1-1-2000

Administrative Law Unbounded: Reflections on Government and Governance

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Administrative law as it has historically been understood presupposes that there is something called administration. The administrator and/or the administrative agency or organization exist as a bounded reality. Administrative law prescribes behavior within administrative organizations; more importantly, it delineates the relationships between those inside an administration and those outside it. Outside an administration lie both the statutemaker whose laws and regulations administrators owe a legal duty to faithfully implement and the citizens to whom administrators owe legally correct procedural and substantive action.

More generally, the political and organization theory that inform our administrative law have traditionally viewed public administration as a set of bounded organizations within which decisions are made collectively. On this view, these "organs of public administration" are coordinated with one another, subordinated to political authority, and obligated to respect the outside individuals and interests whom they regulate and serve.

In today's public administration and political science literature, however, the word "governance" has largely replaced the word "government."[1] This change in vocabulary announces a significant erosion of the boundaries separating what lies inside a government and its administration and what lies outside them. To be sure, governments and their administrative organizations still make collective decisions, but now everyone, or at least potentially everyone, is also seen as a participant in the collective decision-making process.

Today, elected and nonelected government officers, nongovernmental organizations, political parties, interest groups, policy entrepreneurs, "epistemic communities," and "networks" are all relevant actors in the decision-making processes that produce government action. The decision-making process is no longer seen as one in which private activity occurs

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1. *See, e.g.*, DEBATING GOVERNANCE (Jon Pierre ed., 2000); THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION (Beate Kohler-Koch & Rainer Eising eds., 1999).

around government decisionmaking, or seeks to influence government decisionmaking. Rather, the very distinction between governmental and nongovernmental has become blurred, since the real decision-making process now continually involves, and combines, public and private actors.[2]

Some contemporary concerns regarding administrative decisionmaking were anticipated in earlier examinations of the role that certain professionals have historically played in administrative organizations. A civil service engineer participating in a government decision on the design of a new bridge, for example, could not simply weigh engineering considerations against recreational, aesthetic, or financial concerns. He could not approve a design that failed to meet minimum acceptable engineering criteria, no matter what other considerations were at play. The engineer could not do so precisely because he was an engineer, and was therefore constrained by professional norms and expectations.

Several attendant consequences arise when a "government" decisionmaker's choices are constrained by external professional obligations. Perhaps the most significant such consequence is that a crucial government decision is made neither by a government official nor even by a specific nongovernmental person or organization, but rather by the collective practices of a profession—that is a group of persons defined by their possession of a particular body of knowledge. Moreover, the decision may not in its substance be objective, or neutral, or correct. A minimum bridge standard, for example, is derived from stress tables and other professional instruments that themselves reflect an arbitrarily chosen level of acceptable risk. The risk level, in turn, rests on an arbitrarily calibrated balancing of marginal costs against marginal risks. All of these engineering choices, moreover, change over time. Thus, engineers are ethically bound to insist not on a perfectly safe bridge but merely on one that does not exceed an acceptable level of risk as defined by current, but changing, engineering standards.

The transfer of governmental decision-making authority to outside actors occurs along a continuum. While it is evident even when the professional who makes the decision is a government employee, it is considerably greater and more direct when that professional is advised by a committee of

2. *See, e.g.*, Keith Dowding, *Model or Metaphor? A Critical Review of the Policy Network Approach*, 43 POL. SCI. 136 (Mar. 1995); Alex Warleigh, *The Hustle: Citizenship Practice, NGOs and 'Policy Coalitions' in the European Union-The Cases of Auto Oil, Drinking Water and Unit Pricing*, 7 J. OF EUR. PUB. POL'Y 229 (June 2000); Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (Winter 1992).

nongovernment professionals. And it is, of course, greatest when the ultimate power to make the decision is wholly transferred to such a committee. Thus, if a highway department regularly asks private firms to submit bridge designs to a design committee comprising professionals who are not employed by the government, and the department regularly accepts whatever design the committee recommends, then the government has effectively adopted a model of governance in which the applicable accountability standards are defined by private, rather than government, bodies.

A dramatic example of this erosion of administrative boundaries is found in the European Union's (EU) "comitology" process.[3] The EU's law-making body is the Council, which typically enacts general and broadly-worded legislation. Particularly where such legislation regulates private economic activity, it is generally implemented not in its original form, but only after several more detailed standards and rules have been added. Council legislation thus frequently contains a provision that delegates to an expert committee the power to add any necessary regulatory provisions. Members of such committees are usually selected by the European Union Commission (the Commission), the EU's administrative arm. The Commission must include members from each Member State, but may also include experts employed by national or local governments; research organizations owned, subsidized by, or holding contracts with the government; nongovernmental research organizations; private enterprises; nongovernmental organizations (NGOs); and universities (which are themselves often government-owned).

