

DEMOCRACY AND EXECUTIVE POWER: ADMINISTRATIVE POLICYMAKING IN COMPARATIVE PERSPECTIVE

DEMOCRACIA Y PODER EJECUTIVO: LA FORMULACIÓN DE POLÍTICAS ADMINISTRATIVAS EN PERSPECTIVA COMPARADA

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ABSTRACT: This essay on executive rulemaking procedures in the US, the UK, France, and Germany examines how administrative and constitutional law interact when the executive makes policy under delegated authority. Given their differing constitutional structures and legal frameworks, the political incentives for policymaking accountability differ. The US is a separation-of-powers presidential system. Germany and the UK are parliamentary systems with and without written constitutions. The common law underpins the UK's unwritten constitution. France has a strong president with a relatively weak parliament. The US separation of powers generated statutory requirements for notice-and-comment rulemaking. The legislatures in the German and UK parliamentary systems have little incentive to enact such constraints on their own cabinets. The French system lacks required procedures as well. However, even if political incentives suggest that sitting politicians will have little interest in such reform, the need for greater accountability to the public remains. This essay, drawing on the author's recent book *Democracy and Executive Power*, describes these cross-country differences and argues for ways to produce more democratically responsible executive policymaking. Those concerned about the future of representative democracy should include reform of executive rulemaking procedures in their list of priorities. Structural issues linked to the openness and accountability of regulatory bodies and cabinet departments should not be ignored in the heat of day-to-day crises that soak up the headlines.

KEYWORDS: Administrative law; executive rulemaking; public participation; government policy-making; public accountability; US; UK; Germany; France; Latin America; Spain.

RESUMEN: Este artículo examina los procedimientos de elaboración de reglamentos gubernamentales en los Estados Unidos, el Reino Unido, Francia y Alemania, a fin de analizar cómo interactúan el Derecho administrativo y el Derecho constitucional cuando el poder ejecutivo formula políticas públicas a través de normas reglamentarias. Los incentivos presentes en el marco de la formulación de esas políticas a propósito de la rendición de cuentas al público son distintos en cada uno de esos ordenamientos como consecuencia de los diferentes marcos constitucionales y legislativos presentes en ellos. El estadounidense es un sistema presidencialista en el que rige el principio de separación de poderes. Alemania y el Reino Unido son sistemas políticos parlamentarios, pero, mientras que el primero descansa sobre una Constitución escrita, el segundo carece de una y es además un sistema de common law. Francia tiene un presidente fuerte y un parlamento relativamente débil. En los Estados Unidos el principio de separación de poderes ha dado lugar a una serie de exigencias que se materializan en el procedimiento de elaboración de reglamentos conocido como notice-and-comment. Las asambleas legislativas de los regímenes parlamentarios de Alemania y del Reino Unido tienen pocos incentivos para someter a exigencias semejantes a sus gobiernos. El sistema francés también carece de procedimientos semejantes. Sin embargo, por más que los incentivos políticos sugieran que los políticos habrán de tener poco interés en una reforma semejante, garantizar una mejor rendición de cuentas al público sigue siendo algo muy necesario. Este artículo, que tiene su origen en el libro *Democracy and Executive Power*, recientemente publicado por su autora, analiza esas diferencias desde una perspectiva comparada y sugiere diversas vías para incrementar la legitimidad democrática de la formulación de políticas públicas por parte del poder ejecutivo a través de la elaboración de normas reglamentarias. La reforma de los procedimientos de elaboración de reglamentos es una tarea necesaria desde la perspectiva del futuro de la democracia representativa. Los problemas estructurales relacionados con la apertura y la rendición de cuentas de las autoridades reguladoras y los departamentos sectoriales no pueden quedar ocultos como consecuencia del fragor de las crisis cotidianas que acaparan los titulares.

PALABRAS CLAVE: Derecho administrativo; potestad reglamentaria; participación pública; políticas públicas; rendición de cuentas; Estados Unidos; Reino Unido; Alemania; Francia; América Latina; España.

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1. INTRODUCTION¹

Executive branch officials in representative democracies must be technically competent and personally honest when they exercise delegated authority. Going further, in implementing broad policy mandates, they have an ongoing responsibility to citizens, who are the ultimate judges of their performance. If officials remain aloof and unresponsive to public concerns and unwilling to listen to input from citizens

¹ I am grateful to two anonymous referees for their comments on an earlier draft.

and organized interests, their policy choices may lack democratic legitimacy even if they conform to the formal law on the books. The so-called “chain of legitimacy” from voters to parties to a sitting government to bureaucrats is insufficient as a check on public power.² This essay and the book *Democracy and Executive Power*, from which it derives, (ROSE-ACKERMAN, 2021), argue that executive branch policymaking is desirable and inevitable but ought to be publicly accountable through procedures that include public consultation and reason-giving. It posits a key role for administrative law in enhancing the democratic pedigree of delegated power through public participation in bureaucratic policymaking with the judiciary enforcing these requirements without becoming policy-makers themselves.

I elaborate on the above claim, drawing on the experiences of democratic systems with presidential and parliamentary constitutional structures. The case studies in my book concern the US, the UK, Germany, and France—two parliamentary and two presidential systems. Readers wanting fuller documentation should consult my book and its accompanying references. I also briefly introduce a forthcoming article with Edgar Melgar that reviews executive rulemaking procedures in the presidential systems in Latin America (ROSE-ACKERMAN & MELGAR, 2022).

Public policymaking in democracies requires discretion and judgment inside government ministries, independent agencies, and quasi-public bodies. Political appointees work with bureaucrats to make policy under statutes that delegate authority either explicitly or through vague language requiring interpretation. Some constitutional structures permit the executive to make binding choices in specified policy areas without legislative input. Bureaucrats’ technical expertise and programmatic experience are centrally important. However, giving discretion to technocrats, full stop, is insufficient in a representative democracy. Complex policies that rely on an official’s claims to esoteric knowledge are unlikely to convince a skeptical public. Even if the bureaucracy’s analysis is easily understandable, the general public will not necessarily agree with its policy prescriptions. Some will bear the costs; others may want a distribution of benefits skewed toward the poor or other worthy groups; still others may disagree on the weight given to aesthetic or cultural values. Even if analysis settles some disputes over facts, technocratic methods cannot resolve disagreements over values. Fairly managing the distribution of gains and losses is necessary for broad public acceptance.

Administrative law, broadly understood, can help legitimate these choices in the eyes of citizens. In other words, administrative law should go beyond a focus on good administration and the protection of individual rights. Rather, I argue, that it ought also to seek to further the democratic legitimacy of executive policymaking outside of the legislature (ROSE-ACKERMAN, 2021; see also, BARNES, 2021; DELLA CANANEA, 2016: 97-98, 110-116).

² Susan ROSE-ACKERMAN, *Democracy an Executive Power: Policymaking Accountability the US, the UK, Germany and France*, Yale University Press, New Haven, 2021, pp. 3-4. . On the *Legitimationskette* (chain of legitimacy) see Böckenförde, 1992.

Citizens must agree on an institutional framework for making public-policy choices, with the understanding that they will not always obtain their preferred outcomes. Majority rule in the legislature is one option that produces legally enforceable norms legitimized by the democratic process. Once a statute delegates authority to a government ministry or agency, however, new legitimacy issues arise. Technocratic methods, such as cost-benefit analysis, balance gains and losses, but these evaluations differ from majority rule. A policy may pass a cost-benefit test but fail to obtain broad popular support. Democratic legitimacy requires that the contesting normative frameworks be transparent to the public, not hidden in esoteric language. Even for an agreed set of facts, there are alternative ways of aggregating costs and benefits to produce a policy recommendation. These options depend not on science, but on competing views of the public good and on the proper role of the state in society.

