

ADMINISTRATIVE LAW

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Keywords: adjudication, administrative law, agencies, courts, discretion, due process, freedom of information, judicial review, legislative review, liability, privacy, public administration, rulemaking, transparency, democracy.

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Summary

Administrative law regulates agency rulemaking, adjudication, enforcement, and transparency. It specifies the legal status of agencies and administrators and provides for external review by legislatures and courts. Administrative law is the fundamental regulatory law of public administration. In general, administrative law seeks to balance the competing interests of cost-effective public administration and broader governmental values. In democracies it will promote public participation in agency rulemaking, representation of stakeholders and other interested parties, representativeness, transparency, fundamental fairness, effective supervision of administrative operations, and other democratic values.

1. Introduction

Administrative law is the body of law that regulates the powers, procedures, legal status, and external review of public administrative agencies. It consists of constitutional

provisions, statutes, executive orders, judicial decisions, and other measures that apply generally to the administrative agencies of a particular government. The term "administrative law" is not typically used to denote legal provisions that are specifically tailored to the missions of individual agencies. Rather it is generic in its "across-the-board" application to a wide range of agencies dealing with a variety of governmental functions and public policy areas such as finance, transportation, health, and housing. The concerns with which it deals necessarily vary broadly among regimes. Frequently, administrative law addresses administrative rulemaking, adjudication, enforcement, transparency, and administrators and agencies' legal liabilities, as well as judicial and/or legislative review. However, its boundaries are not well defined. Some aspects of public personnel administration, including the privacy and appeals rights of public employees, may be considered within the ambit of administrative law, whereas others, such as pay and position classification, are not. In the USA the substantive regulations that agencies impose on outside parties are not considered part of administrative law (for an overview of U.S. administrative law, see Rosenbloom 2003). For example, although the federal Environmental Protection Agency's rulemaking *processes* are thoroughly regulated by administrative law, the body of its *substantive rules* for clean air, water, and so forth are defined as environmental law. In other nations, the term may cover both the law that regulates public administrative activity and the substantive regulations enacted by administrative agencies.

Administrative law is often treated as a technical specialization. However, it is intimately connected to governance because it defines many of the values that will inform public administrative operations. In democracies, administrative law will emphasize the importance of representativeness, participation, responsiveness, transparency, and fairness in administration. This article focuses on administrative law as the body of regulatory law that controls the procedures, liability, and accountability of administrative agencies. It addresses the application of administrative law to rulemaking, adjudication, enforcement, transparency, and the external review of agency actions.

2. Administrative Power, Discretion, and the Rule of Law

The twentieth century was characterized by the emergence of full-fledged administrative states across the entire globe. "The bureaucratization of the world," as this phenomenon has been called, reached almost all regimes regardless of the extent to which they were democratic, authoritarian, or totalitarian (Jacoby 1973). It also extended across economies, whether capitalist or socialist, industrialized or agricultural, modernized or traditional. Perhaps only nomads and tribes in remote areas were relatively unaffected by the vast role administrative agencies gained in formulating and implementing the public policies upon which societies, economies, and ecosystems came to depend.

Governmental and public dependence on administrative agencies enabled administrators, as a class, to emerge as powerful actors in national and sub-national political systems. This condition was fully predicted by Max Weber (1864-1920), who remains one of the greatest theorists of bureaucracy. Weber noted that over time politics vest more and increasingly complex functions in administrative agencies, which eventually become "overtowering" due to their professional specialization, expertise, and other organizational characteristics (Gerth and Mills 1958, 216).

By taking a very basic human requirement, food, one can readily see how almost absolute dependence on public administration develops. In subsistent agricultural economies, individuals, tribes, and small communities were responsible for supplying their own food. Industrialization and concomitant urbanization made people dependent on strangers for food. Its availability and safety were remotely determined by others, far removed from consumers' direct observation, influence, or control. In theory, one might be able to depend on market forces for the dependability and reliability of the food supply reaching urban centers. However, markets are imperfect and sometimes fail altogether. Consequently, governments step in, first perhaps through public policies aimed at promoting more agricultural production, but eventually by establishing administrative agencies to ensure that an adequate quantity and quality of food reaches the market or is otherwise made available to the general, non-agricultural population.

