

## Administrative Law

Administrative law refers to the body of laws, procedures, and legal institutions affecting government agencies as they implement legislation and administer public programs. As such, the scope of administrative law sweeps broadly. In most countries, bureaucratic agencies make up the largest part of the governmental sector and generate most of the decisions having a direct impact on citizens' lives. Administrative law governs agency decisions to grant licenses, administer benefits, conduct investigations, enforce laws, impose sanctions, award government contracts, collect information, hire employees, and make still further rules and regulations.

Administrative law not only addresses a wide and varied array of government actions, it also draws its pedigree from a variety of legal sources. Administrative law, as a body of law, is part constitutional law, part statutory law, part internal policy, and, in some systems, part common law. The organization and structure of administrative agencies can be shaped by constitutions or statutes. The procedures used by these agencies can be dictated by constitutional law (such as to protect certain values such as due process), by generic procedural statutes (such as the US Administrative Procedure Act), or by statutes addressing specific substantive policy issues such as energy, taxation, or social welfare. As a result, administrative procedures can vary significantly across agencies, and even within the same agency across discrete policy issues.

Administrative law, in all its varied forms, speaks ultimately to how government authority can and ought to be exercised. By directing when and how governmental power can be employed, administrative law of necessity confronts central questions of political theory, particularly the challenge of reconciling decision-making by unelected administrators with democratic principles. The study of administrative law is characterized in part by prescriptive efforts to design rules that better promote democratic and other values, including fairness, effectiveness, and efficiency. At its core, administrative law scholarship seeks to understand how law can affect the behavior of governmental officials and organizations in such a way as to promote important social objectives. As such, administrative law is also characterized by positive efforts to explain the behavior of governmental organizations and understand how law influences this behavior. A

specific emphasis in administrative law scholarship is placed on the empirical study of how courts influence administrative policy. Although administrative law scholarship has a rich tradition of doctrinal analysis, the insights, and increasingly the methods, of social science have become essential for achieving an improved understanding of how administrative law and judicial review can affect democratic governance.

### 1. *Administrative Law and Democracy*

Administrative agencies make individual decisions affecting citizens' lives and they set general policies affecting an entire economy, but they are usually headed by officials who are neither elected nor otherwise directly accountable to the public. A fundamental challenge in both positive and prescriptive scholarship has been to analyze administrative decision-making from the standpoint of democracy. This challenge is particularly pronounced in constitutional systems such as the United States' in which political party control can be divided between the legislature and the executive branch, each seeking to influence administrative outcomes. Much work in administrative law aims either to justify administrative procedures in democratic terms or to analyze empirically how those procedures impact on democratic values.

A common way of reconciling decision-making by unelected administrators with democracy has been to consider administrators as mere implementers of decisions made through a democratic legislative process. This is sometimes called the 'transmission belt' model of administrative law (Stewart 1975). Administrators, under this model, are viewed as the necessary instruments used to implement the will of the democratically controlled legislature. Legislation serves as the 'transmission belt' to the agency, both transferring democratic legitimacy to administrative actions and constraining those actions so that they advance legislative goals.

As a positive matter, the 'transmission belt' model underestimates the amount of discretion held by administrative officials. Laws require interpretation, and in the process of interpretation administrators acquire discretion (Hawkins 1992). Legislation often does not speak directly to the varied and at times unanticipated circumstances that confront administrators. Indeed, legislators may sometimes lack incentives for making laws clear or precise in the first place, as it can be to their electoral advantage to appear to have addressed vexing social problems, only in fact to have passed key tradeoffs along to unelected administrators. For some administrative tasks, particularly monitoring and enforcing laws, legislators give administrators explicit discretion over how to allocate their agencies' resources to pursue broad legislative goals.

Scholars disagree about how much discretion legislators ought to allow administrative agencies to

exercise. Administrative minimalists emphasize the electoral accountability of the legislature, and conclude that any legislative delegations to agencies should be narrowly constructed (Lowi 1979). The expansionist view emphasizes most administrators' indirect accountability to an elected executive and contends that legislatures themselves are not perfectly representative, especially when key decisions are delegated internally to committees and legislative staff (Mashaw 1985). While disagreement may persist over the amount of authority to be delegated to agencies, in practice administrative agencies will continue to possess considerable discretion, even under relatively restrictive delegations.