A citizen's support for a party or candidate at election time based on a broad, diverse platform may bear only a weak relationship to his or her views of particular executive decisions made months or years after the election. The ongoing policy problems facing incumbent governments need a stronger connection to the public than a paragraph in a composite platform issued during an election, which may be several years in the past. Public input into executive policymaking can invite participants to consider the broader merits of policy options, not only their own individual interests. Such considered evaluations of alternatives are a central link between citizens and officials in the administration and contribute to the democratic legitimacy of both plenary executive actions and its implementation of legislative policy mandates. Thus, I defend administrative procedures that require bureaucracies to reach beyond official circles and consult broadly with the public.

The need to balance technocratic knowledge with public accountability is a fundamental requirement for any nation struggling to sustain a credible democracy, regardless of its geographic location. Comparative scholarship is particularly valuable in this regard. It can enable reformers to look beyond a country's inherited legal traditions and consider a richer array of options. This is especially important when existing frameworks were inherited from a colonial or authoritarian past. Although each country confronts special problems, the successes and failures of other national efforts are an essential resource for self-conscious choice.

My comparative enterprise asks reformers from different legal traditions to challenge their own preconceptions of the role of public law in representative democracy—that is, to unpack “the law” and distinguish between substantive and procedural aspects. The serious pursuit of political accountability will challenge the status quo and the political-economic interests of favored groups. Successful reform requires the mobilization of political will, not reliance on the inexorable effects of pre-existing legal traditions or worldwide forces.

2. FOUR CASE STUDIES

The four case studies in my book represent different forms of representative democracy—two presidential systems (the US and France) and two parliamentary systems (the UK and Germany). France, with both a directly elected president and a prime minister, may appear to be a hybrid, but, in practice, it has a strong president. Two countries, the US and UK, have a common-law background, while France and Germany are rooted in civil law. The book examines the diverse ways each country manages the relationship between administrative law and citizens' input into bureaucratic policymaking (ROSE-ACKERMAN, 2021: 6-10, 33-45). The cases raise four interrelated issues.

First, why is executive-branch policymaking necessary? Shouldn't democratic legislatures resolve all the policy issues in the text of statutes? If the executive has plenary power in some areas, does that imply an obligation to seek public input before taking action?

Second, even if policymaking within the bureaucracy is a practical reality, how can it operate consistently with democratic principles? How ought policymakers balance expert knowledge with openness to public input? It is all very well to call for public participation, but who should participate, when should participation occur, and how should governments organize consultations? Can administrative law help to frame the answers to these questions, or are they purely political choices?

Third, there are many ways to organize executive-branch institutions and associated agencies and commissions. How can these organizational choices encourage public input and promote bureaucratic competence? Can private bodies fulfill some policymaking functions, and if so, should they conform to the participatory and transparency practices of public agencies?

Fourth, how can public law monitor and control policymaking without limiting the exercise of political judgment? What role should courts play in enforcing the requirements of administrative law? How should judicial oversight interact with systems of political accountability inside the executive branch?

The answers to these questions in the United States differ fundamentally from those given in the United Kingdom, Germany, and France, each with a different public-law tradition. Despite important differences, the three European cases resemble each other in generally avoiding American-style competition between the legislative majority and the executive. They rely heavily on bureaucratic expertise and place greater confidence in the public-service ethic of the professional staff. None of them has legal provisions, such as the notice-and-comment procedures of the US Administrative Procedure Act (APA), that mandate public consultation and reason-giving in the production of rules with the force of law.³ However, even in the US, much policy

³ Administrative Procedure Act, US Code, Ch. 5, II (1946).

is made outside of the notice and comment process and has de facto authority.⁴ At the same time, national courts in my European cases play a significant oversight role, and European Union law imposes additional constraints on national executives in Member States.

The German and French constitutions interact with an idealized view of the law, distinct from policy or politics—terms that cannot be distinguished in either language (*politique* in French and *Politik* in German). Their civil-law traditions affect the interpretation of their written constitutions and result in different but related approaches to executive rulemaking.

Conventional German administrative law focuses on the administrative act (*Verwaltungsakt*), a term that refers to a public measure taken by a state authority to regulate an individual case under public law.⁵ Germany has a strong civil service that plausibly ensures the citizenry of its seriousness in pursuing the public interest. Here, the chain-of-legitimacy model has achieved maximum credibility—moving from the voters to political parties to elected representatives to the prime minister and cabinet to the bureaucracy. A separate hierarchy of administrative courts considers the legality of administrative acts and related material. Within this overarching structure, public participation in administrative rulemaking may seem unnecessary or downright pernicious. Under the German Constitution or *Grundgesetz*, the courts seek to protect the fundamental rights of individuals, but they have seldom self-consciously furthered policymaking accountability to the citizenry in the making of general rules. Some German scholars recognize the limits of this model, and civil-society activism is pushing officials, as well as some scholars and jurists, to take public participation seriously. Especially in the environmental area, the European Union has allied with those seeking more public input into national policy (EIFERT, 2014; VOßKUHLE & WISCHMEYER, 2017; RUFFERT, 2007; WENDELL, 2019; ROSE-ACKERMAN, 2021: 53-60).

As in Germany, French public law also refers to administrative acts, but defines them more broadly to include general regulations (*actes administratifs réglementaires*). Law and politics are deeply intertwined, with the Conseil d'État acting as both a higher administrative court and an advisor to the government that reviews proposed statutes and rules. Its members are elite generalists who move in and out of government ministries and independent agencies. French law takes a significantly different view of bureaucratic discretion than German law. The French Constitution rejects strict parliamentary government and establishes a strong presidency. Voters directly elect the president to a five-year term, and he or she can dissolve the National Assembly and call a new parliamentary election without resigning (French Constitution, art. 6). The president nominates the prime minister, subject to approval by the National Assembly, but so long as the president has a parliamentary majority,

⁴ For the importance of what she calls “fuzzy law” in both the US and the UK see Margit COHN, *A Theory of the Executive Branch: Tension & Legality*, Oxford University Press, Oxford, 2021..

⁵ § 35 sentence 1VwVfG, https://www.gesetze-im-internet.de/vwvfg/___35.html.

an ally will hold that post. Civil servants implement statutory law, working under a thin layer of political appointees. France, like Germany, has no general statute governing rulemaking procedures (CHEVALLIER, 2011; ROSE-ACKERMAN & PERROUD, 2013; ROSE-ACKERMAN, 2021: 60-71).

The British Westminster government, with first-past-the-post voting rules, usually vests the prime minister with a stable majority in the House of Commons. Even if the parliamentary opposition and some backbenchers object to particular bureaucratic decisions, the prime minister can implement government policy choices by issuing statutory instruments (SIs) that have the force of law. Most SIs require parliamentary approval by both houses, but with the same party or coalition controlling both the House of Commons and the government, approval is generally pro forma. The House of Lords seldom votes against an SI, apparently recognizing its lack of democratic legitimacy (FOX & BLACKWELL, 2014; ROSE-ACKERMAN, 2021: 47-53). The British constitutional tradition is skeptical both of judicial supervision of executive policymaking and of the democratic value of public participation in government policymaking. At present, the exceptions on both counts involve the violation of rights, the regulation of privatized utilities, and environmental policies with broad societal effects. The polarizing debate over Britain's exit from the European Union (Brexit) tested the premises of the Westminster model. Yet, it has not challenged the reliance on SIs. To the contrary, bureaucratic discretion is filling many gaps in the law opened up by Britain's departure from the EU (ROSE-ACKERMAN, 2021: 48-51).