Precisely because they are by constitution "expert" committees, many of their members bring into them strong associations with epistemic communities of experts and/or networks of persons and organizations interested in a particular issue. The detailed regulatory rules constructed by these committees become law if the Commission agrees to them or, in the case of disagreement, if the Council approves them. Typically, however, the Commission interacts closely with the committees to achieve a mutually agreed outcome. The committee members continue in their regular occupations, whatever they may be, during the life of the committee. Committee membership changes often. Committees meet irregularly. There are no formal procedures. No one even knows precisely how many committees there are. Given the significant role that nongovernmental participants play in the EU's legislative process, it makes little sense to view

3. *See* EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS (Christian Joerges & Ellen Vos eds., 1999).

the comitology process in terms of "outside" or "private" or "interest group" influence on the "government," or the "administration," or "an administrative" or "legislative" organ of government. While comitology is governance, the distinction between government and the governed has been lost.

U.S. administrative law is not only affected by the move from government to governance but is one of its primary causes. The great transformation of U.S. administrative law that began in the 1960s was largely driven by a pluralist political theory.[4] "Hybrid" rulemaking and the "dialogue" requirement attempted to make government more transparent and to provide interest groups greater access to government decision-making processes.[5] The culmination of this movement has been regulatory mediation—the government agency itself almost ceases to be the decisionmaker, instead serving as the facilitator of a direct agreement among interest groups. The whole movement begins with an image of bounded government and the desire to make what goes on inside government more available to outsiders. Once the demands for transparency and participation are realized, however, the distinction between insider and outsider fades. As the various actors in the dialogue are given more equal roles, the dialogue itself evolves into governance. The partnership doctrine that originally referred to the relationship between two government officers—administrator and judge—has become irrelevant. Today, everyone involved in the decision-making process can fairly be viewed as a partner.

The erosion of the boundary between government and nongovernment decisionmaking generates several new problems for those who seek to make an administrative law that focuses on governance rather than government. From the perspective of pluralist democracy, an administrative law that maximizes transparency and participation is democratic—it maximizes the access of "outside" interest groups to the government decision-making process. But from the standpoint of individual, popular, or majoritarian democracy, an administrative law that promotes transparency and participation to such a degree that government becomes governance may actually undermine democracy.

As public policy decisionmaking is diffused among various government and nongovernment actors in an amorphous, non-rule-defined manner, democratic accountability is destroyed. Reference to some standard

4. *See* Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

5. MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 36-54 (1988).

observations on the operation of parliamentary government may make this point clearer and less abstract. Where a parliamentary government coincides with a two-party system with strong party discipline, decisionmaking is concentrated in a cabinet that bears collective responsibility. This approach to government epitomizes democratic accountability. Voters know exactly whom to hold electorally accountable for everything that the government does or fails to do. This high level of accountability, however, is achieved at the expense of minimizing pluralist participation in the government decision-making process. Provided that the cabinet can maintain the support of a majority of voters, for example, it can effectively exclude any or all minority participation. A perfectly functioning two-party parliamentary government with strong party discipline is actually a plebiscitary dictatorship in which everyone remains at the mercy of the cabinet until a majority of voters vote it out and replace it with a different cabinet at whose mercy, again, everyone will be. "Governance" by "network" and "epistemic community" has the opposite effect. While every interested group may participate in the decision-making process, the voters have no idea whom to reward or blame for results they like or dislike.

Another paradox created when governance supplants government is that maximizing transparency and participation for the interested minimizes transparency and participation for the disinterested. The EU comitology process again provides a useful example. While virtually every interest group finds a place on the committees, European citizens are generally unaware that the committees even exist. If they are aware of the committees, they generally do not know what matters each committee considers, or when, how often, or where. They do not know the names of committee members, and if they did, they would not know who those people were, whom they represented, or to whom they were beholden. The mass media do not cover the outcomes of committee deliberations which, after all, only clear up details relating to matters actually legislated by the Council months or years earlier. Thus, while the comitology process is extremely transparent and participatory for those who are actually involved in it, and while many of those inside it are outside government, it remains for the citizen voter a highly opaque and nonparticipatory process.

The third major problem with governance is that it favors experts over nonexperts. In our post-industrial, high-tech world where governance must deal with highly complex policy issues, the relevant epistemic communities and networks consist of professionals, specialists, and heavily-committed true

believers. Consequently, governance degenerates into pervasive bureaucratic micromanagement. A government of this sort would be anathema to democratic principles. Do we want a world in which what we eat is governed by dieticians, how we play by fitness experts, how we move by transportation experts, how we are educated by doctors of education, and how we do everything by safety experts? Our illiterate, thin children, clad in plastic helmets and padded suits, would be engaged in group weight-lifting until their next meal of beans and sprouts. A committee that essentially does nothing more than coordinate the vast network of greens, feminists, city planners and epidemiologists would genuinely frighten most people. If that is not enough, think of a network of psychologists making the rules about child rearing. While the ticket to participation in governance is knowledge and/or passion, both knowledge and passion generate perspectives that are not those of the rest of us. Few of us would actually enjoy living in a Frank Lloyd Wright house.

