrative law', as well as the work of Mark Freedland (1994, 1998) on the British PFIs, raised the seminal alarms.

More recent work has stressed how, in an increasing number of cases, outsourcing occurs in contexts where harms to fundamental rights are particularly likely: for example, education, health-care and prisons (Aman 2005, Minow 2002). Similar concerns arise in

the international context if military or quasi-military functions are outsourced or where development aid tasks are externalized.[6]

2. A twofold problem: applicability, processes

Of course, one approach to the problem of contracting out and public values is to define more clearly in legislation those areas which may not be contracted out – perhaps a list of core governmental functions or a catalogue of public tasks whose execution affects human rights in a particularly sensitive manner.

In French law, for example, there is some case-law – not much, but some – concerning the kind of public tasks that administrative authorities cannot transfer to entities pursuant to *contrats de délégation de service public*. The central concern of this jurisprudence pertains to what French administrative law calls *police administrative*, which includes, more or less, those activities that entail command and control regulation, excluding those situations where offences have been committed.

In English law, the Deregulation and Contracting Out Act of 1994 (1994, chapter 40) attempted to list core public functions that cannot be contracted out, including those interfering with individual liberty and those entailing the power of entry into, search or seizure of any property.

In the United States, the Fair Act of 1998 also defines inherently governmental functions which cannot be externalized, including those which can significantly affect the life, liberty or property of private persons. Supreme Court decisions have also suggested that some governmental functions, such as tax collection or fire and police protection, might be non-delegable (Freeman 2006, Verkuil 2006).

However, experience suggests that such efforts are often unreliable. Because these lists are defined by legislation, they can be overturned by subsequent legislation. Perhaps more importantly, they often rely upon such vague standards that it is not difficult for governments that seek to contract out to claim that the standards do not apply to their project.

Nevertheless, the problem remains of developing legal methods to promote respect for public values by private entities operating public functions pursuant to contract. This raises a question of applicability (A) and a question of enforcement (B).

2.1. The problem of applicability: Bring in contracted-out entities within the orbit of public values

Let us start with the idea that, normally, private entities need not comply with public values in the same manner as a public agency. Sometimes, of course, similar principles apply to both public authorities and private sector entities (for example, prohibitions against discrimination based on race or sex, rules on trade unions). But the substantive and procedural public values to which public entities are subject have not been designed to apply to private entities. The function of public values is to protect society against the state and its abuses, not to protect society from private entities.

We recognize here the well-known issue of the potential 'horizontal' effects of human

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[6] A quite original situation is ICANN, which is basically contracting out with the US government, but also has a strategic role in the matter of Internet Domain Names. That makes it a particularly apt example of the problem we are trying to analyze (see Froomkin 2000).

rights. Under limited exceptions, to which we return below, human rights norms generally have only 'vertical' effects, and as such, private parties may only invoke them against public authorities. This rule holds not only in the domestic but also in the international context. A prime example is the European Convention on Human Rights, which, under the prevailing case-law of the European Court of Human Rights, does not have horizontal effects.[7]

We must also realize that, given the nature of private entities, it is difficult to subject them to public values (like transparency) which normally apply to government functioning. Transparency rules are particularly difficult to replicate in the private context because information generated by private entities may constitute 'proprietary' information, while information generated by public bodies is 'owned' by the public (Mashaw 2006). Moreover, public-private distinctions also have a bearing on any limitations we might fairly impose on transparency, for example, 'business' secrets versus 'diplomatic' secrets.

Therefore, the imposition of public values on private entities performing public functions under a public contract is a special case. It requires the development of a legal framework in order to extend the applicability of public values to the private realm. There are four mechanisms by which to accomplish this task:

(a) The outsourcing contract itself, which may include requirements that the contractor respect a range of public values. In this case, the applicability of public values becomes a matter of contractual negotiation.
(b) Legislation (including, perhaps, the Constitution) may explicitly require the application of a range of public values to private entities that carry out public duties pursuant to contract. This may include the incorporation of public values into general private law (for example, commercial law or the law on non-profit associations), as well as special provisions concerning entities which perform public tasks.
(c) Judicial decisions may hold that a private entity operating pursuant to a public contract should be treated like a public body for the purpose of applying some public value because of the function the private entity assumes and/or because of the links it has with public institutions.
(d) A fourth route for incorporating public values is to make sure that they are incorporated in self-regulation mechanisms. Public authorities could then contract out only with entities which voluntarily submit themselves to self-regulation that enshrines respect for some public values.

The same methods are potentially available in the international area with two qualifications. In the international context, of course, legislation is not made in the same way, and the extension of public values to private entities in the international field could result from either international agreements or domestic legislation. Similarly, any judicial extension of public values could take place within either international or domestic forums.

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[7] ECtHR, *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981 (App. No. 7601/76; 7806/77).

2.2. The problem of enforcement: who and how?

Who is in a position to hold contracted-out entities to account when they violate public values? It is not enough to determine possible ways in which public values can apply to contracted-out entities. Law is not just a matter of substance. It is also crucial to determine by whom and through what kind of procedures these entities can be induced to respect those values.

To the first aspect of the question, the answer seems to be as follows:

(a) The first protector of public values should be the contracting public authority. It can play that role at least insofar as respect for these values has been included in the contract's provisions.
(b) Respect for public values can also be the concern of other public authorities: parliaments, government monitoring agencies, ombudspersons and so on: in short, public authorities in charge of public ethics.
(c) Then, there are various types of directly concerned private persons: in particular, users of the contracted-out service and members of the contracted-out entity's staff.
(d) Lastly, there is the ordinary citizen whose human rights may be affected by the contracted-out entity – because her private life is affected. Further, political opponents, civil society associations, etc. may wish to challenge perceived violations of rights.
(e) In the international arena, the stakeholders are not very different, but they will often be represented by governments, which are sometimes the only bodies with access to legal fora of control.

What are the procedural means through which contracted-out entities can be induced to respect public values?

(a) When respect for public values is part of the outsourcing contract's provisions, then, the most direct way is simply contractual supervision that includes monitoring the contractor's respect for public values. When that is not the case, the public authority may have some influence on a private entity that hopes for a contract renewal.
(b) In addition, other routes may be available through the courts. If they exist, who has access to them? Is judicial review available for decisions of the outsourced private body or for decisions of the contracting public authority, and who has standing? Where public values have been infringed, are there other remedies, in contractual or tortious liability for example, and who has access to them?
(c) Outside of court review, other processes may exist to monitor possible violations of public values by contracted-out entities. For example, contracted-out activities will sometimes be directly supervised by political bodies: parliaments, governments, bodies made up of governmental representatives in international organizations.

    Contractors will sometimes be under the scrutiny of other types of monitoring institutions, which can be general ones, such as ombudspersons or budgetary supervisors or special watchdogs in charge of a particular public service. In some cases, these monitoring institutions will include a representative of third parties, such as consumer protection associations or the users of the contracted-out public services.
(d) In situations where respect for public values is linked to contractor self-regulation,

then it is mainly the industry's internal procedures that will enforce standards. In some cases, associations of professionals act as a collective guarantor of the public values accepted by their members.

3. What does comparative law show?

Which law will one particular outsourcing contract be subject to? If the public party is a domestic public body, the contract will normally be subject to that country's law. However, if the private party is a foreign entity, and, in particular, if the contract is to be executed abroad, the – public and private – parties can agree to submit it to another national law, which can be that of the private contractor, that of the place of execution or another body of law altogether.

Generally speaking, contracts made by international organizations are subject to the rules which the parties have chosen – in accordance with the principle that governs, for all international contracts by the Rome Treaty of 19 June 1980. Parties can opt for the law of the state where the contract will be implemented or any other law, including the one of the organization. At present, there is a trend to exclude the reference to a national legal system and instead to submit the contract to general principles, possibly of international law (Seyersted 1967). This trend does not apply, however, to contracts made by European institutions, for which one national law is normally chosen (Auby 2007b). That said, even where the one domestic law applies, some international law can be involved as well because the international contracting institution may have a specific legal framework for its own contracts: this is the case for the European Union, whose contracts are subject to special rules, laid down in two 2002 Financial Regulations.

For that reason at least – there are others, as we shall see hereafter – the comparative law overview we present is both horizontal – based on national systems of law – and vertical – that is, it includes pieces of international law solutions.

3.1. The problem of applicability

Do outsourcing contracts often actually impose respect for public values on private contractors? It does happen on occasion. In the United States, for example, contracts made with privately run prisons will often require compliance with constitutional federal and state standards for prison operations and inmates' rights (Freeman 2000).

We have also already noted that public contracts are sometimes used as regulatory tools, and, in that respect, are sometimes a way of imposing on private parties respect for public law principles that are not normally applicable to them, or are applicable, but with weaker implications. In Australia, for instance, some governmental guidelines subject governmental procurement contracts to a requirement that the bidder conforms to statutes concerning gender discrimination (Saunders and Yam 2004). It is difficult to say, however, if this kind of practice is frequent.

Comparative law includes some examples of case-law where a contracted-out entity is considered to be a public body for the purpose of applying public law principles.

For example, the US Supreme Court, in *Lebron v. National Railroad Passenger Corporation*,[8] held that, because of the way it had been created and the public purposes

[8] 513 US 374 (1995).

it pursued, it was appropriate to consider the government corporation in question an 'agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution'.

Under British law, a similar issue arose regarding the applicability of the Human Rights Act, which was adopted in 1998 in order to transpose into national law the European Convention on Human Rights. The question was whether it applied only to public bodies strictly speaking, or also to private bodies assuming public functions (Bonner and Graham 2002). So far, the House of Lords has refused to apply the Act to private bodies,[9] but scholars have expressed the view that it is appropriate to apply the Act to private bodies, at least in some cases (Oliver 1999).

The French courts have long accepted that decisions of certain private institutions operating pursuant to a public contract could effectively be of an administrative nature. In those cases, the institutions are subject to review by administrative courts that could then check their observance of public law principles. A famous case, decided by the *Tribunal des Conflits* in 1968, concerned Air France, then a contracted-out entity (now entirely privatized).[10] It held that an internal regulation adopted by Air France had the nature of an administrative act and thus the administrative courts had jurisdiction over the case.

European law provides additional examples of a similar extension of public values to private entities. The European Court of Justice has held that private organizations in charge of public functions could infringe basic principles of European treaties (for example, freedom of circulation, free movement of goods or capital, etc.), even though these principles are normally targeted only at public bodies (Wernicke 2007).

There do not seem to be many pieces of legislation that stretch the concept of public values to cover contracted-out situations, but, still, some examples can be found.

Some freedom of information acts apply their transparency rules to private entities in charge of public functions. Thus, the French 1978 'loi sur l'accès aux documents administratifs' makes the rules applicable to information held by public authorities also applicable to private institutions in charge of a public service.

The US Freedom of Information Act is not, by itself, applicable to private institutions, but, in 1998, it was complemented by a 'Shelby Amendment', which requires 'Federal agencies to ensure that all data produced under an award will be made available to the public . . . under the Freedom of Information Act' (Guttman 2000).

Even if it is purely soft law, one international law example can be mentioned. It is the 'Montreux Document', adopted in 2008 by 17 states, and which contains rules and good practice, inspired by international humanitarian and human rights law, that should apply to private military and security companies operating in armed conflicts.[11]

In practice, are public values ever imposed on contracted-out entities because of

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[9] For example, in *YL v. Birmingham City Council*, [2007] UKHL 27 (House of Lords), a case concerning a person who had been placed in a private care home by the local City Council.

[10] Tribunal des conflits (TC) [Conflicts Tribunal], *Epoux Barbier v. Air France*, 15 January 1968, Rec. p. 789.

[11] Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, United Nations, General Assembly, A/63/467 – S/2008/636.

self-regulation or private law legislation that replicates those values? It probably does, for example through accreditation mechanisms: public authorities can restrict contracting out opportunities to entities which have received an accreditation and make sure that, among the conditions the companies must meet in order to be qualified, some are related to their observance of public values (for example, concerning their staff's legal treatment or the way they will treat their consumers). Lack of comparative information on this aspect makes it impossible to say if there are frequent practices of this type.

3.2. The problem of enforcement

If public values that are included in contractual provisions are infringed, what can the contracting authorities do? They can always ask a judge to hold the contractor contractually liable and possibly ask them to terminate the contract. They can terminate the contract, and possibly, before that, inflict penalties on the contractor by themselves if they have that power under the contract.

In some systems, the power of sanctioning the contractor and even of terminating the contract will belong to the public contractor even if it has not been mentioned in the contract. This is the case in the French administrative law tradition – and in jurisdictions whose public contracts law has been inspired by the French tradition, such as Spain, where the power of unilaterally terminating a government contract when it is not respected by the contractor is considered to be the essence of public contracts (Richer 2008).

In terms of judicial redresses, substantial variations exist.

(a) In jurisdictions where the concept of 'public law contracts' is accepted, litigation concerning this kind of contract is dealt with by administrative courts and submitted to the usual procedural and substantive rules of administrative law. There is, however, a significant reservation: in general, administrative courts can only be accessed for challenges aimed at the public party in the contract or for claims made by the public party against its contractor, not for complaints from citizens who are users of the outsourced activity. The latter will, therefore, encounter difficulties in inducing the administration or the contractor to respect their rights, to respect the rules governing the contract and so on.

French administrative law provides a partial remedy. In 1906, the *Conseil d'Etat* ruled that users of a delegated public service could ask the administration to intervene when the company performing the service infringed its contractual obligations and in case of a refusal, challenge the administration before an administrative court.[12]

Another limitation on citizen redress normally derives from the fact that not all contracts made by public bodies are considered 'public law contracts': public authorities also enter into 'private law' contracts. Theoretically, litigation concerning the latter comes under the jurisdiction of ordinary courts. However, some of the administrative laws we are referring to here allow partial judicial review in the *Conseil d'Etat* for decisions that are 'detachable' from the overall contract.

(b) In jurisdictions where the concept of 'public law contract' is unknown, the scope of judicial review, and of corresponding substantive and procedural rules, will obviously

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[12] Conseil d'Etat (CE) [Council of State], *Syndicat des propriétaires et contribuables du quartier Croix-de-Seguey-Tivoli*, 21 december 1906, Rec. p. 962.

be even narrower (Drewry 2000). It will not necessarily be absent, however. In common law systems, in fact, part of the litigation concerning public contracts can be submitted to judicial review: in English law, for example, when the public authority's contractual capacity is debated, judicial review procedures can be used. This is also possible, according to recent case-law, in cases initiated by companies whose bid has not been accepted in procurement contracts devolution procedures.

Except for these limited reservations, public contracts litigation, in common law systems, does not fall within the perimeter of judicial review. Actually, the techniques of judicial review would probably not be adapted. For instance, some American authors suggest that it would not be possible to extend to contractual litigation the usual deference judges have towards administrative interpretations in judicial review procedures (Freeman 2000).

The main flaw commentators point at in the way common law systems deal with public contracts litigation is that, generally speaking, they do not provide citizens who are not parties with efficient remedies if they are affected by the way the contract is implemented. Hence, users of an externalized public service or other affected persons cannot obtain either judicial review or review under the common law. This solution is not absolute, however. For example, US courts have sometimes admitted third-party beneficiaries to bring breach of contract claims (Aman 2005, Guttman 2000).

(c) Is the scope of judicial redress different when it comes to contracting out internationally? In practice, the difference does not seem very large since outsourcing contracts made at the international level, whether by state institutions or by international organizations, are generally submitted to one domestic law. Three kinds of complementary remarks must be added, however.

First, international case-law recognizes that, in certain situations, violations of international law by private entities could lead to their state's international liability because the latter did not do what it should have to prevent those violations.[13] This jurisprudential line can be followed in cases involving infringements of public values by contracted-out entities.

Second, in countries where a universal jurisdiction rule is accepted – in the United States, for example, with the Alien Torts Claim Act – corresponding procedures could apply to a contracted-out institution charged with breaching humanitarian law for example.

Third, in some cases, international courts have jurisdiction over litigation concerning contracts made by international organizations: thus, when contracts made by European Union bodies entail an arbitration clause, the European treaties provide that the European Court of Justice always has jurisdiction. This gives the Court the opportunity to apply principles of European public law.

Contracting out is often conducted in a way that is largely out of reach of parliamentary supervision. This is noted frequently by commentators (Freeman 2000, Saunders and Yam 2004) and has been stressed by analysts of British PFI contracts (Freedland 1994, 1998).

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[13] For example, United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*), Judgment, ICJ Reports 1980, p. 3 (24 May 1980).

In some jurisdictions, political and judicial supervision complement each other – or the defects of one are compensated for by the advantages of the other – notably in terms of the protection of citizens' rights affected by contracted-out activities, by the possible recourse to ombudsmen, parliamentary commissioners for administration, or *médiateurs*. In Great Britain, the Parliamentary Commissioner seems to play a significant role in this respect. Commentators from Australia mention a similar situation (Seddon 2009).

4. Concluding remarks

All legal systems find it difficult to ensure that contracted-out public duties are performed in a way which is respectful of basic public values. It is difficult to bring the mixture of public interest and private concerns – which is the essence of contracting out – into the sphere of these public values.

The problem seems especially acute in systems in which the concept of a 'public law contract' is not accepted: common law systems, some of the continental legal systems as well, such as the German or the Italian. In various common law jurisdictions, an academic debate has arisen about the suggested 'publicization' of the public contracts regime. Some authors (Freedland 1994, 1998, Taggart 1997, Davies 2006) argue that it would be a good idea to promulgate special rules for public contracts, in order to help addressing the various difficulties that are conveyed by the rise of contract in the public sphere. These authors suggest that, in particular, this reform would be the best way to ensure that public contracts and contracted-out public activities incorporate public law values.

Are systems in which there is a concept of a 'public law contract' – such as the French one – less uneasy on these issues? It is difficult to give a general answer. In those systems, contracts which fit in the concept remain within the orbit of public law and, therefore, normally do not escape from the reach of public law values. For example, in French administrative law, entities which are entrusted with the performance of a public service – by the way of a 'délégation de service public' – are supposed to respect some corresponding fundamental principles – equality, continuity, for example – as well as some statutory rules applicable to all entities providing public services, as has been mentioned. However, it would be too optimistic to claim that enforcement of these principles and rules, if infringed by private contractors, is efficiently guaranteed. But one can also ask if 'in house' public activities always respect public values. The answer is, of course, negative: this is a matter for regulation, of incentives for contracted-out activities and for activities carried out 'in house' as well.

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31 Organizational structure, institutional culture and norm compliance in an era of privatization: the case of US military contractors

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The privatization of governmental functions has long since become a fixture of the American political landscape. From the management of prisons, to the provision of welfare and other services, to the running of schools, federal and state governments in the United States have handed over more and more tasks to either for-profit or non-profit private enterprises. Indeed, a 2003 *Harvard Law Review* symposium went so far as to declare ours an 'Era of Privatization' (Symposium: Public Values in an Era of Privatization 2003). While some scholars have extolled the cost savings that privatization may bring, others have expressed deep misgivings (for example, Domberger and Jensen 1997: 72–5), arguing that privatization threatens to erode legal and democratic accountability (Dolovich 2005). Such scholars worry that, because private actors are usually not subject to the constitutional and administrative law norms that apply to governments (Metzger 2003: 1374–76), any purported efficiency gains from privatization may come at the cost of losing important public values.[1] More recently, an emerging middle-ground position embraces privatization while seeking new mechanisms for extending public values through contract (for example, Freeman 2000), democratic participation (for example, Aman 2004), and other modes of accountability.[2]

Despite this rich debate about privatization in the domestic context, far less attention has been paid to the simultaneous privatization of what might be called the foreign affairs functions of government. Yet privatization is as significant in the international realm as it is domestically. The United States now regularly relies on private parties – both for-profit and nonprofit – to provide all forms of foreign aid (including emergency

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[1] And such efficiency gains are themselves a matter of dispute. See, for example, Sclar (2000: 47–70).

[2] I discuss such alternatives in the context of foreign affairs privatization in Dickinson (2011, 2006, 2005).

humanitarian relief, development assistance, and post-conflict reconstruction) – to perform once sacrosanct diplomatic tasks such as certain kinds of peace negotiations (Taulbee and Creekmore 2003: 156–71), and even to undertake a wide variety of military endeavors. These military functions include not only support services such as constructing weapons and building barracks, but also core activities such as guarding military facilities, escorting convoys, conducting interrogations, training soldiers, and providing logistical support.[3] By 2008, the ratio of contractors to uniformed troops in Iraq exceeded 1 to 1 (Congressional Budget Office 2008), and this ratio is likely to increase further as the US military draws down its forces there. Meanwhile, contractors remain a significant part of the US government's operations elsewhere and are likely to be a continuing presence for the foreseeable future (Schwartz 2009). Private military contractors have been implicated in multiple instances of human rights violations, corruption, and waste (Dickinson 2011). Yet, private contractors are likely to become a permanent part of the military landscape. In testimony before Congress in January 2007, General David Petraeus went so far as to say that the US military would not be able to function in Iraq at all without contract security personnel (US Senate 2007).

Nor is this development confined to the United States. Other countries, as well as international organizations such as the United Nations, have privatized many aspects of their work (Weiss 1998). Indeed, some 'failed' states have relied almost exclusively on private actors to perform both international and domestic roles of government, using private military companies to fight their wars, foreign nongovernmental organizations (NGOs) to provide their essential social services, and foreign for-profit companies to build their roads, dams, and other infrastructure (Brooks 2005).

Foreign affairs privatization raises important challenges for comparative administrative law. This is because the typical tools of administrative law – limits on delegation, increased transparency, insistence on adherence to procedural regularities, judicial oversight, and so on – are all substantially weakened in the privatization context and weakened still further when the privatization at issue takes place in the foreign affairs arena. After all, while scholars of domestic privatization have noted that the privatization decision shields many acts from the scrutiny or accountability a government actor would receive, the lack of oversight is even more of a problem abroad, especially in the military context, where bidding is secret and conducted under expedited rules, where contract monitors are largely absent, where even simple record-keeping is problematic, and where the public is less likely to know what is happening on the ground. Moreover, direct legal accountability is also more difficult (though not impossible) because international courts tend to be too weak and domestic prosecutions are less likely to be pursued, and because tort suits against private contractors operating in military contexts abroad face a variety of procedural and political hurdles (Dickinson 2011).

Thus, it will not be sufficient merely to focus on the degree to which these contractors are formally governed by international and domestic law. Certainly there are some gaps in our current legal framework that could usefully be amended to address the rise of

[3] Not surprisingly, this trend has spawned a burgeoning literature. See, for example, Dickinson (2011, 2006, 2005), Verkuil (2007), Avant (2005), Singer (2004), Chesterman and Lehnardt (2007) and Freeman and Minow (2009).

contractors.[4] But the problem is much less about the formal legal framework and much more about the subtle ways in which norm compliance actually operates on the ground. After all, legal rules are often followed not because of the formal existence of a norm, but because of more inchoate processes involving how much the legal norm is internalized by relevant actors. This is particularly true with regard to international law, which is less likely to be enforced through coercive power.

Accordingly, foreign affairs privatization offers a useful case study for considering an aspect of administrative law theory that has received insufficient attention: how do organizational structure and institutional culture affect norm compliance? This is an essential question if we are to analyze the attributes of governmental bureaucracies and private corporations that are more likely to lead to protection of what have been called 'public law values' (for example, Freeman 2000). In the domestic context, scholars have attempted to isolate structural features of institutions that might make them more or less likely to foster a rules-abiding culture (for example, Williamson 1995, March 1988, March and Simon 1993, Scott 1987, Simon 1957, Taylor 1984, Meyer and Scott 1983, Powell and DiMaggio 1991, and Rubin 2005). As such, we might fruitfully begin to apply the insights of this organizational theory literature to the global administrative law discussion (for example, Kingsbury et al. 2005).

Using this literature in the context of private military contractors, the key inquiry is to try to determine how international law norms are currently inculcated within the uniformed military and then see whether those institutional structures are less present (or indeed are undermined entirely) in the private military context. To address these questions, this chapter draws on qualitative empirical data. I summarize conclusions drawn from a series of interviews I conducted with US military lawyers in the Judge Advocate General (JAG) Corps.[5] These lawyers – embedded with troops in combat and consulting daily with commanders – have, to a large degree, internalized the core values inscribed in international law – respect for human rights and the imposition of limits on the use of force – and seek to operationalize those values. Of course, the lawyers are not always successful, and it would be simplistic to assume that their accounts prove that the US military always obeys international law. But their stories strongly indicate that the presence of lawyers on the battlefield can help produce military decisions that are more likely to comply with international legal norms.

Just as importantly, this study suggests that military lawyers are most likely to function effectively and encourage legal compliance if certain specific organizational features are present. These findings track the organizational theory literature about what makes compliance officers within firms effective. Accordingly, the experience of JAG officers suggests links between organizational structure and legal compliance.

Building from this study, I suggest that differences in organizational structure and institutional culture (and not just differences in the applicable legal regime) may be principal reasons that the rise of private military firms threatens these core public law values. In particular, the use of contractors may jeopardize certain aspects of military culture, both because the intermingling of contractors and uniformed troops on the battlefield

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[4] For a longer discussion of possible reforms, see Dickinson (2011).

[5] For a more detailed account of this interview data, see Dickinson (2011, chapter 6).

may weaken public values within the military, and because contractors operating outside the military chain of command may themselves develop a different organizational culture and set of values that come to predominate in conflict and post-conflict situations as contractors assume ever-greater responsibilities there. Thus, if we are to address how to maintain public law values in an era of privatization, we must take seriously the question of organizational structure and culture, its importance, and the ways it might be shaped.

Section 1 introduces some basic insights gleaned from the literature on organizational culture regarding effective compliance agents within organizations, such as lawyers. Then I draw on my study of military lawyers operating in Iraq to emphasize the role that organizational structure has played in the effectiveness of these attorneys. Section 2 notes that such organizational structures tend to be lacking in the private military context and that reform efforts could therefore fruitfully focus on such issues. A brief conclusion suggests other contexts in which an analysis of organizational structure and institutional culture might help open up new avenues of inquiry for administrative law scholars.

By taking issues of organizational structure and institutional culture seriously, we can see that fostering greater compliance may sometimes be less a matter of writing new oversight provisions or increasing judicial oversight and more a matter of subtly influencing organizations and the norms they inculcate. This is a key lesson for administrative law more generally, and suggests intriguing lines of comparative inquiry both within and beyond particular national systems. And while understanding the processes of norm inculcation can be extraordinarily difficult, it is only by focusing on these more intangible features of organizational structure and institutional culture that we can begin to address a world where states are not the only relevant agents of law compliance and where private corporations with radically varying institutional structures are frequently the subjects of administrative law.

1. Organizational theory and military lawyers

Despite important work over the past half century (for example, Simon 1957), organizational theory has still not been sufficiently integrated into the study of either administrative or international law. Yet, as I will attempt to show, this literature, particularly if further developed to focus on those institutions that apply and inculcate legal norms, holds tremendous promise and could meaningfully reshape many administrative law debates, particularly those that concern privatization. Of particular importance to our analysis here is the question of how to best ensure that compliance agents within an organization – again, such as lawyers – can most effectively help ensure compliance with central rules and values of the organization as well as various public norms. Accordingly, I will first summarize some of the core insights in the field regarding successful compliance agents. Then, I will build on my qualitative study of military lawyers to suggest that these lawyers operate within institutional structures that the organizational theory literature predicts would likely have some positive impact on compliance.

1.1. The importance of organizational structure and institutional culture

Organizational theorists have long recognized that group norms and internal organizational structures can further (or hinder) an organization's goals, as well as the goals of individuals within organizations. These theorists are a diverse group spanning multiple

disciplines, from law (Rubin 2005, Rhode 2000, Abel 1989) to economics (North 1990, Williamson 1996) to sociology (Meyer 1983) to political science (Moe 1995) to anthropology (Douglas 1995). Moreover, they study a wide range of organizations, from corporations (Hart 1989, Rock and Wachter 2001) to private associations (Abel 1989) to public bureaucracies. Thus, it is difficult to generalize about this literature, and a detailed survey is beyond the scope of this chapter. Instead, I will focus on some of the core structural features within organizations that this literature has identified as important in helping to ensure a culture of compliance with external norms, such as legal rules.

As Ed Rubin has argued, such organizational theorists can perhaps be divided into four camps: (1) those who view organizations as a nexus of contracts, (2) those who understand organizations as complex decision-making hierarchies, (3) those who see organizations as influenced by broader societal forces or institutions, and (4) those who describe organizations as complex systems or organisms (Rubin 2005). For our purposes, these four theories/camps are important because, despite their differences, each would predict that the structure of an organization and its institutional culture will have distinct impacts on the organization's efficacy and the likelihood that actors in the organization will conform to external norms of behavior.

The first group, which includes economists such as Harold Demsetz, Michael Jensen and William Meckling (Alchian and Demsetz 1972, Jensen and Meckling 1976), views organizations as simply a nexus of contracts or agreements between rational, autonomous actors. In this view, organizations are simply the sum of the contracts that constitute them, and little more. Such a view would seem to assign little weight to more inchoate issues of institutional culture. Yet, even a more narrow focus on employment contracts suggests that the terms of the contracts themselves can influence the self-concept of employees and affect their behavior. For example, as we shall see, the formal contractual role military lawyers fulfill (what rules they are committed to, what chains of command they have at their disposal, what sanctioning authority and so on) significantly affects the culture of compliance.

Even more significant for purposes of this study is a second group – 'decision theorists' such as Herbert Simon, James March and Richard Scott (March 1988, March and Simon 1993, Scott 1987, Simon 1957), as well as economists such as Douglass North and Oliver Williamson (North 1990, Williamson 1996) – which views the organization more as a decision-making hierarchy. According to this approach, the organization is much more than the sum of its parts: just as important is the formal governance structure of the organization, as well as informal norms of behavior that cannot be captured in a contract. Moreover, this group acknowledges that individuals may not always make rational decisions, and identifies many ways in which the structure of a group or organization impedes individuals from making such decisions, contributing to 'bounded' rationality.

From the perspective of decision theory, systems of 'control, management, supervision, [and] administration in formal organizations' are critical (Williamson 1995). Accordingly, leaders within the organization can define and seek to fulfill the organization's purposes by giving incentives and setting penalties for the organization's members. In addition, the location of a decision within the organization's hierarchy will affect its impact on the organization's members. Employees may respond more readily to senior managers. Isolated corporate counsel's offices, by contrast, may have less sway with other employees; indeed Sally Simpson has found that the idea of violating the law might

have a positive appeal as an indication of aggressive business practice (Simpson 2002: 116–51). Nevertheless, as Rubin has noted (2005: 373), an internal compliance program that increases the size and authority of corporate counsel 'will tend to increase the salience of the criminal law for operational employees' and their 'uncertainty about the consequences of their actions may convince them that it is better to follow the instructions of the compliance personnel'.

Other structural factors are also important. For example, Serge Taylor (1984), in a study of environmental regulation, found that the ability of compliance personnel to monitor lower-level personnel and then report back to higher-level personnel within the firm increased compliance. And as Rubin describes (2005: 374):

> In the absence of a compliance program, an employee who decides to engage in legally risky behavior, like instituting a cheaper production process that creates more waste, may have nagging doubts about the wisdom of doing so, but will suppress some of those doubts in reporting to his superior, who will, in turn suppress some of the doubts that were expressed to her in reporting to her superior. Compliance staff may, however, be able to short circuit some of these bureaucratic levels by reporting the employee's doubts directly to top management.

Accordingly, the existence of a compliance unit, combined with the ability of compliance employees to report misconduct up the chain of command independent of the operational employee management chain, may thereby enhance compliance.

Beyond simply the formal organizational structures are the informal institutional features that can help build (or undermine) a culture of compliance. As Scott notes (1995: 39), citing the classic organizational theorist Chester Barnard, 'informal organizations are necessary to the operation of formal organizations as a means of communication, of cohesion, and of protecting the integrity of the individual'. Moreover, Scott highlights the needs for inducements of a 'personal, non-materialistic character, including the opportunities for distinction, prestige, personal power, and the attainment of dominating position . . . and ideal benefactions [such as] pride of workmanship, sense of adequacy, altruistic service for family or others, loyalty to organization in patriotism, etc., aesthetic and religious feeling'. Thus, 'shared values and meanings, internalized by participants, [can] constitute a strong system of control, much more powerful than one based exclusively on material rewards or on force' (Scott 1995: 39). Anthropologist Mary Douglas (1995: 98) likewise has maintained that one cannot make 'good organizational theory without a systematic approach to culture'. Thus, for example, the common culture generates conceptions of esteem, a powerful idea that in turn motivates the organization's members:

> individuals negotiate with one another over what kinds of esteem their organization will provide (a gold watch at the end of a lifetime of service, a place at the High Table, a medal, an obituary notice, a memorial plaque) and the sources of disesteem they will not tolerate (South African investments, dirty washroom, no parking, insult from employers). (Douglas 1995: 102)

The critical point, here, is that culture matters, that it varies across organizations, and that '[w]hat the individual is going to want is not entirely his own idea, but consists largely of the kinds of ideas the social environment inspires in him' (Douglas 1995: 102).

As we shall see, the US military has adopted a number of organizational practices that, should, according to decision theory, enhance commitment to the rule of law.

With respect to formal structures, judge advocates have a strong role both in training troops and commanders, and in advising commanders in the field, thereby increasing the salience of the law for operational employees. In addition, their ability to invoke criminal and administrative sanctions within the military justice system gives them strong authority. And the judge advocates can report abuse through an independent chain of command, as in many of the successful compliance units that theorists have described. Finally, with respect to informal norms and culture, judge advocates construct narratives of commitment to rule of law values that contribute to their loyalty to those values.

More recently, a third group of scholars has turned its attention to how organizations respond to external forces, rather than just internal organization. Like the decision theorists who examine the informal norms within organizations, this group is also preoccupied with organizational culture. Yet economists and sociologists who define themselves as 'institutionalists' tend to be more constructivist, focusing on the ways in which the broader environment shapes that internal culture (Meyer and Scott 1983, Powell and DiMaggio 1991). As a consequence, they might see an organization adopting a set of values or practices not merely because the organization promotes those values internally, but because of outside influence.

Scholars of corporations, for example, have considered whether elements of national culture have had an impact on individual and group behavior within particular firms (Pascale and Athos 1981, Tasker 1987, Litt et al. 1990). In the realm of education within the United States, the sociologist John Meyer has examined whether norms within professional associations might influence an organizational member's practices more than the particular organization (Meyer 1983, Meyer and Rowan 1991). Thus, states (at least prior to the No Child Left Behind Act) tended to deem schools successful based on whether their teachers met certain professional requirements rather than by evaluating the quality of education in particular classrooms (Benavot et al. 1991). Meyer and others also note the existence of 'global scripts,' whereby many institutions in many settings start to speak about their organization in similar terms based on a prevailing influential narrative (Benavot et al. 1991: 145). International law scholars Derek Jinks and Ryan Goodman have argued that states follow such scripts promulgated through the international system in making and implementing treaty obligations (Goodman and Jinks 2004).