In contrast, United States public law seeks to ensure the political accountability of executive rulemaking to the American public, as well as to those directly affected. Under its version of the separation of powers, the president's party may fail to control one or both houses of Congress. This results in partisan competition between the House, the Senate, and the president for effective control over bureaucratic decisions. Even when a single party controls all three institutions, the electoral system gives each member of Congress an individual constituency with priorities that need not match those of the president or the leaders of the House and Senate. Thus, legislation typically involves compromises that generate vague language and inconsistent provisions. As a consequence, implementing departments and agencies have broad discretion to interpret their responsibilities. The US Administrative Procedure Act (APA, 5 U.S.C. §§ 551-559, 701-706) creates a framework if the administration wishes its rules to be treated as legally binding by the courts. It requires administrators to provide public notice, open-ended hearings, and reason-giving before issuing legally binding rules and provides for judicial review. The US system has many flaws, including the use of workarounds to avoid the APA's requirements. However, there remains much to learn from America's successes and failures as democratic reformers elsewhere seek better ways to connect bureaucratic policymaking to their citizens' concerns (ROSE-ACKERMAN, 2021: 72-83; ROSE-ACKERMAN, EGIDY & FOWKES, 2015; FARBER, HEINZERLING & SHANE, 2018; SHANE, 2009; STRAUSS, 2007; WAGNER, 2016).

Regulatory law reform in any of these cases requires a clear focus on a number of key decision points. I highlight five. Begin with the internal structure of the executive: (1) its rulemaking procedures and their relation to the decree power of the executive, and (2) the autonomy permitted to quasi-independent public regulatory agencies and quasi-private bodies. Next consider policymaking techniques: (3) cost-benefit analysis and impact assessment and (4) public participation and consultation. Finally incorporate, (5) the role of judicial review in monitoring the operation of the overall regime.

3. EXECUTIVE POLICYMAKING

Many administrative procedure statutes cover decisions in individual cases but do not constrain the production of either rules with the force of law or executive decrees and guidance documents. Constitutional principles may view procedural restrictions as inapplicable to executive policymaking because it is a political not a legal activity. For example, the German Basic Law or *Grundgesetz* (art. 80(1), s. 2) requires statutory delegations to list their “content, purpose, and scope,” but it does not govern rulemaking procedures. German administrative-procedure law (*Verwaltungsverfahrensgesetz*, VwVfG) only deals with “administrative acts,” a term that omits regulations, that is, secondary norms, and guidelines. The recently enacted French administrative procedure code is mostly a restatement of existing case law and does not include a general right of public participation in rulemaking (CUSTOS, 2017). The UK rulemaking process inside the government is similarly unconstrained. In all three countries, however, the legislature must approve some secondary norms, and some substantive statutes require the government to hold public hearings and organize other forms of participation.

The lack of general procedural constraints not only results from each country’s legal tradition; it also depends upon the distribution of power. The powerful US Congress supported a statute placing procedural checks on executive rulemaking, and the president accepted this check on his power, at least in part, for political reasons. Many democracies, especially outside Europe and the British Commonwealth, have strong presidents with weak legislatures, whose members are not strong or well organized enough either to resist policy delegation or to demand policymaking accountability from the executive. France comes the closest to this model in my study, but outside Europe there are more extreme examples of strong elected presidents (ROSE-ACKERMAN & MELGAR, 2022). Furthermore, to the extent that presidents use patronage and other individualized benefits to control legislators, neither branch will want accountable and transparent policymaking. The combination of a strong chief executive, a weak legislature, and political alliances built on personal ties or even outright payoffs produces executive policymaking that is unaccountable to the electorate (PRADO, 2017). The executive may find it politically expedient to consult with key stakeholders or even with the general public. In the absence of a legal mandate, officials will do so only in their own interest.

In any policy area, organized advocacy is important both to educate the public and to provide clear and useful input to the executive. The law ought to make it easy to register as a not-for-profit advocacy organization, subject to disclosure rules to limit the creation of for-profits in disguise. Banging on pots and pans in Argentina (*cacerolazos*) or wearing yellow vests (*gilets jaunes*) in France can help raise awareness of particular issues both among the citizens and inside government. But they are insufficient. Lasting impact requires hard work both to master technical details and to mobilize people to testify at hearings and monitor the actions of the executive, including bringing court challenges. Institutional survival requires resources, but non-governmental organizations (NGOs) should not be beholden to incumbent governments or opposition parties. Tax exemptions for both donors and organization provide incentives for donations. Other options include earmarking certain public funds to support NGOs, but with the allocation made by a body that operates independently of the government.

The notice-and-comment procedure of the US Administrative Procedure Act (APA §553) provides one model. The APA requires agencies to post draft rules publicly and mandates a hearing open to anyone with an interest in the subject at hand. Final rules must include a public statement that explains the statutory basis of the rule and justifies the outcome. Rules are subject to judicial review for conformity with the underlying statute, the constitution, and APA procedures (APA §§701-706). The US system is imperfect, and even its strong points have been undermined by executive and agency efforts that limit its impact. The rise of what Peter Shane (2009) calls “presidentialism” is undermining the policy role of cabinet departments. Furthermore, the US model may be difficult to transfer to other political systems. In using US practice as a guide to reform, I both recognize its practical limitations and acknowledge that differences in political structure and in the organization of society can undermine its applicability. Nevertheless, it expresses an important goal: public participation in executive policymaking needs to be taken seriously in all polities. The goal is to complement, not override, the role of political parties.

Assuring the democratic legitimacy of executive-branch policymaking is especially important in democracies either where the head of government has significant plenary power or where the legislature is weak, divided, and poorly institutionalized. A legislature may have few staff resources and many inexperienced members. As a result, chief executives may face few effective checks and may issue decrees with minimal legal constraints. Even if decrees require eventual parliamentary approval, that process is pro forma in some presidential systems and is unlikely to matter much in parliamentary ones. Decrees give the chief executive and the cabinet a first-mover advantage. Heads of government, whether presidents or prime ministers, are unlikely to propose constraints on their power. Conversely, if there are no binding procedures for public input or for government transparency and reason-giving, legislative backbenchers and opposition party leaders may push for legislative vetoes over executive rules—in the form of either an up-or-down vote or a report-and-wait requirement, as in the UK. In a presidential system, where different parties may control differ-

ent institutions, such oversight may seem especially attractive given the difficulty of covering all the relevant issues in statutes. In this second case, legislative oversight is an alternative to the lack of public input into regulatory drafting. In practice, the legislature often provides little effective check on the executive. In the worst case, a fractious, divided legislature engages in patronage appointments, private payoffs, and illegal political party financing to follow the lead of the president.

Cutting across these differences, environmental policymaking stands out as an exception where many polities accept or mandate public participation in executive policymaking. In my European cases, a specialized treaty supports civil-society input and has constitutional status in France. However, its rulemaking provisions are quite weak.⁶ The European Union's Environmental Impact Assessment (EIA) procedures require the preparation of strategic environmental impact assessments and public consultation for major projects. The process mandates "social consultation with all interested subjects, not only with those who can prove their legal interest."⁷ This broadening of consultation makes it possible for civil-society groups to participate. Freedom-of-information acts may also facilitate the involvement of civil society although they may be vague about how the participation process should be structured. Public input has a functional justification in the environmental area beyond the formal law. In this technically complex area, executive implementation is necessary, but it implies that the government has a public responsibility to hear from concerned groups and citizens, over and above votes in periodic elections. Many environmental harms and benefits extend broadly across society, so free-rider problems mean that the government cannot rely on aggrieved individuals to hold it to account.

