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BOOK REVIEW

Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany, and France

by Susan Rose-Ackerman, New Haven, CT, Yale University Press, 2021, 424 pp.

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In today's Western democracies, agencies promulgate rules that have the force of law. This is inevitable due to the characteristics of legislative law-making. Often statutes are broad and vague, requiring administrators to make policy at the implementation stage. For example, in the US, while Congress and State legislatures enact statutes under the legislative power given by the US and State constitutions, there is often delegation to administrative agencies of the power to issue rules in specified areas, such as science, technology and food safety. Consequently, US agencies can and do make rules, as is frequently the case elsewhere.

With the increasing relevance of delegated executive policymaking as a backdrop, *Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany, and France* by Susan Rose-Ackerman investigates how to create a public law that advances the democratic accountability of the executive (bureaucrats, administrators and officials) and political appointees, proposing the thesis that administrative law can strengthen democratic values in executive policymaking. As such, Rose-Ackerman calls for reform (Chapter 8) of how executive decision-making, and more specifically agencies making rules, can be made more democratically accountable. For the author, agencies when promulgating rules must consider the contributions of civil servants, experts and political appointees as well as comments from the wider 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" (p 244). At the heart of this call for reform is the utilisation in the US of the "notice-and-comment" rule-making of the Federal Administrative Procedure Act (APA) 1946. The APA requires specific procedures to be followed by agencies when promulgating rules with the force of law to ensure democratic accountability (in particular enhanced public participation) in delegated policymaking.

This book compares the US, France, Germany and the UK through in-depth studies of their different legal and political systems and practices. The APA has no equivalence in the European countries chosen. That is why Rose-Ackerman calls to advance the accountability of executive policymaking in these countries too. US agencies, when implementing and enforcing statutes, must comply with administrative law. The APA imposes some procedural uniformity by specifying the requirements for rule-making. Its role is to "ensure the political accountability of executive rule-making to the American public, as well as to those directly affected" by creating a framework against possible abuse (p 8). It aims to create a system of legal checks and balances to control and limit the powers of the agencies.

There are three key aspects of the APA: public involvement, reason-giving and judicial review. All three aim to increase democratic accountability.

The APA establishes the minimum procedural threshold below which agencies cannot go when making rules.[1] It includes requirements for civil servants to arrange public notice of pending government actions, public consultations (including open-ended public hearings where anyone can submit a statement) and reason-giving before enacting new rules and, afterwards, the publication of final decisions. The final rule comprises a statement describing the statutory basis of the rule and explaining the outcome. Anyone can participate, therefore limiting the chances that the comments will echo those of the agency (p 168). Administrators then deliberate and consider the veracity of the submitted responses, but they do not need to respond to all of them. Reason-giving (or public justification) requirements lead to better-informed and enhanced decisions, as administrators tend to consider a wider range of advantages and disadvantages before deciding on a rule.[2] The APA is crucial to ensuring voices beyond politicians and experts are heard. "Such requirements are a mild self-enforcing mechanism for controlling discretion."[3] Put simply, the APA requires administrators and therefore agencies to be more transparent. It also strengthens (vertical) policymaking accountability through public consultation and reason-giving. As such, it is a tool of "both policymaking and performance accountability" (p 74).

This review will now turn to each main chapter of the book and explain how the chapters taken together demonstrate how agencies can develop rules that are more democratically accountable.

The message in Chapters 1 and 2 is clear: (1) public involvement in executive decision-making is necessary, but so is the technical competence of administrators/wider expertise, and finding the right equilibrium between the two can be difficult; and (2) the risks of regulatory capture from specific groups (environmental, etc.) or industry should be minimised. In relation to the latter, Webb Yackee and Webb Yackee demonstrate that despite the influence of businesses on rule-making, it is the actual procedure that matters, as it (1) enables open-ended participation; (2) restricts the powers of federal agencies; and (3) puts their comments into the public domain.[4] By facilitating participation by a wide range of stakeholders/participants, this enables voices from multiple perspectives to be heard and considered – simultaneously enhancing the range of insights and minimising the chance of regulatory capture.[5]

Chapter 3 discusses how, in environmental policymaking, public participation in executive rule-making is widespread through the four European country case studies. In particular, it demonstrates at length how, in Europe, environmental law and the 1998 Aarhus Convention[6] have led executive policymaking to be more democratically accountable by increasing participatory rights in environmental impact assessments (EIAs) for projects and strategic environmental assessments (SEAs) for plans and programmes.

Chapter 4's main thrust is that, in principle, agencies are independent, and that they need to be to avoid regulatory capture. US agencies are independent because they operate under statutes that shelter them from political influence and because they can promulgate

[1] J Lubbers, *A Guide to Federal Agency Rulemaking* (4th edition, Chicago, IL, American Bar Association 2006) p 6.