The USA is a clear example. Although it is a market economy, agriculture has been deeply affected by national policy since the 1840s, if not earlier, and by federal administrative agencies since the 1860s. Initially public lands were made available to homesteaders who would eventually increase the nation's food supply. Later, a national Department of Agriculture was created, in part, to improve agricultural practices and the welfare of farmers. State-level "land grant" universities, whose mission was largely agricultural education, were a major component of nineteenth century national agricultural policy. In the 1880s, an Interstate Commerce Commission was established, primarily in response to problems in the transport of farm products by railroad. In the early 1900s, a variety of food safety laws were enacted to protect consumers against dangerous and/or repulsive packaged foods. In 1931, a Food and Drug Administration (FDA) was established to administer and enforce these laws. At about the same time, during a severe agricultural depression, a food stamp (voucher) program was first created to subsidize consumers who were otherwise unable to afford food. In the 1960s the program was reorganized, and eventually became the largest in the sprawling Department of Agriculture. Today, the *United States Government Manual* lists the following under "agricultural," "farm," and "food": National Agricultural Library, Agricultural Marketing Service, Federal Agricultural Mortgage Corporation, Agricultural Research Service, National Agricultural Statistics Service, Department of Agriculture, Department of Agriculture Graduate School, Farm Credit Administration, Farm Service Agency, FDA, Food and Nutrition Service, Food Safety and Inspection Service, and Food Stamp Program (Office of the Federal Register 1999).

One of these food programs illustrates the need for administrative law particularly well. Part of the FDA's mission is to "establish maximum levels of natural or unavoidable defects in food for human use that present no health hazard." The defects are defined as "aesthetic" and their levels are set with reference to economic practicality. For instance, 4 rodent hairs are permitted per 100 grams of apple butter (Department of Health and Human Services, 1995). How should such a standard be set? Should it be left up to the expertise of FDA personnel to determine what levels of defects consumers would accept, if they knew about them, and what is economically impracticable? Should the standards be published and widely circulated to the public (e.g., posted in supermarkets or on labels)? Printed up but not publicized? Communicated only to the food processing companies that are subject to the regulations? Should the FDA hold open hearings to gain the perspectives of consumers, organizations representing them, and the affected

companies? Alternatively, should the process for setting standards be essentially closed or limited to the participation by a few food companies? Should there be separate standards for large and small businesses engaged in processing and transporting food? What standard of proof or probability, if any, should the agency have to meet in setting a standard? If the FDA changes a standard, how much time should the companies affected be given to comply? How should the standards be enforced? What processes should be available for individuals, groups, or firms to challenge a standard before the agency? In court? Suppose the FDA learns that a food company is somehow cheating, should that information be available to the public or withheld so as not to indelibly damage the firm's ability to correct its behavior, preserve its reputation, and continue to do business? If one company gains a competitive edge by developing a new and cheaper technique for purifying the foods it processes, should the FDA make information about that technique available to other firms in order ultimately to benefit consumers?

These are among the basic types of issues with which much administrative law is concerned. The administrative case law in the USA is filled with such questions and hundreds of others. And, of course, they are relevant not just to food, but throughout the entire spectrum of contemporary public policy. How are rules made? Who participates? How are they enforced? What kind of judicial or legislative review, if any, should they face? What is the level of information available about them? In the absence of administrative law, agency decision making might be controlled by self-interest or the lopsided participation of one or a few interest groups. Prior to enactment of the U.S. Administrative Procedure Act of 1946 (APA), the American Bar Association criticized federal agencies for making their rules available ". . . sometimes in the form of official printed pamphlets, bound or loose-leaf, sometimes in mimeograph form, sometimes in privately owned publications, and sometimes in press releases. Sometimes they exist only in sort of an unwritten law. Rules and regulations, upon compliance with which important privileges and freedom from heavy penalties may depend, are amended and interpreted as formally or informally as they were originally adopted" (American Bar Association 1934, 228).