Rulemaking processes that permit the participation of civil-society advocacy groups can help to move executive policymaking in a more democratically accountable direction that complements the statutory law. The chain of legitimacy back to the voters is a key anchor for any representative democracy, but it is an insufficient check. Public law needs to incorporate public input and to require executive policymakers to give public reasons for their choices.

4. INDEPENDENT PUBLIC AGENCIES

The tension between technocracy and democracy arises prominently in "independent agencies" that challenge the conventional separation of powers. Such agencies first were established in the US, but variants are now common; in Europe, they often arose in connection with the privatization policies of the EU.

⁶ UN Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 25 June 1998, <http://www.unece.org/env/pp/treatytext.html> (accessed May 31, 2022).

⁷ The directives are 2014/52/EU (for Environmental Impact Assessment, revising an earlier directive) and 2001/42/EC (for SEA),

These agencies aim to deal with technically complex issues via insulation from day-to-day political pressures. Yet, their decisions often have important political consequences. Unless labeled as a court, a truly independent body does not satisfy the chain of legitimacy in a parliamentary regime. Hence, for both political and conceptual reasons, such agencies in Europe usually are nominally under a cabinet minister, lack rulemaking authority, and concentrate on case-by-case adjudication. Nevertheless, some operate with almost as much independence as their US counterparts. At the same time, the independence of US regulatory commissions is currently under attack. Cross-country comparisons help to highlight the tensions generated by different constitutional traditions and rationales for agency independence. The difficulties that have arisen in my case-study countries occur throughout the world and provide insights that may be applicable elsewhere (ROSE-ACKERMAN, 2021: 86-106).

Many democracies arose in political-economic systems with extensive state ownership. Democratic governments have sometimes privatized parastatals or, at least, overseen their incorporation as private-law entities with substantial residual state ownership. Some formerly public firms now operate as private firms, subject only to antitrust, environmental, labor, and health and safety rules. Many privatized or quasi-private firms are natural monopolies or operate in markets with serious imperfections. Then, states usually create industry-specific regulatory agencies with a degree of independence from both the firms and the state.

Even if a president has no power to interfere in an agency's day-to-day operation, he or she may choose a pliable official as its head or stack its board with allies. My case studies provide a guide to features that promote independence: multi-member commissions with rotating membership, fixed terms that are not coterminous with that of the government or president, independent funding, and appointment processes that ensure political balance and/or require relevant expertise. These provisions help avoid too close a link to the politicians in control of the core executive, but they may open up the body to the excessive influence of the regulated industry. To limit that result, the procedural constraints of administrative law, such as a transparent notice-and-comment process, can help, so long as the agency's activities are of interest to public-interest groups and members of the business community distinct from the regulated firms. These might include, for example, the users of electricity and gas for the public-utility regulator, the users of the internet for the communications commission, and freight suppliers for railroads and trucking.

To understand the difficulties, consider Argentina and the Philippines, both presidential systems that carried out extensive privatizations of public utilities. Following US and European models, they created specialized regulatory agencies that are independent of the rest of government and embody considerable industry-specific expertise. At the same time, both countries gave their presidents emergency powers that permitted them to take over nominally independent agencies. Presidents used these for their own political purposes (ROSE-ACKERMAN, DESIERTO & VOLOSIN, 2011).

In general, either the core executive or the regulated industry or both can undermine the supposed benefits of independence. There are ways to limit those risks through the design of the agency itself, but if the risk of political capture is very high, there is an alternative. Rather than trying to limit the influence of the regulated industry, the government could outsource that responsibility to private or quasi-public bodies explicitly controlled by the industry or profession. These bodies are set up to serve the interests of a particular industry or profession and must be regulated to limit the risk of outright capture. At first, the regulatory role of these bodies seems a paradoxical solution to the problem of capture, but it can be the least-bad option. The government may lack the needed specialists in, say, engineering, law, accountancy, or medicine and be unable to attract elite practitioners to sit on a commission. Then, professional self-regulation can seem viable. The risks are obvious, but the dangers of assigning regulatory tasks to poorly trained and motivated government officials may outweigh the risks of relying on self-interested private firms. The implementing statutes should impose strong procedural constraints on these bodies, similar to the requirements of US notice-and-comment rulemaking, to ensure that the public, customers, and suppliers have a voice. These bodies essentially create customary law; those who challenge the rules have a high burden of proof. The risk for any polity is that they act only in the interest of regulated entities, upholding monopoly power and becoming so entrenched that the state lacks regulatory control over the industry or profession (ROSE-ACKERMAN, 2021: 106-119).

Another alternative is what Mariana Mota Prado and Michael Trebilcock (2019) call “institutional bypasses.” The government permits the creation of new regulated financial or other markets without closing down an existing regulatory structure that the established elites have captured. Individuals and firms can choose their preferred market. A good example here is the Novo Mercado, a Brazilian alternative to the existing stock market with rules that provide better protection to minority stockholders. The two markets operate in parallel, but, over time, investors and firms may shift to the new option. This is not a general solution for problems such as environmental pollution where it would produce a race to the bottom, but for financial markets with well-informed participants, it could be way to work around otherwise entrenched interests.

The puzzle of how to combine expertise with political accountability is particularly acute for regulatory agencies where the regulated industry is politically powerful. The industry may lobby for a body that is not dependent on the cabinet, believing that it will be better off dealing with a regulator that is not beholden to politicians. In other situations, firms may prefer a politically dependent agency that will bow to the wishes of politicians who benefit from industry payoffs—bribes, future employment, or campaign contributions.

5. COST-BENEFIT ANALYSIS AND IMPACT ASSESSMENT

Governments should measure and weigh the costs and benefits to individuals when making policy. Most of the steps in a cost-benefit analysis (CBA) require input from technical experts, but governments ought not to leave the final policy choices to technocrats with no special claims either to make value choices or to represent the voting public. Policy choices are not purely technical exercises. CBA attempts to express all costs and benefits in monetary terms, applies a discount rate to the future stream of gains and losses and adds them up to find the option with the largest net monetary gain. The technique has no objective way to incorporate distributive concerns; yet they are de facto an aspect of any CBA exercise. The choice of a discount rate is a similarly vexed exercise, based on how one values the future versus the present (ROSE-ACKERMAN, 2021: 122-145).

Technocratic choices that fail to take account of public sentiment and value choices can result in a backlash that public officials cannot neutralize with the claim that the government's decision was backed up by solid analysis. For example, riots erupted in 2019 when the Chilean government raised transit fares by a small amount based on the recommendation of an expert committee that pointed to the increase in the price of diesel fuel and the fall in the exchange rate against the US dollar. The facts were not in doubt, but the government believed that the imprimatur of experts was sufficient (ROSE-ACKERMAN & MELGAR, 2022). In Germany, the planned rebuilding of the train station in Stuttgart triggered protests that the police put down in an excessively aggressive fashion. The railroad claimed that it had complied with all the needed procedures, but the public was not satisfied. In France, an increased gasoline tax, meant to combat climate change, led to the yellow vests' (*gilets jaunes*) protests. These examples are lessons for those in emerging democracies who think that technocratic solutions are sufficient. At the same time, it is important to make realistic estimates of the costs of public programs, and responsible politicians must make difficult choices. However, they need to take the time to explain these choices and, if possible, to involve the public early in the debate.

6. PUBLIC PARTICIPATION AND CONSULTATION

How can the executive, including regulatory agencies, balance expertise with accountability to citizens? Transparent procedures combined with public reasons are a necessary part of the answer; they allow citizens to know what the government is doing and how it justifies its actions. As a result, individuals, watchdogs, and the media can critique government actions, and both incumbents and political opponents can use that information at election time. However, after-the-fact review may come too late to affect contemporary policy choices. If expertise is essential, the ballot box is an imperfect instrument for connecting citizens to policy outcomes.