For our purposes, this body of scholarship is significant because it suggests that organizational culture is not just an internal matter, but can actually be impacted by external forces, including laws, norms, values and aspirational targets. This means that articulating (and defining) administrative or international law norms, for example, may have a real impact on institutions even absent mechanisms of enforcement. This literature also suggests that training regimens can have lasting effects on institutional culture by changing the normative space within that institution.

Finally, a fourth group of scholars – drawing on the work of Talcott Parsons (1951), Niklas Luhmann (1995) and others (for example, Bertalanffy 1969, Buckley 1967, Galbraith 1977, Grinker 1956, Klir 1969, Kuhn 1974) – has also focused on the impact of external forces on organizations, but through the lens of systems theory. These scholars have argued that organizations such as corporations or bureaucracies are themselves systems as well as entities within larger systems. As such, these organizations seek homeostasis when faced with any particular input.

Systems theorists differ, however, with regard to how permeable systems are and therefore how change can occur within a system. This is a particularly important debate to consider with regard to compliance units. For example, it might be that if a corporation is accused of dumping toxic waste into a river and creates a compliance office to avoid a criminal sanction, the compliance office will have no impact. On this view, the corporation, seeking to maintain a steady state, will refrain from the proscribed behavior only if such compliance is either costless or economically beneficial. Accordingly, a strong external sanction is the only way of affecting the system. In contrast, Gunther Teubner (1985, 1987), employing an 'open systems' approach, argues that the imposition of a compliance unit might have more of an impact. According to Teubner, an external stimulus will spur a change if it can trigger an internal process, and a compliance unit might do so. The dumping case illustrates the difficulty, however. To have an impact, the organization will need to translate the sanction into the terms of the organization.

For our purposes, systems theory, like the institutionalist approach, suggests a focus on how organizations respond to external stimuli such as new regulations or treaty obligations, or to more informal professional norms. Either strong sanctions are necessary, or at least there must be a compliance unit with the ability to produce meaningful internal stimulus. The question then is how effectively such a unit can translate such external norms into the terms of the organization so that these norms become part of the institutional culture rather than remaining a purely external force.

Of course, organizations might simply adopt the forms of the external script without imbibing or inculcating the rule. So, for example, a corporation might adopt compliance or audit requirements simply as a formality without any significant change in internal organizational culture. Moreover, what distinguishes a purely formal shift from one that has a deeper valence can be difficult to distinguish, and the seepage of an institutional change may take years to become truly part of institutional culture. In addition, as scholars in all four of the groups would probably acknowledge, there are limits to which any of these structures will be effective. There may be a deeply pervasive culture of real compliance with particular norms. However, there may be a culture of paper compliance only. There may be an official culture of commitment to particular norms and an unofficial culture that is much more complex. There may also be a culture of compliance at the top of an organization and resistance at the bottom, or the reverse.

What is clear, however, is that organizational structure and culture is one of the most important elements in determining which actors will behave in preferred ways and pursue jobs in accordance with preferred norms and values. Moreover, from the organizational theory literature, we can begin to tease out those structural elements that will help ensure that compliance agents within an organization – such as lawyers – are actually effective at inculcating values and affecting the behavior of operational employees. These compliance agents are likely to be most effective, it appears, if: (1) these agents are integrated with other, operational employees; (2) they have a strong understanding of, and sense of commitment to, the rules and values being enforced; (3) they are operating within an independent hierarchy; and (4) they can confer benefits or impose penalties on employees based on compliance (Rubin 2005, Taylor 1984).

Empirical research confirms the importance of these four organizational structures. For example, it turns out that the more company lawyers mingle with other corporate employees the more likely it is that all employees will begin to internalize the

legal rules the lawyers seek to enforce (Simpson 2002). As a result, these non-lawyer employees become more likely to take such rules into account when they make decisions (Chambliss 2001: 56–64, Chambliss and Wilkins 2003, Ayres and Braithwaite 1992: 25–8). At the same time, lawyers who interact with other employees better learn to frame the rules in terms of broader organizational goals, which in turn enhances the likelihood that operational employees will follow them (Chambliss and Wilkins 2002). Research on corporate lawyers also indicates that, if lawyers have a strong sense of obligation to report rule violations – stemming either from fealty to more senior lawyers within the organization or to a broader professional group and its norms and values – they will be more likely to confront operational employees who are flouting the rules (Chambliss and Wilkins 2002). As to the need for an independent chain of command, the data suggest that accountability agents are more likely to enforce rules and norms if the promotion, reputation, or advancement of these accountability agents is to some degree independent of the operational employees (Taylor 1984). Finally, and perhaps not surprisingly, if accountability agents can impose some form of penalty or confer a benefit on employees based on rule compliance, their ability to promote compliance increases (Taylor 1984).

Accordingly, we must consider the degree to which the organizational structures of the military track the four features described above, thereby contributing to a culture of compliance with public law values. And, if the organizational structure of the uniformed military *does* contribute to a culture of compliance, then we will need to consider such organizational and institutional factors when understanding law compliance more generally, both within the military and in other settings, public and private.

1.2. Military lawyers on the battlefield

Uniformed military lawyers – the career judge advocates – are essentially the compliance unit within the military for purposes of enforcing commitment to the rule of law. These lawyers work to ensure that commanders and troops obey the rules of engagement, which are the rules that operationalize the law of armed conflict in a particular war or occupation. The core public value undergirding this body of law is the principle that the use of force, even in an armed conflict, is limited. Specifically, troops may not target civilians, and the use of force must be proportional to the risk or danger present. Thus military lawyers are essential to inculcating this public value into military culture.

Interviews with more than twenty uniformed military lawyers who served primarily in Iraq and Afghanistan indicate that the current military structure includes all four elements of a successful compliance unit that were discussed above.[6] Judge advocates mingle with operational employees, the commanders and troops. They help devise the rules of engagement and train troops in those rules, both before they deploy and on the

[6] Initially, I interviewed twenty judge advocates, each of whom had served in either Iraq or Afghanistan, or both, during the previous five years and who had encountered private military contractors. I received permission from the Army JAG School in Virginia, and most of the interviews were conducted at the school. Each of these twenty had been military lawyers for approximately eight years, and they were at the school for a second round of training. Several additional judge advocates were identified for interview through the so-called 'snowball method': they were mentioned by one or more of the initial interviewees.

battlefield. At the same time, they provide ongoing advice to commanders and commanders' staff on a daily basis. As a consequence, the legal rules they seek to enforce appear to be more salient throughout the organization. And the lawyers report that they frame the rules in a language that describes those rules as supporting the broader goals of the organization: military effectiveness. These lawyers report a strong sense of commitment to these rules and the values that underlie them. And while the uniformed lawyers face some challenges in establishing credibility, an independent chain of command – which obliges the lawyers to report incidents and which serves as an avenue for supplemental guidance in the field and a basis for promotion that is separate from the operational employees – helps bolster the lawyers' independence and objectivity. Furthermore, uniformed lawyers play a key role in ensuring that commanders impose sanctions on rule breakers within the military justice system. These sanctions include both administrative penalties such as a loss in pay or rank, as well as more severe criminal sanctions. Of course, even having all of these organizational features in place is no guarantee of norm compliance, but there is evidence to suggest that the military lawyers do exert a very real impact on military operations. My interview data are described in far more detail elsewhere (Dickinson 2011, chapter 6), but here I underline the four basic elements of organizational structure that seem most relevant to creating an effective culture of compliance with international law norms.

Integration of accountability agents with operational employees The US military has, since Vietnam, vastly expanded the role of judge advocates in operational activities. Judge advocates now serve alongside commanders on the battlefield, giving advice on a range of issues from troop discipline, to fiscal decision-making to vetting targets to interpreting rules of engagement. Indeed, during the Iraq war the army has actually further expanded the role of the judge advocates. Accordingly, military lawyers who once served primarily at the higher, division level and above, now work with commanders in the field down to the brigade level.

Significantly, this intense integration of lawyers with officers and troops on the battlefield appears to be essential to the lawyers' ability to inject legal norms and values into the decision-making process. Indeed, the lawyers emphasize that their position on the battlefield gives them the opportunity to interact at the moment that the decisions are made, and the lawyers are in the room when the commander and staff lay out the battle plan. It is precisely this kind of co-mingling of accountability agents and operational employees that, according to organizational theory, increases the effectiveness of these agents. Thus, instead of being walled off from the rest of the organization, judge advocates speak with commanders and their staffs about the rules of engagement every day in the thick of battle, thereby increasing general awareness of the importance of these rules, as well as engaging in discussions about how best to interpret them. As one judge advocate recounts, 'my brigade commander was brilliant, and he expected alternative views . . . If an IED went off, and we were going to respond, he wanted to know, "is it a good shoot or a bad shoot.". . . [And if] I had concerns, he listened to me' (JAG Officer #5 2007). This kind of integral involvement of lawyers in core decisions gives greater depth and meaning to the legal rules.

In addition, according to the judge advocates, the integration of lawyers and troops also enhances the lawyers' credibility, because it demonstrates they are participating in

a common mission; although they are lawyers, they are soldiers first and foremost. As one judge advocate noted, 'When you're a JAG at the brigade level, you have to assume a soldier role, not just a lawyer role. You don't earn trust unless you do the soldier part' (JAG Officer #5 2007). Indeed, many judge advocates noted that prior combat experience before becoming a lawyer helped them to build trust with the commanders and their staffs once they assumed the role of lawyer. And a number of judge advocates specifically stressed the need to go out in the field with troops and be with them on the scene in dangerous situations.

To be sure, the judge advocates face challenges in building credibility and rapport in the field. As one noted, 'Some people see lawyers as difficult . . . [So, they engage in] tough guy banter, and make lawyer jokes. They see lawyers as making us less effective' (JAG Officer #2 2007). Another acknowledged that, in the field, commanders and staff only really include judge advocates in the decision-making process '50 percent of the time' (JAG Officer #18 2007). In addition, there is the problem of 'forum shopping: [A commander or staff officer might] request an opinion from three different JAGs' (JAG Officer #6 2007).

For these reasons, one judge advocate, a professor at the Army's Judge Advocate School, noted that the school actually teaches 'building rapport' (JAG Officer #6 2007). Accordingly, the professors emphasize in the classroom that 'all law is in an operational environment' (JAG Officer #6 2007). Each judge advocate should, therefore, seek to

> build a relationship with everyone on [the commander's] staff. Hopefully, they come to you. Hopefully they do it before they take action. Hopefully you've vetted [their plans]: you can say something like, 'All three causes of action look legal, [but the third is riskier from a legal perspective]' (JAG Officer #6 2007).

Thus we see the judge advocates carefully translating their legal advice into operational terms, making it clear to commanders that the military lawyer's job is not to say no, but rather to help their commanders achieve their objectives for the mission. As one judge advocate put it, 'you can't be Dr. No' (JAG Officer #8 2007). Even if a particular course of action posed legal problems, 'our job was to give an alternative course of action that would accomplish the goal without the legal concerns' (JAG Officer #8 2007).

Commitment of accountability agents to legal rules and underlying values The judge advocates expressed a strong sense of commitment to the legal rules applicable on the battlefield and the underlying values they reflect. Indeed, they seem to see their role as the guardians of ethics within the military, and all those interviewed tended to describe their role in similar terms. Thus, one judge advocate said that uniformed lawyers have an 'ethical duty' to protect the applicable rules and laws, including the rule regarding the use of force (JAG Officer #2 2007). Another described his role as standing for 'integrity and to be the commander's conscience . . . not like an inspector general but rather an internal conscience' (JAG Officer #2 2007). And yet another said, 'we're the organization's ethics counsel' (JAG Officer #8 2007).

This ethical role is viewed as having both an internal and external component, encouraging integrity within the military as well as advancing the military's mission in the eyes of the broader public in the United States and elsewhere in the world. As one judge advocate expressed it,

> The linchpin that holds us together at the end of the day is that the rule of law has to exist where citizens believe in equal protection, fairness, equity, justice. [We] make sure it exists within the military, and through leverage within our own organization to other countries we're trying to help, from demonstration (JAG Officer #4 2007).

With respect to the internal culture, another judge advocate noted that 'sometimes JAGs get jaded. . . . [They see] all the crap . . . that there are criminals, child molesters, and child pornographers in the military' just like everywhere else (JAG Officer #5 2007). This lawyer emphasized that the judge advocate's role is important so that the military itself as well as the broader public can see that the organization is 'not controlled by criminals' (JAG Officer #5 2007). Thus, when a general testifies in Congress, 'we want to be able to say we do everything right . . . [and take] the moral high ground' (JAG Officer #5 2007). As another judge advocate stressed, 'we can only fight the global war on terror by holding onto our core values, [and by] establishing the rule of law' (JAG Officer #4 2007).

The need for an independent hierarchy Judge advocates describe another feature that enhances their effectiveness in the field, the ability to seek what they call 'top cover' through an independent chain of command within the JAG corps. This path of alternate authority – separate from the commander to whom the judge advocate is assigned – provides a backup in cases when a commander may be reluctant to listen to the assigned judge advocate. Thus, a judge advocate working with a brigade commander, for example, might seek the advice of a judge advocate at a higher level in the chain of command, such as the staff judge advocate assigned to the division commander (to whom the brigade commander reports). As one judge advocate noted,

> [You might seek] top cover if you want higher level support. It's common if your commander doesn't seek your advice, or if you advise your commander that the course of action he wants to take is a violation of law. It's relatively common for a judge advocate at the brigade level, for example, to seek advice from the lawyer at the division or corps level and ask, 'could you look at this and see if I'm right' (JAG Officer #6 2007).

This judge advocate emphasized, however, that the practice 'could be abused if the judge advocate routinely seeks such opinions' (JAG Officer #6 2007).

The ability to report incidents up an independent chain of command appears to give judge advocates extra leverage in trying to persuade commanders to follow a particular course of conduct. For example, one judge advocate described how his ability to report independently helped him convince a reluctant commander to report an incident of potential abuse. As this judge advocate noted, 'you can go through the divisional chain, if you need to' (JAG Officer #1 2007). 'Sometimes you can win an argument [with the commander] if you say you have to report . . . you may burn a bridge, but it is necessary' (JAG Officer #1 2007). According to this judge advocate, though it was 'understandable' that the commander didn't want to report, 'I told him I had to report it up to the division, and he understood' (JAG Officer #1 2007).

Finally, it is significant that performance reviews and promotion decisions regarding individual judge advocates are primarily the responsibility of senior uniformed lawyers, not the commander for whom the judge advocate is working. According to the

judge advocates, the commanders to whom they are assigned do provide performance evaluations. But, in addition, the more senior supervising judge advocate in the field also contributes an important assessment. As one judge advocate noted, 'I worked directly for G3 [my commander], but my rating chain of command was through the Supervising Judge]' (JAG Officer #7 2007). This structure helps insulate the judge advocates and gives them a greater sense of independence.

The importance of sanctioning authority In protecting the public values that are embedded in military rules, judge advocates wield a strong stick: they have the ability to investigate soldiers who violate those rules, and, in appropriate cases, recommend that those soldiers be brought before courts in the justice system internal to the military, where they may be tried and punished. Indeed, the ability of uniformed military lawyers to refer miscreants to this system is one of the most significant differences between judge advocates and corporate counsel or other organizational accountability agents, who lack the ability to invoke a criminal justice system internal to their organization.

The uniformed military lawyers' ability to invoke the internal military justice system extends not merely to criminal acts, but also to acts in violation of military rules that would, while not ordinarily rising to the level of a crime, undermine military discipline. The penalties arising from these various proceedings can range from full-fledged criminal punishment to administrative penalties such as reductions in pay or rank, or dishonorable discharge. The judge advocates are therefore central enforcers of military discipline. In the field, judge advocates are present at all stages of the law: they seek to shape behavior in advance by advising commanders, staff and troops. And when violations occur, they can initiate punishment.

It is, of course, impossible to say for certain how effective the four organizational features summarized above are in actually protecting public law values on the ground. And of course the perceptions of the military lawyers are bound to be somewhat self-serving. Nevertheless, my study does shed some light on this question. For example, one measure of whether judge advocates help protect public values (such as the rules limiting the use of force) is whether they are actually able to guide commanders away – at least on occasion – from behavior that would undermine those values. And while judge advocates take care not to describe their role as saying 'no' to commanders, many were able to give examples of cases in which they persuaded commanders not to follow a particular course for legal reasons. As one judge advocate observed, in most circumstances in which a legal issue arises, 'it's a plan that's just not well thought out, so . . . you try to work around the problem'. Another judge advocate gave an example of advice he gave to his commander to take a more restricted response after an IED went off at the base (JAG Officer #5 2007). Likewise, on another occasion a commander wanted to respond to a hand grenade attack, and the judge advocate reports that, 'I did not say "no," [but rather] I said [the response] was not legal' (JAG Officer #5 2007).

It is also significant that uniformed judge advocates were a powerful force behind revising Bush Administration detainee treatment rules to prohibit torture, and they strongly criticized the limited due process protections for war on terror suspects brought

before military commissions.[7] Indeed, numerous judge advocates have resigned rather than take part in proceedings before military commissions. Thus, there appears to be strong evidence that, at the very least, having an independent system of judge advocates embedded with troops has some constraining effect by injecting public values into volatile wartime contexts.

2. Organizational structure, institutional culture and the problem of private military contractors

By contrast, private contractors largely fall outside this organizational accountability framework. Although they may receive some training in the rules regarding the use of force, that training does not typically include updated advice on the battlefield about how the rules apply in specific scenarios likely to arise. Contractors also do not receive ongoing situational advice from military lawyers or even from private lawyers employed by the firm itself. Indeed, although the contract firms do employ lawyers, these lawyers do not typically spend time on the battlefield and do not have the same independent chain of command available to uniformed military lawyers. Finally, the accountability system that has applied to troops has not, at least until recently, been extended to contractors. Thus, many crucial, though subtle, mechanisms of compliance with public values are significantly weakened in the privatization process.

If, as discussed above, organizational structure and institutional culture matter, then the next question is: what implications does this observation have for reform efforts? Here there are clearly no easy answers, and the particularly difficult context of the wartime battlefield may thwart all avenues of response. But nevertheless an approach focused on the organizational apparatus may open up possible lines of inquiry that might not otherwise be considered. For example, following the model of the Judge Advocate General corps, we might try to mandate – via contract or regulation – a more direct role for governmental accountability agents. Thus, the judge advocates, and perhaps other accountability agents such as contract monitors, might assume an expanded role in training, interacting with and disciplining contractors.

Congress has already taken a step in this direction by expanding the jurisdiction of military courts to allow contractors to be tried under the Uniform Code of Military Justice.[8] Under the military's guidelines, judge advocates now have the authority to

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[7] For a discussion of the ways in which a military culture steeped in rules of law proved resistant to Bush administration initiatives, see Dickinson (2007).

[8] The John Warner National Defense Authorization Act for Fiscal Year 2007 (2006, § 552) extends the jurisdiction of the Uniform Code of Military Justice (2009) (UCMJ), to apply '[i]n time of *declared war or a contingency operation*' to 'persons serving with or accompanying an armed force in the field' (Uniform Code of Military Justice 2009, § 802(a)(10)) (new text emphasized). A 'contingency operation' is defined more broadly than a declared war and includes, for example, a military operation designated by the Secretary of Defense as an operation in which the Armed Forces may become involved in hostilities or military actions against an enemy of the United States or against an opposing military force, or that results in a call, order, or retention on active duty members of the uniformed services by the President during a time of war or national emergency (10 USC § 101 2009 (a)(13)). Thus, contractors can now be subject to prosecution by court-martial for violating the UCMJ if they serve with or accompany an armed force in the field in a contingency operation, such as Operation Iraqi Freedom or Operation Enduring Freedom in Afghanistan.

investigate and prosecute cases of contractor misconduct (Gordon 2008). This authority remains limited, however, as there are only a small number of offenses that would apply to contractors (Gordon 2008), and judge advocates cannot bring a case unless central command approves (Gordon 2008). In addition, the authority appears to apply only to Department of Defense contractors (Stafford and Goodwin 2008). Military oversight now exists, but it is a last resort when the civilian justice system does not work.

Perhaps even more significantly, judge advocates might also assume greater authority over contractors, even before the commission of an offense. The Department of Defense has moved in this direction recently by issuing a rule that would require security contractors to receive training from judge advocates (Sacilotto 2009). The State Department has, in the wake of several incidents of alleged contractor abuse, gone farther and adopted a rule requiring that agency diplomatic security personnel ride along with all State Department security contractors whose mission requires them to travel (as opposed to monitoring stationary sites) (US Government Accountability Office 2008). The new State Department rule would thus achieve greater integration of agency accountability agents with contract personnel in the field, which, as we have seen, appears to be one institutional feature that tends to cause increased compliance.

While important, these reforms remain baby steps. For example, even under the State Department's rule, the judge advocates accompanying contractors do not have the authority to impose sanctions and they do not have an independent hierarchy with clout in the upper echelons of the contractor firm. Thus, a more ambitious approach would be to try to recreate the full panoply of organizational features discussed above. Such features could be mandated either as terms in the contracts with private firms or through direct regulation. And though it is debatable how best to implement these institutional features outside the uniformed military context, it is clear that this is an area that should be considered seriously in any effort to reform the contracting process.

Rather than seeking more co-mingling of government accountability agents with contractor employees, another possible reform approach would seek to encourage or compel contractors themselves to institute processes that would help establish the organizational or professional culture necessary to protect public values. Thus, through governmental regulation or independent industry efforts, contract firms might create internal organizational structures to enhance compliance with the public law norms and values we have been discussing. Such efforts would involve firms adopting the kinds of reforms that the military adopted post-Vietnam with regard to its judge advocates, including the establishment of compliance units or ombudspeople within the firm who would accompany operational employees in theater, advise commanders, report through an independent chain of command, and have authority to confer benefits and punishments. In short, the idea would be to create within the firm itself a cadre of lawyers who would be analogous to the judge advocates within the military. More broadly, the industry as a whole – either independently or by means of government regulation – might seek to professionalize the conduct of contractor employees through ethical codes, accreditation schemes and the like. Interestingly, the International Peace Operations Association, the trade association for military contractors, has actually welcomed at least some of these reforms and attempted to create professional norms.

Thus, although the obstacles are enormous, both the organizational theory literature and the on-the-ground observations of military lawyers suggest that when we think

about reforming the private military contractor process, we cannot ignore organizational structure and institutional culture. Indeed, it is likely that these sorts of reforms, if they could be enacted, will run deeper and last longer than any other possible reforms that have been suggested to rein in military contractors. Accordingly, a serious consideration of how organizational structure and culture can be linked to compliance suggests that, instead of focusing exclusively on new treaties or new international judicial rulings seeking to formally extend norms to contractors, we might instead look to how best to alter that organizational structure and culture.

Conclusion

Administrative law scholars seeking to consider issues of effective norm compliance must take seriously the organizational structures and cultures of the institutions that implement administrative policy. Those institutions may be governmental bureaucracies, and of course we need to know more about how effective oversight cultures are created within such bureaucracies. However, we also need to study key international organizations, such as the World Bank (Sarfaty 2009), to see how the internal dynamics of such organizations affect the range of ideas considered and policies pursued. And, especially in an era of privatization, we need to address how to build organizational structures and internal institutional cultures within private firms – from military contractors to rating agencies – that are most likely to effectuate core public values. In conducting each of these inquiries, the key point is that it will not be enough to reform our formal laws. In addition, we need to think about the more inchoate, but perhaps even more salient, ways that a culture of norm compliance is actually created and maintained.

This study of military lawyers on the battlefield demonstrates some of the mechanisms by which such a culture can be established. Though obviously not perfect, the system – through which highly trained military lawyers are embedded with troops, advising commanders on the battlefield and answering to their own independent chain of command – has had real impact. And significantly, none of those organizational features currently exists within privatized firms. Thus, reform is urgently needed. But these reforms must go beyond conventional legal frameworks and work towards deeper organizational and institutional change. Only through such an approach can we begin to address the challenges posed by a world of privatized military force. And only through such an approach can we reorient administrative law scholarship to more comprehensively study the various organizational settings in which actors operate and the effect of those settings on law compliance and administrative efficacy.

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32 Financial crisis and bailout: legal challenges and international lessons from Mexico, Korea and the United States

Irma E. Sandoval

Financial bailouts must balance the need to keep financial institutions afloat and the desire to aid debtors and reduce costs to taxpayers. Why do some governments implement 'tough' legal strategies that pass on costs to bank shareholders, hold managers to account and lead to direct government ownership of financial institutions, while others follow more 'permissive' strategies, often leading to serious problems of corruption and moral hazard?

In an effort to answer this question, this chapter presents a comparative-historical analysis of three diferent domestic responses to financial crises: Mexico in 1994–5, South Korea in 1997–8, and the United States in 2008–09. My objective is to understand the causes of the variation in the design of and compliance with bailout legislation. I argue that laws tend to be tougher and more strictly complied with when the state is relatively autonomous from the dominant distributional coalitions (independently of the nature of those coalitions). In contrast, 'corrupt legislation' (laws intentionally designed to benefit powerful minorities) and rent-seeking will tend to predominate when the state is captured or otherwise vulnerable to the influence of organized interest groups.

My analysis also shows that governments are particularly vulnerable to being captured when leaders are simultaneously both uncertain about their future and in full control of policy. Uncertainty without power leads to political humility and a search for broad-based support. Power without concern for one's immediate future leads to overconfidence and a general lack of urgency. But the toxic mix of uncertainty and authority creates incentives for leaders to use their last months in power to 'take the money and run' by cutting deals with external interests in order to assure their own future prosperity.

In general, the behavior of distributional coalitions is more important than the particular ideology of the government leadership or the institutional structure of the state. Using Peter Hall´s terminology, 'interests' trump 'ideas' and 'institutions' (Hall 1989).

In the first section, I outline my theoretical framework. I argue that systems of power/domination and production/exploitation should be analyzed together using a political economy approach. Both 'economistic' and 'state centered' approaches miss the full story, especially at moments of economic crisis. The imbrication of state, market and interest groups is particularly evident today as the global financial crisis reminds us of the central role of the state in the regulation, bailout and financing of the market under capitalism.

The second section discusses the Mexican case. The 'Mexican model' stands out as an example of irresponsible government reaction to financial crisis. In 1995, in response to the profound economic crisis of 1994, the Mexican government orchestrated an indiscriminate, across the board, bailout of all Mexican banks and their holdings in order to

save them from bankruptcy and then, in 1999, converted *Fondo Bancario de Protección al Ahorro's* (FOBAPROA)[1] liabilities into public debt. Due to the flagrant violation of the law and the opacity which predominated during the bailout, the fiscal cost reached remarkably high levels[2].

The political context was one of 'authoritarianism under attack', or partial democratization, in which President Ernesto Zedillo wielded a great amount of power but was simultaneously aware that the days of the ruling Institutional Revolutionary Party (PRI) were numbered. Zedillo also depended on an emerging coalition of domestic corporate monopolists, linked to foreign sources of capital, who had benefited from the opaque and corrupt process of bank privatization which had occurred only a few years beforehand.

In the third section, I compare the Mexican case to the approach taken by government authorities during the South Korean bailout of 1997. Here, despite the fact that these two countries are analytically comparable, the results were radically different. In Korea, the government took a much stricter approach to the bailout, forcing bank owners to share responsibility and in many cases directly taking control of financial institutions. Once again, state autonomy is the central explanatory factor. The protection of the state from the influence of distributional coalitions, as well as the specific political context with the arrival of a new reformer as president, go a long way to explaining the success of the South Korean bailout.

In the fourth section, I consider the recent US case. My analysis of the initial period of the bailout, from the end of 2008 to the beginning of 2009, reveals that instead of following the Korean approach, the US government behaved in a way dangerously similar to the Mexican government during the 1995 bailout. Conflicts of interest were prevalent during the US bailout due to the influence of distributional coalitions on public policies. Nevertheless, the change in presidential leadership during the early stages of the crisis helped prevent an outcome as drastic as the Mexican case. Finally, the last section summarizes my central arguments and offers some general concluding remarks.

1. Theoretical approach

We can divide explanations of financial decision-making into two broad schools of thought. On the one hand, a large and diverse body of literature subsumes politics to economics. Such 'economistic' perspectives deny the existence of political autonomy and eliminate room for a serious analysis of the socio-political dynamics at play during economic transformations. They underscore the role of objective 'market forces' emerging from the international economy and interpret economic change as a relentless transformative process driven primarily by the development of new technologies and more sophisticated financial instruments that increase capital mobility and automatically

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[1] During the early 1990s the Mexican government established FOBAPROA, a fund similar to the Federal Deposit Insurance Corporation (FDIC) in the US. Its principal objective was to keep banks solvent, safeguard the nation's savings and build public confidence in the re-privatized banking system (Ortiz 1994).

[2] The net cost of the bailout was originally supposed to total between 5 and 8 percent of GDP in 1995, but ended up reaching 20 percent. President Zedillo, who was in charge of the bailout, has recently stated that the Mexican bailout was even more expensive than today´s US bailout. See 'Mas Caro el Fobaproa que el Rescate bancario de los Estados Unidos: Zedillo', *El Economista*, January 28, 2009.

lead to financial market opening. According to this view, because the objective forces of globalization are the only rules of the game, regulatory frameworks, or 'financial repression', do not supply the state with as much control over financial transactions as they once did and the only alternative is 'to surrender to financial markets'.[3]

On the other hand, an important contrasting literature focuses on the importance of domestic policy making and opens up room for the systematic study of the role of the state. Nevertheless, this analysis tends to be caught within an organizational perspective on the state that falsely disconnects politics from economics and detaches domestic from international dynamics. Although these explanations take political factors seriously, they see the state as a relatively monolithic and all-powerful machine (for example, Schneider 2004: 5).

There is no doubt that states play an important role and that if one tries hard enough, one can trace many things back to something the state did or did not do at some moment in time. But such an *a priori* radical, state-centric perspective dangerously skates over the crucial differences in state-sociey relations which exist at different times and places.

Timothy Kessler's work exemplifies the state-centric approach as applied specifically to financial management in Mexico. Kessler argues that 'finance policy represents a resource that the state can manipulate to address the interests of domestic groups that it depends on for political survival' (Kessler 1999: 11). In his view, the Mexican state-party regime unilaterally determined finance policy in order to satisfy its objectives, which in the end were driven only by the political and personal interests of policymakers. The main flaw of this state-centric approach is that it regards governmental processes as independent causal forces, rather than as arising out of a constant interaction with societal cleavages and economic fluctuations.

Peter Gourevitch's classic study *Politics in Hard Times* (1986) offers an alternative framework. Gourevitch demonstrates that coalition building is the key to understanding state responses to economic crisis. The author demonstrates that during such 'hard times' it becomes particularly evident that 'the choice made among conflicting policy proposals emerges out of politics' (17). Gourevitch focuses his attention on the different patterns of social support that five industrialized countries (US, Sweden, France, Britain and Germany) developed during three important crises: 1873 to 1896, 1929 to 1949, and from 1971 to the 1980s. He examines the policy sequences in each country, focusing on the demands expressed by various societal actors (labor, corporations, agricultural interests, etc.) and the role of institutional arrangements in shaping the domestic distribution of power. When he analyses the various ways in which these countries broke with economic orthodoxy in the 1930s he underlines the importance of an accommodation or partial consensus among social actors (Gourevitch 1986: 162).

Roger Schoenman's (2005) discussion of privatization in Eastern Europe also draws a line between economistic and exaggerated state-centric perspectives. Schoenman criticizes those analyses which focus exclusively on the speed, the rules and the institutions which have guided economic reforms in the region.

> Scholars should rather think about *who* is acting to understand *what* has happened. . .To understand the actual course of economic policy making in post-socialism and its effects, scholars

[3] See Goodman and Pauly (1993), and Peterson (1995).

> need to move from a focus on institutions and rules to the power struggles and endowments of competing groups of elites. (Schoenman 2005: 41, emphasis added)

Franz Schurmann also links up state and society in a particularly creative fashion. For Schurmann, although the state has an independent existence and an operating structure of its own, it is also intimately intertwined with the various 'currents' of society. 'A powerful corporate or bureaucratic organization may embody currents no longer widespread in society, but their source can always be found in the society past or present' (Schurmann 1974: 33). Schurmann reminds us that government action requires and is grounded in the constant interpenetration of the different spheres of society.

The nature of state-society relations is even more important for economic success than the specific nature of technical solutions. We need to bring politics back into our discussions of economic reform. This also means that we should not only focus on *whether or not* the state withdraws or re-regulates at a particular moment in time, but also on *how* the state behaves during the process.

2. The Mexican bailout

There is a general consensus that in the event of financial crisis, government authorities have the obligation to help recapitalize the banking system to prevent the crisis from getting out of control. It is not acceptable for public officials to simply stand by and watch as the financial system melts down. But there are numerous ways to organize a bailout operation. Specifically, there is what we will call the 'tough' and the 'permissive' strategies.

A 'tough' strategy would follow the three basic rules set out in a key text by Liliana Rojas-Suárez and Steven Waisbrod of the Interamerican Development Bank (Rojas-Suárez and Waisbrod 1997). First, if someone must lose a part of their assets, 'the bank stockholders should be the first in line'. This is important because in addition to limiting the cost of restructuring, it also generates incentives to restrict extreme risk taking in the future (Nuñez 2005: 169).

Nevertheless, as we will see below both in the case of Mexico's FOBAPROA and in the case of the Troubled Asset Relief Program (TARP) in the United States, governments often follow more permissive strategies by first saving the large stockholders of the principal banks before attending to the small- and medium-sized debtors.

In Mexico, noncompliance with this first principle was so evident that even Olivier Lafourcade, director of the Mexico Department of the World Bank in 1997, declared:

> The truth is that bank stockholders proportionally took up a small part of the losses of the credit institutions and most of the cost will end up being paid by the tax payers. [This] reflects the amount of political influence that [the big investors] can have over the governments of their countries in determining the mechanisms and the forms of bail out.[4]

The second principle outlined out by Rojas-Suárez and Weisbrod is to avoid moral hazard during the bailout process. Troubled and bankrupt institutions should be prevented from using government supports to run even higher credit risks in the expectation

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[4] Quoted in Calva (2001: 245).

that the government will bail them out. In the Mexican case, this second principle was openly violated when Ortíz Martínez, as Secretary of Finance, consistently refused to close down insolvent banks. As discussed below, instead of nationalizing the banks or closing them, banks were left on life support at great cost to taxpayers. The refusal to nationalize or close down the banks was not so much due to a faith in 'orthodoxy', but more to the political context and to the regime's alliance with the emergent distributional coalition (Sandoval 2010).

The third principle speaks to the need to build social legitimation for bank bailouts through communication with and support from society. Here the Mexican bailout was a complete failure. The episode was carried out entirely behind closed doors, leaving both the public and Congress entirely in the dark.