The study of administrative procedure takes it as given that agencies possess discretion. The aim is to identify procedures that encourage administrators to exercise their discretion in reasonable and responsive ways. A leading approach has been to design administrative procedures to promote interest group pluralism (Stewart 1975). Transparent procedures and opportunities for public input give organized interests an ability to represent themselves, and their constituencies, in the administrative process. Such procedures include those providing for open meetings, access to government information, hearings and opportunities for public comment, and the ability to petition the government. Open procedures are not only defended on the grounds of procedural fairness, but also because they force administrators to confront a wide array of interests before making decisions, thus broadening the political basis for administrative policy. These procedures may also protect against regulatory capture, a situation which occurs when an industry comes to control an agency in such a way as to yield private benefits to the industry (Stigler 1971).

A more recent analytic approach called 'positive political economy' seeks to explain administrative procedures as efforts by elected officials to control agency outcomes (McCubbins et al. 1987). Administrative law, according to this approach, addresses the principal-agent problem confronting elected officials when they create agencies or delegate power to administrators. The problem is that administrators face incentives to implement statutes in ways not intended by the coalition that enacted the legislation. It is difficult for legislators continually to monitor agencies and in any case the original legislators will not always remain in power. Analysts argue that elected officials create administrative procedures with the goal of entrenching the outcomes desired by the original coalition. Such procedures can be imposed by the legislative as well as executive branch, and they include formal procedures for legislative review and veto, general requirements for transparency and interest group access, and requirements that agencies conduct economic analysis before reaching decisions.

A recent area of empirical debate has emerged in the United States over which branch of government exerts

most control over administrative agencies. The resulting evidence has so far been mixed, as might be expected, since most agencies operate in a complicated political environment in which they are subject to multiple institutional constraints. Indeed, the overall complexity of administrative politics and law presents a major challenge for social scientists seeking to identify the effects of specific kinds of procedures under varied conditions. The recent positive political economy approach advances a more nuanced analytical account of democratic accountability than the simple 'transmission belt' model of administrative law, but the ongoing challenge will be to identify with still greater precision which kinds of procedures, and combinations of procedures, advance the aims of democratic accountability as well as other important social values.

## *2. Courts and Administrative Law*

As much as the connections between elected officials and administrators have been emphasized in administrative law, the relationship between courts and administrators has figured still more prominently in the field. Even when administrative procedures are created through legislation, the enforcement of such procedures often remains with judicial institutions. Courts have also imposed their own additional procedures on agencies based on constitutional and sometimes common law principles. As with democratic issues, scholarly attention to the role of the courts has both prescriptive and positive aspects.

The main prescriptive focus has been on the degree to which courts should defer to the decisions made by administrative agencies. Much doctrinal analysis in administrative law acknowledges that administrative agencies' capacity for making technical and policy judgments usually exceeds that possessed by courts. Even in legal systems with specialized administrative courts, agency staff often possess greater policy expertise than judges, not to mention that administrators are probably more democratically accountable than tenured judges. These considerations have long weighed in favor of judicial deference to administrative agencies. On the other hand, it is generally accepted that some credible oversight by the courts bolsters agencies' compliance with administrative law and may improve their overall performance. The prescriptive challenge therefore has been to identify the appropriate strategies for courts to take in overseeing agency decision-making.

This challenge typically has required choosing a goal for judicial intervention, a choice sometimes characterized as one between sound technical analysis or an open, pluralist decision-making process (Shapiro 1988). Courts can defer to an agency's policy judgment, simply ensuring that the agency followed transparent procedures. Or courts can take a careful look at the agency's decision to see that it was based on a

thorough analysis of all relevant issues. The latter approach is sometimes referred to as 'hard look' review, as it calls for judges to probe carefully into the agency's reasoning. Courts also face a choice about whether to defer to agencies' interpretations of their own governing legislation instead of imposing judicial interpretations on the agencies. Prescriptive scholarship in administrative law seeks to provide principled guidance to the judges who confront these choices.