Rulemaking is a clear exercise of administrative power, but it is not the only context in which administrative agencies are key actors in political systems. Agencies also exercise considerable discretion in implementing policy mandates from legislatures or other political authorities. The older idea that agencies are merely "transmission belts" that simply translate policies into action without exercising any independent judgment is no longer accepted as accurate. First, for many agencies universal enforcement is precluded by the scope of their missions and the limits of their human, technological, and financial resources. For instance, a single safety inspector may be responsible for 1,500 or more geographically dispersed sites (Kagan 1994, 404). Selective enforcement—which is also to say, nonenforcement—is inevitable. In "street-level" administration involving police, border patrols, social work, and safety inspection, public policy *is* the outcome of myriad enforcement decisions made by individual public employees (Lipsky 1980).

Second, the policy mandates given to administrative agencies may not be entirely clear. They may require supplementary interpretation. The ability to refine the meaning of public programs through the application of technical expertise is one of the great virtues of public administration. But it also requires the exercise of discretion. The FDA's food

purity mission is an example. The statute authorizing it to set limits on impurities does not define the key terms of enforcement: unavoidable, economically impracticality, or even "health hazard." In one well known American case, the federal Environmental Protection Agency was given the leeway to define the words, "stationary source," differently in separate programs and at different times (*Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.* 1984). All they meant for certain was that the source of pollution was not mobile.

Third, public policies may conflict with one another. For instance, there is a common tension between environmental protection and economic development. Legislatures and other political authorities are not always able to prioritize conflicting governmental interests. Much may be left to public administrators whose actions will affect the pace and tone of policy implementation.

Finally, political cross-pressures may enable agencies to exercise discretion in defining their missions and objectives. In democratic nations, many administrative agencies face intense pressures from interest groups, which may place competing demands upon them. The need to harmonize these with the agency's own interests and mission is a long-standing theme in the analysis of "bureaucratic politics." In "presidentialist" systems, in which both the directly elected chief executive and the legislature have authority over agencies, part of the senior public manager's job is to bridge a separation of powers. This, too, may require mediating conflicting interests, forging accord on specific objectives, and gaining agreement steps toward implementing them.

Administrative discretion is generally considered a threat to democracy or representative government in two respects. The discretion used in implementation modifies the policies enacted by the electorate's representatives. Complaints about administrative intransigence and deviation from policy mandates are legion. Political authorities tell subordinate administrators what to do, but for one reason or another it does not get done they way they anticipated, or perhaps at all. This problem goes beyond the popular stereotype of lazy, incompetent, entrenched bureaucrats who display little interest in serving the government or the people. It is directly related to the amount of discretion administrators can and must exercise in doing their jobs. The problem is especially acute when, in the process of implementing broad policy objectives, administrators are empowered to make rules having the force of law (that is, "legislative" or "substantive" rules).

Discretionary administration is also antithetical to the rule of law. It has been said, and is written on the U.S. Department of Justice's headquarters, "Where Law Ends Tyranny Begins." Kenneth Davis, one of the foremost administrative law theorists of the twentieth century modified the aphorism to say, "Where law ends, discretion begins." (Warren 1996, 369). Davis' point is that despite being extra-legal, administrative discretion can be prevented by administrative law from resulting in tyranny.

There are two broad, complementary approaches for mitigating the challenges that the administrative state poses for democracy. One is to make government bureaucracies into representative political institutions by placing them under the direction of politically appointed ministers or department heads and by drawing their personnel from all social

and economic sectors of society, whether through merit, patronage, or other means. The other is to ensure that their activities conform to democratic norms and values. This can potentially be accomplished through creating administrative cultures that value individual rights, external participation, representation, transparency, and subordination to political leadership. However, administrative law is a surer approach than culture. It can constrain administrative behavior so that it comports fully (or nearly fully) with the requirements of democratic governance. The following sections outline the operation of administrative law as a tool for maintaining and promoting democratic-representative government with respect to administrative rulemaking, adjudication, enforcement, transparency, the legal status of agencies, and external review.

3. Administrative Rulemaking

It is often useful to differentiate among three types of administrative rules: procedural, interpretative, and legislative (also called substantive). Procedural rules govern an agency's internal operations, such as how it deals with employee complaints of unfair treatment or processes appeals of various kinds. Interpretative rules are essentially policy statements explaining how an agency understands its statutory mandate. Legislative rules are like laws; they regulate conduct generally and such matters as private parties' eligibility for licenses and other benefits. Administrative law may specify the same or different standards and processes for each type of rulemaking. In either case, the following questions are central.