Mexico has come to be an international example of what not to do when faced with a financial crisis. This is because of the discretion, ineffectiveness and opacity involved in the bank bailout carried out through FOBAPROA, as well as the flagrant violation of the three basic principles.[5] In a recent *World Development Report*, the World Bank (2006) pointed to the serious distortions that arise when economic elites dominate the financial system:

> Captured banking systems exchange favors: market power is protected for a few large banks, which tend to lend favorably to a few selected enterprises, which may not be those with the highest expected risk-adjusted returns. (. . .) Achieving more equal access to finance by broadening financial systems thus can help productive firms that were previously beyond the reach of formal finance. (World Bank 2006: 14)

To illustrate the problems that arise in such 'capture' situations, the World Bank chose Mexico as the principal anti-model, whose bank bailout 'represented the payment of 125 billion dollars of public funds. That is, a quarter of the GDP of the country' (World Bank 2006: 14). Another way to put it is that the fiscal cost of the bank crisis in Mexico is equivalent to four times the 33 billion dollars received by the Mexican state from all of the privatizations carried out during the 1990s. There is extensive evidence that the debtors who had close personal relationships with the owners of bailed-out banks received illegal favors during the crisis, along with the fact that their political connections allowed them to escape what could have been significant punishments (MacKey 1999, ASF 2005, Di Constanzo and Moncada 2005, González Aréchiga 2009, Sandoval 2010).

2.1. History

In 1994, financial crisis hit Mexico. The explosion of speculative activities, insider lending and debt combined with an increase in government spending during the 1994 presidential race and a significant overvaluation of the peso set the stage for economic collapse. On December 22, only three weeks after incoming President Ernesto Zedillo (1994–2000) came to office, the house of cards came tumbling down. The peso lost half its value, foreign investors scrambled to withdraw their money, and the economy went into free fall. During 1995, GNP decreased by 6.2 percent, the exchange rate increased by 100 percent, and unemployment soared. This situation pushed most major Mexican banks to

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[5] See, for example, 'Latin's Lessons for Asian Banks', *The Economist*, July 25, 1998: 21.

the verge of bankruptcy as debtors defaulted on their loans and creditors quickly withdrew their deposits in search of a more reliable investment climate.

Something had to be done to save Mexico's system of financial mediation. Zedillo was faced with a crucial economic policy decision. A full menu of options was open to the president, including the re-nationalization of the banks, a partial takeover, a bailout of all banks, a partial bailout of some banks or specific debtors, or simply allowing the existing banks to fail and be replaced by new ones.[6]

The economic orthodoxy of the time called for a careful partial bailout while doing everything possible to avoid multiplying the moral hazards present in any rescue operation. Those responsible for the high level of debt should take most of the hit, those guilty of illegal practices should be punished, and illegal loans should not be covered by bailout programs. Otherwise, the government would send a signal that irresponsible and illegal behavior would not be punished and set the stage for a worsening of the crisis in the short run and the emergence of a new crisis in the medium to long run.

Mexican law also required a careful approach to any bailout operation. The original law regulating FOBAPROA did not authorize it to use government funds to bail out banks, limiting it to using only bank security deposits. The Mexican Constitution also requires Congress to formally authorize any new public debt. These legal impediments should have pushed Zedillo to carefully design his bailout strategy with an eye to public legitimacy and the future health of the banking system.

But Zedillo didn't follow either economic orthodoxy or Mexican law. His government orchestrated an indiscriminate across-the-board bailout of all Mexican banks and their holdings that was riddled with corruption and favoritism for those with inside connections and undue influence.[7] This was not the best strategy from either a strict technocratic perspective or from the perspective of public legitimacy and the rule of law. But it was the correct strategy from the point of view of defending the interests of Mexico's emergent distributional coalition. Politics trumped economics.

The political context played an important role because 1994 was a year of political as well as economic crisis. On January 1, an indigenous guerrilla group, the Zapatista National Liberation Army (EZLN), emerged in the southern state of Chiapas and declared war on the federal government in protest against neoliberal policies and the dire situation of Mexico's indigenous people. On March 23, the ruling party's (Institutional Revolutionary Party, or PRI) candidate for the upcoming August, 1994 presidential elections, Luis Donaldo Colosio, was assassinated in cold blood during a campaign stop in northern Mexico, forcing an unprepared Zedillo to fill his shoes halfway through the campaign. On September 28, the sitting president of the PRI, José Francisco Ruiz Massieu, was assassinated while getting into his car in broad daylight in the middle of downtown Mexico City.

Zedillo came into office as a particularly weak president in desperate need of legitimacy. He was not the first-choice candidate, and he sat atop a fractured PRI and a country in the midst of political crisis. Nevertheless, Zedillo still had full control over state power. The PRI retained control over Congress in the 1994 elections and controlled

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[6] See Roubini (2008) for an evaluation of the options available to policymakers.

[7] See ASF (2005), Di Constanzo and Moncada (2005), MacKey (1999).

the majority of the state governorships. The toxic mix of a desperate need for legitimacy along with authoritarian control created a sense of urgency in which the PRI government had an incentive to take full advantage of its last period in power.

The FOBAPROA trust was created by the Law of Credit Institutions passed on July 18, 1990. Article 122 established it as a *preventive mechanism* designed to avoid financial problems with the recently privatized banks. It was not supposed to be a bailout instrument for systemic crises like the one which occurred at the end of 1994. FOBAPROA was not formally part of the executive branch but a private trust, insulated from the obligations and demands of legislative control and oversight (Article 122, subsection I, Law of Credit Institutions, June 28, 1990: 42).[8]

Both the institutional design and the functioning of FOBAPROA, therefore, led to serious problems of opacity and lack of accountability. Although FOBAPROA 'was not subject to the rules applicable to public agencies', it was directly run by the government through a 'Technical Committee' (Law of Credit Institutions, June 28, 1990, Article 122: 43). Public officials from the Finance Ministry, the Central Bank and the National Banking Comission – many of them the architects of the disastrous bank privatization of 1991–92 – were fully in control of FOBAPROA and simultaneously freed from Congressional oversight because FOBAPROA was formally a private trust. For instance, according to the Superior Federal Auditor, Arturo González de Aragón, during the 1994–95 bank bailout 'the FOBAPROA Technical Committee acted without operation rules and with an excess of discretion in its decisions for the bank bailout and made tailormade suits for some banking institutions'.[9]

Unfortunately for the operators of FOBAPROA, subsection IV of Article 122 of the Law of Credit Institutions was in direct conflict with the Mexican Constitution. Article 73, subsection VIII of the Constitution states that all public debt must be authorized by the Federal Congress: but Article 122 of the Law of Credit Institutions grants a handful of public servants authority to 'determine the terms and conditions of the supports granted with charge to the Fund', thereby authorizing them to take up public debt without the authorization of Congress. As we will see below, this eventually created significant problems for the Zedillo administration.

A second crucial feature of FOBAPROA concerns the use of public funds. FOBAPROA replaced an earlier body whose constitutive contract clearly established that 'in no case can the property of the Trust be increased with donations from the federal government

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[8] FOBAPROA replaced the Fund for the Preventive Support of Bank Institutions (FONAPRE by its Spanish acronym), created in 1981. This fund also received deposits from the banks, which were then available in order to practice 'financial operations to support the financial stability of credit institutions and avoid circumstances that may have a negative impact in the timely payment of their obligations' (Cláusula 3º del Contrato de Fideicomiso del FONAPRE, y Artículo 77 de la *Ley para Regular el Servicio Público de Banca y Crédito*). With the privatization of the banks at the time of Salinas, the FONAPRE was substituted by FOBAPROA. On October 18, 1990, the agreement which formally created the FOBAPROA, entitled *Modificaciones al Contrato del Fideicomiso FONAPRE*, was approved (see Mackey 1999, Di Constanzo and Moncada 2005, and Nuñez 2005).

[9] Interview with Arturo González de Aragón, Jorge Francisco Moncada: 'Fobaproa asunto de ética política y moral pública', *Revista Vértigo*, p. 12., Ano III, No. 136, October 26, 2003: 12.

with a charge to the budget'.[10] FOBAPROA throws this provision overboard. The official 'Agreement to Compile in a Single Instrument the Constitutive Contract of FOBAPROA', signed in early 1994 by Pedro Aspe, Secretary of Finance, and Miguel Mancera, Governor of the Central Bank, eliminated the contractual provision preventing the use of fiscal funds to capitalize the trust. In addition, the Agreement states that the 'Trustee [the Central Bank] will be free of all responsibility', including those incurred as a result of the execution of 'urgent acts which have to be realized without the authorization of its Technical Committee', thereby opening up the margin of discretion.

In 1996, now under the Zedillo administration, the new Secretary of Treasury, Guillermo Ortiz Martínez, and again Mancera as the governor of the Central Bank once more changed the rules of FOBAPROA. This time they gave it meta-constitutional powers, explicitly enabling this private trust to directly indebt itself with a charge to public funds (see Table 32.1).

Here we can see that with the 1996 reforms, FOBAPROA could give financial support to and acquire debt and stocks from not only banks but also the controlling companies or 'holding companies' for the banks. In addition, the trust was no longer limited to using direct monetary supports but was permitted to use a diversity of financial engineering strategies, including lines of credit and 'anything else foreseen in the market legislation', like promissory notes. FOBAPROA was also allowed to create new subsidiary trusts, issue its own debt instruments and give direct government guarantees ('*avals*'). These changes were not legal because they were implemented through a simple 'agreement' between two top financial officials.

2.2. Actors, mechanics and operation

Despite the fact that FOBAPROA was not originally designed to bail out banks, in the face of the December 1994 financial meltdown the government decided to use its discretionary powers to reinvent the purpose of the trust. Through FOBAPROA, the government implemented five distinct programs to try to help Mexico emerge from the ashes of crisis: the *Programa de Ventanilla de Liquidez* (the Counter Liquidity Program), the *Programa de Capitalización Temporal* (the Temporary Capitalization Program) (PROCAPTE), the *Programa de Capitalización y Compra de Cartera* (the Capitalization and Debt Purchase Program) (PCCC), *Programa de Intervención y Saneamiento* (Intervention and Recovery Program) (PIS), and the *Programas de Apoyo a Deudores* (Debtors Support Programs) (PAD).

The Counter Liquidity Program was the first program to be implemented after the crisis, on January 6, 1995. Under this program the Central Bank gave short-term dollar-denominated credits to banks so that they could maintain payments on their foreign debts. As collateral the banks offered a part of the capital of their institutions or other assets including government bonds or other banking instruments. This program fortunately did not generate any fiscal cost, because the banks paid back the entirety of these loans. It also was relatively clear of the legal irregularities which plagued the other FOBAPROA programs. Nevertheless, this program was short lived and used a very small percentage of the total amount of money dedicated to the bailout (see Figure 32.1).

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[10] Bátiz (2000).

Table 32.1 Authorized financial operations for FONAPRE and FOBAPROA

FONAPRE and FOBAPROA (1986–1990) (1990–1996)	FOBAPROA (As of May 3rd, 1996)
• Finance banking institutions through the use of deposits, credits or loans	• Finance banking institutions or their controlling companies (holdings) through the use of credits, line credits, simple credit accounts, or currency accounts, or by any other operation established by the Market Legislation
• Purchase subordinate instruments of debt issued by the banking institutions	• Purchase of stocks, subordinate instruments of debt or any other debt instruments issued by the banking institutions or their controlling companies (holdings)
• Purchase B series shares, according to the law	• Purchase and sell assets or property titles in order to gain financial improvements for the banking institutions and their controlling companies (holdings)
• Purchase credits, shares and other assets of the banking institutions	• Issue credit titles, allow endorsements and receive obligations in favor of the banking institutions
• Offer non-recuperable contributions, when strictly necessary, to cover financial disturbances in the institutions	• Participate in the social capital of those entities participating in FOBAPROA in order to achieve its goals, including those firms that contribute with secondary and complementary services. Besides, this Trust Fund may create alternative trust funds and establish all the necessary alliances that will provide more assistance to the Trust Fund
	• Obtain financing
	• Hire complementary or auxiliary services to fulfill the operations and tasks of FOBAPROA
• Any other similar and related activities established by the Technical Committee according to the kind of support required	• Any other similar and related activities authorized by the Technical Committee of FOBAPROA

Source: *Operative Rules for FONAPRE*, December 24, 1986 and *Modifications to the Agreement for the FOBAPROA Trust (Agreement of Parts)*, May 3, 1996, clause 3. FONAPRE: Fund for the Preventive Support of Bank Institutions; FOBAPROA: Banking Fund for the Protection of Savings.

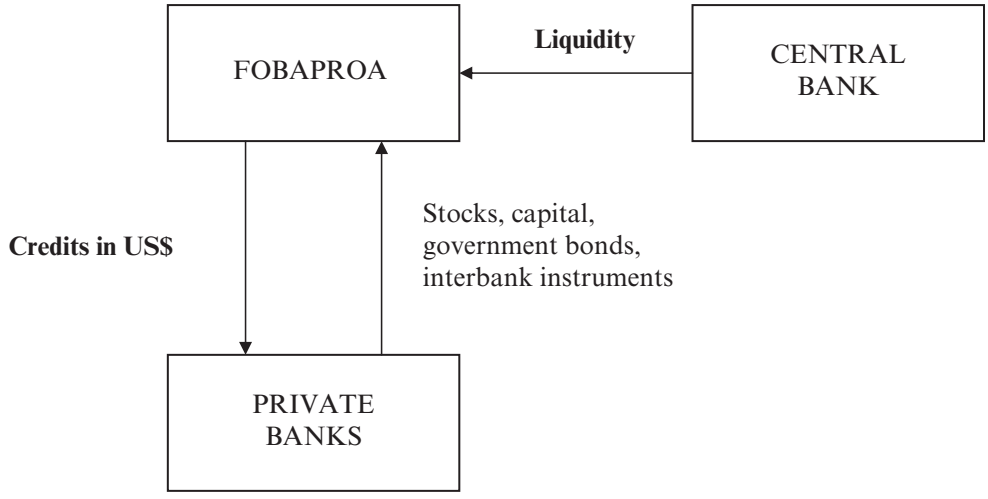

Figure 32.1 Counter Liquidity Program

The Temporary Capitalization Program (PROCAPTE) was the second program to be implemented. This program began in February 1995 and consisted of special supports for banks with low levels of capitalization (less than 8 percent). Through this program the banks could get extra funds to capitalize themselves temporarily until they found alternative sources of funding (see Figure 32.2). As in the case of the Counter Liquidity Program, the PROCAPTE also required bank stocks and financial assets as collateral. This guaranteed that this program would have no fiscal costs because almost all the credit institutions paid off these short-term loans, with the notable exception of Banco Inverlat which repaid only 28 percent of its debt (ASF 2005: 68–74).

Despite the direct channeling of resources to the banks through these two programs, the banks continued to have difficulties during the 1994–7 period, and a dozen institutions had to be rescued by the government through the third program, the Intervention and Recovery Program (see Table 32.2).

According to CNBV (Comisión Nacional Bancaria y de Valores [National Banking and Securities Commission]) and the MacKey Report (1999), each one of the aided banks experienced irregular 'looting' behavior by the owners. Related lending, credits to businesses directly linked to the lending banks and controlling groups, credits to friends and family of the stockholders as well as bank employees and advisors, loans without collateral or to minors with political connections, financing for the PRI and other similar operations pervaded the banking sector and led to its collapse.

The Intervention and Recovery Program was used before the December 1994 meltdown. In September 1994, Banco Unión and Banca Cremi, both the property of Cabal Peniche, had been bailed out. In these banks, the credit expansion had mushrooomed.[11]

[11] In 1992, Banco Union registered a sudden enlargement of its credit portfolio of more than 94 percent, more than twice the growth of the entire bank system's portfolio. In 1993, the development of the banking system's credit portfolio reduced a bit but the credit portfolio of this

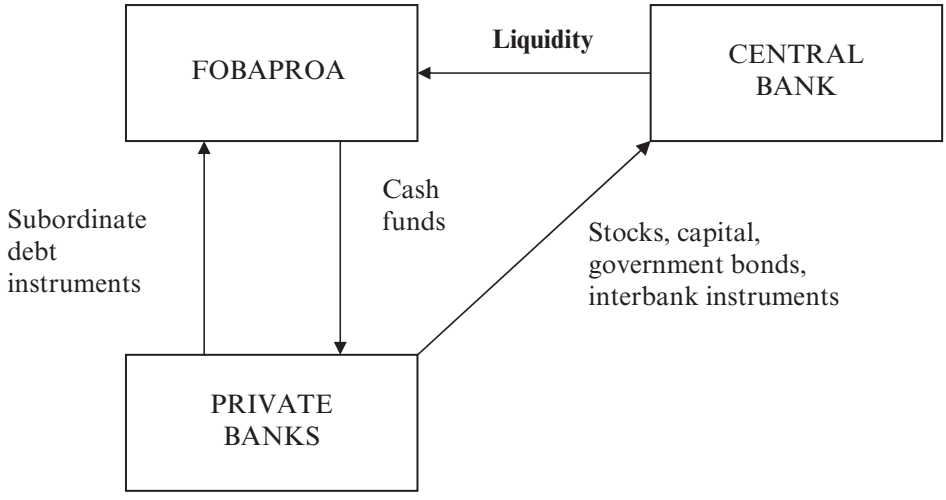

Figure 32.2 PROCAPTE

Evidence later indicated that these credits were related to illegal activities linked to narco-trafficking, money laundering and the funding of the electoral machine of the PRI (Oppenheimer 1996, MacLeod 2004).

Chong and Lopez-de-Silanes (2005) have demonstrated the central role that related lending played in causing the collapse of the banking system in Mexico. First, the banks offered better borrowing conditions to related parties than to unrelated ones. Second, the default rate on related loans 'was 70 percent compared with only 39 percent for unrelated parties' and recovery rates were 19 to 40 cents per dollar lower for related borrowers than for unrelated ones. Third, related lending 'represented about 20 percent of all loans outstanding'. Fourth, the worst-performing loans were those made to persons or companies closest to the controllers of the banks. In short, related loans were used to divert funds away from banks and to exploit minority shareholders. 'As the economy slipped into recession, the fraction of related lending doubled for banks that subsequently went bankrupt, while it increased only slightly for the banks that survived. This suggests that when bankers thought they might lose their investment, they stepped up the rate of looting to extract as much value as possible while they still controlled the bank' (Chong and Lopez-de-Silanes 2005: 386).

In general, government aid to the banks was usually too late in coming. In addition, the recovery process was extremely controversial because the government actions were controlled by the FOBAPROA Technical Committee. It was not at all clear why aid was provided to some banks and for some loans and not for others. The policy was supposed to 'restructure' the banks' balance sheets, thereby making them attractive to new buyers. But the opaque nature of the process left a large cloud of doubt, making it appear that

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particular bank (Banco Union) increased almost 100 percent, which was four times the growth of the rest of the banking system. See ASF 2005.

Table 32.2 Banks subject to intervention by the National Banking Commission (CNBV) 1994–1997

Bank	Date of Detection of Problems	Date of Management Intervention	Principal Stockholders	Causes of Bank Failure
Union	July, 1994	Sept., 1994	Carlos Cabal Peniche	• Self-made loans • Related lending • Loans to the main bank stockholders so that they could buy shares from the same bank • Financial frauds
Cremi	Feb., 1994	July, 1994	Carlos Cabal Peniche	• Self-made loans • Related lending • Loans to the main bank stockholders so that they could buy shares from the same bank • Financial frauds
Interestatal	Mar., 1995	Sep., 1995	Alfonso Garay	• Lack of capitalization • Loans to the stockholders from the same bank
Obrero	Sept., 1991	May, 1997	Jorge Eduardo Familiar Haro	• Lack of capitalization • Loans to the stockholders from the same bank
Banpais	Sept., 1994	Mar., 1995	Angel Isidoro Rodríguez	• Related lending • Loans to the stockholders from the same bank so that they could buy Banpais Financial Group
Inverlat	Mar., 1994	Mar., 1995	Raymundo Gómez Flores	• Lack of capitalization • Related lending • Loans to the stockholders from the same bank
Oriente	June, 1995	Mar., 1995	Ricardo Margain Berlang	• Related lending
Centro	Feb., 1995	Mar., 1995	Hugo Villa Manzo	• Related lending
Anáhuac	Nov., 1996	Nov., 1996	José Luis Sánchez Pizzini and Federico de la Madrid Cordero	• Related lending • Loans to the stockholders from the same bank • Unacceptable practices regarding credit guarantees

Table 32.2 (continued)

Bank	Date of Detection of Problems	Date of Management Intervention	Principal Stockholders	Causes of Bank Failure
Capital	Oct., 1994	May, 1996	Pedro Osorio Gómez	• Related lending • Loans to the stockholders from the same bank • Lack of capitalization
Confía	Mar., 1994	Aug., 1997	Jorge Lankenau Rocha	• Related lending • Loans to the stockholders from the same bank • Offshore operations • Fraud against the investors
Industrial	June, 1996	Feb., 1998	Jorge Martínez Güitrón	• Related lending

Source: Mackey (1999).

assistance had been designed more to 'legalize' and cover up malfeasance than to actually put the banking system back on its feet.

The most important program used to 'recover' or 'cure' troubled banks and thereby prevent formal intervention was the now infamous Capitalization and Debt Purchase Program (PCCC). The formal purpose of the PCCC was to help the banks which were comparatively strong to increase their capital through the substitution of their problematic financial assets (non-performing loans), with 10-year promissory notes. These notes were issued by FOBAPROA, and authorized by the Federal Government, and offered attractive interest rates capitalizable every quarter and tied to the interest rates of the CETES, or federal treasury bonds.

The banks who participated in the PCCC chose which loans would be sold to the government. These bad loans were then sent to a special trust which was administered by the originating bank. In other words, although the government 'purchased' the loans, the rights to collect the past due loans were given back to the banks (Nadal 2003: 77).

When the banks failed to collect the unpaid loans, a scheme of 'shared losses' was implemented. The government absorbed 75 percent of the loss and the bank the remaining 25 percent. In exchange for such a generous scheme, the owners committed to injecting fresh resources into their own banks in a proportion of two to one. For every two dollars purchased by FOBAPROA, the bankers were supposed to deposit a dollar from their own pockets into their own banks (see Figure 32.3). Unfortunately, the program operated in an entirely opaque manner and did not follow clear legal or technical guidelines. It therefore generated a major political controversy, so some authors have called it 'a monster of corruption' (Di Constanzo and Moncada 2005). For instance, the PCCC loans were supposed to be reviewed by an auditor from the bank and later validated by the Banking Commission which then approved the loans' acceptance by FOBAPROA.

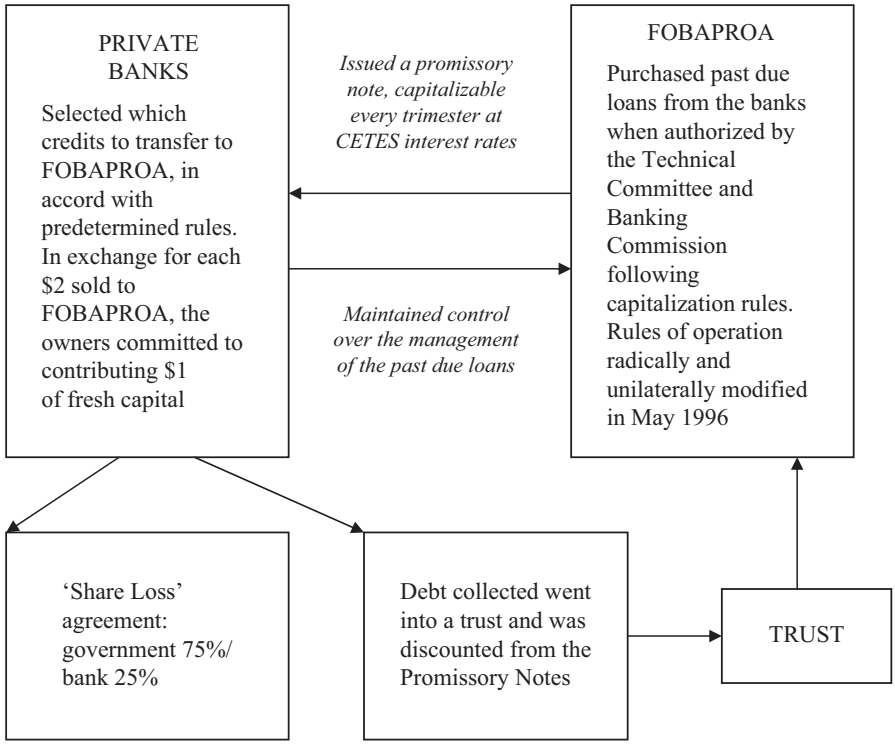

Figure 32.3 PCCC

In reality, this process turned out to be more of a cover-up operation than a serious attempt to root out fraud. A large part of the non-performing loans which the government purchased were delinquent, often due to an intentional refusal by large industrial and financial groups to pay back loans instead of a real inability to pay on the part of small- and medium-sized debtors.

For FOBAPROA to authorize an operation through the PCCC, its Technical Committee and the authorities of the Banking Commission had to approve the credits on the basis of certain 'general guidelines' which in the end were not so 'general' because they were applied in a discretionary manner. According to the guidelines, FOBAPROA could not acquire certain kinds of risky credits. The FOBAPROA Technical Committee consistently bent these rules, first one way for one bank, then another way for the next, until there was no longer a 'general' set of rules which guided the process. In the end, the bankers threw all of the uncollectable 'financial trash' they had into FOBAPROA. In addition, lack of respect for the rules allowed the bankers to skirt their obligation to deposit one dollar of fresh capital for every two dollars of non-performing loans. Needless to say, all of this led to huge fiscal costs, which will have to be covered by the Mexican taxpayers for generations.[12]

[12] See: Sandoval (2010), González Aréchiga (2009), Nuñez (2005), ASF (2005).

An additional problem with the application of both the PCCC and the Intervention programs is that they were systematically used to prop up failing banks which should have been closed down. The independent auditor hired by Congress to review FOBAPROA, Michael Mackey, claimed that a number of rescues 'uselessly elevated the fiscal cost of the bailout' (Mackey 1999: 202). It would have been much cheaper and more effective to close the banks and directly compensate the holders of bank accounts than to keep the banks on 'life support'.

One source of the problem was the bankers' calculation of past due loans. The banks, with authorization from the Mexican government, only classified as 'past due loans' the amount of monthly payments which had not been paid after three months. This greatly underestimated the real amount of non-performing loans because it left the lion's share of the principal untouched.[13] In total, the amount of past due loans reported by the Mexican banks and authorized by the Banking Commission was approximately 12 times less than the amount it should have been following international accounting standards.[14] This underestimation of the credit risk artificially increased profit margins and allowed the banks to compensate stockholders and attract new investors.

To conclude, the problematic actions of the PCCC were rooted in an operation that was largely illegal and unconstitutional. The Mexican Constitution (Article 73) clearly establishes that all debt issued by the Executive must be approved by Congress. When the Technical Committee of FOBAPROA directly acquired the bankers' non-performing loans, it violated this basic precept. Ironically, the fund, which had been designed to 'safeguard the savings of the nation' and to prevent the need for bailouts, ended up financing the incompetence and illicit enrichment of Mexico's political and economic elites. The bailout was carried out in a totally opaque manner, without informing Congress, let alone the public. Opacity permitted serious abuses by the bankers to go undocumented. But even more alarming were the abuses by the authorities of taxpayers, since the bank bailout used public funds and irresponsibly increased the fiscal cost imposed on citizens.

3. Comparing Mexico and Korea

Both Korea and Mexico have undergone substantial political and economic liberalization over the past 20 years. Both have recently emerged from dictatorial regimes, opened up their economies and suffered massive financial crises. In response to their respective financial crises (of 1997 in Korea, 1994 in Mexico) both countries also orchestrated large-scale bailouts of their banking sectors.

But the Korean bailout was very different from the Mexican one. Although Mexico applied a 'gradualist' approach to its bailout, with significant delays and irregularities in response to the crisis, Korea used more aggressive tactics that allowed it to significantly reduce the economic and social costs of the bailout. The Mexican strategy was characterized by the reluctance of the authorities to rapidly recognize the magnitude of banks' problems in the early stages of the crisis. Korea relied on a much more proactive program for resolving the banking crisis. As a result, in Korea, small, insolvent

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[13] According to US bank accounting rules, non-performing loans do not only include missed payments but the total amount of debt which is overdue.

[14] See Solís Rosales (1998) and Chávez (2003).

institutions were rapidly shut down, the remaining distressed banks were nationalized, and most bad assets were promptly removed from banks in one-off transactions.

In general, the bailout by the Korean authorities was much less 'generous' than that used by the Mexican government. De Luna (2000) has acknowledged this:

> Mexicans have been generous and flexible enough to allow their banking institutions to gain time to recover. Shareholders have been given wide incentives and enough time to recapitalize their banks. Intervention of banks has been seen as the last policy option. Banks have been intervened only when shareholders fail (usually after several attempts) to inject capital into their institutions or when authorities have found evidence of wide fraudulent activities. The Korean authorities, on the contrary, have been much stricter. Non-viable banks have been rapidly identified and restructured. Weak but viable institutions have received strong support from the government, but at the same time their shareholders have had to assume a large part of the losses. Purchases of Non Performing Loans have occurred at market values, while banks' shareholders have been 'forced' to rapidly recapitalize their banks. Any capital shortfall has been covered by the government which has become the major shareholder of the Korean banking system. (De Luna 2000: 22)

There are three principal ways in which the Mexican and the Korean bailouts differ. First, in Korea, the government stepped in and partially nationalized the banks. In a majority of cases, the government came to own over two-thirds of bank assets. In Mexico, nothing of the sort occurred. On the contrary, the Zedillo administration only became the principal owner of the banks' *bad debt*, as well as the principal lender to the banks through promissory notes. It did not formally acquire any of the banks' property or assets. The taxpayers therefore suffered all of the losses without enjoying any of the gains, and the moral hazard problem expanded exponentially.

Second, the Korean government established and strictly followed general principles for evaluating the viability of banks and for deciding on the specific tactics to use in foreclosing or rescuing them. In Korea, the government also focused on injecting capital directly into the banks and financial institutions. In Mexico, the government bent the rules and applied tailormade solutions in each case. The focus was not so much on strengthening the banks by injecting capital, but on simply purchasing their bad debt.

Third, the Korean bailout followed international best practices with regard to transparency. The public was informed of the specific criteria used to evaluate the viability of banks, offered clear justifications for the public funds used in the bailout, and given complete information on how and why public funds were disbursed in specific cases (De Luna 2000). On the contrary, the Mexican case is famous for the extreme opacity of its bank bailout (González Aréchiga 2009, Sandoval 2010).

Why were there such extreme differences in the management of similar financial crises in Mexico and Korea? In principle, the Korean government was just as involved in interest-based politics as the Mexican government during its liberalization process. In Korea, market reforms were highly influenced by the *chaebols*, the powerful industrial conglomerates frequently linked through family ties. These groups had direct influence over financial policy, primarily due to their organizational strength and the virtual oligopoly control they held over the Korean economy (Zhang 2003: 76). Throughout East Asia there is a long history of intimate cooperation between the public and the private sectors. As Stephan Haggard has argued, 'close ties between business and government

have long been a distinctive feature of many of the rapidly growing Asian economies' (Haggard 2000: 135).

Nevertheless, in Korea and other East Asian countries, the government has also historically maintained a relatively autonomous relationship with the corporate class. As Peter Evans (1995) argues, despite the 'embeddedness' of the government in the private sector, it has also maintained significant 'autonomy' which has allowed it to maintain control over the economy (Jenkins 1991, Hamilton and Mee Kim 1993). For instance, the process of economic liberalization in Korea was accompanied by active protectionism and even nationalism. 'Liberalization efforts were highly selective: overseas borrowing by domestic banks and short-term trade-related flows were liberalized whereas foreign investment in domestic fixed-income assets were restricted and portfolio inflows only partially oponed' (Zhang 2003: 68). Although in Mexico the state also remained powerful during the 'liberalization' process, it has not maintained the same capability for autonomous decision making. To the contrary, it has been systematically captured by powerful interest groups.

In addition to the stronger relative autonomy of the state, Korea also benefited from the specific political context. As in Mexico, the Korean financial meltdown of 1997 occurred at the moment of transition between two presidential terms, between Kim Young Sam (1993–98) and Kim Dae Jung (1998–2000). But in Korea the crisis occurred immediately *before* the transition instead of afterwards, thereby giving the new president a clear mandate to clean up the situation which the previous president had left. Incoming president Kim Dae Jung was also a relative outsider to the networks of business-government relations that had developed under his predecessors. He was therefore much less directly indebted to political donations from these groups than was Zedillo upon taking office in 1994.

Kim Young Sam had been relatively lax with the bankers and had delayed his response to the crisis. But upon arriving in office, Kim Dae Jung turned things around and immediately established a new independent regulatory agency (the Financial Supervisory Commission, FSC) in order to manage the bank bailout. 'All banks were subject to thorough review, on the basis of which five were shut down and merged with others under government direction. A large number of nonbank financial institutions were also shut down' (Haggard 2000: 139). Although the new government negotiated some of the most important elements of the bailout plan with the most important *chaebols*, it also gave the FSC broad powers and a wide margin of independent action.

The comparison of the Korean and Mexican bailouts is consistent with at least two of my hypotheses. First, it lends support to my argument that interest-based politics is more important than economic orthodoxy as an explanation for financial policy making in times of crisis. Korea followed orthodoxy more closely than Mexico not because these ideas were felt more powerfully in the East than in the South, but because the state had historically developed the autonomy necessary to implement these policies and because the political situation favored such actions.

Second, the comparison reveals that we need to go beyond an analysis of formal regime type to examine the underlying structure of power and authority. Korea and Mexico were in the midst of similar democratic transitions, but the nature of their response to similar financial crises was radically different. Although the Mexican case was full of corruption, rent-seeking and opacity, the Korean case was relatively open

and clean. The presence or absence of formal democracy is not sufficient to determine the response to financial crises on its own.

4. The US Bailout

The dominant ideology of deregulation during the eight years of the George W. Bush administration opened the door to an increase in high risk lending on Wall Street. 'Subprime' mortgages increased 292 percent, from 2003 to 2007.[15] An increase in loan incentives such as easy initial terms and a long-term trend of rising housing prices encouraged borrowers to take out mortgages with high or variable rates in the belief that they would be able to quickly refinance later at more favorable terms. However, once interest rates began to rise and housing prices started to drop during the 2006–07 period, refinancing became more difficult.