Judicial decisions are influenced in part by legal principles. Empirical research has shown, for example, that after the US Supreme Court decided that agencies' statutory interpretations deserved judicial deference, lower courts made a significant shift in favor of deferring to agency interpretations (Schuck and Elliott 1990). Nevertheless, just as administrators themselves possess residual discretion, so too do judges possess discretion in deciding how deferential to be. Other empirical research suggests that in administrative law, as in other areas of law, political ideology also helps explain certain patterns of judicial decision-making (Revesz 1997).

In addition to empirical research on judicial decision-making, the field of administrative law has been concerned centrally with the impact of judicial review on agency decision-making. Normative arguments about judicial review typically depend on empirical assumptions about the effects courts have on the behavior of administrative agencies. Indeed, most legal scholarship in administrative law builds on the premise that judicial review, if employed properly, can improve governance (Sunstein 1990, Edley 1990). The effects often attributed to judicial review include making agencies more observant of legislative mandates, increasing the analytic quality of agency decision-making, and promoting agency responsiveness to a wide range of interests. Administrators who know that their actions may be subjected to review by the courts can be expected to exercise greater overall care, making better, fairer, and more responsive decisions than administrators who are insulated from direct oversight.

Notwithstanding the beneficial effects of courts on the administrative process, legal scholars also have emphasized increasingly courts' potentially debilitating effects on agencies. It has widely been accepted, for example, that administrators in the United States confront a high probability that their actions will be subject to litigation. Cross-national research suggests that courts figure more prominently in government administration in the USA than in other countries (Brickman et al. 1985, Kagan 1991). The threat of judicial review has been viewed as creating significant delays for agencies seeking to develop regulations (McGarity 1992). In some cases, agencies have been said to have retreated altogether from efforts to establish regulations. The US National Highway Traffic Safety Administration (NHTSA) is usually

cited as the clearest case of this so-called 'ossification' effect, with one major study suggesting that NHTSA has shifted away from developing new auto safety standards in order to avoid judicial reversal (Mashaw and Harfst 1990). Other research, however, indicates that the threat of judicial interference in agency decision-making has generally been overstated. Litigation challenging administrative action in the United States occurs less frequently than is generally assumed (Harrington 1988, Coglianese 1997), and some research indicates that agencies can surmount seemingly adverse judicial decisions to achieve their policy objectives (Jordan 2000).

Concern over excessive adversarialism in the administrative process persists in many countries. Government decision makers worldwide are pursuing collaborative or consensus-based processes when creating and implementing administrative policies. In the USA, an innovation called negotiated rulemaking has been used by more than a dozen administrative agencies, specifically in an effort to prevent subsequent litigation. In a negotiated rulemaking, representatives from government, business, and nongovernmental organizations work toward agreement on proposed administrative policies (Harter 1982). In practice, however, these agreements have not reduced subsequent litigation, in part because litigation has ordinarily been less frequent than generally thought (Coglianese 1997). Moreover, even countries with more consensual, corporatist policy structures experience litigation over administrative issues, often because lawsuits can help outside groups penetrate close-knit policy networks (Sellers 1995). In pluralist systems such as the USA, litigation is typically viewed as a normal part of the policy process, and insiders to administrative processes tend to go to court at least as often as outsiders (Coglianese 1996).

Courts' impact on the process of governance has been and will remain a staple issue for administrative law. In order to understand how law can have a positive influence on governing institutions within society, it is vital to examine how judicial institutions affect the behavior of government organizations. Empirical research on the social meaning and behavioral impact of litigation in an administrative setting has the potential for improving prescriptive efforts to craft judicial principles or redesign administrative procedures in ways that contribute to more effective and legitimate governance.

### 3. *The Future of Administrative Law*

Administrative law lies at several intersections, crossing the boundaries of political theory and political science, of public law and public administration. As the body of law governing governments, the future of administrative law rests in expanding knowledge about how law and legal institutions can advance core