The limitations of transparency and reason-giving suggest that executive policy-making ought to engage the public directly when policies are still under discussion inside the executive. In my book, I explore a variety of techniques for public participation and argue that most are poorly suited to large polities facing technically complex problems (ROSE-ACKERMAN, 2021: 146-183). My interest is in public participation as an input into policymaking processes that government bodies organize. For technically complex and society-wide issues, grassroots participatory systems can have only a limited effect, even under ideal circumstances. Procedures should ensure adequate participation and transparency, but it cannot mimic village-level engagement. Central-government policymaking is necessary and cannot be made in a decentralized manner.

In recent decades, active public engagement has spearheaded national social and legal transformations. Social movements have generated fundamental shifts in public attitudes toward women, racial and religious minorities, and sexual orientation. These transformations typically take many years and include many different individuals and institutions (BARVOSA, 2018). The chain of legitimacy operates, but it is insufficient. In a democracy whose citizens have diverse views on substantive policy and basic values, unanimous consent is not the goal. Generally, there will be both losers and winners, but the state can institute processes that citizens accept as legitimate even if they do not always get the outcome that they prefer.

If CBA sets the stage within which public participation occurs, the process must overcome its limits. That implies that participation must be open to those at the bottom of the income ladder, and officials need to address fears of intimidation in an open and straightforward fashion. Long-standing patron-client relationships between politicians and local elites, on the one hand, and ordinary citizens, on the other, may make open-ended citizen participation difficult to institutionalize. The public administration should create a space for independent, issue-oriented citizen involvement.

Some of the most interesting experiments in public participation come from middle-income countries, some emerging from non-democratic pasts (ROSE-ACKERMAN, 2021: 157-168), including some in Latin America (ROSE-ACKERMAN & MELGAR, 2022). The most prominent examples are participatory budgeting in Brazil (POGREBINSCHI, 2013) and deliberative polls organized by James Fishkin and his associates throughout the world (FISHKIN, 2009). Here, I wish only to suggest the importance of understanding and replicating these and other exercises in citizen involvement under different conditions.

7. JUDICIAL REVIEW

Rulemaking processes do not always further democratic accountability, even if the law on the books is adequate. Strategic actors can hijack the process; hence, the losers need avenues of appeal to argue that the government has not followed its own proce-

dures or has acted lawlessly. Here is where the judiciary can help to promote accountable executive-branch policymaking, even though the courts are the least democratic of the branches. Administrative courts review for unbiased and honest administration in dealing with individual cases. Nevertheless, their isolation from day-to-day politics can permit them to provide impartial review of executive policymaking, as well as violations of individual rights. Judicial review can focus on procedures that encourage public input, on officials' public reasons, and on the consistency of executive rules with underlying substantive statutes and constitutional provisions.

In providing oversight, the courts walk a tightrope. Judges should set the parameters for government policymaking and monitor its agents' performance, without meddling in politics. A good balance is not easy to achieve. Each country's legal structure determines which issues are appropriate for judicial review and which should be left to the discretion of politically responsible institutions. My book's case studies reveal marked differences in the oversight role of courts. The comparative analysis provides a grounded sense of institutional possibilities, as well as assessing their strengths and weaknesses (ROSE-ACKERMAN, 2021: 184-243).

Generalist courts in the US and UK decide disputes involving executive rulemaking. The advantages are their broad perspective and their independence from the public administration. However, these virtues have potential downsides. Judges may fail to recognize the distinctive features of the administrative process—in particular, the political/policy aspects of rulemaking. In practice, both countries have introduced some specialization within their judiciaries. Thus, the US federal appellate court in the District of Columbia hears a large share of challenges to executive-branch rules. The UK recently established a specialized section of the High Court to hear appeals from tribunals covering particular policy areas.

In contrast, in France and Germany specialized administrative courts are the main locus of judicial oversight. Judges are career public officials who are close to the civil service in training. This knowledge has both benefits and costs. These judges have the expertise to evaluate the actions of the administration, but they may not have a sufficiently critical perspective. In essence, the debate over the value of specialized administrative courts repeats the controversy over the merits and disadvantages of specialized expertise that arises in executive policymaking itself.

Courts have intrinsic limits as monitors. They cannot set their own agendas; they only intervene in response to litigation. They manage their caseloads by refusing to accept certain kinds of cases by refusing jurisdiction, by judging ripeness and timing, and by limiting standing. Some courts permit public-interest standing, while others insist that plaintiffs suffer individualized harm. As to timing, courts can pause agency proceedings to resolve judicial challenges, hear a case after the rule takes final form, or hear complaints only after the agency has applied the rule to a particular case. Each aspect of review has different implications for the effectiveness of judicial monitoring.

The judicial role is shaped by each country's stance on the inherent prerogatives of the executive branch. How much information must the executive disclose? Is

agenda-setting a purely executive function, or can plaintiffs use lawsuits to force the government's hand? Should the internal organization of the bureaucracy and government contracting practices be subject to judicial review? May the courts impose limits on executive orders if they are not based on statutory grants of authority? If legislation creates an institution not contemplated in the explicit constitutional text, is the innovation constitutionally acceptable?

Judicial review can make corruption and other types of self-dealing harder to hide by forcing review both of the process and of the substantive outcome. Courts should check that agencies have correctly followed procedures and that the result complies with legislative purposes or constitutional principles. However, courts are constrained by the laws on the books. Requiring notice and an ability to comment may have little effect if agencies are not required to give reasons and are not subject to judicial oversight.

Judicial review of executive policymaking procedures only makes sense if the judiciary itself is competent and has an adequate budget; review can be counterproductive in states with weak, underfunded, or corrupt courts. Judicial independence is necessary but not sufficient. Taken alone, it risks impunity. A corrupt judiciary can undermine reforms and override legal norms. When dealing with such courts, the wealthy and the corrupt are confident that a well-placed payoff will resolve any legal challenges they face. An honest government administration will be difficult to establish if the judiciary is venal. In practice, no country has an entirely independent judiciary. Some accountability to the government and the citizens is consistent with a well-functioning judiciary, and it acts as a check on judicial corruption and other forms of self-dealing.

Even in the best of cases, judges may need additional training in the social sciences, policy analysis, and public administration to decide public-law disputes. If traditional legal training is formalized and legalistic, lawyers may lack the tools to carry out reviews of executive policymaking procedures at the intersection of the technical and political spheres. Outside of some US law schools, lawyers receive little training in fields relevant to the review of public-law cases, including those who become judges on administrative courts.⁸ Judges may need to call on outside advisors to complement their legal training, or (as in the US) hire as clerks recent law graduates with the relevant expertise. For example, if called upon to resolve a legal challenge to an environmental rule or standard, judges need at least a rudimentary understanding of the social and technical issues at stake. The courts' goal is not to judge the science directly but to be sure that the agency has acted consistent with democratic mandates.