Defaults and foreclosures increased dramatically as easy initial terms expired, home prices failed to go up as anticipated, and subprime mortage interest rates reset at a higher level. This situation, along with the securitization of mortage-backed securities and the generation and indiscriminate use of a diversity of financial instruments, triggered a global financial crisis. By July 2008, major banks and financial institutions that had borrowed and invested heavily in subprime loans and mortage-backed securities, reported losses of approximately US$435 billon.[16]

On September 20, 2008, Treasury Secretary Henry Paulson proposed the Emergency Economic Stabilization Act (EESA) whose key provision was the Troubled Asset Relief Program (TARP). After extensive debate and some important amendments, Congress passed the EESA on October 3, 2008 by a vote of 263–171. The EESA authorized the US Secretary of the Treasury to spend up to US$700 billion in order to purchase toxic mortgage assets and other bad debts held by banks and other insolvent investors. In theory, the money was supposed to help troubled lenders make new loans and keep credit lines open. The government would later try to sell the discounted loan packages at the best possible price. Obviously, however, such bailouts are risky if, as in Mexico, they just reward shareholders at the expense of taxpayers.

As in the case of Mexico and Korea, supporters and authorities proclaimed that the proposed intervention would cost much less than it first appeared and that it was the only alternative possible. For instance, immediately after the bill became law, President Bush declared: 'I know some Americans have reservations about this legislation. . . . In this situation, action is clearly necessary, and ultimately the cost to taxpayers will be far less than the initial outlay'.[17]

The statute granted sweeping discretionary power to the Secretary of the Treasury. Just as in Mexico, the Secretary had almost unlimited power to determine the mechanisms, terms and methods for the purchase of troubled assets.

The first paragraph of section 101 of the EESA states:

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[15] Center For Responsible Lending (November 27, 2007). 'A Snapshot of the Subprime Market', available at http://www.responsiblelending.org/mortgage-lending/tools-resources/snapshot-of-the-subprime-market.pdf.

[16] *Wall Street Journal*, October 11, 2008. Front Page.

[17] 'Bush Signs $700 Billion Financial Bailout Hill', National Public Radio (NPR), October 3, 2008, http://www.npr.org/templates/story/story.php?storyId=95336601 & from=mobile.

> The Secretary is authorized to establish the Troubled Asset Relief Program (or 'TARP') to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary. (Section 101, Title I)

The Secretary of the Treasury is also authorized 'to take such actions as the Secretary deems necessary to carry out the authorities in this Act, including, without limitation, the following':

> (1) The Secretary shall have direct hiring authority with respect to the appointment of employees to administer this Act. (2) Entering into contracts, including contracts for services authorized by section 3109 of title 5, United States Code. (3) Designating financial institutions as financial agents of the Federal Government, and such institutions shall perform all such reasonable duties related to this Act as financial agents of the Federal Government as may be required. (4) In order to provide the Secretary with the flexibility to manage troubled assets in a manner designed to minimize cost to the taxpayers, establishing vehicles that are authorized, subject to supervision by the Secretary, to purchase, hold, and sell troubled assets and issue obligations. (5) Issuing such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of this Act.

The law does try to stimulate debate and inter-agency coordination in running the TARP. Section 101 points out that the office responsible for implementing the program, the Office of Financial Stability, must consult with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, and the Secretary of Housing and Urban Development. But the law does not assign specific roles to any of these agencies.

The EESA gives Congress an important role. The Treasury Secretary has immediate access to the first $250 billion. Following that, an additional $100 billion can be authorized by the President 'at any time'. Neverthless, for the last $350 billion, the President must notify Congress of his intention to grant the additional funding to the Treasury; Congress then has 15 days to pass a resolution disallowing the authority. But if Congress fails to pass a resolution within this period, or if the resolution passes but is vetoed by the President, and Congress does not have enough votes to override the veto, the Treasury will receive the final $350 billion anyway. In the end, the Treasury Department maintains full control over as well as the last word on the process.

Along with the extraordinary discretion given to the Treasury Secretary, and the Office of Financial Stability, the bailout risks creating multiple conflicts of interest.[18] The bailout legislation gives almost total control to the Secretary of the Treasury to manage any issues related to this topic:

> The Secretary shall issue regulations or guidelines necessary to address and manage or to prohibit conflicts of interest that may arise in connection with the administration and execution of the authorities provided under this Act, including – (1) conflicts arising in the selection or hiring

[18] Conflict of interest occurs where, in a specific situation, a public functionary is subject to interests of a personal, private or other nature that conflict with the interests s/he should pursue as a public official (Peele and Kaye 2009).

> of 18 contractors or advisors, including asset managers; (2) the purchase of troubled assets; (3) the management of the troubled assets held; (4) post-employment restrictions on employees; and (5) any other potential conflict of interest, as the Secretary deems necessary or appropriate in the public interest. (Section 108, Title I)

It seems unlikely that the Secretary of the Treasury is the best official to to determine whether and to what extent he and his subordinates have a conflict of interest. It would have been far better to have given this responsibility to an external agency.

Furthermore, the first version of the legislation drafted by the Executive exempted Paulson entirely from judicial oversight over the use of the funds. This would have made it difficult to police conflicts of interest and insider deals.[19] Although the final version of the bill states that in order 'to restore liquidity and stability' to the financial system the Act should provide 'public accountability for the exercise of such authority' (EESA, Section II Purposes), it gives little guidance about how this should be done or whether the courts should be involved.

Henry Paulson was Chief Executive Officer of Goldman Sachs Group, one of the main beneficiaries of the bailout. Goldman Sachs received more than 10 billion dollars under the TARP. It is ironic, to say the least, that a former head of a major investment firm was later in charge of reforming the system that he had participated in bringing into crisis.

In addition, in parallel to the Mexican case, government authorities hired some of the same bankers who had been implicated in the crisis and put them in charge of the bailout process. Secretary Paulson hired top Goldman executives as advisors, and some of these former advisors also later joined banks that benefitted from the bailout.[20] Here we see in operation the well-known 'revolving door' between the public and the private sectors, with all of the problems of conflicts of interest that this implies (Peele and Kaye 2009).

Robert A. Eisenbeis, a former director of research at the Federal Reserve Bank of Atlanta, has argued that instead of hiring bankers about to fall into unemployment, the US government should have employed people with specific experience in the area of bailouts. For instance, the officials who worked in the 'Resolution Trust Corporation', the government agency created to deal with the savings and loan crisis of the late 1980s and 1990s, should have been at the top of the list.[21]

Conflicts of interest had a dangerous impact in determining the value of the bad assets the government acquired. Many of the same executives who were responsible for creating the crisis through their irresponsible behavior as bank executives were the people in charge of determining the price at which the government purchased these assets from their former bosses.[22]

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[19] The original bill led Paul Krugman to declare that Paulson was 'demanding dictatorial authority', plus immunity from review 'by any court or any administrative agency'; Krugman (2008).

[20] 'Paulson Turns to Goldman to Unclog Credit Markets', *USA Today*, October, 6, 2008.

[21] Eisenbeis has pointed out that: 'working at Goldman Sachs doesn't qualify you for doing this job', in 'NASA whiz-kid to head new US Treasury position', *The Wall Street Journal*, October 8, 2008, available at http://www.theaustralian.com.au/business/markets/nasa-whiz-kid-given-his-biggest-job/story-ebfrg9/o-1111117690155.

[22] Sam Stein, 'Paulson's Conflicts of Interest Spark Concern', *The Huffington Post*, September 22, 2008.

The main paradox of the bailout is the vicious cycle that it encourages. The central problems of the American economy were created by excessive credit and indebtedness. But the bailout seeks to solve this problem by infusing even more credit into the economy. In order to fund the bailout the government itself falls further into debt. Unless the funds are promptly repaid, it will eventually be forced to squeeze the economy for more tax income, thereby potentially creating even deeper economic problems down the road if the recovery is delayed.

Recognition of this problem created another paradox. The Treasury sought to provide as much of the bailout funds as possible to fundamentally healthy banks that could be expected to repay the funds in a short period of time. The Treasury encouraged such banks to take TARP funds by providing extremely generous loan terms (Chen and Raso 2009). These loans could then balance funds provided to genuinely distressed financial institutions that arguably should have been allowed to fail or at least to bear a bigger share of the cost.

We see this tension as Secretary Paulson in October 2008 struggled to defend his legislative proposal before public opinion and Congress. He argued that the TARP was more of an investment than an expenditure, and that there was no reason to expect this program to cost taxpayers anything. Nevertheless, the reports of the Congressional Oversight Panel, created by the bill to review the Treasury Department's management of the TARP, revealed that the preferred stock the government received in exchange for its initial injection of $254 billion into the banks only amounted to a market value of $176 billon at the time, $78 billion dollars less than the amount the government invested. Elizabeth Warren, a professor at Harvard Law School and chairwoman of the panel, stated: 'At various points, Treasury has articulated policy objectives which could result in the program involved paying subtantially more for investments than they appear to have been worth at the time of the transaction'.[23]

For example, in return for the $40 billion that the Treasury Department 'invested' in the insurance giant American International Group (AIG), it received shares worth only $14.8 billion, 37 percent of the price it paid. Another striking case is the purchase of the assets of Morgan Stanley, where the government spent $10 billion and in return only received assets for $ 5.8 billions, barely more than half of what the government had paid.[24]

But the bailout has not only been tainted by opacity, conflicts of interest and overvalued purchases of toxic assets. There have also been allegations of fraud and looting of public resources. The first case which received public attention was the case of AIG, which lost an historic $62 billion in the fourth quarter of 2008 alone. After receiving a bailout package worth $170 billion, the insurance giant proceeded to award over $165 million in bonuses to its top executives. The company argued that these bonuses were necessary 'to retain the best and the brightest talents' to run AIG.[25] It apparently did not matter that precisely these 'best and brightest' had just squandered $62 billion dollars

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[23] 'Treasury Overpaid for Bank Assets in Bailout, Oversight Panel Says', *The Washington Post*, February 6, 2009.

[24] 'Oversight Report: Valuing Treasury's Acquisitions', Congressional Oversight Panel for Economic Stabilization, US Senate, February 4, 2009.

[25] 'AIG to Pay $450 Millions in Bonuses', *The Wall Street Journal*, March 15, 2009.

of their investors' funds. The case of AIG generated an intense debate in the press and the US Congress.[26] But the Congressional critiques are in the end self-serving because Congress had the opportunity to prevent this type of scandal by structuring the bailout to require more transparency and accountability. Nevertheless, they preferred to pass an opaque statute that granted broad discretion to the Executive in the use of the government bailout package. Later on, in an attempt to correct their mistake, the legislature passed a bill which would specifically tax at a rate between 70 percent and 90 percent all bonuses awarded by corporations receiving more than $5 billion in Treasury aid through the TARP (American Recovery and Reinvestment Act of 2009, PL 111-5, February 17, 2009).

Another scandal involved the 'performance bonuses' which Merrill Lynch gave to its top executives who had driven the company into the ground, only a few days before the investment bank was taken over by Bank of America.[27] A total of $3.62 billion was handed out to executives, a sum equal to 36.2 percent of the $10 billion in taxpayer funds that were allocated to Merrill as part of the Troubled Asset Relief Program (TARP). This sum is 22 times larger than the bonuses given to the AIG executives.[28]

It appears that top officials in the Bush administration were not entirely ignorant of these bonuses. Paulson and Ben Bernanke, the head of the Federal Reserve Bank, met with the top executives at both banks on several occasions during December 2008 to keep Bank of America on board in the deal to buy Merrill Lynch. Bank of America subsequently received an additional $20 billion (bringing the total up to $45 billion) in government funds and a $118 billion guarantee against potential losses in risky investments.[29]

Moving beyond particular cases, a statistical study has found that during the Bush administration, TARP funds favored firms whose employees had disproportionately contributed to Republican candidates as well as those that ranked high on other measures of political engagement (Chen and Raso 2009). Overall, the implementation of the TARP program is reminiscent of the Mexican bailout in which government funds were used to benefit prominent individuals instead of helping to restart the economy. In both cases, powerful financial interests were allowed to extract part of the bailout package for their own benefit.

The obvious alternative would have been to use the bailout to protect small investors and directly help home owners in debt. Nouriel Roubini (2008) has argued that purchasing bad assets, the predominant strategy in the cases of both Mexico and United States, is a particularly ineffective and inefficient way to recapitalize the financial sector. He has proposed that the government should directly purchase partial equity in the banks, inject

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[26] See, for example, Senator Charles Grassley's reaction: 'GOP Senator to AIG Execs: 'Resign or Commit Suicide', The Raw Story, March 17, 2009, available at http://rawstory.com/news/2008/Grassley_to_AIG_execs_Resign_or_0317.html.

[27] The performance bonuses were determined by Merrill's compensation committee on December 8, 2008, but in previous years, Merrill paid performance bonuses of this type after the end of the year, in January or February of the next year.

[28] 'Merrill Lynch Bonus Payments Dwarf AIG', 31 March 2009, http://www.fourwinds10.com/siterun_data/business/corporate_fraud/news.php?q=1238608487.

[29] 'Study: Bernanke, Paulson Misled Public on Bailouts', *The Washington Times*, October 5, 2009.

further public capital in the form of preferred shares in the financial institutions rather than a mere purchase of bad assets, suspend dividend payments on common shares and even in preferred shares to avoid moral hazard, and finally let insolvent banks and financial institutions disappear.[30]

Joseph Stiglitz (2008) has proposed a different alternative. From his point of view the best strategy would be to issue 'preferred shares with warrants (options)', but most importantly 'to impose a special financial sector tax to pay for the bailouts conducted so far. . . also to create a reserve fund so that poor taxpayers won't have to be called upon again to finance Wall Street's foolishness'.[31]

The arrival of Barack Obama as president of the United States offered some hope with regard to the management of the bailout. For instance, under the Bush administration it would have been hard to imagine Congress acting as it did with regard to the AIG bonuses. President Obama also ordered the seven corporations that have received but not repaid TARP funds (Bank of America Corp., American International Group Inc., Citigroup Inc., General Motors, GMAC, Chrysler and Chrysler Financial) to cut their top executives' pay by between 50 and 90 percent, and he appointed Kenneth Feinberg as a Special Master to set compensation levels. These restrictions have proved a potent spur encouraging large borrowers to exit the TARP program (Brill 2010). The new president also tried to push banks to use the bailout package to help small- and medium-sized businesses. In addition, the President set out a new plan to manage the failure of large financial companies that would cost the average taxpayer much less.

In general, President Obama has the same advantages as Kim Dae Jung in the Korean case. He is a reformer who is not as tied to large corporate interests like his predecessor. He also has the advantage of not being directly responsible for the crisis but of having arrived after it had already begun. He therefore brings a fresh perspective to the problem. In addition, President Obama has a strong incentive to deal with the crisis in a transparent and open way because he will be held accountable for his actions during the rest of his presidency and in his subsequent reelection campaign.

Nevertheless, the structural independence of the US government from large corporate interests is arguably much less than in the Korean case. Evidence of this is that President Obama has not radically changed the background of the people in charge of the Treasury Department and of the bailout in particular. Neel Kashakari remains head of the Office of Financial Stability and Timothy Geithner´s team, like Henry Paulson´s, has extensive links to Wall Street. Visionary leadership will not be enough if the people who are directly in charge of operating the bailout are not solidly protected from falling into conflicts of interest.

The long-term solution lies in rethinking the structure of financial regulation in the United States. The underlying problem is not only an issue of short-term liquidity, but most importantly of impunity and of the problematic incentives created by extremely flexible regulation. Unfortunately, the Obama administration's initial actions have not yet gotten to the root of the issue.

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[30] Roubini (2008).
[31] Stiglitz (2008).

5. Conclusion

The contemporary global economic crisis has reminded us of the inextricable relationship between states and markets which lies at the heart of capitalist development. The spread of 'free-market' ideology throughout the world over the last three decades has not led to the unilateral 'retreat of the state' from the economy, but rather has produced a reconfiguration and reorientation of the state's role in economic matters (Sandoval 2005). The US bailout reminds us of the central role that the state plays in maintaining the viability of market economies.

It is therefore particularly important to approach the issues from an interdisciplinary political economy perspective. We need to break with both excessively state-centered, legalistic perspectives, as well as with economistic, overly technical approaches. In this chapter, I have tried to demonstrate the advantages of such a synthetic approach.

The global crisis and governmental responses to it confirm the idea that so-called 'market reforms' do not necessarily lead to greater autonomy of the state from interest groups. On the contrary, these reforms often lead to the self-conscious reshaping of the 'distributional coalitions' which sustain government power. In the analysis above, we have seen how interest group politics has played a central role in determining the timing and nature of past government bailouts. The groups that influenced the bailout processes were not created out of whole cloth during the rescue operations, but grew in the shadows of the dominant model of deregulation and were ready to pounce on the opportunity of a bailout when it arrived.

The bailouts in Mexico in the late 1990s, South Korea in 1997 and the United States today reveal the importance of interests over and above ideology and even institutions. An important underlying theme is also the potential value of transparency and accountability. Interest group politics and conflicts of interest thrive in situations of opacity. One of the most important reasons Mexico's bailout was riddled with fraud and self-dealing was that there was little public scrutiny of the details of the process. One of the most important dangers with the bailout in the US is the broad discretion powers given to the Secretary of the Treasury. The US bailout is more transparent than the Mexican case, but, even so, fundamental decisions can be taken with little oversight so that transparency only acts as an ex post check on Executive branch behavior. There are few mechanisms of accountability that have real legal bite.

Transparency and accountability can help neutralize conflicts of interest and produce more efficient and fair outcomes. Indeed, open decision-making processes may be even more important in the financial sphere than in other areas. Advocates for transparency often urge its value in monitoring such government services as social spending, infrastructure and education. Scholars often hesitate to extend transparency into more sensitive and highly technical areas such as financial management or monetary policy. But the results of the present study suggest that such caution is not warranted and may in the end be harmful.

The political background is also extremely important. Autonomy and resistance to rent-seeking and corruption do not arise on their own through the appointment of 'pure' or naturally independent government officials. On the contrary, it is a process which is constructed through politics and with careful attention to context. In the end, technocratic solutions can only go so far. A truly successful bailout is not only one that distributes costs efficiently, but also one that is fair and just.

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33 The role of the State in (and after) the financial crisis: new challenges for administrative law

Giulio Napolitano

1. The economic institutions of the crisis and the two sides of administrative law

Any major financial and economic crisis will have a profound impact on the role of the State and on administrative law rules and institutions. Certainly this was the case at the time of Wall Street crash in 1929. All over the world, the Great Depression precipitated a dramatic expansion in administrative power – perhaps the greatest that history to that point had ever experienced. In the United States, the New Deal represented an extraordinary chance for the expansion of the Regulatory State, both in its economic and social dimensions. In European countries, the government response to the crisis was the nationalization of banks and utilities, as well as the establishment of planning in many economic sectors.

The Great Depression of the 1930s had a deep and long-lasting impact on what could be called the 'two sides' of administrative law. The first concerns the role of the State and its prerogatives, giving legitimacy to a wide command and control system and to the direct public provision of goods and services. The second concerns the codes of conduct of administrative agencies and efforts to offer guarantees to citizens. Even after the Great Depression had passed, the economic institutions to which it gave rise were not dismantled, because they were now deeply embedded in political and social life. At the same time, the expanded role of the State generated a new administrative law framework, both institutional and procedural, of which the adoption of the US Administrative Procedure Act in 1946 is the most well-known example.

On both sides of the Atlantic, the economic institutions created during the crisis endured for nearly a half-century, until the deregulation and privatization initiatives of the 1980s and the 1990s. The law and economics movement played an important role in intellectually supporting this process of dismantling and challenge. It pointed out the many instances of State failure, arising from regulatory capture and political rent-seeking. It strongly argued for the primacy of market performance and for a market-like approach to regulation. In this way, law and economics both described and prescribed, after 'the rise' of the modern Regulatory state, its seemingly inevitable 'fall'.

This chapter explores the extent to which the 2008–09 financial crisis may 'resurrect' the idea of regulation and in so doing radically change existing administrative law systems. It further considers whether these changes are likely to result in either progressive convergence or even rising divergence across countries. As a matter of fact, in the face of a worsening financial and economic crisis, many States have passed acts and statutes designed to stabilize financial institutions and restore trust in the market. The most important effort arose in the United States, where Congress adopted legislation both at the end of Bush administration and at the beginning of Obama administration. In the

meantime, European countries also adopted a variety of plans and laws to confront the economic and financial crisis.

This chapter is organized as follows. Section 2 will detail how, throughout the world, the legislation emerging out of the financial crisis arguably marks the end of a long period of confidence in the market's capacity to regulate itself. Section 3 will turn more specifically to how this legislation enables public bodies to adopt a number of measures aimed at addressing the crisis, focusing in particular on bailout measures, stimulus packages and regulatory reform. Section 4 will take a broader perspective, arguing that the crisis legislation has the potential to create a complex political and institutional infrastructure geared toward guaranteeing the legitimacy and accountability of the State in the economic emergency. Section 5 will then detail how all these transformations challenge existing systems of administrative law both in national and in global perspective.

2. Changing patterns

As Richard Posner recently argued, every political, economic or social crisis may have a 'silver lining' (2009a: 220 ff.). A crisis can certainly be a learning experience, forcing a reconsideration of existing patterns of economic and legal analysis. The 2008–09 financial crisis was no different, revealing the existence of market failures that advocates of a more limited economic role of the State over the last several decades had either ignored or forgotten.

2.1. The rediscovery of market failures

All around the world, the last two decades were dominated by the retreat of the State through deregulation (Swann 1988, Strange 1996, Taggart 1997, and Napolitano 2007). Mainstream law and economics strongly argued in favor of market primacy, albeit with some notable exceptions (Rose-Ackerman 1988 and 1992, Mashaw 1996). The movement regarded State failures as worse than market failures, reflecting a widespread feeling of confidence in the capacity of markets to regulate themselves (La Porta et al. 1998: 1113 ff.).

Hence the shock of the financial crisis of 2008, was, first of all, the consequence of a market failure.[1] The conversion of debt into financial products traded on the market (securitization) may well have produced many benefits. It contributed to the achievement of high levels of growth both in the United States and in developing countries. It also provided investors with more security, increased risk tolerance and, as a consequence, widened the field of those who could benefit from low-cost credit otherwise confined to the more well-off or to large companies. Nevertheless, this system in fact masked

[1] Richard Posner, one of the founders of the Chicago school of economic analysis of law, attributed the basic causes to six factors, all intrinsic to the functioning of the markets (Posner 2009a:1 ff. and 75 ff.): first, the abundant availability of reduced-cost capital, which encouraged lending at very low interest rates; second, the financial 'bubble' caused by low interest rates and by a particularly aggressive offering of mortgages; third, the creation of new financial instruments considered particularly suited to reducing loan risks and increasing optimal leverage; fourth, the difficulty of selling a conventional business strategy to shareholders against the backdrop of the property 'bubble'; fifth, the impact of the uncertainty surrounding the extent and duration of the 'bubble' and the effectiveness of the financial instruments in avoiding its negative impact; and sixth, the breakdown in company controls within the financial intermediaries.

substantial risks created by these new financial instruments (Rodrik and Subramanian 2008). Indeed, debt securities were issued on actuarial criteria and not on real security. Rather than commercial banks sustained by traditional forms of savings collection, merchant banks and credit institutions played a key role in the spread of these instruments, engaging in innovative off-balance sheet activities. Insurance companies also played a major role, underwriting the increased risks of insolvency thereby generated.

The failure of the market was not adequately corrected, but, rather, was exacerbated by a failure in the regulatory system. Indeed, the public oversight system allowed the assumption of excessive risk. Focusing on compliance with merely quantitative criteria, it did not pay enough attention to qualitatively assessing the credit risks. The Securities and Exchange Commission generally took a hands-off approach, reflecting faith in the market's capacity for self-regulation. Overconfidence in the market also had an impact on accounting and auditing rules. Finally, the merchant banks enjoyed preferential treatment compared to commercial banks, because the former were often exempt from the controls to which the latter were subject. The watchdog authorities thus proved incapable of effectively responding to the negative externalities inflicted on the entire financial system by weak intermediaries, by problems of agency which had induced financial institutions and investors to undertake excessive risk, and by shortcomings in collective action in areas such as investment in risk management capacity and structures, market infrastructure and the provision of support to the liquidity of financial markets and transparency (Draghi 2008).

The failure of the regulatory system built on failures in the political sphere. The excesses of the high-risk subprime mortgage market resulted, at least in part, from policies designed to promote the American dream of everyone owning a home. Congress, for example, adopted the American Dream Downpayment Act in 2003, a small subsidy program which allowed certain purchasers to acquire homes almost entirely through loan financing, without the purchaser having to invest any of his/her own money in downpayment. This raised the potential of the most irresponsible buyers entering the housing market. Congress had also earlier instructed the Department of Housing and Urban Development to set affordable-housing goals for Fannie Mae and Freddie Mac, both government-sponsored enterprises. This had the effect of increasing the availability of high-risk loans, thus further distorting the home mortgage market. (Nevertheless, it should be stressed that the private-label securitization market was an even larger financier of reckless home mortgages.) Contributing to the development of this policy approach was the intense lobbying of financial intermediaries that had accumulated home mortgage debts and made significant contributions to the electoral campaigns of many members of Congress. That's why, according to some scholars, the economic and financial unraveling of 2008–09 is fundamentally a political crisis of the American state and gives evidence of its unsustainability.[2]

It would, however, be a paradox to exonerate the market of all responsibility on the ground that the State had not done enough to regulate it. Of course, it would be even more naïve and misleading to consider the current crisis as a sign of a failure of capitalism now destined to be superseded by a 'new statism'. On the contrary, it could be

[2] Jacobs and King (2009).

argued, controversially, that with the collapse of the most exposed financial intermediaries, the capitalist system has functioned perfectly, expelling from the market operators who engaged in behavior that was clearly mistaken and irresponsible. Cycles of boom and bust are intrinsic to capitalism: the State, depending on the circumstances, can only exacerbate or alleviate the effects of such processes, as happened with the 1929 crisis. The challenge, today, is to reconceive 'capitalism beyond the crisis' (Sen 2009), taking into account the fact that the movement to deregulate the financial industry went too far by exaggerating the resilience – the self-healing powers – of 'laissez-faire capitalism' (Posner 2009a). What is needed, then, is to define a new economic role for the State.

2.2. The new economic role of the State

The range of measures to address the economic emergency included government assumption of a large number of private losses, State control of certain assets and securities, and the effective nationalization of several banks. The financial system found itself under the penetrating glare of publicity to a level that would have been unthinkable up until only a few months ago. It is unlikely, however, that such measures will define future relations between the State and the economy. Rather, they are necessary but temporary remedies (or at least that is the hope), aimed at mitigating the negative repercussions in the financial markets flowing from the initial crisis, which are very likely to be gradually pulled back over time. Nevertheless, if history is any guide (thinking particularly of the consequences of the 1929 crisis), interventions originally conceived as merely transitory can give rise to profound transformations over time. In the American case, for example, the New Deal established the federal government as regulator and redistributor; in the European case, it prompted the development of the State as planner and entrepreneur.

Regardless of the actual effects of the current crisis, one can suppose that the global spread of the market economy is bound to lead to an increase in certain types of State intervention. In the aftermath of privatization and liberalization, an initial paradox emerged. The openness of markets – at least in the early stages, although the transition period proved longer than expected – gave rise to a need for new and more stringent rules and procedures, precisely to ensure the smooth functioning of competition (Posner 2000). A second paradox, however, also emerged, particularly in the American case. The increase in paperless financial operations and the deregulation of oversight systems has given rise to the State as *savior*, the cornerstone of emergency public measures that were unprecedented during the time of State management of and involvement with the market. This is particularly the case when the need arose to cover the debt exposure of financial intermediaries in order to ensure the stability of the economic system and preserve the value of savings. However, the purpose of the bailout program was not to displace the market but rather to restore its correct functioning. In this context, even nationalization could constitute a means of preserving the free market. The rescue program in the US, as well as those subsequently developed by European countries, thus remind us that the State's economic role is not confined to correcting traditional market failures. A stabilizing role for the State is also fundamental, a fact often overlooked in times of economic and market expansion, but which nevertheless becomes unavoidable in crisis situations, particularly those of a financial nature (Stiglitz 2000: 85 ff.).

A different issue concerns the optimal level of public intervention. Faced with

economic crises afflicting what are now global markets, some calls for multilateral solutions to be developed at an international or supranational level have increased (Eichengreen and Baldwin 2008). In fact, despite efforts at coordination, the measures adopted by individual States have diverged, at least in part. The response has continued to be predominantly national, but this is not solely due to a weakness of international and supranational institutions. On the one hand, the pressure from individuals, families and businesses for rescue and protective measures has focused on electorally accountable national representative bodies. On the other hand, States are the only entities that possess the financial resources necessary to fund rescue packages. Moreover, they are the only ones who have the necessary authorizing powers, as well as the acknowledged legitimacy to exercise them.

3. How governments respond to the crisis

National responses to the current economic crisis developed in three different directions. First, several countries adopted bailout programs that responded specifically to the financial crisis through injections of liquidity into the banking and financial sectors. Second, many countries supplemented these bailouts with stimulus packages that sought to expand demand for goods and services in the real economy, which had been battered by the financial collapse. Third, national and supranational institutions design regulatory reforms to prevent new systemic crisis in the future.

Each of these responses can be analyzed from different perspectives. From a public choice perspective, these measures are just the result of a market exchange in the political process, to the benefit of the most organized pressure groups (Davidoff and Zaring 2009; in this book, for a comparative approach, see Chapter 32 by Irma Sandoval). On a positive political theory approach, they are the effect of a rational strategy by political actors aiming to expand their chance of being re-elected. From a law and economics point of view, they can be analyzed to test their capacity to address the existing market and regulatory failures. In each country, the choice of remedies is path-dependent. Existing administrative law traditions are one of the most relevant patterns of path-dependence.

3.1. The bailout programs

The bailout programs pursue three basic objectives: (a) guaranteeing the stability of the financial system; (b) injecting liquidity into the market, including for the purposes of ensuring continuity in the provision of credit to businesses and consumers; (c) restoring confidence among savers. Solutions, anyhow, may differ from country to country and evolve through time. As a matter of fact, bailout strategies comprehend both financial support and nationalization.[3]

Financial support aims at increasing the liquidity available to intermediary operators and to banks, and at underwriting their debt exposure. The basic idea is that since economic profit is not the short-term objective of the State, it can carry forward financial operations with assets that at the moment do not seem to have a market, thus supporting banks, restoring trust in financial transactions and reassuring savers.

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[3] For an overview, see Masera and Mazzoni (2009: 105 ff.).

The first statute was the Economic Emergency Stabilization Act passed in October 2008 by the US Congress. The statute authorizes the Treasury Secretary to establish a Troubled Asset Relief Program (TARP) for the purpose of purchasing or committing to purchase 'troubled' financial instruments issued before March 14, 2008.[4]

There are two types of troubled assets that can be bought by the State. The first are mortgage-related securities. The second type consists of any other financial instrument in relation to which the Treasury Secretary, subject to notifying Congress, deems it necessary to extend public intervention measures. The bailout is backed by funding of seven hundred billion dollars, which will be made available gradually over time. Dealings will be conducted in accordance with terms and conditions determined by the Secretary, in line with legal requirements and with intervention guidelines issued and published beforehand. The Secretary is thus called on to exercise any rights attaching to the assets acquired. He may therefore sell, enter into securities loans, repurchase transactions or other financial transactions with respect to the assets.

The Secretary is required to use his/her powers in a manner that will minimize any potential long-term negative impact on taxpayers, taking into account the direct outlays, potential long-term returns on assets purchased and the overall economic benefits of the Program, including those due to improvements in economic activity and the availability of credit, the impact on the savings and pensions of individuals and reductions in losses to the Federal Government. To this end, the Secretary is required to hold the assets till maturity or for resale until such time as the Secretary determines that the market is optimal for selling such assets, so as to maximize the value for taxpayers and the financial return on investment for the government.

While the rescue program is *dirigiste* in its approach, it is tempered by the adoption of a range of measures. On the one hand, the involvement of the private sector in the implementation of the Program is encouraged. Indeed, the Secretary is required to encourage the private sector to participate in purchases of 'troubled' assets and to invest in financial institutions. On the other hand, public intervention must be carried out using market mechanisms. Each purchase must be made at the lowest price in keeping with the purposes of the rescue program. In addition, in order to maximize efficiency in the use of taxpayer resources, resort to auction procedures is preferred.[5]

Despite the adjustment and honing of these intervention mechanisms, they have been criticized from various points of view. In general, it has been observed that the State rescue program creates a moral hazard problem, in that it encourages future irresponsible behavior by banking institutions and other financial intermediaries once they learn

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[4] The economic argument underlying this project is that the Federal government would thus be able to pay a price equal to the estimated value that the acquired assets would have once the crisis of confidence that had arisen in the market had been overcome. In this way, it would be possible to alleviate the exposure of the banks and other intermediaries by injecting financial liquidity, thereby reducing doubts regarding their solvency and restoring confidence in the market and among investors.

[5] Indeed, there are various mechanisms which can make vendors and purchasers of assets and securities 'tell the truth' about their value. The auction system can be especially useful if the State does not automatically purchase all securities offered by banks, so that the latter are forced to compete with one another. Moreover, competition can be increased by staggering the auctions over time (Becker 2008b).

that they can, whatever happens, rely on public relief.[6] More specifically though, there has been criticism regarding the impossibility of fixing a fair price for troubled assets to be purchased or insured. Indeed, the benchmark criteria cannot be the market price given that it is precisely the collapse of the market that has led to the liquidity crisis among financial operators. However, the payment of a price which is necessarily higher than that of the market risks translating into unjust enrichment for financial operators and their executives to the detriment of taxpayers.

To avoid all these problems, European countries have adopted different solutions, like the creation of special funds, the concession of government guarantees and the exchange of government securities, in addition to central bank operations.[7] In Italy, for example, the Economics and Finance Ministry can offer state guarantees on bank liabilities, on bank refinancing operations, on financing supplied by the Bank of Italy to face the serious crisis in liquidity, and on temporary exchange operations between government securities and financial tools.[8] At the European level, all public intervention on financial support (because it is State aid) is subject to the limits imposed by Community treaties and control by the European Commission.[9]

A second instrument of the bailout strategy is nationalization. This solution is authorized even by the Economic Emergency Stabilization Act, given the wide definition of 'troubled asset' it contains, which is capable of extending to any financial instrument. The Secretary has taken this approach since the early negative responses from the stock exchange towards plans to purchase only 'troubled' mortgage-related securities and the initial success of the different European model based precisely on the government acquiring equity and stocks in banks.[10] This way, even the US, traditionally against any

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[6] This risk is widely condemned by many economists, including Becker 2008a.

[7] See Spain, the Real Decreto-Ley, October 10, 2008, n. 6, which creates the 'Fondo para la Adquisición de Activos Financieros', and the Real Decreto-Ley, October 13, 2008, n. 7, on 'Medidas Urgentes en Materia Econòmico-Financiera', including the issue of public guarantees for banks and the market. In Germany, the Finanzmarktstabilisierungsgesetz, approved on October 17, 2008, created a special Fund for market stabilization managed by the Bundesbank, in conformity with direction from the Finance Minister.

[8] See law no. 185/2008.