3.1. How Much Independence Should Administrative Agencies Have In Developing And Issuing Rules?

In democratic political systems it is axiomatic that lawmaking rests with the citizenry or its representatives. However, in practice modern democracies are apt to delegate some portion of this function to administrative agencies. Administrative law is concerned with the level of guidance that is provided to agencies in their exercise of delegated lawmaking authority. Standards such as "regulate this or that in the public interest" are too general to provide much guidance or external direction. Broad standards also weaken administrative legitimacy in democratic regimes because agencies cannot claim that their politically controversial rules are based on clear legislative or popular mandates. Nor can they rely on administrative expertise as the basis for rules that clearly involve normative policy judgments.

Administrative law establishes the minimum standard of guidance that must accompany delegations of legislative authority. Perhaps the lowest potentially meaningful standard is that delegations of legislative authority must be accompanied by an "intelligible principle" to guide agency decisionmaking. This is the U.S. federal standard and although it allows flexibility, it has also been heavily criticized on a number of grounds. It is said to undermine democratic-constitutionalism by vesting too much policy choice in administrative agencies. It makes judicial review more difficult because the courts cannot be certain whether agency rules reflect legislative intent. It contributes to the "crisis of legitimacy" that pervades American public administration by increasing administrative power (Freedman 1978).

A standard that is too high also poses problems, though these difficulties are more in the realm of practice than theory. To deny administrators almost all discretion in rulemaking is also to deprive the political system of their expertise in formulating public policy. For example, a statute requiring a food safety agency to ban the use of any additive that causes disease in animals or humans forecloses a cost-benefit analysis. A sugar substitute that in very heavy doses is slightly associated with cancer in rats must be taken off the market even though many people suffering from diabetes or obesity could benefit greatly from its availability. There is no universal practice with respect to the standard of guidance that must accompany delegations of legislative authority. For authoritarian regimes, the issue is more one of setting a standard that is too high rather than too low. For democracies, it is the opposite. But systems that lack stable governing coalitions or party discipline may have a greater propensity toward weaker standards as a means of enabling their legislatures to pass difficult and controversial policy judgments on to administrators. A good deal may also depend on the complexity of the policy area and the nature of the expertise required.

3.2. What Values Should Be Emphasized In Rulemaking Procedures?

Administrative law also regulates the procedures used in agency rulemaking. A number of value dimensions are pertinent.

- (a) **Flexibility:** rulemaking procedures can range from highly flexible to inflexible. Flexibility takes full advantage of agency discretion and expertise. It adds to the efficiency of rulemaking as an alternative to legislating. Inflexibility protects against misguided and abusive rules, but also imposes procedural impediments on timely rulemaking.
- (b) **Participation:** rulemaking can be limited to one or a few agency personnel or opened up to the universe of interested or affected parties. In general, democracies will prefer participation by stakeholders substantially affected by the rules. Their input is thought to enhance the quality and legitimacy of rules as well as to facilitate enforcement. Participation can be structured in a variety of ways ranging from soliciting mail and phone calls to holding interviews or hearings and negotiating rules with those upon whom they will have a particularized and significant impact. Exceptions are likely in areas where secrecy is desired, such as national security and combating crime.
- (c) **Information:** agencies engaged in rulemaking can provide different types of information to interested parties and to the public at large. Open rulemaking processes require agencies to publicize their intent to make a rule and to publish the final rule. It may also require them to publish or otherwise make available comments and testimony submitted during the rulemaking exercise. In closed processes, as noted earlier, even the final rule may not be well publicized.
- (d) **Substantive criteria:** Although administrative law is heavily oriented toward regulating agency procedures, it may also control the criteria that must be considered in rulemaking. The most generic substantive requirement is that rules meet an acceptable benefit-cost ratio. Other criteria might look toward protecting various interests or concerns such as farmers, small businesses, families, minorities, endangered species, or ecosystems.