[2] M Shapiro, "The Giving Reasons Requirement" (1992) 8(1) University of Chicago Legal Forum 179, 180.

[3] ibid, 181.

[4] J Webb Yackee and S Webb Yackee, "A Bias towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy" (2006) 68(1) The Journal of Politics 128.

[5] GJ Stigler, "The Theory of Economic Regulation" (1971) 2(1) The Bell Journal of Economics and Management Science 3; RA Posner, "Theories of Economic Regulation" (1974) 5(2) The Bell Journal of Economics and Management Science 335.

[6] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters Aarhus (1998).

rules (p 86). In contrast, in Europe, independent regulators are seen as diminishing democratic accountability; as such, the agencies in the four countries studied do not have similar powers (p 87). In European countries, agencies report back to a minister or cabinet (although this oversight is often weak), as it is perceived that unelected appointees should not create new policies or even develop existing policies without some political oversight (even if judicial review is available, as it is limited and does not fulfil the legitimacy issue).[7] Nonetheless, the European agencies studied also have some independence from government cabinets and ministers. Such independence further strengthens the regulatory framework established. What the agencies across those four legal systems have in common is that, when creating these rules, unelected civil servants need to involve the public to ensure that they consider what people want. Public involvement and public justification are key to ensuring the accountability of agencies, especially as they cannot rely on the chain of legitimacy from a source in the electorate to justify or explain their actions. Indeed, they are not elected and cannot claim their power back to voters. Instead, they are dependent on demonstrating their value and legitimacy through a combination of efficiency/effectiveness and accountability through engagement with the public.[8]

In Chapter 5, the tensions between technocracy and democracy are rendered highly visible, especially when it comes to the consideration of cost–benefit analysis and impact assessment. The chapter criticises these two technocratic techniques that enable the quantitative assessment of the costs and benefits of public policies and more specific rules and regulations. Impact assessment is widely used in the European Union (EU). The European Commission requires one for each legislative proposal and non-legislative initiative (eg financial programmes, recommendations for the negotiations of international agreements), as well as implementing and delegated acts.[9] This tool assesses the impacts of such initiatives on the environment, society and the economy. The EU, like many other countries, established impact assessments for draft legislation and executive rules following the "Better Regulation" agenda in the 1980s. The Regulatory Scrutiny Board reviews the European Commission's proposals. Its findings are published in a report. If the report is positive, then the Commission can put the proposal in front of the Council of the EU and the European Parliament; if it is negative, the proposal will be sent back to the Commission to be revised. In contrast, a cost–benefit analysis tends to reflect a US approach. It balances monetary costs and benefits, ultimately maximising net benefits. It does not, however, assess non-market values, such as fauna and flora, nature more generally or the beauty of landscapes, well-being and leisure (p 131).

More positively, the four country case studies include EIAs for relevant policies and rules – in the US with the National Environmental Policy Act (NEPA) 1969 and in the EU with Member States' requirements to undertake EIAs for projects and SEAs for plans and programmes as a result of the Aarhus Convention obligations being embedded into EU law. The situation currently remains the same across the UK despite Brexit. Furthermore, in the areas of health, safety and environmental protection (including climate change), uncertainty and assessing risk are at the heart of policymaking and cost–benefit analyses (p 129). But how do we measure risk? How precautionary should we be? Do we consider citizens' preferences? Do we consider that citizens tend to be more worried about risks that they can relate to (cancer) and to underestimate those that are remote (nuclear

[7] M Maggetti and K Verhoest, "Unexplored Aspects of Bureaucratic Autonomy: A State of the Field and Ways Forward" (2014) 80(2) International Review of Administrative Sciences 239.

[8] See in the EU the comitology procedure. See European Commission, "Comitology", available at <https://commission.europa.eu/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts/comitology_en>.

[9] European Commission, "Impact assessments", available at <https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/impact-assessments_en>.

incidents)? For the author, in Europe, the precautionary principle can be reduced to a participatory process (p 133).[10]

For Rose-Ackerman, these tools should be seen as providing some information rather than the whole solution (p 144). They balance wins and losses often in a very abstract way in comparison to what the public wants and the public good. Choices made by decision-makers often go beyond what they formally assess. The author further argues that such instruments also focus too heavily on short-term costs, whilst "costs may occur today that provide benefits to unborn generations" (p 143), especially when dealing with long-term challenges. For these reasons, she contends that (1) the public ought to participate in policymaking regarding intergenerational and worldwide issues and (2) decisions about the future should not solely be made by experts and officials (p 138).