[9] See Communication from the Commission – Temporary Community Framework for state aid measures to support access to finance in the current financial and economic crisis (2009/C 16/01), of January 22, 2009, as modified on February 25, 2009.

[10] In this regard, see the Statement by Secretary H.M. Paulson, Jr. on actions to protect the US economy, October 14, 2008, in which he announced that, given the seriousness of the situation, 'the Treasury will purchase equity stakes in a wide array of banks and thrifts', despite the knowledge that the idea of the 'government owning a stake in a private firm is objectionable to most Americans'. On a theoretical level, this last option has also divided the main proponents of the free market. On one side, there are those who insist that that the State becoming a shareholder is 'a bad idea'. This inevitably ends up involving the State in business and company decisions, yet experience shows that public shareholders make their decisions on the basis of political rather than business considerations, with a distorting effect on the functioning and efficiency of the market (Becker 2008b). On the other side, there are those who recognize that the State, on the whole, is not a good shareholder, but that in certain circumstances, like those prevailing today, direct intervention can be positive if it is temporary in nature.

form of direct public intervention in economics, has been induced to experiment with nationalization.[11]

As a matter of fact, in many European countries, outright acquisition of equity in banks is preferred to the purchase of 'troubled' assets. The United Kingdom, for example, decided to buy equity in eight of the major banks, with a recapitalization plan backed by £50 billion. To this purpose, the Banking Bill contemplates the hypothesis of 'temporary public ownership' through the Treasury release of transfer orders of credits.[12] In Italy, the Ministry of Economics and Finance is authorized to underwrite capital increases, and thus acquire shares devoid of voting rights and with privileges in the distribution of dividends. Public intervention is made subject to the ascertainment of the existence of capital inadequacy. While this requirement addresses appreciable concerns relating to market freedom from intervention, in reality it may provide a disincentive for banks and public authorities to declare the existence of such circumstances so as to avoid causing further damage from the market being judged negatively.[13]

Both in the US and in European countries, nationalization is conceived as an exceptional measure, authorized for a circumscribed period by sunset laws. According to some commentators, anyhow, the banks' nationalization requires a 'survival manual' (Elliot 2009). Among other things, this could set out how to: (a) design a preliminary exit option; (b) create a sound financial base; (c) institute a good bank/bad bank structure; (d) make the necessary managerial changes; (e) announce and implement a new strategic plan; (f) sell the government's stake over time.

3.2. The stimulus packages: expanding public law and institutions influence

The financial crisis has pretty quickly deprived the entire economic system of the resources needed to its good functioning. That way, all countries have not limited their intervention to bailout programs, adopting different stimulus packages. This way, with potential supply exceeding actual demand, due to falling private consumption, the government hopes that it can restore balance in the markets.

The American Recovery and Reinvestment Act and the similar statutes passed in all Western countries facing the crisis focus the stimulus on four areas: tax reductions, aids to specific economic sectors, social welfare expenditures and public works programs. This way, the government responses to crisis, following both monetarist and deficit-spending prescriptions, reveal evidence of the enlargement of the space for pragmatic, apolitical, non-idelogical solutions. Each solution has its pros and cons (Posner 2009a: 164 ff.). But, except for the first, all the other measures are going to expand the area of influence of government and of administrative law regulations.

The solution of tax cuts is much more developed in the US than in European countries. The Tax Extenders and Alternative Minimum Tax Relief Act of 2008 reduces taxes or postpone their payment for the unemployed and victims of natural disasters. Measures based on tax cuts do not redistribute wealth and keep government from meddling with the markets. The main problem with tax cuts as a response to the depression is that many people will save rather then spend. Besides that, tax cuts cannot be

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[11] The point has been stressed, with some malice, in the French literature (Custos 2009).
[12] See section 2 of the Banking Bill.
[13] See art. 1, legge no. 190/2008.

permanent. Moreover, from an administrative law point of view, tax cuts recipes imply a further reduction of public provision of goods and services in favor of a model of private consumption.

Both in the US and in Europe, State aids were introduced in favor of specific economic sectors, the most relevant example being the benefits conferred upon automakers. The US initiative was justified with the argument that the peculiarities and the dimensions of the industry would have made bankruptcy likely to exacerbate the nation's miserable economic condition.[14] In a globalized market, the US initiative stimulated also the European one. Member States were induced to adopt similar measures not to misplace the competitive position of their national industries.[15] On both sides of the Atlantic, State aids were conditioned on the use of specific green technologies. More generally, many countries decided to support the development of new networks, like broadband, capable of producing positive externalities on the environment, information and high quality services.

An indirect way to give aid to business is to link State underwriting of bonds in banks and other financial institutions to the way in which they are managed and the credit supplied to third parties. The objective, in this highly uncertain macroeconomic context, is to avoid a perverse spiral being set off between the emergence of debt and the restriction of credit. In exchange for public financial contributions, subsidized operators assume commitments both regarding their internal organization and their corporate functioning modalities. These commitments were created in the United States under the ethical and moral auspices of a ceiling on management remuneration.[16] Now, the Financial Stability Plan obliges operators who receive credit to demonstrate how public support is to extend loans to businesses and families and obliges the Treasury Secretary to publish data and reports on the subject.[17] In some European countries, like France and Italy, financial institutions aided by the State must guarantee an adequate credit flow to the economic operators and to the families affected by unemployment.[18] State officials operating at local level are charged with enforcing these commitments, through administrative law powers and soft law tools.

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[14] Auto Industry Financing and Restructuring Act of 2008; on the topic, see Posner (2009a: 153 ff.).

[15] In Germany, Gesetz zur Neuregelung der Kraftfahrzeugsteuer und Änderung anderer Gesetze, approved on, May 29, 2009; in Spain, Plan Integral de Automoción, approved on, February 13, 2009.

[16] Art. 111 of the Economic Emergency Stabilization Act, in particular, foresees the setting of limits for payments and compensation that motivates administrations to assume unnecessary and excessive risks that threaten the value of credits or that are based on profits that are proven groundless or that are attributed to 'any golden parachute payment'.

[17] See 'The Financial Stability Plan: Deploying our Full Arsenal to Attack the Credit Crisis on All Fronts', by Treasury Secretary Tim Geithner, February 10, 2009. For an initial implementation through the involvement of private companies as well, see the Public-Private Investment Program, March 23, 2009.

[18] See France, art. 6 of the Loi de finance rectificative pour le financement de l'économie, no. 2008-1061, by which credit operators, in exchange for guarantees and public underwriting, stipulate an agreement with the state regarding the financing of single parties, businesses, and local collectives and adopt ethical rules in conformity with the national interest; similarly, in Italy, see art. 12, legge no. 2/2009.

The economic crisis following the financial one has obliged many countries to adopt programs to transfer wealth and other social welfare expenditures.

All over the world, protection against poverty and unemployment was strengthened. The UK developed a comprehensive plan to help people and small businesses.[19] France and Italy introduced mechanisms of money transfers in favor of the poorest.[20] The US government was the first to enlarge the coverage of public subsidies in case of unemployment.[21] At the beginning of 2009, Germany and Spain approved the more comprehensive statute in the field of welfare services.[22]

Many countries have introduced new provisions about housing. The US scored the record on the topic. On the one hand, the Federal Housing Finance Regulatory Reform Act of 2008 established a new Federal Housing Finance Agency, holding regulatory and oversight powers over Fannie Mae, Freddie Mac and the Federal Home Loan Banks. On the other, the Economic Emergency Stabilization Act of 2008 and the Helping Families Save their Homes Act of 2009 gave assistance to homeowners.

Finally, in the US, the Congress, with the strong support of the Obama administration, approved a reformation of the health care system, aiming to extend public protection to all citizens. The justification for such a change is not only political, but also economic: expanding the demand for health services may have a positive stimulus effect on the market.

All these measures have the great advantage of putting money in the hands of more people who are too poor to save much and who will therefore spend money. By doing so, they will increase demand for goods and services, which is the aim of deficit spending in a depression. The transfer programs are perhaps the more relevant from an administrative law perspective. They create new entitlements especially in the field of social security and enlarge the scope of administrative agencies. Moreover, these programs determine a ratchet effect: even when the crisis is over, they will be difficult to abolish because interest groups form about them.

Finally, most countries adopted public-works programs.[23] Undoubtedly, they are the best suited to reducing unemployment and fostering economic growth. From a law and economic perspective, the main issue is to identify worthwhile public projects in the sense of those that create real value, in terms of positive externalities for market exchange and social welfare. From a public choice perspective, the problem is to choose the right projects to fund rather than those projects favored by elected officials on political instead of economic grounds. On both perspectives, it must be considered that public works and

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[19] See Department for Business, Enterprise and Regulatory Reform, 'Real Help Now for People, for Businesses', February, 2009.

[20] See, in France, 'Décret n° 1351-2008 du 19 décembre 2008 instituant une prime de solidarité active'; in Italy, 'decreto legge n. 112/2008', art. 81, co. 29 ss.

[21] See Unemployment Compensation Extension Act of 2008.

[22] See, in Germany, 'Gesetz zur Sicherung von Beschäftigung und Stabilität in Deutschland' (approved on March 2, 2009); in Spain, 'Real Decreto-ley 2/2009, de medidas urgentes para el mantenimiento y el fomento del empleo y la protección de las personas desempleadas' (approved on March 6, 2009).

[23] See, in France, 'Décret n° 1355-2008 du 19 décembre 2008 de mise en œuvre du plan de relance économique dans les marchés publics'; 'Loi n° 2009-179 du 17 février 2009 pour l'accélération des programmes de construction et d'investissement publics et privés'.

infrastructures are very different from one another. The best investments in a middle to long-term period, such as those in high-tech, are not necessarily the best-equipped to address the current depression.

Anyhow, from a macroeconomic point of view, the big problem with the public-works approach is the inevitable delays in beginning to spend project funds. Normally, months will be spent identifying and designing each project and signing necessary contracts before a project actually gets under way. The problem of delay may be reduced in two ways. The more empiric approach is to concentrate resources on projects that have been interrupted by the economic downturn and can be resumed at short notice. The conferral of special prerogatives on extraordinary public officials to make the execution of contracts faster may be consistent with this recipe. The second option is to derogate to ordinary rules on adjudication, allowing direct negotiating. In European countries, this solution may be too difficult, considering the existing regulatory framework on public contracts. Some countries, like France, have tried to do anyway that.[24]

3.3. Strategies of regulatory reform

In contrast with bailout programs and stimulus packages, which no doubt can entail fundamental reforms but are often of an ephemeral nature, regulatory reforms have sought to change fundamentally the scope and efficacy of supervision of markets, particularly in the banking and financial sectors (Acharya and Richardson 2009). Of course, given the extensive economic and financial innovation as well as the global market integration of the last several decades, the choice of proper rules is a major challenge. What is needed are more complex and targeted regulatory mechanisms that rely on both incentives and public intervention (Cudahy 2009). From this point of view, three different kinds of measures appear indispensable.

The first entails intensified public oversight of banks and financial institutions, particularly as to minimum capital requirements, the limitation of leverage, and the obligatory amount of reserves. This oversight should also extend to particular financial instruments, such as credit-default swaps, whose use greatly contributed to the increase in systemic risks. But it must be recognized that key players in the current crisis are financial institutions like commercial banks that were already subject to extensive public supervision. This suggests problems both with regulatory capture as well as with pressures and distortions coming from the political process. Consequently, greater institutional independence for regulators, whether from private individuals or elected officials, is essential. Furthermore, the introduction of automatic mechanisms could also be useful. For example, rules could constrain the size of intermediaries, thus reducing the risks of a systemic crisis flowing from actors that are 'too big to fail'.

The second set of measures focuses on increasing the level of cooperation and integration between supervisory authorities. The goal is to reduce transaction costs that prejudice the timeliness and appropriateness of public risk intervention. In many countries, the problem arises at the national level where responsibilities are divided among several sectoral regulators (in banking, insurance, or real estate), or at the sub-governmental

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[24] 'Décret n° 1356-2008 du 19 décembre 2008 relatif au relèvement de certains seuils du code des marchés publics'.

level (for example, in the US case, where each state has sectoral regulators). The problem also exists at the international level, whether within macroregional organizations like the European Union or globally. Given the scope of the current crisis, pressures exist to improve cooperation and coordination both at the rule-defining phase and in enforcement.[25]

The third group of measures concerns the development of a more stringent and effective set of global regulatory standards for the banking and financial sectors. The purpose would be twofold: on the one hand, to prevent a regulatory race to the bottom among competing legal orders; and, on the other, to reduce the ability of market actors to engage in regulatory arbitrage. Diverse areas of international trade (including finance) entail multiple standards, often based in soft law instruments providing for limited and generally ineffective enforcement. Any initiative aimed at redefining global financial rules and standards must overcome these limits and defects.

This is a highly complex undertaking, involving single states and their particular national schemes, existing international organizations, and perhaps the creation of new supranational institutions. It will also entail significant consultation with diverse interests, both the objects of regulation and, perhaps more importantly, regulatory beneficiaries in order to balance the ability of regulated interests to influence and capture the regulatory process. Enforcement must be rethought, mixing incentives and controls. Almost certainly this will require reliance on national authorities, although national bodies must be given the tools to effectively enforce standards defined at the international level.[26]

What are the prospects for developing such global regulatory standards? The United States and Europe must be central players in their formulation, although at this point they may pursue different strategies of regulatory reform at national and supranational level.

In the United States, the Financial Regulatory Reform program sets five different objectives (Department of the Treasury 2009). The first is to promote robust supervision and regulation of financial firms, ensuring that similar financial institutions face the same supervisory and regulatory standards, with no gaps, loopholes, or opportunities for arbitrage. The second is to establish comprehensive regulation of financial

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[25] See, for example, the de Larosière report on financial supervision and stability in the European Union (published on January 21, 2009), which, in the EU context, calls for more direct involvement by the European Central Bank and for converting the Financial Stability Forum into a permanent Board (thereby strengthening the level of institutionalization).

[26] And yet, even where there is clearly a need for global standards, this ought not to entail a pervasive and homogeneous system of worldwide regulation (Rodrik 2009). Such an approach would be destined to fail for three reasons. First, as a matter of political-institutional realism, it is extremely difficult to force states to cede sovereignty even on questions of trade and financial practices. Second, there are obvious benefits to a plurality of regulatory models, particularly from the standpoint of regulatory innovation. Third, there is a great variety of preferences amongst political, economic and social communities, leading to different forms of financial regulation from country to country, reflecting both different levels of development and different social models. The fundamental challenge is to develop adequate global standards that are both sensitve to these realities yet prevent countries from adopting regulatory approaches with significant negative externalities (that is, risky practices that imperil the stability of the financial system beyond national borders).

markets, most importantly by bringing the markets for all over-the-counter derivatives and asset-backed securities into a coherent and coordinated regulatory framework (Litan 2009). The third is to protect consumers and investors from financial abuse, and to this end the Obama administration proposes the creation of the Consumer Financial Protection Agency with the authority and accountability to make sure that consumer protection regulations are 'written fairly and enforced vigorously'. The fourth is to provide government with the tools to manage financial crises, most importantly those that can address the potential failure of a bank holding company or a financial firm whose stability is at risk. The fifth is to raise international regulatory standards and improve international cooperation, focusing on reaching international consensus on four core issues: regulatory capital standards; oversight of global financial markets; supervision of internationally active financial firms; and crisis prevention and management.

The European regulatory reforms call for the establishment of a European financial supervision system based on two pillars. The first is a new European Systemic Risk Board that will monitor and assess potential threats to financial stability that arise from macroeconomic developments and from developments within the financial system as a whole ('macro-prudential supervision'). The second is the European System of Financial Supervisors (ESFS), which consists of a robust network of national financial supervisors working in tandem with new European Supervisory Authorities to safeguard financial soundness at the level of individual financial firms and protect consumers ('micro-prudential supervision').

Asymmetries between US and European strategies are due to the different institutional context. The US reform, in order to gain political consensus in the Congress and among citizens, aims to strengthen consumer protection and reveals the US purpose to lead the worldwide process of regulatory reform. The EU reform, on the contrary, is much more concerned about the problem of institutional cooperation at European level between national authorities. It's progress, compared with the present situation, but it runs the risk of being not courageous enough to reduce the transaction costs arising from a system of multilevel governance.

4. The economic emergency and stabilization constitution

An economic emergency may change not only the role of the State in relation to the market, but also the internal organization of the State and the constitutional balance among different branches of government. On one side, lawmakers, faced with the need to act quickly, are likely to confer wide discretionary power on the Executive. On the other, they will try to limit the opportunistic behavior of the executive branch of government. Strategies to balance these factors may differ according to the different institutional settings and legal traditions in the US and Europe.

4.1. Delegation in an economic emergency

All over the world, stabilization and the rescue programs are giving wide discretionary power to the Executive. The US Emergency Economic Stabilization Act is a good example. It vests the Treasury Secretary with the authority to establish a Troubled Asset Relief Program and to commit to purchasing 'troubled' assets of financial institutions according to terms and conditions determined by the Secretary. The Secretary is then

authorized to make decisions and take such actions as he deems necessary to implement the Program, including the authority to appoint officials and employees to administer the Program, to enter into contracts and to designate financial institutions as agents of the Federal Government for the purposes of performing all such duties as required by the Program. In addition, in order to provide the Secretary with the necessary flexibility to manage troubled assets in a manner designed to minimize the cost to taxpayers, the Secretary may establish vehicles useful for purchasing, holding, and selling troubled assets and issuing associated obligations, and may issue regulations, recommendations and other guidance.

Hence, once more, an emergency situation, whether it be economic or linked to the threat of terrorism or natural events, has led to an increase of executive power at the expense of other branches of government.[27] According to some commentators, this way American administrative law is going to be 'Schmittian', insofar as emergencies can be addressed only by extending prerogative and discretion of public bodies (Vermeule 2008–09). Indeed, all decision-making powers are directly vested in a political body at the core of the Administration. In this case, for the purposes of the implementation of the Program, the Secretary is provided with a dedicated Office of Financial Stability established within the Department of the Treasury. The Office is headed by an Assistant Secretary, appointed directly by the President with the consent of the Senate.

The delegation of power to political bodies in the Executive and to administrative agencies under their control may be socially preferable when the rescue program entails the expenditure of a vast amount of public money, may lead to profound and widespread redistributive effects, and requires complex negotiations to build consensus or achieve efficiency. However, the vesting of power in political bodies may also be the result of opportunistic behavior on the part of elected bodies, which seek to maximize their own sphere of influence. Political actors may seek to maintain influence over policymaking in the administration and related agencies to help forge winning coalitions or to encourage electoral funding (Alesina and Tabellini 2007a, 2007b).

The discretionary power vested in the Executive must be wide because the economic and financial context in which decisions are made is largely unpredictable and this inevitably increases the costs of inflexibility. Widespread scrutiny and an unpredictable climate thus argues in favor of giving broad discretion to the decision-maker. In turn, the existence of wide discretion requires that it be exercised by the Treasury Secretary or, at any rate, by agencies whose heads have been chosen on the basis of their trustworthiness (see Cooter 2000, for further applications, and with reference also to European countries, Napolitano and Abrescia 2008). Managing the economic emergency by vesting political bodies in the Executive with wide discretionary powers seems consistent with criteria of efficient allocation of powers. At the same time, however, considering the sensitivity of the decisions, the amount of public resources involved, and the potentially widespread redistributive effects, an appropriate legal and institutional infrastructure is necessary to handle the emergency situation that takes in all arms of the State. A system

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[27] See Ackerman (2003–04: 1029 ff.), Dyzenhaus (2006), from a political science perspective, on the convergence between the American and European systems in 'Crisis Management'; Fabbrini (2007: 276 ff.).

thus framed can increase the democratic legitimacy, transparency and accountability of bailout programs enacted by the State.

According to different institutional settings (in terms of divided or unified government) and administrative law traditions, strategies to control the Executive vary across countries, selecting and mixing:

(i) the political accountability model;
(ii) the administrative procedure model;
(iii) the technical advice model.

Each of these models has its own pros and cons that can be better understood, by making reference to theories of a principal-agent relationship between elected officials and appointed actors in the Executive (even if selected according to political criteria, like a Treasury Secretary or Ministry).[28] The political accountability model is a typical 'police-patrol' system of reviewing administrative action, based on the direct involvement of elected officials in detecting bureaucratic drift through monitoring and investigations. The administrative procedure model, on the contrary, is an indirect technique of oversight, in which 'fire-alarms' signals are sent by individual citizens affected by bureaucratic behavior. Lastly, in the technical advice model, any decision of the Executive is submitted to the evaluation of an independent body, equipped with an high degree of expertise: this way, its agenda is controlled by a third party, which limits its discretion.

4.2. The political accountability model

The US Economic Emergency Stabilization Act sets out a coherent institutional infrastructure for the bailout program, based on a political accountability model. When the Act was under consideration Congress was in a particularly strong negotiating position compared to the Executive and its President. Indeed, the latter was nearing the end of his term and was viewed by the general public as responsible for the financial crisis and, more generally, for the economic woes afflicting the country. In contrast, after the 2006 elections, Congress seemed to more accurately reflect the prevailing views of citizens. Furthermore, in a situation of uncertainty regarding the outcome of the upcoming presidential election, both parties preferred to adopt a strategy aimed at increasing direct and indirect oversight of the actions of the Executive, irrespective of who would be called on to lead it.[29]

The Act provides for a multilevel system of controls to be conducted by a series of different bodies. Some of these were newly established and are temporary in nature, while others widen the powers of existing bodies. The basic idea is that the Treasury Secretary's actions should be subject to a set of political controls.[30]

For this reason, the statute established the Congressional Oversight Panel. This is

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[28] Regarding the different models of control on bureaucratic behavior, McCubbins and Schwartz (1984), McCubbins et al. (1987), Ginsburg (2002).

[29] For a comparison of different balances of power in different types of crisis, see Posner and Vermeule (2008).

[30] For the view that, in certain circumstances, political oversight may be more rapid and effective than legal scrutiny, see Tushnet (2007).

a temporary body with five members: four members are separately appointed by the majority and the opposition from the House of Representatives and the Senate, while the fifth member is appointed by the Speaker of the House of Representatives and the majority leader of the Senate, after consultation with the minority leaders of the Senate and the House of Representatives. The Panel is required to review the performance of the financial markets and the functioning of the regulatory system. It must prepare a series of reports covering the exercise by the Secretary of authority under the Program, the impact of purchases of troubled assets on financial markets and institutions, the observance of principles of market transparency and the effectiveness of the Program in minimizing long-term costs to taxpayers. The Panel is also required to submit a special report on regulatory reform of the entire financial and regulatory system, aimed at protecting consumers. For these purposes, the Panel may hold hearings, take testimony and obtain information and official data.

Congressional oversight is also provided by the US Comptroller General. He is called on to oversee, on an ongoing basis, all activities and transactions carried out under the Program, including by private parties and financial vehicles, with the aim of ensuring the achievement of the pre-established objectives. For these purposes, the Secretary must make available to the Comptroller all facilities and information necessary to facilitate such oversight. Every sixty days, the Comptroller must submit reports of findings to the appropriate committees of Congress. Finally, the Comptroller must audit the financial statements issued annually under the Program. A further monitoring body is the Office of the Special Inspector General, established specifically to oversee the implementation of the Program. The Special Inspector General is appointed by the President with the advice and consent of the Senate, on the basis of criteria of integrity and demonstrated ability in management analysis, financial analysis and law. The Inspector is required to conduct, supervise and coordinate audits and investigations of the purchase, management and sale of assets by the Secretary. He is to collect and prepare information on the categories of troubled assets purchased, the reasons it was deemed necessary to purchase them, each financial institution that sold troubled assets, each person hired to manage them, the profit and loss deriving from their management and any insurance contracts issued.

The Congressional oversight of the Executive bailout programs is a typical 'police-patrol' system of political control on public officials, based on direct monitoring and investigations by elected officials. Police-patrol control systems are highly costly for politicians because they are time-consuming and require specific expertise and the sharing of political responsibility.

However, the legislature may prefer this system to a fire-alarm model based on administrative procedures and private participation, when Congressmen, acting as political principals, can earn a high pay-off through direct involvement in comprehensive oversight of the bailout programs. That is the case when Congressmen can criticize the waste of money and other failures of the bailout programs, taking advantage of the high saliency of such policies during the crisis. Rather than seeking to off-load oversight to others, the legislators hope to reap political gains from engaging in monitoring themselves.

In this context, private fire-alarm oversight, through administrative procedures and judicial review, can be costly in times of emergency. Hence, decisions of the Secretary in implementing the Economic Emergency Stabilization Act are subject to only limited judicial review. The original Bill that was drafted by the Treasury Department conferred

total immunity on the Secretary. Indeed, it provided that the decisions of the Secretary were committed to agency discretion and were non-reviewable by any court of law or administrative agency (for a critique, see Krugman 2008). This proposal was rejected by Congress, with the consequence that any actions taken by the Secretary and his/her subordinate officers may be set aside if found to be arbitrary, an abuse of discretion or not in accordance with law. However, no injunctions or other forms of equitable relief may be issued against actions involving the purchase, insurance or management of troubled assets, other than to remedy a violation of the Constitution. Furthermore, any request for a temporary restraining order against the Secretary must be granted or denied within three days of the date of the request. Any request for a preliminary or permanent injunction must, in turn, be considered and granted or denied on an expedited basis. Finally, no action may be brought by any person or company that participates in the Program other than as expressly provided in a written contract with the Secretary.

This way, administrative law of crisis management is based on 'grey holes', as far as 'there are some legal constraints on executive action (. . .) but the constraints are so insubstantial that they pretty well permit government to do as it pleases' (Dyzenhaus 2006: 42). But, according to a different opinion, the existence of 'grey holes' and even of 'black holes' (when statutes or legal rules either explicitly exempt the executive from the requirements of the rule of law or explicitly exclude judicial review of executive action) is inevitable. As a consequence, the aspiration to extend legality everywhere, so as to eliminate the Schmittian elements of our administrative law, is 'hopelessly utopian' (Vermeule 2008–09).

4.3. The administrative procedure model

In European responses to the crisis, on the contrary, political controls are very limited because, in a unified system of government, the Parliament does not act as an effective counter-power to the Executive. Laws approved by the Parliament delegate every power directly to the Executive, without retaining any type of oversight of either the general rules or individual decisions issued by the Executive and the Treasury Ministries.

In this context, the only legal protections available are those offered by general administrative law with its procedural requirements and rules of transparency. Final decisions regarding the application of bailout measures, like providing guarantees or underwriting credits, can be appealed to the courts on administrative law grounds. Bailouts are decided through an administrative proceeding initiated by a private party, the requesting financial institution. Thus, for example, according to the Italian Law on administrative procedure, the public official who denies a bailout request must preemptively notify the private party and explain the reasons for denying the request. Through cross-examination, the requesting bank could submit data and documents that seek to demonstrate that it qualifies for aid. Of course, such an individualized approach is unlikely to succeed if the rejection of a bank's petition depends on a political evaluation 'of high level supervision' or 'financial policy', based on data on general market trends and on classified information that is not contestable by any individual party.

One might ask if a bailout decision could be contested by pointing to the market distortions caused by the public support given to one or more competing operators. This possibility might give rise to a significant divergence between European Union and national Member State jurisprudence. The EU tends to recognize direct access to judicial

review for all public decisions that prejudice competition among rival businesses.[31] The Member States, in contrast, tend to deny access to judicial review to contest competition and other agencies decisions to individual and collective actors that are not direct beneficiaries. Third-party banks could, in any case, protect their own interests not only on a Community level, but also at the national level by signaling potential cases of assistance fund abuse and the consequent advantage earned by the beneficiary banks to political principals.

In conclusion, administrative law rules provide an alternative framework for public intervention in the banking system as guarantor of both the public interest in the proper collection and the use of collective resources and the private interests of the banking sector in the concession of assurances and the underwriting of shares. The doubt remains as to whether such a formalized system of public decision-making, within a context characterized by a necessarily high level of discretion, is more efficient than a mechanism able to combine the informality of interventions with a higher level of political-parliamentary control (as in the United States, according to the estimates of the Economic Emergency Stabilization Act). Administrative judges should be able to demonstrate their ability to adequately and effectively protect the various interests at hand without slowing down or paralyzing the urgent and necessary public decisions to be taken, both for the recipients of these decisions and for the entire economic system.

4.4. The technical advice model

A third way to balance the delegation option to the Executive is to insulate some aspects of the decision from political discretion through the involvement in the policymaking of an independent body, like a central bank, a regulatory authority or an external or supranational institution, equipped with a high degree of expertise.

That way, a public body retains an *agenda control* power over the activity of another public body, even if the degree of this power depends on the compulsory effect of its advice. Both US and EU countries use this solution in some cases, but often with quite different results.

In the US, a fundamental role is played by the Federal Reserve Bank (the Fed). The Fed was directly involved in the management of the crisis: first, in the bailout decisions on individual cases before the approval of the emergency statutes; then, in the draft of the new legislation, from the Economic Emergency Act to the Stimulus Plan; finally, in the execution and oversight of the TARP, within and outside the Financial Stability Oversight Board.[32]

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[31] See the Court of First Instance, May 19, 1994, case T-2/93, *Air France v. Commission*; Court of First Instance, May 3, 2002, case T-177/01, *Jégo-Quéré et Cie SA v. Commission*; and lastly, Court of First Instance, February 10, 2009, case T-388/03, *Deutsche Post AG–DHL International*; see also the conclusions of the Advocates General, Eleanor Sharpton, May 5, 2009 in case C-319/07.

[32] This body is set up for a defined period and comprises the Treasury Secretary, the Secretary of Housing and Urban Development, the Chairman of the Board of Governors of the Federal Reserve System, the Chairman of the Securities Exchange Commission and the Director of the Federal Housing Finance Agency. In general, the Board must ensure that the measures adopted by the Secretary are effectively in accordance with the purposes of the Act, the economic interests of the United States and taxpayer interests. To this end, the Board is tasked with reviewing the

In providing highly technical support to government decisions, the Fed is playing an important role in circumscribing the political discretion of the Executive and in assuring the transparency and accountability of the bailout measures.

However, the effective role played by the Fed may have been diminished by a number of factors. First of all, its authority has been somewhat weakened by its direct responsibility for the origins of the crisis, due to the monetary policy followed in the past by Alan Greenspan. Second, its credibility has been undermined insofar as it has been involved in deciding whether a bank should be allowed to fail while another bank receives a huge bailout, or when it uses its position as a bank's creditor to alter its management or influence its business strategy. In such cases it can be easily suspected of favoritism or worse (Posner 2009b). As a result, it is less able to provide an effective check and balance on Executive discretion in the bailout programs.

The weakness of the Fed is particularly dangerous in the US context where the independence of the Fed is not protected by the Constitution. Central bank independence is valuable to prevent its power over interest rates from being abused for political ends. Because the costs of inflation are now widely recognized, a central bank that focuses on limiting inflation will be reasonably popular and its independence will be highly appreciated by public opinion (Posner 2009b). But inflation provides a possible way out from under the enormous amount of public debt generated by the crisis. As a matter of fact, history tells us that the independence of the Fed has changed enormously over time, rising and falling according to different economic and political situations (Becker 2009).

Regulatory reforms may greatly change the relationship between the Executive, the Fed and the other financial authorities.

On one side, the new Financial Services Oversight Council is going to be chaired by the Treasury Secretary and staffed by Treasury officials. This solution will give the Treasury the last word on regulatory and oversight strategies of each individual regulator and on conflicts between them arising from overlapping authority over the market. Furthermore, the Treasury can develop specific expertise on financial matters, without solely relying on disclosure of information by regulators.

On the other side, the Federal Reserve Board is required to receive prior written approval from the Secretary of the Treasury for emergency lending under its 'unusual and exigent circumstances' authority. Hence, the Executive is going to play a much more important role in both regulatory oversight and crisis management, gaining an informational advantage from the increased institutional competition between different authorities and from solving conflicts of competence between them.[33]

Completely different is the situation in many European countries. There, technical advice from financial authorities can play a much more effective checks and balance role, for at least three reasons.

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ways in which the Secretary and the Office of Financial Stability implement the Program, including the appointment of financial agents, the designation of asset classes to be purchased and intervention plans adopted from time to time. The Board may also appoint a Credit Review Committee for the purpose of evaluating the way in which the authority to purchase troubled assets has been exercised. The Board may also make recommendations to the Secretary regarding the exercise of authority under the Act and report any suspected fraud, misrepresentation, or malfeasance.

[33] On the topic, in general terms, see Macey (1992).

First, the legislation makes a clear distinction between the technical advice provided by the bank or financial market authority and the political decision to adopt a bailout or subscribe to stocks or obligations. This way, the independent authority reduces the danger of being suspected of favoritism and discrimination, insofar as it must give reason for its judgment on objective grounds. Second, the delegation of the monetary function to European Central Bank avoids any risk of confusion between this role and the evaluation of the stability of the financial institutions.

Third, the independence of national authorities is protected, if not by national constitutions, by European treaties and legislation. The degree of protection is very high when the national bank authority is a member of the European central bank system. In this case, any infringement of the independence of the bank authority can be prevented by the compulsory advice of the European Central Bank and can eventually be sanctioned by the European Court of Justice.

In this context, regulatory reforms at European level may be twofold. On one side, at the national level, the Executive retains high-level oversight powers and last-resort lending authority. As a matter of fact, Member States succeeded in avoiding both the conferral of oversight powers directly on the European Central Bank and the establishment of a common European fund to manage financial and economic crisis in the area.

On the other side, the establishment of three European Authorities on banking, insurance and securities, even if composed of the existing national regulators, will loosen the relationships between them and national political actors. Moreover, the European Systemic Risk Board will be chaired by the European Central Bank President or other appointed person, not by any political figure.

Finally, the European Commission is an important check and balance on the exercise of political discretion by Member State Executives in its oversight role on State aids. The evaluation of the impact of State aids on competition becomes indirectly a highly influential judgment concerning the necessity of a bailout. Of course, the technical assessment of the European Commission was weaker when the crisis was at its peak and the EU was in transition; but its influence will greatly increase as the economic emergency becomes under control and a new Commission takes charge.

5. New challenges for (comparative) administrative law after the financial crisis

The fundamental changes in the role of the State brought about by the financial crisis create new challenges for administrative law that may be best addressed in a comparative perspective on four different grounds.

The first challenge is a reassessment of the proper economic role of the State and of the different legal forms of it. All around the world, the last two decades were dominated by the retreat of the State. In almost every economic sector, the State ceased the direct production of goods and services. Public corporations were privatized and public aids to enterprises were forbidden or strongly controlled. The financial crisis, on the contrary, has led to a re-discovery of the fundamental economic role of the State. This new role, however, is seriously challenged by the sovereign debt crisis arising in many countries, starting from Europe.