3.3. By What Criteria Should Rules Be Judged?

In some respects, legislative rulemaking is the most important function of administrative agencies because it produces binding regulations that can have major repercussions for the society, economy, and ecology, as well as the welfare of individuals, groups, and industries. Consequently, many of the same concerns that apply to lawmaking generally are applicable to rulemaking (Kerwin 1999).

- (a) **Quality:** administrative law should encourage agencies to produce rules that are clear, enforceable, faithful to delegated authority, and efficient in the sense that they are cost-effective within the political, economic, and social constraints in which they are framed and will operate. Administrative law may require rules to be based on the best available information or analysis and written in plain language. It may also provide for the participation of enforcement agents in framing rules and require that agencies analyze alternative approaches to achieving the policy objectives at issue.
- (b) **Timeliness:** administrative law can be used to regulate the speed of the rulemaking process. It may require that rules be issued within a specific time period after an agency is authorized to formulate them. For instance, an agency may be required to produce an initial rule within a year or two after receiving authority to deal with a specific policy area. Alternatively, the grant of authority may be open-ended, allowing the agency to develop and amend rules on an as needed basis. Because elaborate rulemaking procedures can become an obstacle to timely rulemaking, administrative law may provide for expedited processes under certain circumstances. For example, where the norm is that proposed rules must be published in advance for public comment, agencies may be allowed skip this step in emergencies and publish direct or interim final rules that can be reevaluated at a later time.
- (c) **Ability to enforce and conform:** the efficacy of rules requires enforceability and the ability of affected parties to comply. Enforcement is generally a variable rather than a fixed process. Many agencies lack the wherewithal for universal enforcement. Costs and benefit-cost ratios are often of considerable importance in deciding how to allocate enforcement resources. Agency cultures and the behavior of inspectors, in particular, produce dramatically different styles of enforcement. Some styles will be legalistic, whereas others will be more oriented toward problem solving; some responsive, others inflexible (Kagan 1994; Scholz 1994).

Enforceability also depends on the ability of the regulated to conform to rules. Costs and available technologies are important factors. Firms that cannot afford to comply may have to stop producing a product, go out of business, move "off-shore," or evade the rules. This is why administrative law may attempt to make agencies not only sensitive to costs, but also to differences between large and small businesses as well as those operating in different geographical settings. Rules dealing with safety, energy, or pollution may sometimes be "technology forcing." However, if the required technologies do not develop, the rules will have to be revised or abandoned. Ordinarily, administrative law will put a premium on requiring agencies to be realistic in their rulemaking.

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Biographical Sketch

David H. Rosenbloom was born in New York City in 1943. He holds M.A. and Ph.D. degrees from the University of Chicago and BA and Honorary Doctor of Laws degrees from Marietta College. He is Distinguished Professor of Public Administration at American University in Washington, DC and a member of the National Academy of Public Administration. Among his awards are: the 2001 American Political Science Association's John Gaus Award for Exemplary Scholarship in the Joint Tradition of Political Science and Public Administration, the American Society for Public Administration's 1999 Dwight Waldo Award for Outstanding Contributions to the Literature and Leadership of Public Administration, the 1993 Charles H. Levine Award for Excellence in Public Administration, the 1992 Distinguished Research Award, and the American University School of Public Affairs' Outstanding Scholarship and Service Awards (1994, 1999, 2000, and 2005). In 2004, he received the First Annual American University School of Public Affairs Ph.D. Students' Excellence in Teaching Award for Outstanding Contributions to Ph.D. Students. His study on *Building A Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* received the National Academy of Public Administration's 2001 Louis Brownlow Book Award. His latest book is *Public Administration: Understanding Management, Politics, and Law in the Public Sector*, sixth ed. (coauthored with Robert Kravchuk, 2005). Rosenbloom's research focuses on public administration and democratic-constitutionalism. He was editor-in-chief of *Public Administration Review* (1991-1996) and currently serves on the editorial boards of about a dozen leading public administration journals. Rosenbloom frequently guest lectures at universities and public service organizations in the U.S. and abroad. He holds continuing affiliations as Guest Professor with Renmin (People's) University in Beijing and Xi Bei Da Xue (Northwest University) in Xi'an, PRC. Rosenbloom's public service includes appointment to the Clinton-Gore Presidential Transition Team for the Office of Personnel Management in 1992.