Chapter 6 discusses examples of instruments that enable public input into the executive's policymaking to ensure accountability and the consideration of values, concerns, interests and morals by officials (p 149). One key aspect of Rose-Ackerman's argument is that public participation (by individuals and organised groups) is both about social and economic rights as well as providing democratic accountability (p 147). However, public participation faces some challenges. It is often described as costly and time-consuming, and the public might lack that knowledge and motivation to provide input. Online participation has not necessarily quickened these processes, as bots and other artificial intelligence software threaten the integrity of the whole process.[11]

The definition of public participation that Rose-Ackerman adopts[12] is quite broad and includes referenda such as the Brexit referendum and its consequences for the UK.[13] This is key, as referenda are seen as core examples of direct democracy and as enabling the participation of sections of the public often left out of policymaking.

The chapter emerges with five guidelines to enhance participatory processes in executive policymaking (p 181): (1) the ability for the public to comment on the merits of policies; (2) the establishment of consultation methods that can reach out to all sectors of the population; (3) officials should critically review the comments received; (4) open-ended procedures for comments should be complemented by civic forums or mini-publics (small groups of citizens involved in deliberations over policy, also called citizen assemblies or citizen juries); and (5) civil servants must justify their choices and comply with judicial review. Overall, the chapter argues that the public ought to have input into the direction of policies as well as more specific rules following a cost–benefit analysis or impact assessment. Political accountability rests on both technocratic techniques and public involvement initiatives.

Chapter 7 deals with how judicial review can strengthen public values by assessing how the courts, in the four study countries, have handled executive rule-making. Judicial oversight encourages officials to follow procedural requirements such as the APA or the national or EU requirements emanating from the Aarhus Convention. All four countries have made

[10] For more on the precautionary principle in the EU and its relationship with genetically modified foods, see L Petetin, "The Precautionary Principle and Non-Scientific Factors in Biotech Foods" (2017) 8(1) European Journal of Risk Regulation 106.

[11] BS Noveck, "The Electronic Revolution in Rulemaking" (2004) 53(2) Emory *Law Journal* 433.

[12] The definition of public participation chosen is the following (p 146): "forums of exchange that are organised for the purpose of facilitating communication between government, citizens, stakeholders and interest groups, and businesses regarding a specific decision or problem". This definition can be found in O Renn, T Webler and P Wiedemann, "A Need for Discourse on Citizen Participation: Objectives and Structure of the Book" in O Renn, T Webler and P Wiedemann (eds), *Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse* (Berlin, Springer 1995).

[13] For more on the consequences of Brexit, especially for agriculture, see L Petetin and M Dobbs, *Brexit and Agriculture* (Legal Perspectives on Brexit; Abingdon, Routledge 2022).

progress towards greater political accountability by aiming to square executive rule-making with democratic accountability. In particular, the APA enables judicial review of both substantive and procedural grounds. However, the contradiction is that it is difficult for an individual to be granted standing, diminishing the opportunities to obtain actual executive accountability. The APA would lose much of its power without judicial checks on the practices by agencies when making policy. For Rose-Ackerman, it is crucial that courts (beyond the US) are able to decide on both substance and procedure; both aspects go hand in hand.

Overall, Chapter 8 concludes the book and includes Rose-Ackerman's call for reform around seven key points for enhanced democratic accountability of executive policymaking. Rose-Ackerman concludes that the APA should be built upon (not replaced) to improve processes further. What should be minimised in particular are barriers to participation: the lack of awareness of rule-making, the lack of knowledge that people can be involved and the lack of understanding of how to do so effectively. In parallel, issues of information overload due to the length and complexity of the documents open for comments should be addressed. Similar (but improved) binding requirements should also be adopted across other democracies.

Rose-Ackerman describes some of the different ways to circumvent the APA and identifies them as issues to be addressed. Two will be highlighted here. First, the increasing role of the White House in agencies decreases the role of the APA (p 82). As the Executive Office of the President (especially the Office of Information and Regulatory Affairs) grows more powerful (as presidents want increased powers), policymaking accountability is threatened as its guidelines and policy statements are outside the requirements of the APA (p 75).

Second, over the years, notice-and-comment rule-making has become increasingly burdensome, expensive and time-consuming for these agencies. This system creates an ossification[14] that leads the agencies to rely increasingly on interpretative rule-making and guidance documents in order not to have to follow the strict APA procedures. Interestingly, this criticism of the APA is brushed away by Rose-Ackerman rather quickly. However, agencies increasingly prefer "more informal methods – which lack adequate opportunities for public participation and evade meaningful judicial oversight – to promulgate important policies".[15] These non-binding rules include policy statements, guidelines and memoranda. Guidance documents can frequently be adopted without any procedure and therefore do not have to fulfil the requirements of notice-and-comment rule-making.[16]