Models and legal forms of public intervention, anyhow, differ through time and across nations, according to the different legal and economic structures and cultures. Bailout programs include buying toxic assets, temporary public ownership, public guarantees of

private transactions, direct funding or underwriting of financial instruments of banks. Moreover, some countries have opted for direct intervention by the State. Others have stressed the importance of market models of public intervention and emphasized the role of public-private partnerships in assuring the achievement of the most efficient solutions. At the same time, stimulus packages are characterized by a policy mix of tax cuts, State aids, welfare provisions and public works programs. Except for the first, all the others expand the influence of the public sector and increase the scope of administrative law.

As a result, the convergence in re-conceptualizing the economic role of the State does not necessarily involve a convergence in the specific tools adopted, which are deeply influenced by the institutional setting, administrative law traditions and the different relations between the State and the market across countries. Paradoxically enough, at least in the short term, common law countries, like the US and the UK, adopted public law schemes, like bank nationalization, more than continental European countries, with a long-standing administrative law tradition. And the US largely overdid European countries in terms of the relevance of both economic and social reforms following the crisis, even if it is too early to say if the overall impact will be similar to the New Deal's one.

The second challenge is related to the optimal design of economic emergency management. The necessity of facing with promptness the financial and economic crisis has greatly widened the discretionary powers of the Executive branch of government. The constitutional impact of this shift, of course, is greater in a system of divided government like the US, than in a system of unified government, like the one prevailing in European countries. Everywhere, anyhow, deep concern has emerged about the multiplication of black and grey holes zones in which Executives are called to act to face the crisis.

That way, across Western countries, different institutional models of control have arisen to check and balance this enormous extension of powers of the Executive. The US moved toward the establishment of a Schmittian administrative State, only limited by some means of political control by the Congress and of technical advice by the Fed. Some European countries, on the contrary, adopted a much more – American style – procedurelized system of control, based on participation and monitoring by vested interests and on judicial review.

The third challenge concerns the techniques and the structures of regulation. Since the 1990s there has been a constant move in the direction of light regulation, co-regulation, and self-regulation. The failure of these alternative methods of regulation, at least in the financial markets, explains the worldwide pressure for the re-building of a strong regulatory State, in which public functions would no longer be delegated to private actors. Models and techniques of re-regulation differ across countries. Some will move in the direction of reinforcing political patronage and command and control systems. Others aim to strengthen the independence of regulatory authorities and their supervisory powers with the goal of finding more efficient systems of sound regulation.

Once again, US and European countries are playing the game in a somehow inverted way. The latter are adopting American-style reforms, extending the US regulatory model of independent agencies at European level. The first, on the contrary, are going to introduce bureaucratic means of control over both business and regulators that are much more consistent with the European tradition than with the US one.

The last challenge requires re-conceiving regulation at global level. Deregulatory races to the bottom and the worldwide negative externalities of financial activities offer

strong arguments for increasing regulation at the global level. Many of the existing and failing regulations at the global level are based on delegation to private regulators and the dominance of soft law mechanisms. Their legitimacy and accountability problems were limited through consultation processes, even if the consulted parties only included the regulated firms. Preventing new crises in the future calls for global solutions based on the direct involvement of new public bodies at the international level and on a more balanced consultation process to avoid capture by regulated interests.

The building up of a new worldwide regulatory system requires passage from a comparative administrative law approach to a global administrative law approach. The first is necessary to select the best options available, taking into proper account the different institutional context of each. Once a new worldwide system of regulation and oversight is established, global administrative law may provide the proper mechanisms of both substantial and procedural legitimacy, making reference also to the different national administrative law traditions.

Undoubtedly, it is too early to forecast the way in which countries and international organizations will solve the open questions arising from the crisis and how national and global administrative law will face all these challenges. But the history of the 1930s following the Great Depression teaches us that the solutions that will prevail in the future will deeply influence the future development of the economic role of public bodies and of administrative law rules and institutions. A widespread and highly specialized use of comparative administrative law may be highly recommended to catch the actual meaning of all these transformations around the world.

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Section B

Administration Beyond the State: The Case of the European Union

34 A restatement of European administrative law: problems and prospects

George A. Bermann

The European Union is a vast regulatory enterprise (Lindseth 2006). Thanks to a mass of both primary legislation (predicated directly on the Treaty Establishing the European Community[1] and the Treaty on European Union[2]) and secondary legislation (adopted by one or more of the EU institutions via delegation through pieces of primary legislation), the EU institutions exercise an abundance of rulemaking authority. They also enjoy, on the basis of these same normative instruments, the authority to render large numbers of individualized decisions. This combination of rulemaking and adjudicatory power has enabled the European Union to become an arena of administrative law activity as intensive as any to be found on the globe (Bermann et al. 2008a).

One of the virtues of the European Union, particularly in evidence in recent years, has been its taste for procedural innovation and experimentation (de Búrca and Scott 2007, de Búrca and Walker 2007). However, these have come at a price. A disconnect exists between the proliferation of procedural regimes, on the one hand, and the relative absence of general standards of administrative procedure and its review, on the other. As the EU law literature never fails to emphasize, at stake are the transparency and legitimacy of EU law and the European Union itself (Joerges et al. 2004, Larsson and Schaefer 2006: 541).

These reflections have generated a strong impulse to make sense of the administrative procedure of the European Union. One manifestation is the recent surge in academic literature seeking to provide a comprehensive and systematic understanding of EU administrative law – or as comprehensive and systematic an understanding as can be had (Auby and de la Rochere 2007, Bermann et al. 2008a, Craig 2006, Hofmann and Türk 2006b, 2009a, Seerden and Stroink 2002). Another manifestation is the discussion afoot about the possibility of producing, if not a general European Union administrative procedure act, then at least something along the lines of a 'restatement' or set of 'best practices' of European Union administrative law. One forum is the recently launched Research Network on EU Administrative Law (or 'ReNEUAL') – a project designed by a group of leading European administrative law scholars to pursue precisely these objectives. According to its prospectus, 'EU administrative law is regulated in a rather unsystematic manner, mainly on a policy-by-policy basis. To date, only few areas of EU

[1] Treaty Establishing the European Community, OJ C 340/3 (1997), 37 ILM 79. Pursant to the Treaty of Lisbon, effective December 2009 (OJ C306/01 (2007)), the EC Treaty was replaced by the Treaty on the Functioning of the European Union (TFEU), OJ C83 (2010). As a result of the Lisbon Treaty, the European Community was absorbed into the European Union.

[2] Treaty on European Union, OJ C 340/2 (1997), 37 ILM 67. The Treaty on European Union was amended by the Treaty of Lisbon. For its current version, effective December 2009, see OJ C83 (2010).

administrative law [have been] subject to a systematic approach with rules and principles applicable beyond a single policy area.'[3]

1. A Restatement?

The term 'Restatement', of course, has a decidedly American law ring to it – so much so that it is difficult, though not impossible, to imagine any instrument bearing a title of that sort emerging from an initiative such as the ReNEUAL Project. But the term is nonetheless sometimes used as a shorthand for any enterprise whose aim is to rationalize, clarify and, on the margins, improve European Union administrative law.

Not that the term 'Restatement', as understood in US law, would be entirely inapt for an enterprise of this sort. In the United States, the notion of a Restatement of the Law has traditionally signified a consolidation of the principles of law governing a given field with a view to bringing a measurably greater degree of clarity, consistency and simplicity to the law than would otherwise exist – without, however, any pretense that such a consolidation amounts in itself to positive law (Hull 1998). Instead, a Restatement's value lies principally, though by no means only, in guiding courts in their development of the law and their adjudication of individual disputes. A successful Restatement helps courts to align their case law not only with other decisional law within the jurisdiction, but also with the decisional law of sister-state jurisdictions, to the extent of course that the enacted law within any given jurisdiction permits such alignment. Viewed at this very general level, the notion of a Restatement looks like quite a good fit with the movements in which European administrative law academics are increasingly engaged.

The fit, however, is by no means exact. Restatements initially flourished in the United States in fields where existing law was largely judge-made rather than statutory, and where the matter fell within the jurisdiction of the states rather than the federal government (Bermann 2008: 314). These features – state as opposed to federal law, common law as opposed to statute – combined to produce a risk of substantial legal divergences within and across jurisdictions. This is not, however, an entirely accurate description of the EU law landscape. Much of the administrative law that would be 'restated' in the European Union is law established at the EU level, whether by treaty, legislation or the case law of the European courts, or takes 'soft law' form (Jans et al. 2007: 12). It would not entail the 'state law purity' of the bodies of law that were the subject of the early Restatements in the United States (Bermann 2008: 314). Moreover, European administrative law is not judge-made to the extent that the bodies of law subjected to Restatement in the United States have traditionally been. The procedures by which primary and secondary EU legislation are adopted and applied in individual cases are largely laid down in written law (notably the treaties and the primary and secondary legislation itself), though subject to a substantial measure of judicial supervision. European Union administrative law is thus neither as pervasively 'state' nor as pervasively 'judge-made' as the law that has been the object of the American Restatements.

Of course, even Restatements in the United States are no longer quite what they used to be. Consider the titles and subjects of some of the American Law Institute (ALI)'s

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[3] Research Network on European Administrative Law (ReNEUAL), 'Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law', p. 1 (on file with the author).

most recent Restatements and other projects. They include the foreign relations law of the United States,[4] draft federal legislation on the recognition and enforcement of foreign judgments,[5] principles of world trade law,[6] principles and rules of transnational civil procedure,[7] private international law aspects of world intellectual property law,[8] the law of cross-border insolvency,[9] and principles of aggregate litigation.[10] The current Restatement project on the US Law of International Commercial Arbitration[11] addresses a field of predominantly federal rather than state law, albeit one that is not subject to federal preemption. Rather, it is dominated by a federal statute[12] and international treaties to which the US is a party.[13] Nor has the field been by any means wholly relegated to the courts, notwithstanding the voluminous case law interpreting the relevant statute and treaties. If a field as federal and as statutory as international commercial arbitration in the US is the proper subject of an ALI Restatement, it would not seem wide of the mark to consider EU administrative law equally susceptible to 'restatement.'

That the ALI Restatements have turned out to be an attractive model for EU administrative law has nothing to do with state versus federal law or the case law versus statutory character of the field, but rather with the architecture of Restatements themselves. Not unlike many uniform and model laws, Restatements have regularly followed the tripartite structure of 'blackletter', 'comments', and 'reporters' notes'. Within this architecture, the 'blackletter' portion sets forth legal principles that courts are invited to apply in cases falling within a Restatement's scope, as if it were law, even though it is not. The 'comments', in turn, lay out in explanatory fashion the basic rationales and underlying policy choices that animated the drafters to produce the blackletter text. Finally, the extensive 'reporters' notes' reveal the sometimes vast reservoir of sources and authorities that the drafters consulted, thus providing a background for understanding the positions adopted by the blackletter and explained in the comments. The ReNEUAL Project contemplates performing essentially the same three exercises, though in reverse order:

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[4] Restatement (Second) of the Foreign Relations Law of the United States (1965), Restatement (Third) of the Foreign Relations Law of the United States (1987).

[5] Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006).

[6] Principles of Trade Law: The World Trade Organization (2003).

[7] Principles and Rules of Transnational Civil Procedure (1998).

[8] Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes (2008).

[9] Transnational Insolvency: Principles of Cooperation Among the NAFTA Countries (2003).

[10] For information on the ALI Principles of the Law of Aggregate Litigation project, see http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=7.

[11] Restatement (Third) of the US Law of International Commercial Arbitration, Chapter 5: Recognition and Enforcement of Awards (Proposed Official Draft 2009).

[12] Federal Arbitration Act, 9 USC §§ 1–16 (2000).

[13] United Nations and the Panama Conventions on the Recognition and Enforcement of Foreign Arbitral Awards. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517, 330 UNTS 38 [hereinafter New York Convention]. Organization of American States [OAS], Inter-American Convention on International Commercial Arbitration, pmbl., January 30, 1975, 1438 UNTS 245 [hereinafter Panama Convention].

namely, a presentation of the administrative law *status quo*, followed by its assessment in light of alternatives, followed in turn by what the ReNEUAL Project is, for now, calling 'best practices'. (Using the term 'best practices', instead of 'restatement', is meant to make it clear that the instrument is not a set of binding legal norms.)

For these reasons, I use the term 'restatement' (and I favor using the lower case) to mean nothing more than any exercise by which the legal principles governing a given field are set forth in a clear and systematic fashion with a view to promoting a consistent understanding and application of the law.

2. Why a 'restatement'?

Would a restatement of European Union administrative law be a useful project and product? My answer is yes. Even looking only at the EU level, we find little by way of comprehensive, horizontally applicable procedural legislation, whether in the form of an EU administrative procedure act or otherwise. Some still debate whether the EC Treaty (now the TFEU) provides a legal basis for such a codification (Jans et al. 2007: 59, Craig 2006: 280). However, even today, certain horizontal instruments have distinctly cross-sectoral applications. These instruments would include the Comitology decisions of 1987, 1999 and 2006,[14] the EU's Financial Regulation,[15] and the regulation governing the EU's 'executive agencies' (Craig 2006: 37).[16] But these instruments govern only the institutions and mechanisms that they themselves specifically create. Noteworthy also is the European Ombudsman's Code of Good Administration,[17] which is wide-ranging but also not legally binding. Instruments such as these aside, generalities of EU administrative law take the form of a small number of vague propositions known as 'general principles of law' (Jans et al. 2007: 115, Schwarze 2005, Tridimas 2006).[18] These enjoy only a tenuous basis in the EC Treaty.[19]

The 'best practices' envisaged by the ReNEUAL Project would not even purport to be

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[14] See Council Decisions 87/373/EEC, available at http://www.dst.dk/pukora/epub/upload/ 2285/6_5_en.pdf, and 1999/468/EC, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/1999/l_184/ l_18419990717en00230026.pdf, as further modified by Council Regulations 806(2003) (qualified majority) and 807(2003) (unanimity), and by Council Decision 2006/512/EC, available at http://www.stat.fi/eu2006/ councildecision_7-2006.pdf.

[15] Council Regulation 1605/2002 of June 25, 2002, on the Financial Regulation Applicable to the General Budget of the European Communities, OJ 2002 L 248/1. Mention could also be made of EU access to data and data protection regimes, as well as requirements for the conduct of regulatory impact assessments.

[16] Council Regulation 58/2003 of December 19, 2002, laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programs, OJ 2003 L 11/1. Executive agencies denote those entities specifically created by sectoral regulations to administer and manage programs on a centralized basis. Because the Commission's right to take policy decisions remains undisturbed, the executive agencies – located within the Commission, but outside the Commission hierarchy – allow administration of EU law to be centralized without that burden being lodged in the Commission staff itself.

[17] European Code of Good Administrative Behavior (2005), available at http://www.ombudsman.europa.eu/code/en/default.htm.

[18] These principles include, in addition to fundamental rights, principles of equality, proportionality, legitimate expectations and the right to be heard.

[19] Article 220 states: 'The Court of Justice and Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty, the law is observed'.

as authoritative as the Restatements in the US. Although Restatements furnish courts with rules of decision for cases that come before them, statements of best practices have a more varied set of goals. They inform the legislative process and may even permit more streamlined legislative proposals that need not include detailed and potentially inconsistent provisions on administrative procedure. They provide guidance to officials at all levels on the formulation and implementation of EU law and policy. They can promote cooperation in the growing number of areas of law governed by joint EU-Member State (or 'integrated') administration. They can provide a more clear and consistent terminology for both those who make and those who apply the law. And although they may not be immediately applicable to the political and judicial supervision of administrative actors, it is difficult to imagine that they would not inform the standards that supervising bodies, including courts, employ in exercising their review functions.

3. The challenges

Like any ambitious project, a restatement or set of best practices of European Union administrative law faces serious challenges – challenges pertinent to (a) its scope, (b) its extension to Member State administrative law, (c) its relationship to positive law, and (d) the sheer complexity of the administrative processes to be restated.

3.1. Scope of inquiry

What kinds of administrative processes should a restatement or compendium of best practices address? The ReNEUAL Project, like any similar undertaking, needs to define administrative procedure, which in turn requires defining what it means to 'administer' the law. Within the EU context, shall the project include the adoption of primary legislation by the Council and Parliament, a function that by its very name suggests that it represents the making rather than the administration of the law? Yet a good case can be made that such legislation bears much the same relationship to the European treaties as regulations bear to enabling statutes within the United States and should accordingly be viewed as administrative instruments, albeit in legislative form (Strauss et al. 2008: 4).

Shall we consider the EU judiciary as an administrative institution? Instinctively, most would not include the courts. And yet, taken in its broadest sense, administration of EU law is performed not only by political but also by judicial institutions at all levels. Consider that the courts of the EU and the Member States regularly exercise judicial review over administrative action, an exercise of power that has long been considered an essential aspect of administrative law at the national level, and is no less so merely because the law and policy being administered have their genesis in EU law. Not only does administrative law at the national level properly concern itself with such issues as the availability, scope and standard of judicial review of administrative action, and the liability of administrative actors for their illegal or otherwise wrongful acts (Craig 1999), but those issues figure regularly in the administrative procedure legislation and administrative law case law at the national level.[20] Given the absence of

[20] For example, Germany's Administrative Procedure Act [Verwaltungsverfahrensgesetz (VwVfG)] of 25 May 1976 (as amended May 2004) [Germany], May 25, 1976, available at: http://www.unhcr.org/refworld/docid/48e5def72.html. US Administrative Procedure Act, 5. USC 706

any general administrative procedure legislation at the European Union level,[21] would judicial review of administrative action not be an appropriate chapter of a restatement of administrative law?[22]

In fact, in the area of administrative law courts do more than conduct judicial review of administrative action. As European Union law ventures further and further into private law terrain – as it has done with products liability,[23] consumer contracts,[24] and, more recently, with choice of law in both torts[25] and contracts[26] – courts at the Member State level *are* the administrators of EU law. It is true that in the United States one seldom looks upon civil litigation in areas such as these as administration of the law, but that is what it is. If the Council and Parliament enact a piece of consumer protection legislation giving consumers one or another legal remedy directly enforceable in litigation, the courts become in every sense of the term administrators of EU law. Although a restatement or statement of best practices of EU administrative law would not presume to restate the substantive law of product liability or consumer protection, it could well restate or set forth certain general principles designed to guide courts in their exercise of authority within these fields.

Once defined (with or without including the Council and Parliament acting in co-decision and with or without including the courts), the universe of administrative law still needs to be organized. Indeed, notwithstanding the variety and complexity of administrative processes in the EU, they cannot manageably be addressed without a classification. Although any number of classifications can be imagined,[27] a likely typology – and one that has been provisionally adopted by the ReNEUAL Project – consists of (a) administrative rulemaking, (b) unilateral single-case decision-making, (c) administrative contracts, and (d) information management. These represent the species of administrative action that the ReNEUAL Project regards as most central to European Union administrative procedure.

(1994). See generally, Seerden and Stroink (2002), Schneider (2007–08 forthcoming), Ziller (1993). For judicial review under the applicable APA sections, see Sunstein (1990), Scalia (1989).

[21] See note 3 *supra*, and accompanying text.

[22] According to settled case law of the European Court of Justice, every person enjoys a right to be heard to the extent that an EU act has a serious adverse effect on its interests. See *Al-Jubail Fertilizer Co. v. Council*, Case C-49/88, [1991] ECR I-3187. That right is to be read into every EU law enactment and, as a general principle of law, cannot be legislatively excluded.

[23] Council Directive 85/374/EEC of July 25, 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210/29 (1985), amended by European Parliament and Council Directive 1999/34/EC, OJ L 141 (1999).

[24] Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ L 95/29 (1993).

[25] Regulation EC 864/2007 of July 11, 2007, on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40.

[26] Regulation EC 593/2008 of June 17, 2008, on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6.

[27] The American Bar Association project on The Administrative Law of the European Union was divided into five chapters, based on commonly used US law notions: rulemaking, adjudication, judicial review, transparency and data protection, and oversight.

3.2. Extension to Member State administrative processes

It is a commonplace of EU law that a great deal of the rulemaking activity – and indeed the vast majority of the adjudicatory activity (Jans et al. 2007: 199)[28] – that is predicated on the European treaties and on EU legislation is conducted not at the European Union level, but rather in the Member States and their political subdivisions. Although the implementation of EU law is, to this extent, entrusted to Member State officials, the EU nevertheless retains an obvious interest in ensuring the effectiveness and fairness of the administrative procedures by which Member States implement EU law and policy. It also has an added interest in ensuring that these procedures are both clear and reasonably uniform and predictable across the EU.

Consequently, a consensus has emerged that any attempt at a restatement or a compilation of best practices should include not only rulemaking and enforcement activity at the EU level, but also implementation of EU law norms at the Member State level. However, prescribing administrative process at the Member State level entails some delicate line-drawing. No one contemplates that a restatement or even a set of best practices would prescribe how Member State officials should go about administering purely national law; the principles governing the administration of national law rightly remain the province of national law. Yet, it is also not realistic to expect Member State officials to observe one set of administrative processes for the making and implementing of EU law and another for the making and implementing of domestic law.

Up to now, EU legislation has largely refrained from dictating the particular ways in which Member State officials should make decisions when carrying out EU legal mandates. Indeed, the very notion of a directive is that Member States should enjoy a healthy measure of discretion in determining the means of achieving the objectives of EU legislation taking that form.[29] Bringing consistency to the application of EU law by Member States requires careful thought. The challenge consists of reforming EU law to minimize discontinuities in the administration of EU law across Member States, while at the same time minimizing, within Member States, the discontinuities between the modes by which EU and Member State law are implemented.[30] The solution may lie in (a) establishing general EU principles to guide the implementation of EU law in the Member States, while (b) encouraging the EU to prescribe implementing methods that comport well with Member State practice (provided the efficacy of EU law and policy is not threatened), and (c) fostering the evolution of domestic administrative law to bridge gaps between EU and Member State administrative law methods (Craig 2006: 50; Jans et al. 2007: 5, 8, 35 ff).[31]

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[28] Reference is sometimes made to the European Union's 'enforcement deficit'.

[29] Treaty of Rome Establishing the European Community, Article 249.

[30] The 'ReNEUAL Project' proposes as follows: '[T]his project is not about general harmonising of national administrative law. The best practice guidelines will be used to reduce the complexity of EU law itself.' ReNEUAL, *supra* note 3, n. 5.

[31] One way in which gaps between Member State and EU administrative procedure, and gaps among Member State administrative procedures, can be bridged is through the EU's establishment of a network of national agencies whose implementation of EU law the Commission itself coordinates and supervises. See Craig (2006: 50). Some European administrative law scholars discern a more general 'Europeanization' of national administrative law that extends, through 'voluntary adoption', even to the administration of purely domestic law at the Member State level. See Jans

3.3. The relationship to positive law

A challenge intrinsic to any restatement, in the US sense of the term, consists of the reconciliation of the restatement with positive law. Although instruments like restatements or best practices legitimately aim to rationalize and, within limits, improve the law, they inevitably operate within the confines of certain legal givens. Though driven to bring improvement to the law, the drafters of the American Restatements know that their prescriptions must be consistent with certain norms – at a minimum, established constitutional case law and clear statutory and regulatory mandates. It is only within those confines that innovation can legitimately occur (Bermann 2009).

But in reality European Union administrative law – indeed all of EU law – is based on a complex web of highly detailed treaty provisions and a massive body of secondary legislation. To one degree or another, each of these operates as a constraint on the innovations and improvements that restatements can hope to introduce. Reconciliation of this kind is not a mechanical exercise. Only with resourcefulness and good judgment can restaters determine the latitude that different elements of existing law allow them. Both the utility and legitimacy of restatements and best practices depend on the skill with which the drafters manage this operation.

3.4. The complexity of EU administrative process

Any attempt at restating EU administrative law or fashioning best practices, even strictly at the EU level, must cope with EU administrative law's extraordinary procedural complexity. This can be traced to several causes. In the first place, administrative procedure within the EU has developed as a highly sectoral affair, particularly when it comes to individual decision-making (or, in US parlance, administrative adjudication) (Asimow and Dunlop 2008). Relatively few sectors have adopted something resembling a comprehensive procedural code.[32] The absence of standardization across sectors and the general eclecticism of EU administrative procedure law have allowed the EU administrative process to become, and to remain, deeply variegated (Craig 2006: 279).[33]

Second, even where significant horizontal unification has occurred, complexity reigns, as evidenced by comitology.[34] Even after the 2006 comitology reform[35] and under the

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et al. (2007: 5, 8, 35 ff.). An important ingredient has been the case law of the European Court of Justice requiring that, when implementing EU law, Member State administrations and courts provide procedures and remedies that are equivalent to those they provide for the vindication of domestic law claims and that are in any event effective. See *Edis*, Case C-231/96, [1998] ECR I-4951 (principle of equivalence); *Santex*, Case C-327/00, [2003] ECR I-1877 (principle of effectiveness).

[32] See, for example, Council Regulation 1/2003/EC, December 16, 2002, on the implementation of competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1 (competition law); Council Regulation EC 659/1999, March 22, 1999, laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83/1 (state aids).

[33] Craig identifies the sources of EU administrative law as treaty articles, Community legislation, judicial pronouncements and norms embraced by the Commission and the Ombudsman.

[34] On comitology generally, see Craig (2006: 99–142); Hofmann and Türk (2006: 77–84).

[35] Council Decision 1999/468/EC of June 28, 1999, laying down the procedure for the exercise of implementing powers conferred on the Commission, as amended by Council Decision 2006/512/EC of July 17, 2006, OJ 2006 L 200/11.

comitology provisions of the Treaty of Lisbon,[36] the rules remain extremely complex. With the sub-delegation of delegated powers that will occur under the new comitology regime, the need for guiding principles will only increase (Hofmann and Türk 2009a: 361–2).[37] Much the same can be said of the development of agencies in the EU institutional landscape, another feature of EU administrative law in which a certain degree of harmonization has been achieved. Despite the proliferation of agencies and their superficial commonality, there still do not exist even rudimentary understandings about the principles that should govern the agencies or the principles of accountability that should govern their relationship to existing institutions at the EU level, much less the mechanisms through which to enforce those principles (Everson 2009: 116).[38] Each is essentially fashioned by its enabling regulation.

Although the need for a restatement of principles or a set of best practices that covers comitology and the functioning of agencies is widely acknowledged, they represent only a portion of the problem, and a small portion at that. Daily administration of EU law increasingly entails the use of 'composite procedures', defined by Herwig Hofmann as 'multi-stage procedures with input from administrative actors from different jurisdictions' (Hofmann and Türk 2009a: 365). Because these arrangements do not conform to traditional hierarchical principles of control and coordination, they defy generalization. They also pose a challenge to the supervision of administrative activity and even to the operation of judicial review, and thus indirectly to maintenance of the rule of law. Although what scholars have recently come to call 'integrated' models of administration have been around for a long while (Craig 2006: 94),[39] they are becoming ever more prevalent (Hofmann and Türk 2009a: 365, Jans et al. 2007: 31–2).[40] Thus, the EU administrative process has not only a 'multi-level governance' character, but also a distinctly *ad hoc* one (Chiti 2009: 9; Craig 2009: 34; Hofmann and Türk 2009a: 357). A telling sign of this is the uneven manner in which the EU calls on Member States to monitor the application of EU law on their territory (Jans et al. 2007: 221–5) and the disparate character of the new forms of governance that bring private actors and representatives of civil society into the administrative process (Neuhold and Radulova 2006: pp 44, 58–65).[41] The 'open method of coordination' (OMC), which has emerged as an alternative to traditional hierarchical lawmaking within the EU, deliberately encourages highly variable patterns of decision-making (Craig 2006: 205, 191–233).[42]

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[36] Treaty on the Functioning of the European Union, Articles 289–91.

[37] These authors contemplate 'delegation cascades'.

[38] But see Communication from the Commission to the European Parliament and the Council, European Agencies: The Way Forward, COM (2008) 135 final (March 11, 2008).

[39] The EU's Common Agricultural Policy and its Structural Funds have been operated on this basis nearly from their beginning.

[40] For an example of a recent enactment, see Council Regulation 1083/2006 on general provisions on the European Regional Development fund, the European Social Fund and the Cohestion Fund, OJ 2006 L 210/25.

[41] See also Jans et al. (2007: 12).

[42] OMC has been defined as 'a soft law approach fostered through deliberation, learning, and discourse' (Craig 2006: 205). OMC was itself a response to sectoral peculiarities (becoming entrenched notably in the economic and monetary, employment and social inclusion sectors) and has in turn generated diversified patterns of implementation (Craig 2006: 191–233).

Third, the European Union is a conspicuous administrative law actor on the world stage, perhaps more so than any other polity, including the United States. It participates in a wide variety of international regulatory and enforcement regimes, both bilateral and multilateral. Some of this international activity mimics conventional rulemaking and administrative adjudication. But much of it is *ad hoc*, and much of it is generative only of soft law, at best. Questions are already being raised in Europe (Hofmann and Türk 2009a: 372), as they have been in the US (Bermann 2001: 373), as to whether international regulatory and enforcement cooperation opens up avenues for circumventing or, in any event, weakening, 'constitutional' understandings in domestic law regarding allocations of authority, transparency, participation and accountability (Bermann 1993).[43] While it may be difficult to imagine the Council or Parliament enacting hard law instruments to regularize the EU's administrative activity on the international plane, it is not at all difficult to imagine the development of ground rules for the participation of EU actors in international regulatory and enforcement regimes.[44] The growing international dimension of regulation surely complicates any attempt at restating EU administrative law or establishing best practices, but the challenge is one that a restatement or set of best practices has a possibility of meeting.

Conclusion

The fact that EU administrative law has evolved in the direction of ever greater differentiation is incontestable. If that is one of its strengths, it is also one of its weaknesses. Although such differentiation improves the capacity of the EU administrative process to respond to the need for effective regulation and enforcement across sectors, it has also lessened the intelligibility of the administrative process. While that environment only heightens the difficulties associated with restating the law or setting forth best practices, the system's very complexity and diversification highlights the serious need for just such an instrument.

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[43] See also, Administrative Conference of the United States, Recommendations and Reports 63–172 (1991).

[44] Id.

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35 Adversarial legalism and administrative law in the European Union

R. Daniel Kelemen

European Union (EU) administrative law has tended to promote a juridification of administrative procedures across the Union. This tendency seems puzzling because for more than thirty years, the European Court of Justice (ECJ) has emphasized that member state legal systems enjoy 'procedural autonomy' when implementing acts of Community law, with regard to both the procedures involved and the remedies available to citizens.[1] And yet, despite this supposed procedural autonomy, the EU has developed an extensive body of law guaranteeing European citizens a host of procedural rights and increasingly forcing national authorities to respect common rules of administrative procedure. This 'Europeanization' of administrative law has pressed member states to ensure greater transparency, accountability and access to justice in their administrative processes and has encouraged more searching judicial review of administrative action. The EU has developed an administrative law that applies both to itself when it directly implements Community law and to national administrations when – as is more common – they implement Community law on behalf of the EU. And ultimately, the impact of European administrative law at the national level extends beyond instances in which national authorities are implementing EU law. For once a procedural right or remedy is granted in EU-related matters, it becomes difficult to withhold that right or remedy in purely national matters. As Carol Harlow has put it, EU administrative law 'creates pressure for judicial resolution of every problem and denies its rightful place to the extra legal tradition' (2000: 74). She and other critics worry that this tendency will undermine national administrative traditions that have relied on more informal approaches to redress and will place unsustainable burdens on national judiciaries. Why then has the EU placed so many limits on national administrative discretion and done so much to juridify administrative procedures despite its supposed commitment to national procedural autonomy?

I argue that the EU's approach to administrative law reflects its broader tendency to rely on adversarial legalism as a mode of governance. To understand the development of Europeanized administrative law, therefore, we must understand the political foundations of adversarial legalism in the EU. Adversarial legalism is a term coined by Robert Kagan (2001) to refer to the distinctive attributes of the American approach to

[1] See Case 33/76 *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, especially para. 5 (see Kilpatrick 2000: 3, Himsworth 1997: 296). Case 158/80 *Rewe V. Hauptzollamt Kiel* [1981] ECR 1805, para. 44. Harlow highlights the link between administrative procedures and remedies, in that administrative procedures constitute the means through which individuals can access remedies where their rights are violated. Thus, as she explains, 'the ECJ reads remedy backward to include access' (2000: 74). See also Kilpatrick (2000).

law and regulation.[2] Kagan explains that American legal and regulatory style, which he labels 'adversarial legalism', is characterized particularly by (1) detailed prescriptive rules often containing strict transparency and disclosure requirements; (2) legalistic and adversarial approaches to regulatory enforcement and dispute resolution; (3) costly legal contestation and multi-faceted 'mega-lawyering' techniques; (4) active judicial review of administrative decisions and practices and frequent judicial intervention; and (5) frequent private litigation concerning regulatory policies. By contrast, approaches to regulation that long predominated across western Europe were more informal, cooperative and opaque – relying more on closed networks of bureaucrats and regulated interests and less on the involvement of lawyers, courts and private enforcement actions (Kagan 2001, 2008).

The EU and the process of European integration have encouraged the spread of a European variant of adversarial legalism designed to harness national courts and private litigants for the decentralized enforcement of European law. European integration promotes adversarial legalism through two linked causal mechanisms. First, the construction of the Single Market has depended on an interlinked process of deregulation and juridical reregulation: national regulations that restrict trade are replaced with pan-European regulatory frameworks which – compared to the national regulations they replace – tend to rely on a more formal, transparent approach backed by vigorous legal enforcement. Second, the fragmentation of power in the structure of EU political institutions creates incentives for policymakers to adopt laws with strict, judicially enforceable goals, deadlines and procedural requirements. In particular, policymakers will have incentives to frame legal norms as individual rights that can be enforced by private parties.

These tendencies of the EU have profound implications for administrative law. The reregulation necessary for the creation of the Single Market, coupled with the fragmented nature of EU institutions and public distrust of Eurocrats all encouraged the development of an administrative law that would ensure transparency, accountability, enhanced access to justice and the uniform application of Community law. Actually granting member states autonomy with regard to administrative procedures could have undermined the uniform application of Community law, as some national procedural rules could have made it difficult or impossible to enforce EU rights. By juridifying administrative procedures in this way, EU law has served as a means to limit administrative discretion at the national level and to enhance transparency and access to justice (see Harlow 1998).

The remainder of this chapter is divided into three sections. Section 1 elaborates my explanation of why European integration encourages adversarial legalism. Section 2 describes how the tendency toward adversarial legalism manifests itself in the field of administrative law. Section 3 concludes.

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[2] Kagan's concept of 'adversarial legalism' refers to a broad pattern or style of regulation and should not be confused with the familiar notion of an adversarial or adversary system of justice typical of common law countries (as opposed to the inquisitorial system typical of civil law jurisdictions).

1. Why European Integration Promotes Adversarial Legalism

Adversarial legalism is emerging today in Europe for essentially the same reasons that it emerged decades ago in the US. When a political system fragments regulatory authority between multiple veto players and when these policymakers confront a highly liberalized economy, they have incentives to rely on an approach to regulation that emphasizes transparency, juridification and the broad empowerment of private litigants – in other words 'adversarial legalism' (Kagan 2001: 40–54). This occurred decades ago in the US, and it is occurring today in Europe, largely as a by-product of European integration.