A judiciary that is competent and not captured by the executive, nevertheless, may be unable to act because restrictive rules of standing and jurisdiction limit its docket, especially cases that challenge rulemaking processes. In addition, lawyers

⁸ See Thomas PERROUD, "Les études d'impact dans l'action publique en France: Perspective critique et propositions", *Politiques et management public*, Vol. 35, 2018, pp. 215-242. On the situation in France.

who bring public-interest cases without wealthy named plaintiffs may be unable to earn a living. There may be relatively few public-interest law firms, and these may be poorly funded and unable to reach financial settlements that could finance future suits. Most challenges may come from business firms and trade associations—biasing the caseload of the courts. In Europe and elsewhere, the courts require the loser to pay both sides' legal and court fees. This discourages frivolous lawsuits, but it also discourages risky suits that test the limits and meaning of vague statutory and regulatory language. A lawsuit brought to improve the clarity of the law usually has social benefits to many not directly involved in the lawsuit. Hence, there is a public interest in encouraging such suits. Two-sided fee-shifting can discourage such risky suits, as can rules where each side pays its own fees. One response, embodied in some US environmental laws, is one-sided fee shifting, where the public-interest plaintiff does not have to pay the government's legal fees if it loses, but the government pays the plaintiff's legal fees if it wins.⁹ These provisions provide an incentive to test the law's interpretation without opening up the plaintiffs to large liabilities if they lose.

Establishing an effective system of judicial review of executive policymaking is a complex undertaking where the basic competence and honesty of the judiciary interact with the nature of judicial review. Review is, however, necessary to further the policymaking accountability of the executive ministries and regulatory agencies.

8. SPAIN AND LATIN AMERICA¹⁰

Moving beyond the in-depth case studies in my recent book, I pause briefly to consider the related cases of Spain and Latin America, drawing on the overview of Latin America in Rose-Ackerman and Melgar (2022). Although Spanish administrative law draws on the public law of Germany and France, its legal framework for executive policymaking arose in 1958, during the authoritarian Franco period and included procedures for drafting and issuing regulations. However, in practice, executive degree-laws, not based on statutory delegations, were of central importance.¹¹ The 1975 transition to democracy made Spain especially attuned to the dangers of unilateral executive action. However, Spain's 1978 democratic constitution, article 86.1, gives the Government limited authority to issue emergency "Royal Decree-Laws" with force of law and without an authorizing statute. Under article 86.2, the decree-law must be ratified by the Congress within 30 days to remain in force. In March 2022, for example, the Government issued a decree-law on matters relating the effect of the war in Ukraine on the Spanish labor force, arguing that immediate

⁹ See the US Clean Water Act 33 C. W. A § 1365.

¹⁰ Javier Barnes and Edgar Melgar provided comments on the Spanish case and its relationship to Latin American public law. I remain responsible for errors and my over-simplification of a complex and fluid reality.

¹¹ According to Javier Barnes, although the APA of 1958 introduced rulemaking as a legal option, executive decree—laws were more important and generated much fear.

action was needed.¹² Thus, although the executive's decree authority is much more restrictive than under the Franco regime and is limited in subject matter, Royal Decree-Laws permit broad executive discretion.

At the same time, the 1978 Constitution, Section 105.a, requires the law to make provision for: "The hearing of citizens, directly, or through the organizations and associations recognized by the law, in procedures for rules and regulations affecting them." Two principal statutes implement these constitutional provisions. First, APA 50/1997 dealt with the rulemaking process.¹³ After 1998, other statutes broadened the scope of judicial review so that regulations may face court challenges. Second, section 133 of the Spanish Administrative Procedure Law 39/2015 implements the constitutional text and elaborates on the nature of the required consultation.¹⁴ Under that provision, much of the consultation process should be open to anyone, but these procedures can be omitted, "if serious reasons of public interest" justify doing so. Apparently, the public administration itself makes that finding. Nevertheless, unlike my other European cases and most Latin American countries, the constitution's explicit mention of consultation with citizens recognizes the importance of assuring the democratic legitimacy of executive rulemaking, over and above links through the electoral connection.¹⁵ These developments place Spain in what Javier Barnes calls the "second-generation" of administrative procedure, that is, one that includes consultation processes but where the procedures remain part of a centralized top-down regulatory process "not based on a wide vision of cooperation between agencies, regulated parties, and the public" (BARNES, 2017: 312, BARNES, 2010: 336).

Latin America shares a legal culture with Spain and Portugal, but its constitutional forms are similar to the US presidential system. In addition, some regulatory bodies imitate US regulatory commissions, established as these countries privatized their public utilities, such as electricity and telecoms. They represent a distinct set of cases, not examined in *Democracy and Executive Power*. Their national presidents

¹² Royal Decree Law 06/2022, Summarized in "Government Approves Restrictions for Layoffs, Employment Measures for Specific Sectors, and an Increase to the Guaranteed Minimum Income", *Garrigues*, March 30, 2022, https://www.garrigues.com/en_GB/new/spain-royal-decree-law-62022-government-approves-restrictions-layoffs-employment-measures.

¹³ That act supplemented APA 30/1992, which replaced the 1958 act and covered aspects of the administrative process except rulemaking.

¹⁴ Article 133 foresees three different forms of participation in the procedure for the adoption of an administrative rule: (i) the 'consulta pública' on a concept note is open to any 'person potentially affected', (ii) the 'información pública' on a draft is also open to anybody, and (iii) the 'audiencia pública' on a draft is addressed to the individuals or groups specifically concerned. There are exceptions to the duty to carry out these participatory procedures (Article 133.4). An administrative document discussing the results is mandatory after the 'consulta pública' (Article 26.3 of the Public Sector Act 40/2015), and after the 'información pública' (Article 83.3 APA 39/1995). I am grateful to one of the anonymous referees for this elaboration. In addition, other sectorial laws (such as urban or town planning) as well as local or regional administrations have analogous rulemaking procedures for their respective fields. I do not deal with these here, but they also deserve comparative study.

¹⁵ Other constitutional provisions also recognize the right of citizens, individually or collectively to petition (Art. 29.1) and to have access to public information (Art. 105(b)).

generally have independent decree power co-existing with relatively weak or divided legislatures. To some extent, these strong executives reflect not just the US model but also the model of the strong Spanish executive in spite of its parliamentary structure.

Across Latin America, administrative law structures differ by country, but overall, there are only weak legal requirements, if any, for notice, hearings, and public reason-giving when the executive branch issues regulations with legal force. A few countries, such as Argentina, adopted APAs that closely tracked the Spanish 1958 APA; within the last decade, the Dominican Republic and El Salvador enacted statutes with provisions similar to the notice-and-comment provisions of the US APA. In practice, these statutes apparently have had little practical significance. However, there are two important exceptions: environmental policymaking, familiar to me from my European cases, and the distinctive position of indigenous groups with consultation rights established by section 169 of the *Indigenous and Tribal Peoples Convention* for public projects that will affect these groups (ROSE-ACKERMAN & MELGAR, 2022).¹⁶

The judiciary provides varying degrees of oversight in Latin America (ROSE-ACKERMAN & MELGAR, 2022, on Spain see MIR, 2021). Many countries have separate administrative courts (*jurisdicción contencioso-administrativa*) building on European models such as France, Germany and Spain. In addition, in most countries, the *amparo*, process evaluates the effects of policies on individuals, based on their constitutional rights. Although the process enforces substantive rights codified in statutory or constitutional law or international treaties, the courts may add their own procedural requirements. Although traditionally used to enforce individual rights, some Latin American legal systems recognize a collective *amparo*, and the courts hear cases brought by groups, for example, a community affected by a mining project or a class of people affected by the same medical problem (ROSE-ACKERMAN & MELGAR, 2022).

The Spanish constitution recognizes a right to *amparo* (Art. 161(1)(b)), and “any natural or legal person with a legitimate interest” can seek its protection (Art. 162(1)(b)). However, this constitutional right is not the usual route for challenging regulations because it requires exhaustion of legal remedies. According to Javier Barnes, the *amparo* process generally concerns rulings by other courts that have not remedied the violation of a fundamental right. Instead, the channel for judicial review of administrative actions is the contentious-administrative jurisdiction, and there are two forms of judicial challenges, both individual and collective: direct, against the regulation itself, or indirect, against the administrative act applying the regulation. The contentious-administrative jurisdiction, therefore, may annul a regulation for material or substantive reasons, as well as for procedural reasons.