The policy around genetically modified (GM) foods developed by the Food and Drug Administration (FDA) is an example of such a trend, as my research demonstrates.[17] The Federal Food, Drug, and Cosmetic Act 1938 has a broad mandate and gives some leeway to the FDA in respect of the regulation of GM foods. Most importantly, guidance documents are the main method that has been used in the US to create the regulatory regime for GM foods, such as the 1992 Policy Statement on Foods Derived from New Plant Varieties, the 2001 Premarket Notice Concerning Bioengineered Foods and the 2006 Recommendations for the Early Food Safety Evaluation of New Non-Pesticidal Proteins Produced by New Plant Varieties Intended for Food Use. Such rules fit well with the rapid pace of scientific advancement, and in particular GM foods and modern agricultural biotechnology, as they provide

[14] LE Blais and WE Wagner, "Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts" (2008) 86 Texas Law Review 1701, 1704; TO McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process" (1992) 41(6) Duke Law Journal 1385.

[15] Blais and Wagner, supra, note 14, 1705.

[16] Similarly, the EU is increasingly relying on soft law. For more, see O Stefan, "The Future of European Union Soft Law: A Research and Policy Agenda for the Aftermath of Covid-19" (2020) 7(2) Journal of International and Comparative Law 329.

[17] L Petetin, "The Regulation of Modern Agricultural Biotechnology in EU, US and WTO Law: What Role for Substantial Equivalence and Consumer Preferences?" (PhD thesis, University of Leeds), available at <https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.581948>.

"the best means of providing information to assist industry in understanding and complying with regulatory requirements". [18] They reach the parties more quickly and allow for faster communication, and this allows the agency some flexibility.

Although these policies do not theoretically establish legally enforceable rights or responsibilities and are not technically legally binding on the industry, the wider public or the agency, they are often followed by the addressees as if they were hard law. This is an example of where soft law, such as these guidance documents which do not allow for public participation, have hard-law effects. Therefore, and problematically, the public cannot comment on such developments. There is an enhanced risk that agencies will further want to use rule-making exempted from public participation procedures, which might lead to policies lacking consensus and legitimacy. For instance, GM foods are only regulated by the FDA through guidance documents, indicating the lack of public input in the rule-making process.[19] This process is a unidirectional, top-down "communication" with no exchange between the FDA and its constituencies and no chance for public comment. A balance should be found to determine "how society can maintain adequate controls on the rulemaking process while not interfering unduly with agencies' ability to carry out their assigned missions".[20] The concern is that the policies that are addressed by these more informal methods will not only be the "important policies", but also the more controversial and conflicting ones that would most merit engagement with the public. Indeed, it is arguable that the reverse of what is needed might occur, with formal procedures being applied to less significant, less controversial matters and informal procedures being applied where public engagement and accountability are essential.

Before concluding, it is important to note that the book's comparative approach appears underpinned by a bias towards the US system and in particular the APA. For instance, the author writes that "those who critique the notice-and-comment process for being biased and cumbersome must ask if they would prefer a process closer to executive rulemaking in Europe that lacks legal participation mandates, relying only on the incumbents' political expediency to manage the process" (p 85). Another example would be Chapter 5 on "policymaking norms", which spends some length of time discussing the US method of cost–benefit analysis but little on the more European method of impact assessment due in particular to the Aarhus Convention.

Despite this criticism, the book delivers on identifying how to achieve greater democratic accountability of the executive, with an emphasis on strengthening public participation in agency rule-making. Rose-Ackerman notes that it is of particular relevance to states transitioning to a democratic system and to middle-income states wanting to strengthen their administrative law (p 244). This book will appeal to both political scientists and lawyers in the four mentioned countries and beyond, both in civil and in common law traditions. It should also be read by officials and administrators working in agencies making delegated rules and policies to help them learn about best practices and identify where improvement is needed. The historical background underpinning the book is particularly useful to the reader in terms of helping them to understand how the different systems developed and reached their current positions. The attention to technical details and practical aspects, combined with theoretical approaches towards legitimacy and accountability, is excellent and brings the discussion forward on important topics. Crucially, this book highlights different viewpoints from mainstream currents, and readers will feel refreshed after reading this book and ready to think outside the box.

[18] E Seiguer and JJ Smith, "Perception and Process at the Food and Drug Administration: Obligations and Trade-Offs in Rules and Guidance" (2005) 60 Food and Drug Law Journal 1723.

[19] The National Bioengineered Food Disclosure Law 2016 required the US Department of Agriculture to establish a national mandatory standard for labelling foods that are or may be bioengineered. Labelling GM foods is now compulsory in the US.

[20] E Gellhorn and RM Levin, *Administrative Law and Process in a Nutshell* (5th edition, St. Paul, MN, Thomson West 2006) p 351.