1.1. Economic liberalization

The creation of the Single European Market has required economic liberalization at the national level, coupled with reregulation at the European level. The economic liberalization unleashed by the Single Market initiative introduced new actors, many of them foreign, into previously sheltered domestic markets. For these new market players, opaque systems of national regulation that relied on insider corporatist networks did not ensure a regulatory level playing-field. The opacity of these systems often functioned as a kind of 'non-tariff barrier' to trade, and the very attributes of these systems that many observers had lauded – such as their flexibility and informality – created opportunities for bias in favor of national incumbents and other forms of protectionism. Therefore, advocates of liberalization criticized – and in some cases brought legal challenges against – many aspects of national regulatory systems for their lack of transparency and legal certainty. Moreover, the growing diversity of players in liberalized markets simply rendered traditional systems of regulation ineffectual. The operation of cozy, corporatist regulatory regimes had relied on trust and familiarity amongst repeat players. However, such trust and familiarity dissipated as the range of players involved in regulated sectors grew and became more diverse and fluid.

Policymakers did not simply seek to deregulate, but to replace the increasingly anachronistic national regulatory regimes with EU-level regulatory regimes. The new EU-level regulatory regimes differed profoundly from their national predecessors. The EU followed a dynamic that Steven Vogel (1996, 2007) has identified in a number of political systems, whereby the creation of 'freer markets' actually requires 'more rules', and where deregulation is often followed by 'juridical reregulation'. Following a fundamental insight of the sociology of law, as the social distance and distrust between regulators and regulated actors in larger liberalized markets increased, laws and regulatory processes tended to become more formal, transparent and legalistic (Black 1976). Contracts replace handshakes and courtroom proceedings replace back-room deals. This cycle of market liberalization followed by juridical reregulation creates greater demand for lawyers to protect the interest of their clients through guidance, advocacy and dispute resolution. In short, the growing number and diversity of market players and their demands for a 'level playing-field' undermined informal national styles of regulation and pressured EU policymakers to turn to a more formal, transparent and juridified approach to regulation – an approach bearing many of the hallmarks of adversarial legalism.

1.2. Political fragmentation

The structure of EU political institutions divides power between multiple veto players (Tsebelis 2002). Authority is divided horizontally at the EU level between the Council,

Commission, Parliament and ECJ, and authority is also divided vertically between the EU level and the member states. The EU is also a weak regulatory state, with an extremely limited administrative capacity to implement or enforce its own policies. A large literature suggests that in polities with these institutional characteristics, policymakers will be tempted to rely on approaches to governance associated with adversarial legalism. Thus as EU policymakers have increased the pace and scope of their regulatory activities since the late 1980s, they have done so in a political context that is not conducive to the styles of regulation or 'modes of governance' that had prevailed at the national level but instead encourages them to rely on adversarial legalism as a mode of governance.

Comparative research suggests that the fragmentation of political power is a primary cause of judicial empowerment in general (Shapiro 1981, Ferejohn 2002, Ginsburg 2003) and of adversarial legalism as a policy style in particular (Kagan 2001, Kelemen and Sibbitt 2004). In polities where political authority is highly concentrated, political principals can rely on a variety of non-judicial tools to control their bureaucratic agents (Ramseyer and Rosenbluth 1993: 107–19, Shapiro 1981, Moe and Caldwell 1994). But in political systems where political authority is fragmented, lawmakers have difficulty assembling the political coalitions necessary to pass legislation and to subsequently rein in the bureaucratic agents who implement it. Political fragmentation also insulates the judiciary from political interference and tends to enhance its independence and assertiveness. As a result, lawmakers have an incentive to draft legislation in a manner that will insulate their policies against potential manipulation by the bureaucracy or by political forces that may come to power later and to invite the courts to play an active role in enforcing legislation (Moe 1990, McCubbins et al. 1999, Shapiro 1981, Ferejohn 1995). Therefore, lawmakers will draft statutes that specify in detail the goals to be achieved, deadlines to be met and administrative procedures to be followed. Also, they establish enforceable rights for private parties, empowering them to take legal action to hold the bureaucracy accountable (McCubbins et al. 1987, Moe 1990). When lawmakers rely on such a judicialization strategy as a means to control the bureaucracy, they encourage adversarial legalism.

These dynamics can be seen at work in the EU. Given the fragmentation of power between the EU's major lawmaking institutions (the Commission, Parliament and Council), it is difficult to secure the broad political backing necessary to adopt or amend EU legislation or to exercise political control of national administrations after the adoption of an EU law. At the same time, the fragmentation of power makes it difficult for lawmakers to agree on how or when to rein in the ECJ, and this gridlock emboldens the ECJ to play an active role in the policy process and to make expansive interpretations of EU law (Pollack 1997, Alter 1998, Garrett et al. 1998). Recognizing this, EU lawmakers have incentives to draft EU laws in ways that stipulate in detail the policy objectives that administrative actors must pursue and that invite the ECJ, national courts and private litigants to play a central role in limiting administrative discretion.

The European Parliament recognizes that member states have incentives to shirk their EU commitments, and therefore demand legislation that includes detailed, legally enforceable provisions and individual rights that will encourage the Commission or private parties to take enforcement actions against laggard states (Kelemen 2004, Franchino 2007). The Commission too favors this approach. In particular, recognizing that it cannot enforce all EU law on its own, it supports measures that promote the

decentralized enforcement of EU law by private parties. Even member state governments regularly favor this approach, because they doubt one another's commitment to implementation (Majone 1995). To make their commitments more credible and to hold one another to account, they regularly support strict EU laws that create rights that can be monitored and enforced by the Commission and private parties before European and national courts.

The EU's weak administrative capacity also encourages EU policymakers to rely on adversarial legalism. Compared to the massive scale of the EU's territory and population, the Commission's budget and bureaucracy are diminutive. The EU cannot hope to adopt significant distributive policies or to implement large-scale service programs (Majone 1993). EU policymakers lack even the capacity necessary to enforce regulatory policies from Brussels. Moreover, it is clear that member states are firmly opposed to any major expansion of the EU bureaucracy. Working within the confines of this 'weak state', EU policymakers who wish to affect outcomes 'on the ground' within member states have turned to adversarial legalism. By presenting policy goals as individual rights that private actors and state governments are obliged to respect and that national courts are obliged to enforce, the EU can readily shift the costs of compliance to the private sector and state governments and can rely on national courts as a substitute for EU-level bureaucrats (Dobbin and Sutton 1998). An extensive literature in political science and law demonstrates the leading role played by national-level litigation initiated by private parties in the enforcement of European law (Alter 2001, Cichowski 2007, Conant 2002, Schepel and Blankenburg 2001, Stone Sweet 2004, Harlow and Rawlings 1992, Kelemen 2006, Tridimas 2000: 35).

Finally, mounting criticism of the EU's supposed 'democratic deficit' and public distrust of distant, 'faceless' Eurocrats has further encouraged the spread of adversarial legalism – particularly in the sphere of administrative law. Critics of the democratic deficit have called for increasing transparency and public participation in the EU's regulatory processes (Harlow 1999, Shapiro 2001, Bignami 2004, Hartnell 2002: 81, Schepel and Blankenburg 2001). Opaque regulatory processes that were long tolerated at the national level are deemed unacceptable at the EU level, where voters demand greater transparency. EU policymakers have responded to these demands by putting in place more transparent administrative procedures, more formal procedures for public participation and stronger 'access to justice' provisions (Shapiro 2001, Kelemen 2006).

The argument presented above implies neither that shifts toward adversarial legalism in the EU were caused by the US nor that European legal styles will converge completely on an American model. The American legal system has become the most influential national legal system in the world and many US legal norms have spread to other jurisdictions through a variety of diffusion processes (Mattei 1994, Wiegand 1991, Lester 1988, Ajani 1995, Dezalay and Garth 1995, Kelemen and Sibbitt 2005, Garth 2008). US administrative law has been considered as a model for a nascent global administrative law (Stewart 2005). While various American influences have played some role in the spread of adversarial legalism, American legal style is referred to at least as often as an example of what must be avoided as it is seen as a model of what should be followed. The primary underlying cause of the spread of adversarial legalism in the EU does not involve coercion by, competition with, learning from, or emulation of the US. Rather, adversarial legalism is taking root in Europe because of the shifts in economic conditions

and political institutions described above. As a result, the adversarial legalism emerging in the EU will be channeled through entrenched legal institutions and norms in European states and will emerge with distinctive 'European characteristics' – what we might label adversarial legalism *à la européenne* (Kelemen 2008).

2. Adversarial legalism in European administrative law

As Kagan (2001) explains, for policymakers to rely on adversarial legalism as a mode of governance, they need to put in place laws that establish detailed substantive and procedural requirements, the violation of which can serve as the basis for legal claims. Laws also need to include transparency provisions that make it easier for potential litigants to identify breaches of the law. Finally, framing legal requirements in the language of individual rights will do much to encourage and facilitate enforcement litigation. For the EU to harness adversarial legalism as a mode of governance, EU lawmakers must establish legal norms with these characteristics, giving public and private actors a strong basis on which to bring legal claims.

And they have. EU regulation is replete with detailed judicially enforceable provisions (Kelemen 2006, Senden 2004, Prechal 2005, Dehousse 2008: 95–7), and EU Treaties and secondary legislation establish a host of rights that individuals have been empowered to enforce before national courts (De Búrca 1995, de Búrca and de Witte 2005, de Witte 2005, Geddes 1995, Aziz 2004, Maas 2005). My focus in this chapter is not, however, on the many enforceable substantive legal norms and 'rights' that EU law has established, but instead on the procedural norms and rights the EU has established through its administrative law.

EU administrative law is, for the most part, judge-made law, crafted through the case law of the ECJ.[3] The ECJ did not divine the principles of EU administrative law from the ether. Rather, the ECJ developed its administrative law by borrowing principles from the administrative law traditions of EU member states, above all Germany and France (Harlow 1998, Bignami 2005, Schwarze 2000, Craig 2006: 263–81). But as Jürgen Schwarze (1996, 2000), one of the leading authorities on the Europeanization of administrative law notes, this process of development has undergone an ironic reversal. EU administrative law, which was itself distilled from national traditions, is now reshaping those very traditions, imposing new constraints on national systems of administrative law and encouraging convergence from above (Schwarze 2000: 164–5). As Carol Harlow (1998) puts it: 'In a number of highly publicised cases, rules of national administrative law have been forced to give way before the "superior" legal order'. Bignami (2005) notes that while many of the procedural rights enshrined in EU administrative law have their origins in the national legal traditions of the member states, once transferred to the EU level, 'they display one striking common characteristic: they afford citizens a greater set of entitlements against European government than in their place of origin'.[4]

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[3] EU lawmakers have addressed procedural issues, though not in a comprehensive fashion. For instance, particular substantive directives sometimes include requirements concerning procedures and remedies. Also, there have been a variety of academic efforts to promote common codes of administrative and civil procedure for the EU (Storme 1994, Hartkamp et al. 2004).

[4] One important exception to this trend can be found in the ECJ's jurisprudence on standing (*locus standi*). In a series of decisions dating back to *Plaumann* (Case 25/62 *Plaumann &*

Two legal principles – the principles of equivalence (which requires that national systems of administrative law can not make it harder to exercise EU rights than purely domestic rights) and effectiveness (demands that domestic administrative procedures must not make it excessively difficult or practically impossible to exercise EU rights) – together provide the foundation stones upon which the edifice of EU administrative law is built (Kilpatrick 2000: 3, Hartnell 2002: 120–21).[5] These seemingly minor exceptions to the general rule that states should have procedural autonomy have opened the door to significant ECJ influence over national administrative procedures and remedies.

In the 1980s and 1990s, the ECJ asserted an interventionist interpretation of effectiveness, ruling that national courts were obliged to ensure the full and effective protection of EU rights – altering national rules of administrative procedure or rules concerning remedies where necessary to do so. To ensure this full and effective legal protection, the ECJ has imposed on national administrations a number of requirements concerning national procedural rules and remedies (see, for instance Van Gerven 1995, Eilmansberger 2004, Prechal 2005, Curtin and Mortelmans 1994, Szyszczak 1996). For instance, the ECJ restricted or outlawed national rules that limited the availability of judicial review of administrative acts (*Johnston*[6]), that imposed time-limits for instituting judicial proceedings (*Emmott*[7] and *Levez*[8]), that restricted interim injunctive relief for plaintiffs while litigation was pending (*Factortame*[9]), or that limited state liability (*Francovich*[10]). The ECJ has both pressed national courts to lift restrictions on damages imposed by national legal systems and established the principle of member state liability for breach of Community law. In *Von Colson*,[11] *Dorit Harz*,[12] and later in *Johnston*,[13] the

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Co. v. Commission [1963] ECR 95), the ECJ has restricted the standing of private parties to challenge the legality of Community acts (see Craig 2006: 331–47). There is a marked inconsistency between the ECJ's effort to restrict private parties from challenging acts of Community lawmakers, on the one hand, and its effort to encourage access to justice and accountability of national administrations, on the other. The political and institutional context of EU law helps to explain this inconsistency and to explain why the ECJ is so eager to channel individual legal claims through the national courts (relying on the preliminary ruling procedure). If the ECJ relaxed standing requirements for individual claimants, it would risk being overwhelmed by a flood of cases (as the European Court of Human Rights has been). Moreover, encouraging private plaintiffs to circumvent national courts and to come directly to European courts could undermine the cooperative relations between European and national courts that underpin the EU legal system. The Treaty of Lisbon promises to partially relax standing requirements for individual claimants seeking to challenge Community regulatory Acts (see Article 263).

[5] Harlow (2000); Lenaerts and Vanhamme (1997). See for instance, Case C-120/97 *Upjohn Ltd. v. The Licensing Auth. Est. by the Medicines Act of 1968*, 1999 ECR I-223, para. 32; and Case-228/98 *Charalampos Dounias v. Ypourgos Oikonomikon*, 2000 ECR I-577, para. 58.

[6] Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

[7] Case 208/90 *Emmott v. Minister for Social Welfare and Attorney-General* [1991] ECR I-4629. But see Flynn (2000) for discussion of subsequent ECJ retrenchment on the issue of national time-limits.

[8] Case C-326/96 *Levez v. T.H. Jennings (Harlow Pools) Ltd.* [1998] ECR I-7835.

[9] *R v. Transport Secretary, ex parte Factortame* (No. 1) [1990] 2 AC 85.

[10] Joined Cases 6, 9/90 *Francovich and Bonafaci v. Italy* [1991] ECR I-5357.

[11] Case 14/83 *Von Colson and Kamman v. Land Nordrhein-Westfalen* [1984] ECR I-1891.

[12] Case 79/83 *Dorit Harz v. Deutsche Tradax GmbH* [1984] ECR I-1921.

[13] Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

ECJ ruled that when enforcing directives, national courts must provide for effective remedies – adequate to achieve the aims of the EU directives. In *Marshall II,*[14] the ECJ ruled that states must provide full compensation for damages resulting from violations of the Equal Treatment Directive, and therefore could not maintain statutory damage caps (for further discussion, see Craig and de Búrca 2008: 309–20). In a series of decisions beginning with *Francovich,*[15] the ECJ established the principle that member state governments could be held liable for damages that private parties suffer as a result of the member state breach of EC law – and that member state courts must provide for that remedy (Craig and de Búrca 2008: 329–34). European courts have increased the scope for damage claims not only against national governments but against the EU administration itself. In *Schneider*,[16] the Court of First Instance (CFI) ruled that where European Commission merger or antitrust decisions are later overturned by European courts, the Commission may be forced to compensate firms for losses caused by those wrongful decisions.

Also, the ECJ has extended one of the few administrative law provisions explicitly mentioned in the EU Treaties – the Giving Reasons Requirement. Article 253 (ex Article 190) of the EU treaties requires that organs of the European communities 'give reasons' for their rulemaking decisions.[17] The 'giving reasons requirement' is a powerful tool of judicial oversight, strengthening both the transparency and accountability of the administrative process. By the mid-1990s, the ECJ and CFI had moved to a strict reading of the giving reasons requirement, engaging in detailed analysis of the reasons given by the Commission for its decisions and rejecting those it found inadequate (Shapiro 2001: 103–04). Likewise, the ECJ has extended the giving reasons requirement to national administrations on matters that affect EU law (Schwarze 2000: 170). The ECJ has also encouraged the spread across Europe of a 'proportionality test' for discretionary administrative decisions – demanding that national courts assess whether an administrative measure imposed a burden on the individual suitable, necessary and *proportional* to the objective sought (Craig and de Búrca 2008: 322–3, 545). By spreading the principle of proportionality across the EU, the ECJ has invited courts to engage in stricter judicial scrutiny of discretionary administrative decisions.

How can we explain the development of EU administrative law and its impact on national legal systems? Certainly, there is a clear line of legal reasoning behind the trajectory of ECJ jurisprudence. In a sense, the very notion that one level of governance (the EU level) could establish and guarantee substantive rights while another level of governance (the national level) maintained exclusive control over procedures and remedies was implausible from the outset. If national procedures governing the exercise of EU rights or national remedies for breach of those rights were inadequate, this could render EU rights dead letters. Arguably, it is the role of individual rights that distinguishes the EU legal system from other international or supranational legal orders and gives it its unique quasi-federal character. Again and again, EU policymakers and the ECJ have relied on the need to ensure effective judicial protection of those rights to justify the EU's

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[14] Case C-271/91 *Marshall v. Southampton and SW Area Health Authority* [1993] ECR I-2367.
[15] Joined Cases 6, 9/90 *Francovich and Bonafaci v. Italy* [1991] ECR I-5357.
[16] Case T-351/03 *Schneider Electric SA v. Commission* [2007] ECR II-02237.
[17] This requirement in effect establishes a right for parties involved in those proceedings to be given a reason for the administrative decision.

incursion into the legal systems of its member states (Ward 2007: 1–15, Burley and Mattli 1993). In the field of administrative law, national procedural autonomy threatened to undermine the rule of law in the EU and the fundamental legal principle of *ubi jus, ibi remedium* – for every right, there must be a remedy.

If the EU was serious about guaranteeing EU citizens' rights, it had to guarantee them access to justice and remedies as well and had to demand changes in national administrative procedures where necessary to do so (Kilpatrick 2000: 6; Himsworth 1997). Thus it took only a very small doctrinal leap for the ECJ to assert that national courts must ensure full and effective protection of EU rights, offering individuals the opportunity to assert those rights and offering them adequate remedies where those rights were violated. The ECJ moved slowly, but ineluctably to this conclusion and national procedural autonomy has been steadily reduced in the process (Harlow 2000: 72).

But we must move beyond purely legal account and consider the political context of the development of EU administrative law. Doing so, we can see that trends in the development of EU administrative law are consistent with the explanation of the spread of adversarial legalism in the EU presented above. Martin Shapiro has offered an analysis of the development of EU administrative law that is entirely consistent with this argument. Shapiro explains that the development of EU administrative law in the 1980s and 1990s was driven by the confluence of two cross-cutting phenomena: (1) a need to adopt a 'huge apparatus of European-wide regulations' to help complete the common market; and (2) a growing distrust of technocracy and growing demand for transparency and participation. Shapiro argues that in the EU of the 1980s and 1990s, as in the US of the 1960s and 1970s, the judiciary interposed itself in the administrative process of market building, addressing public concerns over the regulatory process and business demands for a level playing-field by developing principles of administrative law that emphasize transparency and accountability. Shapiro specifically links these trends to the fragmented structure of the European Union and its 'distance' from citizens and regulated entities. Shapiro's analysis is worth quoting at length:

> The very indirectness, peculiarity, and complexity of Union decision-making processes acutely raises the problem of transparency. . . [At the national level] government regulators and business managers meet in closed and confidential sessions and collaboratively work out regulatory compliance arrangements. When regulation moves from national capitals to Brussels, some degree of opening and distancing takes place. . . . [A]s corporate managers begin to feel a little less intimately connected to regulators, the charms of transparency and participation grow. Specifically for Union administrative law, all this means that not only the generalized anti-technocratic sentiment generally presses for pluralist transparency and participation changes in administrative law but also that there are particular persons with particular money to hire particular lawyers to bring particular lawsuits designed to persuade particular judges to produce a new administrative case law of the Union which will guarantee those now less on the inside what they now need: transparency and participation. (Shapiro 2001: 97–8)

In short, with the single market project, the EU took on an ambitious program of reregulation at the EU level. It did so in a political context characterized by fragmentation between major political institutions and growing public distrust of distant Eurocrats. This bred demands for transparency and public participation that then manifested themselves in developments in EU administrative law. EU lawmakers and the ECJ developed an administrative law suited to the new regulatory environment, and in the

process they created ample new bases for administrative law litigation and control of the national bureaucracies through adversarial legalism.

3. Conclusions

The emergence of aspects of 'adversarial legalism' in EU administrative law reflects a much broader trend toward adversarial legalism in EU governance. These developments are most evident if we examine developments in particular policy areas such as disability policy, anti-discrimination policy, competition policy, securities regulation, environmental policy or consumer protection (Kelemen 2006, 2008). But the shift toward adversarial legalism is also evident in the development of civil procedure (Hartnell 2002, Hodges 2009, Kelemen 2008) and administrative procedure (Shapiro 2001). Across these areas of law, the EU has sought to regulate a liberalized economy with a weak and highly fragmented set of political institutions. In this context, policymakers have had incentives to rely on adversarial legalism as a mode of governance. Administrative and civil procedures have emerged as a lynchpin of this mode of governance. Uneven and/or inadequate national procedural rules (either administrative or civil procedures) can stand in the way of individuals realizing their EU rights and thus undermine efforts to encourage private enforcement of EU law. Moreover, given public suspicions of the EU regulatory process, there was pressure to promulgate procedural rules that would ensure transparency and accountability at all stages of the EU regulatory process. In their effort to ensure uniform and effective access to justice for individuals and to ensure transparency and accountability of regulators, EU lawmakers and courts have established a body of administrative law that encourages adversarial legalism.

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36 Supranational governance and networked accountability structures: Member State oversight of EU agencies

Johannes Saurer

The most remarkable recent development in EU administrative law is the widespread establishment of European agencies. Beginning in the early 1990s, EU agencies emerged as significant actors in a number of areas, including trademark law, pharmaceutical licensing and aviation safety. EU agencies are best understood, however, not as autonomous regulators at the federal level, but as the most recent expression of European governance through administrative networks. The regulatory intertwining of supranational and national authorities in the EU is significantly different from the division of authority between federal and state bureaucracies in the United States federal system (Peters 2006). Hence, the accountability of European agencies to the EU and to Member States has unique features that can be traced to the dynamics of European integration. Accountability is largely a function of networked institutional relations that link European administrative entities to both supranational and national forums of accountability (Hofmann 2008: 671, Vos 2005: 125 ff.). This chapter concentrates on the second form of accountability through an in-depth exploration of the way Member States oversee EU agencies. Oversight, here, covers monitoring, hearings, budgetary reviews or judicial actions, as well as procedural constraints.[1]

Section 1 locates the EU agencies within the emerging networks of the EU administrative sphere. Section 2 provides an overview of the unity and diversity of the accountability architecture of the European agencies. Section 3 examines the oversight competences and activities of the Member States, distinguishing internal and external oversight mechanisms. Section 4 reflects on the consequences of this oversight for the theory and practice of administrative accountability in EU administrative law.

1. The transformation of European administration: from the paradigm of indirect administration to the governance of administrative networks

A distinctive feature of European governance (Möllers 2006) is the way in which the various levels of government share responsibility. Traditionally, the supranational level was responsible for policy formulation and legislation, while the Member States were responsible for implementation and administrative adjudication under the model of 'indirect administration'. National authorities acted as agents for both domestic and European policy implementation (Mehdi 2007). EU institutions carried out a few tasks themselves (for example, in competition law, agriculture and state subsidies); these

[1] For a similar inclusive concept of 'oversight', see de Wet (2008: 1991 ff.), Lindseth et al. (2008:7 ff.), for the distinction between 'oversight' and 'accountability', see Harlow (2002: 146).

were seen as exceptions to the rule. For many years, institutional reform stalled in the light of the 1958 *Meroni* jurisprudence,[2] in which the European Court of Justice (ECJ) articulated rather strict limits for the delegation of administrative powers (Schneider 2009: 34 ff.). However, as European integration came ever closer, the scope of tasks to be fulfilled at the EU level enlarged tremendously, in terms of both regulation and adjudication. European structures increasingly influence national administrations. The EU directly assigned more and more tasks to supranational actors – particularly to actors other than the Commission. EU administration developed into a networked form of governance with extensive interplay and interconnection between national and supranational authorities (Weiss 2009, Ruffert 2007). A recent study located three forms of networked administrative governance: EU agencies that rely on contributions from national authorities, institutionalized networks of national authorities (for example, the network of European competition authorities), and the Open Method of Coordination (especially in the area of social policy) (Sabel and Zeitlin 2008: 278–92). A common feature of those institutions is the existence of committees that are closely associated with the formal decision-making bodies and subject to various attempts in the direction of procedural rationalization (Szapiro 2009). The EU agencies emerged gradually from humble beginnings in the 1970s (when only two information-managing agencies existed) into a broad and diversified set of more than 30 EU agencies at present.[3] This evolution occurred even though the European treaties contain no explicit provisions foreseeing the establishment of supranational agencies or – until recently – providing for their control.[4] Today, the tasks and competences of the various agencies are remarkably diverse and are having a growing impact on EU citizens and enterprises (Craig 2006: 148 ff., Saurer 2009: 440 ff.). Illustrative examples of significant opinion-giving agencies are the European Agency for the Evaluation of Medicinal Products (EMEA) and the European Food Safety Agency (EFSA). Agencies entrusted with formal decision-making-powers are the Office for Harmonization in the Internal Market (OHIM), the Community Plant Variety Office (CPVO) and the European Aviation Safety Agency (EASA). The EASA is the first agency with an actual licensing competence, issuing *inter alia* type-certificates for airplanes and environmental certificates. However, many agencies are organizationally weak, with relatively small staffs of no more than about 500 employees. As a consequence, there is a huge practical need for cooperation with the Member State administrations, for example through national representatives on scientific committees that operate within the organizational structure of the agencies.

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[2] Cases 9/56 and 10/56, *Meroni & Co., Industrie Metallurgiche, SpA, v. High Auth. of the European Coal & Steel Cmty*., 1958 ECR, 11, 53.

[3] European Agencies – The Way Forward, at 5 ff., COM (2008) 135 final.

[4] For a complete register of the existing EU agencies see http://europa.eu/agencies/index_en.htm (last visited 27 August 2009); on the reforms through the Treaty of Lisbon, (see infra at Section 3.2.1).

2. The accountability framework of European agency administration

2.1. The multi-principals system

The emergence of administrative networks as the paradigmatic feature of European administrative law is paralleled by evolving structures of networked accountability (Harlow and Rawlings 2007). This is particularly true for EU agencies. Whereas in the United States, the federal agencies are accountable to the President and Congress as their two major principals (see Section 4.1), there is no identifiable hegemon in the European multi-principals system (Dehousse 2008, Weiler 1991: 2413–31). On the supranational scale, the EU agencies are held accountable to the Council, the Commission and the European Parliament, all of which play important roles in both ex ante and ex post accountability.[5] In addition, institutions such as the Court of Auditors and the European Ombudsman, which deploy particularly evaluative and communicative *soft law* tools, are becoming increasingly significant.[6] Finally, Member State governments seek to control agency activities.

2.2. Unity and diversity of accountability designs

All European agencies share a core set of common institutional features, including the limited mandate for each agency laid down by its establishing secondary legislation. Generally, agencies have a dual management structure with a management board and an executive director. However, the accountability provisions are remarkably diverse when one considers aspects such as the availability of access to boards of appeal and judicial review. For example, the basic regulations of several powerful agencies with legal decision-making competences include detailed and layered systems of administrative appeal and judicial review. These mechanisms, included in secondary legislation, are found, for example, at OHIM and EASA, and, most recently, at the European Chemicals Agency.[7] However, outside those agencies, protection of individual rights is much more complicated in agencies that have no agency-specific review mechanisms. Several recent judgments document the problems that can arise. For example, in the *Olivieri* case, the Court of First Instance (CFI) denied the admissibility of an action against the scientific opinion of the EMEA, noting that a legal challenge would be possible against the final decision of the Commission.[8] The European courts issued a similar judgment with respect to the EFSA (Alemanno and Mahieu 2008). In the *Artegodan* case, however, the CFI acknowledged the factual significance of a scientific opinion of a subcommittee of the EMEA and held that effective review requires exploration beyond the Commission's formal decision into the findings of the agency and its committee.[9] As I discuss below,

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[5] See, for example, Interinstitutional Agreement Between the European Parliament, the Council and the Commission on Budgetary Discipline and Sound Financial Management, 2006 OJ (C 139) 1 (EC).

[6] European Court of Editors, Special Report No. 5/2008: The European Union's Agencies: Getting results; EU Ombudsman, Annual Report 2005: 160; id., Annual Report 2006: 74.

[7] Council Regulation (EC) No. 40/94, art. 63 (1) (OHIM); Parliament and Council Regulation 216/2008, art. 50 (2) (EASA); Parliament and Council Regulation 1907/2006 (EU), art. 94 (ECHA).

[8] Case T-326/99, *Nancy Fern Olivieri v. Commission*, 2000 ECR II-1985.

[9] Case T-74/00, *Artegodan GmbH v. Commission*, 2002 ECR II-494, at 197–200.

the recent judgment of the Court of First Instance in the *Sogelma* case is particularly important (Section 3.2.1).

3. Mechanisms of Member State oversight

The following section reviews the oversight competences and activities of the Member States. The analysis proceeds in two major parts – distinguishing internalized and external oversight mechanisms. 'Internalized' mechanisms are built *into* the institutional architecture of an agency. 'External' oversight mechanisms, on the contrary, cover instruments of control and accountability that the Member States deploy outside the agencies' organizational framework.

3.1. Internalized mechanisms of Member State oversight

3.1.1. Management and administrative boards A first line of internalized oversight is the representation of the Member States on the agencies' management and administrative boards.[10] The powers of these boards include the appointment of the executive head of the agency and competences related to the budget and the working procedures. The representational structures vary among the agencies, but the most common model guarantees one representative from each Member State. For example, the basic legal framework of the EASA explicitly states that the 'Member States should be represented within a Management Board in order to control effectively the functions of the Agency'[11] – and thus follows the rule of one seat per Member State. The same mechanism applies to the EMEA. Most boards also include representatives of the Commission, the European Parliament and societal actors, mostly from affected interest groups such as (in the case of EMEA) patients, doctors, and veterinarians. In terms of institutional dynamics, the ongoing dominance of Member State representatives on the Management Boards appears to be the result of the dominance of the Council vis-à-vis the Commission (and the European Parliament) in the institutional bargaining process that determines the EU administrative structure. The Council, as a representative of the Member State governments, seeks agency control through management boards dominated by Member State representatives, and through the integration of national regulatory authorities into agency operations via a hub-and-spoke model (Kelemen 2005). The Commission pressed largely unsuccessfully for a more professional and scientific model favoring professional experts instead of nation state representatives.[12]

The one major exception to the rule of one representative per Member State is the European Food Safety Agency (EFSA), which was created in 2002. During the establishment process, the Commission drew on growing public concerns about food safety and succeeded in promoting its ideal of enhanced independence in the agency architecture

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[10] The terminology varies: for examples of 'management boards' see the following paragraphs, the term 'administrative board' is used, for example, at the Community Fisheries Control Agency and the European Maritime Safety Agency.

[11] See Parliament and Council Regulation 216/2008, reason (23).

[12] See 'The Operating Framework for the European Regulatory Agencies', at 9, COM (2002) 718 final; see also Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies, art. 11(5), COM (2005) 59 final.

(Dehousse 2008: 798). Thus, the EFSA's enabling act stresses that the Management Board should be appointed in a way to secure the highest standard of competence and a broad range of relevant expertise, and it sets up a rotation mechanism among the Member States to fill the 14 seats on the Management Board.[13]

3.1.2. Expert committees A second internalized oversight mechanism is the numerous committees that are built into the operational structures of most EU agencies. As a consequence of the small number of directly employed staff, agencies rely on a large number of scientific and expert committees mostly comprised of national representatives, oftentimes officials from the corresponding national sectoral administrations. For example, in evaluating pharmaceuticals the EMEA regularly entrusts scientific committees with developing and giving substantive opinions, including a recommendation to the Commission to either grant or refuse the permission.[14] The final market authorization takes the form of a decision issued by the Commission, but it usually follows the recommendation of the agency's expert committees (Sabel and Zeitlin 2008: 284). Another illustrative example is the air safety agency, EASA. Before issuing rules or making other important decisions, it consults with two bodies comprised of members of national aviation authorities and of private experts from the airplane industry. The committee structure supplements other types of cooperation, including information exchange and infrastructural resources administered by national aviation authorities. Given the small administrative bodies of the European agencies, the committee procedure has become an important mechanism for incorporating external expertise. Making use of knowledge and experience from the Member States appears to deal efficiently with the scarcity of the agency's own human resources. Integrating national officials into the agency's licensing procedure also enables Member States to exercise informal control over the day-to-day practice at the European level (Chiti 2004: 45, Craig 2006: 178).

3.2. External mechanisms of Member State oversight

3.2.1. Judicial review Member States can seek judicial review of agency actions. The Treaty of the Functioning of the European Union (TFEU) – established through the Treaty of Lisbon as the successor of the former EC Treaty – grants Member States privileged standing to bring an action for annulment.[15] Moreover, as a result of the Lisbon treaty reform, the European treaties for the first time explicitly allow for actions of annulment against EU agencies.[16] The new provision is fully in line with the most recent jurisprudence of the European courts. Most importantly, in 2008 the Court of First Instance applied the holding of the seminal *Les Verts* case of 1986 to European agencies.

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[13] Regulation (EC) No. 178/2002 of the European Parliament and of the Council.

[14] The four committees deal with medicinal products for human use (CHMP), medicinal products for veterinary use (CVMP), orphan medicinal products (COMP) and herbal medicinal products (HMPC).

[15] Art. 263 TFEU; for earlier acknowledgements, see Case 131/86, *United Kingdom v. Council*, 1988 ECR 905, at 6; Case 41/83, *Italy/Commission*, 1985 ECR 873, at 30.

[16] Art. 263 (1) TFEU reads: 'The Court of Justice (. . .) shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'.