¹⁶ International Labor Organization, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document.

Some argue that political considerations are relevant in the selection of justices for Latin American constitutional or supreme courts and other courts with a role in the oversight of the government. Even with nominal independence and terms that overlap those of the president, chief executives have frequently determined Supreme Court composition upon taking office. As in the US, prosecutors are presidential appointees in some countries, although in others they are independent and appointed on merit. In contrast to the US and similar to Spain, France, and Germany, most judges are civil servants with lifetime career paths. They may be apolitical but they often have low budgets and few staff to handle caseloads effectively.

One response has been the creation of judicial councils (*consejos de la magistratura*) charged with selecting judges on merit, but this has had mixed results. One commentator suggests that councils might work better if they were required to operate transparently and to develop participatory processes that consult with concerned citizens (POPKIN, 2005). Some of the same issues relating to accountability and public legitimacy arise with the courts as with the executive rulemaking procedures themselves.

In spite of these weaknesses, our review of the administrative law of rulemaking in Latin America reveals clear movement in the direction of more public accountability (ROSE-ACKERMAN & MELGAR, 2022). Procedures for consultation, however, seldom express broadly democratic goals that involve citizens qua citizens. At the same time, courts have enforced consultation rights, and the growth of such processes could be a first step toward a broadened democratic involvement in executive policymaking.

Reforms of Spanish administrative rulemaking procedures parallel developments in Latin America. Both the Spanish Constitution and the 2015 amendments to its administrative procedure act recognize a right to public participation including the right to a hearing and public access to information. Two years earlier, Spain, after many Latin American countries, enacted a law on transparency and freedom of information.¹⁷ Granted, the provisions in Iberian and Latin American law do not amount to requirements for notice-and-comment procedures, as embodied in the US APA (BARNES, 2017), but they could serve as a base on which to build toward enhanced citizen participation in executive rulemaking procedures.

¹⁷ Act 19/2013 on Transparency, Access to Public Information and Good Governance, https://www.hacienda.gob.es/Documentacion/Publico/AdministracionElectronica/Act-19-2013_on_transparency_access_to_public_information_and_good_governance.pdf. The Mexican Freedom of Information Act, dates from 2002, and is particularly well institutionalized. Several Latin American countries, including Brazil, Chile, and Colombia, as well as Mexico, rank above Spain in a 2016 list prepared by RTI, <https://www.rti-rating.org/country-data>.

9. A REFORM AGENDA

All democracies face the same basic challenges if they seek to institutionalize accountable executive policymaking processes. Constitutional and administrative law must confront the difficulties of balancing competence, public participation, and government accountability. These are not challenges that the judiciary can confront on its own. A constitutional or statutory framework is necessary. Every country must make its own diagnosis, but several pervasive problems reoccur that suggest directions for reform related especially to the issuance of executive rules with the force of law. These suggestions arise from the overall analysis in Rose-Ackerman (2021). They involve:

- (1) Procedures for issuing rules and policy documents that balance competence and democratic values;
- (2) Better civil-service training and integrity;
- (3) Laws that facilitate the establishment and accountability of civil-society groups;
- (4) Balanced oversight of independent agencies and quasi-private regulatory bodies;
- (5) Experimentation with alternative routes to public participation in executive policymaking;
- (6) Judicial review of the democratic efficacy of the administrative process, supported by standing for non-governmental advocacy groups; and
- (7) Improved legislative capacity to evaluate delegated authority.

First, administrative-law reform may need to limit executive decree powers, especially as the drafting capacity of the legislature improves. As the US example demonstrates, placing procedural constraints on the issuance of rules with the force of law may lead to circumvention of these procedures through case-by-case implementation and the use of instruments, not subject to notice and comment. Presidents, ministers, and regulatory commissions, instead, may issue executive orders, guidance documents, policy statements, or memoranda. These are familiar workarounds in the US, and they could spread to other governments newly subject to notice-and-comment procedures. Thus, administrative-procedure acts should set explicit limits on efforts at circumvention. They should provide for their use in clearly defined areas and forbid them in others.

At the same time, the law of administrative procedures ought to reflect the time and trouble of using these procedures. There is no value in red tape for its own sake. Some reforms can succeed through internet portals; others require face-to-face interactions. We need more and better research on alternatives that combine modern technology and human interaction. Sometimes simply streamlining and clarifying procedures is sufficient to improve government functioning. If citizens and business-

es know what they need to do to comply with the rules, streamlining can increase both the competence and the public acceptability of public policies. However, administrative reforms of that sort cannot solve underlying policy problems. The state can make compliance with rules easy and quick, but if the policies that they reflect do not incorporate public concerns or even acknowledge public discontent, the population may resist them, sometimes violently. Simplicity of implementation is only one value.

Second, the quality and honesty of the bureaucracy set the background conditions for executive policymaking. The civil service needs officials trained in policy analysis based on economics, social science, and the technocratic knowledge at the heart of their offices' mandates (for example, meteorology for the weather bureau, statistics for the census bureau, the effects of toxic chemicals for the regulation of pesticides and food additives). Some officials may have few technical qualifications beyond party loyalty and patronage links; others may be competent technocrats who lack an understanding of the operation of government and its interactions with the public. These contrasting concerns have been central to the field of public administration. Bureaucracies operate in a political context, and career officials need to be aware of the connections between their professional expertise and the shifting political imperatives of periodic elections. Most officials will need to balance their specialized training with deference to political appointees at the top of their agencies. In extreme cases, they will face sharp tensions between professional and technocratic norms and political pressures.

The fundamental background conditions for an effective civil service are limits on conflicts of interest and the prevention of corrupt inducements. These conditions also ought to apply to political appointees and to private contractors. Tension exists between the government's ability to tap into private-sector expertise and the worry that experts have political biases that will compromise their impartiality. There is no easy way to resolve this tension, but the public sector can mitigate it in several ways. Thus, those who leave government for the private sector may be restricted from private-sector work related to their previous government service. Furthermore, rulemaking procedures that promote democratic accountability also help make bureaucratic actions more transparent and act as a check on official self-dealing. Policies that limit conflicts of interest can also limit corruption, but more direct anti-corruption policies are necessary both to reduce the economic rents in public programs and to discipline and suspend the corrupt.

Third, the law should make it inexpensive and easy to establish civil-society advocacy groups, at the same time as it requires transparency about their finances and backers. Nonprofit organizations (NGOs) that are "for-profits in disguise" are a risk if reporting requirements are lax and taxes on for-profit firms are high. In turn, public authorities must not deny licenses to NGOs for political reasons.

Fourth, the policymaking roles of independent government agencies raise distinctive issues. Are these agencies too independent of central political control or not independent enough? Their constitutional status may be in question. In the US,

the judiciary has upheld the constitutionality of independent agencies and allowed them to make rules with the force of law in the same way as cabinet departments. The parliamentary systems of the UK and Germany limit the policymaking role of agencies, although many have de facto rulemaking power. In France, such agencies adjudicate individual cases. They do not make rules, although the relevant ministries consult them. The tripartite separation of powers into legislative, executive, and judicial does not accord well with the functional requirements of modern government. Independence from both the core executive and the legislature, constrained by judicial oversight, is a pragmatic response to certain kinds of regulatory challenges in the modern state. Both wealthy countries and middle-income democracies have implemented such institutional reforms, especially in Latin America in connection with the privatization of public utilities. The key point is not so much the need for independent expertise, which government can obtain through consulting contracts. Rather, the primary justifications are the value of insulating regulators from day-to-day political imperatives and from the ministry that makes economic decisions as part owner of the firm, even after privatization. Politicians may seek to favor their constituents and donors. The relevant ministries may resist regulatory policies that increase competition but lower the profits of regulated firms. The arguments against independence focus on the possibility of a rogue agency captured by some portion of the regulated industry or by an interest group. These risks imply that the participation of nonpartisan, civil society and of affected groups is especially important when independent or quasi-independent agencies issue rules with the force of law. Independence may promise impartial, expert agency actions, but it needs to include input from ordinary citizens.