Thus far, we have considered the erosion of the boundaries that separate the governors from the governed. A second erosion of these boundaries is taking place along a different geographic dimension; national governments are increasingly losing authority to both supra- and subnational governments. It is now commonplace that the two losses are linked. Catalonia and Scotland, for example, are achieving autonomy precisely because they have access to a EU free market. The traditional threat of exclusion from the Spanish national market and the U.K. market, respectively, no longer holds them in subordination. Of course, globalization and regionalization generate a multitude of opportunities and problems. For administrative law, regionalization does not create special new problems at least so long as each region is confined within the boundaries of a single nation-state. In such instances, regionalism resembles the federalism with which we are familiar.

Transnational or global governance, however, raises more serious problems for administrative law. Under this form of governance, decision-making processes are relatively new and tend to be elitist and opaque, with few participants and no agreed upon protocol. Provided the only actors were nation-states, there were well-established diplomatic customs governed not by administrative but by international law. Here again, however, the movement from government to governance has brought NGOs greater, but as yet undefined, participation in transnational policymaking.[6] Lack of defined participatory mechanisms leads to street demonstrations that demand

6. *See generally* Haas, *supra* note 2.

additional places at the table, but there are as yet few seating plans or even table manners. Even transnational governments that are more narrowly defined experience difficulties in shaping administrative law for themselves, as the nation-states of which they are composed often have very different administrative law traditions. For instance, the administrative law of the EU is very under-specified in the treaties creating it; and there is a debate about whether that law should be codified, as it has been in many EU Member States, or remain case law, as it has in several of the EU's prominent members.[7]

In general, then, the proliferation of geographic levels of government, the increase in functionally specialized or regional governing units that do not correspond to traditional national boundaries, and the rise in epistemic community, network, and interest group participation in public policymaking surround the procedures for transnational decisionmaking with complexity and uncertainty.

Two notable problems for democratic theory arise from these transnational developments. The first involves the extent to which decisions reached by agreement among the nation-state members of transnational organizations may be considered democratic simply because the national governments themselves are democratic. If fourteen democratic governments agree on a joint decision, is that a democratic decision even if the individual voters of those fourteen nations had no direct say in the outcome and had not themselves directly elected the decision-making bodies? For administrative law, this "democratic deficit" problem rests largely with the transparency, or rather the lack of transparency, in transnational decisionmaking. Traditional diplomatic norms of multinational negotiation emphasize secrecy and consequently favor a narrow range of participants. For this very reason, individual democratic States can hardly develop their own stances in multinational negotiations through the transparent and participatory processes they may use for deciding domestic issues. It is not at all clear, that is, whether procedural rules that emphasize transparency and participation can simply be moved "up" from national to transnational settings.

The second problem—one primarily of international law, but with administrative law implications—can be seen most clearly in the area of international human rights law. Many international law "rules" are largely the creation of an epistemic community of human rights enthusiasts. At some

7. *See generally* Martin Shapiro, *The Codification of Administrative Law: The U.S. and the Union*, 2 EUR. L.J. 26 (1996).

point in the development of these rules, citizens of various States are informed that they are bound by the rules as a result of various international conventions and court decisions. This process places much emphasis on nonelected judges and little on elected legislators. International human rights policies thus illustrate a movement not only beyond the nation-state, but from government to a form of governance in which the decision-making process is far more complex and unbounded than the typical processes defined by conventional constitutional and administrative law. Moreover, these processes are largely invisible to and uncontrolled by electorates; more governance may well mean less democracy. The question then arises what kinds of international procedural rules this situation warrants.

The last great movement in U.S. administrative law was toward increased transparency and participation in government decisionmaking as a means of achieving a more perfect pluralist democracy. A certain reaction against this movement is now taking place—the dethroning of pluralism as the orthodoxy of democratic theory, a call for deliberation rather than "adversarial legalism" and mere interest aggregation, and a renewed trust in expert decisionmaking. Even in the face of this reaction, however, a fascination with transparency and participation remains central to administrative law. So too does the general question of democratic administration, as well as the long-term concern for bringing policy-making discretion under procedural rules. The next administrative law must deal not only with applying a system of rules to national government, but also with the complexities of national and transnational governance. If administrative policymaking is to involve networks and epistemic communities of experts and enthusiasts, ought there to be transparency and participation-enhancing rules for those networks and communities? It does not seem sensible, after all, that only the official national government part of governance should be subject to procedural rules. Ought there to be rules for redressing the advantages enjoyed by experts and enthusiasts when governance replaces government? Can transnational decisionmaking move from traditional diplomatic practices to the administrative practices common in democratic States? Interestingly, that question too will have to be asked at the same time that we ask whether U.S. administrative law has moved too far toward governance and too far away from government in-house administrative expertise exercised in pursuit of the public interest.

These problems are not, of course, entirely new to administrative law, as evidenced by the long and indecisive struggle over *ex parte* communication

and the advisory committee statutes. In Europe, there are stirrings about procedural rules for the comitology process; but there are also calls for turning government regulation over entirely to experts.[8] Just as in the age of government, who governs and how remain the central and pressing questions—both empirical and normative—in the age of governance. The answers, however, are likely to be more complex.

8. *See, e.g.*, REGULATING EUROPE, (Giandomenico Majone ed., 1996).