In *Les Verts*, the ECJ, on the premise of a 'Community of Law', extended the action for annulment to actions of European institutions not explicitly mentioned in the relevant treaty provision (then Article 173 EC).[17] In *Sogelma*, the CFI extended *Les Verts* to any EU institution as long as they are 'endowed with the power to take measures intended to produce legal effects vis-à-vis third parties'.[18]

The Treaty of Lisbon also improves the availability of judicial review of agency actions taken in the 'area of freedom, security and justice'. Most importantly, the reform treaty transfers the policy of the former 'third pillar' from intergovernmental co-operation between Member States to what is traditionally known as the 'Community method'. As a result of this incorporation, the actions of agencies such as Europol and Eurojust become subject to the 'regular' mechanism of judicial review based on Article 263 TFEU. Prior to the Treaty of Lisbon, the availability of judicial review was a source of contention. Before the ECJ, the issues at stake have been discussed, most prominently in the case *Spain v. Eurojust*.[19] The plaintiff, supported by Finland, challenged a call for recruitment of temporary staff issued by Eurojust. The action was brought to the ECJ mainly because of language requirements in the application process that allegedly disadvantaged non-native English speakers. Spain argued for the admissibility of the action on the ground that because the EU is a 'community based on the rule of law', no action of a European institution with legal personality can be excluded from judicial review.[20] Similarly, Advocate General Poiares Maduro concluded that the Court should extend the reasoning in *Les Verts* from the EC treaty to the intergovernmental area.[21] To the contrary, the ECJ declared that the action was inadmissible. The Court particularly relied on textual and structural arguments related to then Title VI of the EU treaty.[22]

3.2.2. Oversight through political processes Significant oversight activities also occur in the political processes inside Member States. In particular, national legislatures are taking an increasingly vigilant approach towards the EU agencies. They demonstrate the power of negative publicity as a form of sanctioning despite the lack of a formal retribution (Harlow and Rawlings 2007: 545). Political oversight exercised by Member State legislatures focuses on both the overall agency system and its day-to-day practices.

Both chambers of the federal legislature in Germany, the largest EU Member State, have recently criticized the entire agency system. In 2008, the *Bundestag* thoroughly explored the EU agency system. The federal parliament distinguished ordinary 'regulatory agencies' from the few 'executive agencies' that were created with limited powers through Council Regulation (EC) 58/2003 (Craig 2006: 153). It deemed that only the latter were not problematic and questioned the legality of the regulatory agencies by pointing to the principle of subsidiarity (Deutscher Bundestag 2008: 3).[23] The *Bundestag*

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17 Case 294/83, *Parti Ecologiste 'Les Verts'*, 1986 ECR 1339, at 21, 23–5.

18 Case T-411/06, *Sogelma v. European Agency for Reconstruction*, 2008 ECR II-2771, at 37.

19 Case C-160/03, *Spain v. Eurojust*, 2005 ECR I-2077.

20 Id., at 32–4.

21 Id., Opinion of AG Poiares Maduro, at 11–25.

22 Id., at 38.

23 For judicial discussions of subsidiarity see, for example, ECJ, C-377/98, 2001 ECR I7079, at 30–33 and – from the (German) Member State perspective – Bundesverfassungsgericht, Judgment

argued for enhanced parliamentary controls over all regulatory agencies, in particular, by giving enhanced powers to the European Parliament in the appointment of executive directors. The *Bundestag* also urged that each regulatory agency be subordinated to the oversight of a single European Commissioner (id.). Perhaps even more critically, the *Bundesrat* – the second chamber of the federal legislature representing the 16 German states (*Länder*) – called into question not only the 'regulatory' but also the 'executive' European agencies (arguing in terms of subsidiarity, proportionality, de-regulation and de-bureaucratization).[24] A salient issue was the lack of a coherent system of judicial review.[25] The *Bundesrat* called for a moratorium on the further establishment of EU agencies. Regulatory agencies should only be established in exceptional cases on the basis of extensive cost-benefit-analysis by external institutions. Along these same lines, the French *Assemblée Nationale* recently started its own extended inquiry into the entire European Agency system (Rapport 2006). Its report questioned the overall performance and, in particular, the legal framework of EU agencies. The French pushed for a thorough evaluation of the agency system by the Commission, and the agencies were urged to make information on their work available in the languages of all Member States (Rapport 2006: 85).

The British House of Commons has also recently scrutinized the general EU agency system (House of Commons 2008: 7–10). More specifically, the Transport Committee explored the organization and work practice of the EASA (House of Commons 2006: 13–22) and summoned the head of the national British Civil Aviation Authority – widely acknowledged as a worldwide authority in its field – representatives of pilots and aircraft engineers organizations, and several experts from the social sciences. The Committee was not satisfied with the performance of the EASA, decrying the fact that the speed of rulemaking had slowed down since it was transferred from the British to the European level (id.: 17). In the highly technical and evolutionary field of aircraft safety, this raised worries about keeping pace with the necessary standards (id.:17). Other concerns pertained to a lack of responsibility among the EASA staff, the personnel choices of the management board, as well as the deficiencies in the personal and technical resources that EASA needed to manage its current tasks (id.:15). In the conclusion to its assessment, the British Parliamentary Committee stated in drastic words: 'It is with dismay that we have learnt of the chaotic state of the European Aviation Safety Agency (EASA), which at this time is not able to fulfill its declared purpose. EASA is an accident waiting to happen – if its problems are left unchecked, we believe it has the potential to put aviation safety in the UK and the rest of Europe at risk at some point in the future' (id.: 16).

The Committee also warned against transferring further powers from the national level to the EU agency, stating that '[t]he United Kingdom cannot and must not transfer any further powers from the CAA to EASA until the Government is assured that the serious problems of governance, management and resources at EASA have been resolved', expecting assurances from the Minister on the topic (id.:16). It urged the

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of 30 June 2009, 2 BvE 2/08 et. al., at 240, 251, 304 f. (on the Treaty of Lisbon); English translation available through http://www.bverfg.de.

[24] Bundesrat; BR-Drs. 228/08 (B), 4–5 (2008); for a corresponding earlier statement, see BR-Drs. 168/05 (2005).

[25] BR-Drs. 228/08 (B), 7 (2008) and earlier BR-Drs. 134/08 (B).

British government to work towards resolving the operational problems of EASA. Faced with these charges, the British government took various actions. About six months later, it claimed to have 'played a leading role in improving the performance of the EASA' and announced that it would 'continue to take steps to ensure that the Agency is firmly established as a properly resourced and high performing safety regulator' (House of Commons 2007: 3). The United Kingdom pointed especially to the influential work of their member on the EASA Management Board to improve manpower, planning, and risk management (id.:5). In addition, the British government stressed the close informational and personal exchange of the EU agency and its national equivalent (id.: 5).

4. Conclusions

4.1. Dominance of Member States as a genuinely supranational feature

The analysis demonstrates the important role that the Member States play in overseeing EU agencies. Through various oversight mechanisms the Member States have emerged as the agencies' most visible critics. Moreover, the dominance of the Member States constitutes a genuinely supranational form of accountability. The significance of the Member States becomes particularly clear in comparison to state control of federal actions on the national level, for example, in the United States and in Germany.

First, the US administrative system allocates authority through a divided federalism that formally segregates central, and state bureaucracies (Peters 2006, Halberstam and Hill Jr. 2001). Accountability at the federal level operates vertically through oversight structures that hold the federal agencies accountable to the federal political branches, namely the President and Congress. Unlike the EU Member States, the 50 States of the US traditionally have little or no power to oversee the federal agencies (Geradin 2005: 236 ff.). This difference in the accountability environment is especially interesting once one recognizes that the European agency model was initially inspired by US models before taking on its novel, networked form. Since the 1980s, vertical accountability in the US has even increased, particularly through extending the influence of the President. Since the Presidency of Ronald Reagan, various institutional and substantial reforms added up to the movement toward 'Presidential Administration' (Kagan 2001). The most significant elements of this process, mostly promulgated through Executive Orders, include the establishment of the Office of Information and Regulatory Activities (OIRA) in the Office of Management and Budget (OMB), along with increasing emphasis on cost-benefit analysis and growing Presidential attempts to intervene in agency rulemaking (Kagan 2001: 2277 ff., 2285 ff., Geradin 2005: 237 f.).

In contrast, efforts by the American States to control the federal government appear to be relatively insignificant. They mostly take the form of political interventions, such as meetings of the National Governors Association that discusses and comments on federal policies that affect the states, for example, in the area of environmental policy.[26]

However, an interesting recent development with the potential to produce more active State oversight of federal agencies is the judgment of the US Supreme Court

[26] See, for example, the list of policy positions of the NGA – Natural Resources Committee – available through http://www.nga.org (last visited 26 August 2009), which includes statements related to the EPA's policy, for example under the Clean Air Act and the Endangered Species Act.

in *Massachusetts v. EPA* (2007).[27] Here, the Court granted standing to the State of Massachusetts to sue the EPA for its failure to regulate CO_2 emissions relating to global warming. The Court started from the notion of 'the special position and interest of Massachusetts'.[28] It significantly relaxed the standing requirements for States vis-à-vis those for individuals, as set out, for example, in *Lujan v. Defenders of Wildlife*. The *Lujan* Court stated that the 'irreducible constitutional minimum of standing contains three elements', namely (1) that 'the plaintiff must have suffered an "injury in fact"', (2) a 'causal connection between the injury and the conduct complained of', and (3) that it 'must be "likely" as opposed to merely "speculative", that the injury will be "redressed by a favorable decision"'.[29] Thus, *Massachusetts v. EPA* (by granting standing on the basis of Massachusetts' geographical conditions) could be understood as allowing States to exercise oversight powers over federal agencies using the trigger of Supreme Court review.

In the German federal administrative law system, agency-related oversight also differs tremendously from the European structures.[30] It is almost exclusively practiced through mechanisms at the federal level. First, the few federal agencies that have existed for several decades, such as the *Bundeskartellamt* (Federal Cartel Office), are subject to general instructions from the Federal Ministry of Economics and Technology.[31] Second, several more recently established autonomous federal agencies, including the *Bundesagentur für Arbeit* (Federal Employment Agency) and the *Bundesfinanzagentur*, which is the central service provider for federal borrowing and debt management, possess similar properties. The agency with the broadest-ranging tasks is the *Bundesnetzagentur* (Federal Network Agency), the central regulatory institution for German electricity, gas, telecommunications, postal and railway markets.[32] The oversight process of the *Bundesnetzagentur* takes place almost exclusively at the federal level. For example, the agency is subject to detailed instructions from the Federal Ministry of Environment and the Federal Ministry of Economics and Telecommunications.[33] According to the constitutional principle of the 'prohibition of mixed administration'[34] and the constitutional clause assigning specific infrastructural tasks to the federal level (Article 87 f (2) Grundgesetz), there is almost no role for the German States in overseeing the *Bundesnetzagentur.* As a modest concession to the States, an Advisory Council was created that is comprised of members of both the *Bundestag* (federal parliament) and of the *Bundesrat* (federal chamber representing the *Länder*). Moreover, a Coordination Committee coordinates

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[27] *US Supreme Court, Massachusetts v. EPA*, 127 S. Ct. 1438, 1451 (2007).

[28] Id., 127 S. Ct. at 1454.

[29] J. Scalia (Opinion of the Court), 504 US 555, 560–61 (1992).

[30] For bilateral comparisons of German and US federalism, see Halberstam and Hills, Jr. (2001), Rose-Ackerman (1994: 85 ff.).

[31] The agency operates essentially on the basis of the Act Against Restraints of Competition (Gesetz gegen unlautere Wettbewerbsbeschränkungen – GWB) of 1958.

[32] For an organization chart, see http://www.bundesnetzagentur.de/media/archive/10837.pdf (visited 2 April 2009).

[33] § 117 TKG (Federal Telecommunication Act); the instructions have to be published in the Federal Gazette.

[34] See Bundesverfassungsgericht, 119 BVerfGE 331, 365 f. (2007), Hartz IV-Arbeitsgemeinschaften; 108 BVerfGE 169, 182 (2003), Zugangsberechtigungssysteme im TKG.

the regulatory activities of the Federal Network Agency and the corresponding sectoral agencies at state level.

4.2. The compensatory and complementary functions of Member State oversight

On one view, the oversight by the Member States of the EU agencies is meant to *compensate* for the loss of substantial Member State competences. The EU agencies have gained power at the expense of Member State authorities, rather than at the expense of the Commission (on the inherent challenge to the Meroni Doctrine, see Dehousse 2008: 793). As an example, consider the European Aviation Safety Agency. The tasks carried out by EASA, such as the issuance of type-certificates of airworthiness licenses and environmental certificates, were never within the competences of the Commission. On the contrary, until the establishment of the EASA through Parliament and Council Regulation (EC) 1592/2002, the equivalents of today's European licenses were issued by national aviation safety authorities (Riedel 2006: 50 ff.). Similarly, prior to the establishment of the EMEA and the OHIM, national bodies issued marketing authorizations for medicinal products and registered trademarks. The Commission played no role (Dehousse 2008: 793, Lorenz 2006: 41 ff.). However, from the Member States' perspective, the new oversight mechanisms do not compensate entirely for the loss of national authority. The Member States have lost proactive regulatory powers and only gain reactive powers – similar to patterns in the context of legislative competences (Dann 2007).

In relation to supranational institutions, the oversight exercised by the Member States fulfills a *complementary* function. The accountability forums at supranational and national level interact (Hofmann 2008: 664–8). Oversight activities at national level are related to a lack of corresponding action at supranational scale and vice versa. The Member States intervene because of accountability gaps caused by deficiencies of other forums and principals, including both individuals and institutional actors such as the Commission or the European Parliament.[35] The inherent flexibility of this complementary relation implies that the accountability environment may adapt over time. Thus, if other actors increase their accountability activities, Member States might become less active. In particular, the European Parliament (EP) has become an increasingly significant factor in holding EU agencies accountable and might contribute to less extensive political oversight processes, particularly in the national legislatures (Vos 2005: 126 ff.).[36] Moreover, individual due process rights before European agencies (such as the rights to notice, to be heard and for a reasoned decision) have also become more important (Mashaw 2007, Shipley 2008). The same is true for judicial remedies, particularly with regard to the most recent judgment of the CFI in the *Sogelma* case (Saurer 2010: 60–61, Alemanno and Mahieu 2008).[37] A further extension of individual rights of access to the European courts could turn those courts into increasingly significant accountability forums. If the process of strengthening individual rights continues, a possible result may be an internal shift within the EU agencies accountability system, strengthening

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[35] On accountability features involving both, see supra Sections 2.1. and 2.2.

[36] The increase of powers at the EP relates to the claims of various national actors (see supra section 3.2.2 for the example of the German federal legislature).

[37] Case T-411/06, *Sogelma v. European Agency for Reconstruction*, 2008 ECR II-2771.

the control functions of individuals and potentially cutting back on the significance of oversight activities of Member State governments and legislatures.

4.3. The democratic promise of networked accountability

European law scholarship places particular emphasis on the democratic potential of networked accountability. This scholarship argues that the interactive committee structures of EU administrative law further deliberative values (Gerstenberg 2002: 183, Everson and Joerges 2006: 528 ff.). Thus, these structures are seen as sources of procedural democratization and an expression of constitutional values (Joerges 2006: 781). Due to its specific discursive character, EU procedures are said to favor arguments that are capable of universal application (Joerges 2006: 795, Neyer 2003). This literature views various forms of cooperation and communication in EU governance as significant instruments for rendering the 'institutions of European decision making comprehensible and democratically accountable' (Sabel and Zeitlin 2008: 272). Sabel and Zeitlin claim that the 'regulatory successes' of the EU have occurred because 'decision making is at least in part deliberative: actors' initial preferences are transformed through discussion by the force of the better argument'. Moreover, they emphasize the significance of the socialization of various deliberators (civil servants, scientific experts, representatives of interests groups) into 'epistemic communities, via their participation in "comitological" committees: committees of expert and member state representatives that advise the Commission on new regulation and review its eventual regulatory proposals' (Sabel and Zeitlin 2008: 284). The authors particularly point to EU agencies to prove their point. They claim that networked EU agencies are an example of 'processes of framework making and revision . . . that give precise definition to the deliberation, informalism, and multi-level decision making characteristic of the EU' (Sabel and Zeitlin 2008: 274, 276). In their concept of 'directly-deliberative polyarchy', agencies in the domain of public health and safety comprising the regulation of, for example, drug authorization, occupational health and safety, environmental protection, food safety, rail, and aviation safety, are becoming 'animating centers . . . for pooling experience under the current regulations and learning about possible alternatives' (Sabel and Zeitlin 2008: 279–80). Together with other conditions, the deliberative character of agency administration opens up 'the possibility for transforming distributive bargaining into deliberative problem solving through the institutional mechanisms of experimentalist governance' (Sabel and Zeitlin 2008: 280).

If applied to EU agencies, however, these broad claims must confront several challenges that undermine much of the power of the argument. There are at least two major objections to be raised. First, even though the opacity of the comitology process (Dehousse 2003, Weiler 1999: 347–9) is less of a problem in the context of EU agencies,[38] the deliberative quality of the Committees that advise agencies is limited. Most importantly, the discourse is by and large limited to the circle of technical or sectoral experts who belong to the particular 'epistemic community'. There is no communicative link to the general public (Smismans 2008). Thus, the novel organizational structure of the EU

[38] For example, the EASA publishes a list of the members of consulting committees on its homepage, as well as the minutes of the regular meetings; see http://www.easa.europa.eu/ws_prod/r/r_cb_sscc.php and http://www.easa.europa.eu/ws_prod/r/r_cb_agna.php (both visited 4 April 2009).

agencies lacks essential features of democratic processes as conceptualized in modern political theory. For example, the concept of democratic public discourse understands public and deliberative discourses as necessarily interconnected features of democratic governance (Habermas 1997: 304, 306 f.). Accordingly, institutions of representative democracy do depend on both administrative input and implementation, as well as forums for the general public to articulate 'public opinion' and a citizenry that is not determined or constrained by particular decision-centered procedures. This open-ended 'weak public' is lacking in the case of scientific and technical committees attached to EU agencies (Habermas 1997: 306).[39]

Second, the procedural position of Member State representatives in the agencies' management boards and various committees is mostly of a reactive rather than a pro-active nature.[40] Usually, the agenda-setting power lies with the agency itself rather than the national representatives. Member States are all too often limited to exercising ex-post controls. This mechanism resembles other structures of institutional interaction in the multi-level system of European governance. For example, European law scholarship identifies a 'communication gap' in the procedural structure of comitology in the context of the regulatory responsibilities of the Commission (Szapiro 2009: 93 f.). In the European legislative process, the persistent dominance of the Commission and the Council over the European Parliament, which still lacks the power to initiate legislation, is one of the main aspects of the notorious 'democratic deficit' of European integration (see especially Scharpf 1999: 6 ff., Dahl 1999: 19 ff.). Similarly, the reactive nature of Member State participation in EU agency administration significantly limits the democratic quality of this procedure. Political theory suggests that the democratic quality of political rationalization procedures depends ultimately upon a link to democratic will-formation that is expressed not only through ex-post control over political power but also 'more or less programs it as well' (Habermas 1997: 300).

However, the finding of limited democratic potential of the networked accountability environment of EU agencies does not constitute an argument against supranational administration through agencies as such. Rather, it supports a functional conception of agency administration that relies on the qualitative advantage of agencies in areas of technical and scientific complexity (Majone 1996: 15 ff., id. 2002: 331–36), without neglecting the political dimensions of economic regulation (Craig 2006: 188). EU agencies could derive institutional legitimacy from the duality of the responsibility taken on by European political institutions through the actual creation of each agency and the development of networked accountability structures, particularly ensured through Member State oversight.

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[39] For the term, Habermas (ibid.) refers to the distinction between 'strong' and 'weak' publics by Fraser (1992: 109 ff.).

[40] Section 4.2.

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37 Individual rights and transnational networks

Francesca Bignami

Today the paradigm of public policymaking is global, not simply national or local. Rules and standards are decided, fiscal and macroeconomic policy is determined, and policy commitments are enforced through regional and global institutions that have simultaneously built upon and transformed their national bureaucratic counterparts. Some of these institutions are traditional international organizations and tribunals, which have proliferated and expanded over recent years. Yet transnational regulatory networks, in which decisionmaking occurs through routine contacts among national civil servants, are quickly becoming the primary institutional vehicle through which cross-national policymaking occurs.

Networks marry domestic bureaucratic capacity with transnational policy ambitions and thus fall at the intersection of a number of disciplines: administrative, criminal, and constitutional law, international law, public policy studies and international relations theory. These different research traditions have begun to raise and offer answers to a number of important questions about the nature and promise of regulatory networks: Under what circumstances do states choose to cooperate through networks as opposed to international organizations and more traditional international institutions (Raustiala 2002, Eilstrup-Sangiovanni 2009)? Relatedly, what are the advantages and disadvantages of networks over more traditional forms of international cooperation (Slaughter 2004, Verdier 2009, Zaring 1998)? Under what circumstances can this form of transnational cooperation be expected to generate international convergence or other types of policy outcomes (Singer 2007)? And what types of public law metrics should be used to evaluate regulatory networks and how has the experience so far measured up to the chosen normative metric (Kingsbury et al. 2005, Slaughter 2004)?

In this short contribution, I offer some reflections on the last question. I focus on the interplay between classic liberal rights and network decisions that implicate personal freedom, property rights, and other basic interests. Safeguarding rights against arbitrary government action is one of the oldest concerns of public law – constitutional, criminal, and administrative – and therefore is necessarily at the heart of any attempt at the normative reconstruction of global governance via networks. Yet most scholarly analysis of transnational networks has tended to emphasize the agenda-setting and rulemaking activities of networks and the problem of network accountability to the broader public through transparency, the consultation of affected interests, and other devices (see, for example, Slaughter 2004). This is obviously a subject of critical importance, both because agenda-setting and rulemaking are core network activities and because public accountability in a globalized world raises difficult and novel questions about the relationship between conventional accounts of democracy and the new political terrain of globalization (see, for example, Lindseth 2006). Nonetheless, the analytically distinct aspiration of safeguarding individual rights triggers an important and distinct set of issues. By shifting the normative focus to this aspect of network activity, I seek to bring together a number

of experiences from a variety of institutional settings to illustrate the unique issues that arise in protecting rights in the expanding domain of transnational networks.

The rest of this contribution proceeds as follows. In the next section, I offer a definition of transnational networks and give some examples of the phenomenon, with particular attention to those that can result in individualized determinations that affect liberty, property, and other types of interests. Any type of policy determination can have implications for rights, but when the institutional landscape is as fluid as with transnational networks, courts only tend to get involved and rights challenges brought at the point in the policymaking chain at which a concrete decision, affecting an individual or set of individuals, has been taken. In the third section, which contains the bulk of the analysis, I point to the difficulties triggered by the core characteristic of networks – the dispersion of decisionmaking power across government units. In particular, I discuss the issues that have arisen in the EU legal system, which has a long experience with networks designed to apply and enforce common EU policies. The conclusion suggests how this EU experience is relevant for transnational networks that operate in other international regimes.

1. Defining regulatory networks

In the international law and international relations literature, transnational networks are generally defined in opposition to classic treaty regimes (Eilstrup-Sangiovanni 2009, Verdier 2009). In this characterization, the actors are regulators that deal with specific policy problems, not heads of government and officials charged with representing the national interest abroad, generally located in foreign ministries. The legal instruments in which they set down their course of action are soft, informal documents such as memoranda of understanding, letters of intent, and common guidelines, not formal legal instruments such as international treaties. Network meetings and exchanges of information are conducted as necessity dictates, not set down in advance in formal treaties or fixed at the conclusion of international conferences of the parties. And, in contrast with the elaborate set of institutions and decisionmaking procedures that characterize traditional international organizations, networks often do not have any official voting rules or membership criteria; rather they proceed informally, generally by consensus and with the national configuration that tradition, practice, and functional necessity dictate.

More recently, however, a number of scholars have argued that transnational networks are often embedded in the more formal decisionmaking structures of traditional international organizations and therefore their structural and output characteristics cannot be as neatly contrasted with those of formal treaty regimes as was originally suggested (Slaughter and Zaring 2006). Moreover, they have noted the tendency for transnational networks to quickly morph into more routinized forms of organization that betray many of the same characteristics as classic international organizations (Zaring 2005). This understanding of global networks comes closer to the understanding of networks that prevails in research on the European Union. The work of a number of scholars, including several contributions to this volume (for example, Chapter 36 by Johannes Saurer), demonstrates that regulatory networks are omnipresent in the EU (Bignami 2005a, Cassese 2004, Chiti 2004, della Cananea 2004). As the Saurer chapter suggests, in many ways, the modus operandi of these EU regulatory networks is no different from that of traditional international institutions: they are generally established by formal legal instruments such as EU directives and regulations, their decisionmaking

rules and procedures are fixed in advance, and their regulatory output can range from soft opinions to legally binding decisions.

What, then, is distinctive about transnational networks as compared to other types of international institutions? The answer rests in the practice of making and enforcing policy by way of routine contacts among civil servants in different countries, civil servants who are embedded in different bureaucracies and constitutional systems and who are tasked with managing specific policy areas both internally and externally. This sets transnational networks apart from high-level decisionmaking by heads of state, classically associated with international treaties, because in the latter case, the international component of policymaking is sporadic and control over policymaking is largely retained by national officials, with only occasional incursions from the broad directives contained in international treaties and the decisions of international tribunals. This also sets the work of transnational networks apart from that of international secretariats, which are generally staffed by career officials, have their own financial resources, and undertake their mission much as any centralized bureaucracy would. Transnational networks are characterized by the routine exchange of bureaucratic capacity and resources across state borders and for this reason, the policymaking process can be expected to be systematically different from other forms of international decisionmaking.

What types of networks are most likely to raise concerns related to fundamental rights? Of course, any type of policy decision taken by a transnational network, including those establishing general rules and programs, can tread upon fundamental rights. Thus, for instance, a (hypothetical) decision of the Basel Committee on Banking Supervision to establish a formula limiting the compensation of bankers would implicate the property interests of bankers. Similarly, changes to the Europol databank, through which national police exchange information on criminal suspects in the European Union, might very well implicate privacy rights. Yet the basic right to be free of arbitrary government determinations arises in the context of individualized decisionmaking, and in many legal systems, especially one as fluid as the international one, the opportunity to vindicate other fundamental rights such as the property and privacy interests just mentioned, most commonly presents itself in the context of an individual decision applied to a specific person or set of persons. Thus an analysis of the fundamental rights implications of transnational networks should, at the very least, begin with those networks that are involved in the process of making individualized determinations.

Enforcement networks most clearly fit this bill. They can involve the enforcement of classic regulatory policies, such as transatlantic cooperation on antitrust enforcement (Piilola 2003, Whytock 2005). They can also entail intelligence exchange, designed to facilitate the detention and arrest of suspects, by law enforcement and national security officials through bilateral arrangements and multilateral frameworks such as Interpol (Savino 2009) and Europol (Peers 2008). And there are many other examples, too numerous to review here.

2. Safeguarding rights in transnational networks

The operation of transnational enforcement and other types of networks has given rise to new puzzles for those committed to safeguarding individual rights against arbitrary government action. The central difficulty is the separation, in the network form of organization, between the government bodies responsible for collecting information and making

policy decisions, and the national authority that ultimately takes the decision to arrest a suspect, freeze assets, impose a customs duty, or deny a subsidy. Due process, before and after such a decision is taken, is the main mechanism that the criminal and administrative law of liberal democracies has developed to keep check on policemen and bureaucrats and to ensure respect for a variety of fundamental rights when state authority is exercised. But these guarantees have not been systematically built into the transnational network form of organization, largely because of the old mindset of divided international and domestic spheres: in this account, the international sphere governs relations between states, the domestic one governs relations among individual citizens and between citizens and states. Therefore, because the very notion of individual rights and duties turns on citizenship in a national community, the protection of these rights and duties can only be afforded by the domestic rule-of-law institutions of the state.

Although this outlook might have sufficed in the past, when international cooperation was more sporadic and did not routinely enter into the details of individual cases, today it has generated a series of conundrums for the national officials charged with acting upon the information and decisions generated by transnational networks and the national courts tasked with checking those officials: should they automatically act upon the information and decisions generated by transnational networks, on the assumption that, at some point, individual rights and interests have been considered and adequately addressed? After all, to the extent that the participating network officials operate in the broader context of constitutional democracies, they can be expected to abide by fundamental rights guarantees. If not, and the executing national authorities decide to review the grounds for the determination independently, how can they guarantee the integrity of the review process when the bulk of the decisionmaking was handled by government agencies that escape their jurisdiction?

This problem of how and at what point in the transnational decisionmaking process to afford rights protection has recently come to fore with the UN Security Council's initiatives to combat terrorism. As is well known, in the late 1990s, the Security Council established a committee to administer a sanctions regime against individuals and entities associated with Osama bin Laden, the Al-Qaida network, and the Taliban. The process by which individuals and entities are listed and their assets then frozen is typical of a transnational enforcement network: domestic intelligence and law enforcement agencies communicate information on terrorism suspects to the national officials on the Sanctions Committee, this transnational committee then decides by consensus to place those suspects on an official list, at which point national officials everywhere are under a duty to freeze the assets of the suspects that fall within their jurisdiction. The difficulty of affording adequate rights protection has been compounded by the policy area involved – counter-terrorism – and the secrecy that attends this area, confounding vigorous rights guarantees even when government action is exclusively domestic. Nonetheless, the dilemmas that the UN sanctions regime has created for the national bureaucracies and courts asked to freeze assets are typical of transnational enforcement networks more broadly speaking: can these national actors trust the network players to comply with fundamental rights guarantees, making their decisions worthy of enforcement, notwithstanding the protests of the individual concerned – in the case of the Sanctions Committee, the domestic intelligence agency that initially communicated the information and urged the listing, as well as the collective decision of the Sanctions Committee? If national rule-of-law

institutions decide to go ahead and independently assess the rights claims, how can they overcome the handicap of one-step-removed information-gathering and decisionmaking and organize an effective review process? On the first question, the Supreme Court of Switzerland decided to defer to the UN network (Reich 2008), but not the European Court of Justice, which held in the *Kadi* case[1] that the EU must independently afford due process rights for targeted individuals and entities (de Búrca 2009, della Cananea 2009). Now, however, the EU is faced with the second question of how to guarantee effective rights protection: due process requires that terrorist suspects be able to contest evidence used against them, but it is highly unlikely that either the Sanctions Committee or the United States, which originally requested the *Kadi* listing, will turn over the evidence to the European Commission, especially given its sensitive nature.

Although the UN Security Council's sanctions proceedings have recently brought attention to the difficulty of rights protections in transnational networks, it is by no means an isolated or novel phenomenon. Very similar issues are faced by intelligence and law enforcement agencies that exchange information for purposes of detaining individuals, making arrests, and freezing assets through bilateral arrangements or through international organizations like Interpol (Savino 2009). In the European Union, the fragmentation of decisionmaking power in enforcement networks has given rise to a directly related set of conundrums, which have been worked out in the case law of the European Court of Justice for over thirty years now. In the EU, the structure of the rights issue is slightly different because the decisions of EU institutions are subject to review by a central court – the European Court of Justice – in marked contrast to other international institutions like the UN Security Council and Europol. Two sets of issues have arisen in the EU context: how to allocate responsibility for judicial review of network decisions between national courts and the European Court of Justice and what fundamental rights law to apply to network decisions.

The puzzle of how to allocate jurisdiction between national courts and the European Court of Justice is directly connected to the dispersion of power among national regulators, the European Commission, and transnational committees of national regulators in networked policymaking. This issue has arisen mostly in the areas of agriculture and customs administration, where the decision to grant or withhold an agricultural subsidy or apply or waive a customs duty is the product of a particularly complex decisionmaking sequence involving national bureaucrats, the European Commission, and EU committees formed of national regulators (della Cananea 2004). The Court of Justice has held that individuals only have a right to challenge administrative decisions at the point at which they are 'directly affected' by the decision, meaning that there is no discretion left to the administrative authority to depart from the adverse outcome feared by the challenger.[2] The result is that most challenges are brought in national courts, against local agricultural and customs authorities, because even though their decisions are based on the information and policies transmitted through the relevant EU network, it is the local bureaucrat that has the last say on whether to deny the subsidy or impose the customs duty. If, however, the national court wishes to overturn the administrative decision, it is

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[1] Joined cases C-402 and 415/05P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 ECR I-6351.

[2] See, for example, Case T-33/01, *Infront WM AG v. Commission*, 2005 ECR II-5897.

obliged to refer questions of EU law, including challenges to the network's regulatory framework, to the Court of Justice, through the preliminary reference system.[3] This division of jurisdiction strikes a balance between distributing the task of safeguarding rights broadly, among all national courts, while at the same time retaining central control over the application of EU law and thus remaining faithful to the principle of equality. Yet it is not without its flaws: the test for allocating jurisdiction is fairly complex and therefore litigants face real uncertainty in deciding in what court to challenge the decisions of enforcement networks; it is unclear whether local courts are capable of fully reviewing the complex sequence of decisions that results in individualized determinations; and, if a preliminary reference is required, the time for obtaining an answer from the Court of Justice can be as much as two years.

The interplay between liberal rights and the decisions of enforcement networks has given rise to a second set of issues: what are the fundamental rights to be guaranteed by national courts and, in some instances, by the European Court of Justice when reviewing network enforcement decisions? Those guaranteed under the national constitution of the reviewing court or those guaranteed under EU law? And if the fundamental rights law of the EU applies, how is the content of that law to be determined? This is obviously a rich and complex debate, developed in the jurisprudence of the Court of Justice and national courts over decades and directly related to the question of supremacy. Suffice it to say that while national courts have come, for the most part, to accept that EU rights prevail, the content of those rights has been shaped by national traditions because of the interdependent nature of authority, both judicial and bureaucratic, and the need to accommodate different public law traditions in a governance structure based on policy networks. It is no coincidence that many of the early Court of Justice cases setting down constitutional principles such as human dignity, proportionality, and the right to property involved references from German administrative courts, exercising their power of review over network decisions and operating in the domestic context of a strong constitutional court. Likewise, as I have argued elsewhere, the due process rights that are afforded in individualized administrative proceedings have been shaped by the English tradition of natural justice by virtue of the same institutional logic of interdependent government authority (Bignami 2005b).

Conclusion

With this brief review of the experience with safeguarding liberal rights in the face of transnational networks, I have sought to highlight a couple of the key public law dilemmas that have arisen in the administration of networks. The dispersion of responsibility for decisionmaking has given rise to similar issues across different international regimes – the United Nations, the European Union, Interpol, and many others – such as the difficulty of protecting rights nationally when much of the information giving rise to administrative action is generated elsewhere. By the same token, EU networks raise a distinct set of issues compared to other transnational enforcement networks because they are policed by a combination of national courts *and* a central judicial body. Yet recently, some have urged the UN Sanctions Committee to establish a centralized process

[3] See, for example, Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 ECR 4199.

involving an independent, expert panel through which terrorist suspects could petition for de-listing (Keller and Fischer 2009: 266). Similar calls can be heard for establishing centralized review of red alerts – the equivalent of arrest warrants – issued through the Europol information system (Savino 2009). Thus we might expect some of the same problems, related to the allocation of jurisdiction between national and supranational courts and to the creation of a common body of fundamental rights, to emerge in the public law of other transnational networks too.

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