Fifth, both government ministries and civil-society groups should be given incentives to experiment with alternative ways of encouraging public participation in policymaking, and funds should be available to test alternative routes to public involvement. Analysts should measure effectiveness not by asking the participants if they are “satisfied” with the process but rather by looking at the impact of the process on the administration’s policy choices. Within my framework, the goal is not to have “the public” make rules and regulations by itself. Rather, rulemaking ought to be the responsibility of cabinet departments and independent agencies operating under delegated authority. But these bodies ought to seek input, not just from regulated entities and technical experts but also from citizens and organized advocacy groups. Furthermore, once this input has been provided, the public body ought to issue a public statement of reasons that tells the electorate what policy it has chosen and why. The judiciary can review this decision if someone brings a case, but only to check the procedures used and the rule’s consistency with the statute and the constitution. It should not second-guess policy choices but rather focus on the democratic legitimacy of the outcome and the process.

One model that seems worth developing merges some aspects of American-style notice-and-comment rulemaking with lessons from participatory experiments elsewhere. The key features would include the following steps:

- A preliminary technocratic exercise by a public agency that produces a set of feasible options;
- An open-ended public website for the provision of input on these options, with comments posted on-line;
- A sifting process that consolidates the agency's options with the public comments to isolate the key points of contention;
- Selection of a limited-sized group that represents a cross-section of those with an interest in the policy;
- A moderated discussion among the group members either to reach a consensus recommendation or to produce a report laying out areas of disagreement.

With that information in hand, the agency then decides on its course of action and issues a rule along with a statement of reasons. To the extent that analysts use CBA or impact assessment, these studies would enter the process up front when the agency drafts the options, but before public consultation occurs. This proposal is just a sketch, not a blueprint. It combines elements of existing systems to bring together expertise and public input. If the political will exists, it could operate in both wealthy and middle-income countries.

Sixth, laws that require public participation may mean little in practice unless those excluded from the administrative process have access to the courts. The courts can review not just the administration's acceptance of outside input but also the extent to which government agencies take it into account. Such oversight risks converting the courts into policymakers, but it is possible to craft doctrines of review that stress, first, the proper use of procedures, and second, the consistency of executive rules with statutory mandates or constitutional grants of authority. The argument for the judicial review of procedures is precisely that it distances the courts from substantive policymaking and stresses the connection between the government and bureaucracy, on the one hand, and the citizenry, on the other.

Seventh, legislative capacity to review statutory delegation needs strengthening in many countries. This could involve better staff support for members, parties, and committees, as well as non-partisan training programs for new members at the start of each session. Such training is especially important in a separation-of-powers polity, such as the US, where bills are both drafted and modified inside the legislature, rather than presented to it by the cabinet as an almost finished product. Better legislative capacity could also help members of parliament to push back against unilateral efforts by the cabinet to impose statutory drafts on the legislature without providing for adequate evaluation and discussion of their consequences. Controversial efforts to achieve open-ended delegations to the government would then be subject to more intelligent debate both inside and outside the legislature. Laws could still pass in the heat of a political moment, but, at least, the legislature would have the capacity to raise informed questions about government initiatives.

Some may challenge a rule as a violation of individual rights, and such review is an important part of the judiciary's responsibility. Nevertheless, rights review should not prevent the courts from acting as a backstop to help promote the democratic accountability of government policymaking. Because policymaking in the executive is the only realistic option in a modern democratic policy, the law should empower the courts to check on the responsible use of such power. This may be a difficult task for legally trained judges with little in-depth knowledge of substantive policy, and that weakness suggests caution. It explains why judges may review procedures and defer to well-justified policy choices. If a policy choice is reflected in rules, however, the judiciary should be careful not to impose procedures that mimic those used in the courts themselves—procedures that do not acknowledge the mixture of technical knowledge and democratic responsiveness necessary in a representative democracy seeking to respond competently to the challenges of governing a regulatory/welfare state.

10. CONCLUSIONS

Administrative law and constitutional law interact whenever policymaking occurs outside the legislature under statutory delegation or executive prerogatives. Law constrains the exercise of both pure political expediency and technocratic expertise, but it is not independent of the political and policy context. Law regulates the democratic structure of government with enforcement by the courts, but the political incentives for policymaking accountability differ across constitutional structures. All four of my case study countries have professional bureaucracies and competent courts, but their constitutional structures have had a strong influence on the democratic accountability of policymaking within the government in each country. Other wealthy and middle-income countries, such as Spain and Portugal and the Latin American democracies, seeking technically competent and democratically acceptable delegated policymaking, face similar challenges. The variety of constitutional frameworks helps explain the differences in administrative policymaking practices and the role of the courts. It does not excuse them. Even if the political incentives embedded in certain constitutional structures suggest that sitting politicians will have little interest in reform, the need for reform remains. I have presented some general options for more democratically responsible executive policymaking, and I hope that they will generate debate both in countries with few procedural constraints on rulemaking and in the US, where rulemaking procedures need reform. The US notice-and-comment process may be losing some of its standing as a protector of democratic legitimacy in an atmosphere of distrust of government. The process itself can leave out important voices, and public officials, elected presidents included, are finding routes to policymaking that lack even the imperfect protections of the APA. Those concerned about the future of representative democracy should include rulemaking reform in their list of priorities along with a critical examination of other ways in which policies take

form. Structural issues linked to the openness and accountability of regulatory bodies should not be ignored in the heat of day-to-day crises that soak up the headlines.

Public participation in executive policymaking interacts with each state's constitutional structure in different ways. The incentives for making policymaking accountable to the public differ between alternative forms of parliamentary and presidential government. Formalistic theories of the separation of powers are insufficient; they place government activities too rigidly into predetermined boxes. In spite of cross-country differences, citizen agitation for more effective public input into major government decisions is commonplace.

My analysis leads to a paradoxical conclusion. Although American politics is riven by inter-branch conflicts, the implications for the law of bureaucratic rulemaking have been generally salutary. I argue that notice-and-comment rulemaking under the APA comes closest to the democratic ideal of public involvement in delegated policymaking. Although under pressure from presidential overreaching and subject to justified criticism for failing to live up to its promise, the APA, at least, does confront the political and technocratic values at stake in rulemaking.

In most democracies, civil-society organizations are pushing the courts and other oversight institutions to encourage public input into the actions of public bureaucracies. Much of this activity, especially outside the US, focuses on the violation of individual rights. However, a deeper look at these developments suggests an enhanced concern with the democratic status of executive policymaking. Reformers elsewhere can learn from studying the interactions between courts, government monitors, and civil-society watchdogs. These reformers may face very different levels of institutional capacity and public involvement, but the imperfections of even established democracies should promote critical and creative thinking about institutional design.

Representative democracies need to go beyond elections, representative legislatures, and the establishment of political parties. Executive policymaking should have a legal basis that accepts its necessity and gives it democratic legitimacy through structures of policymaking accountability—that is, transparency, public input, and reason-giving, with judicial review of process. These procedures ought to be a priority for reformers in any country that is rethinking the connection between its administrative-law system and constitutional structures that entrench democratic institutions.

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