Comparative administrative law: an introduction

Susan Rose-Ackerman and Peter L. Lindseth

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
Comparative administrative law

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, 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/État 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 Scheppelle (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, Scheppelle 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 policymaking 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 party. 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, Dominique 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 rule-making 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

---


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’État_, 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’État_ 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’État_ 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.
An introduction

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 Scheppelé’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 Scheppelé’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

Susan Rose-Ackerman and Peter L. Lindseth - 9781849808101
Downloaded from Elgar Online at 03/13/2019 06:42:26AM
via free access
An introduction

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
An introduction

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 ‘Europeized’ 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.

References
20 Comparative administrative law


