Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany and France (2021) by Susan Rose-Ackerman

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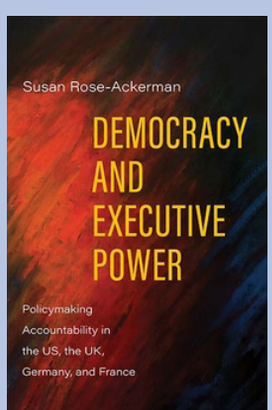

Susan Rose-Ackerman (2021) *Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany and France* is published by Yale University Press priced at $65.

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Susan Rose-Ackerman has written this book to assess the contribution that administrative law can make to enhancing democratic accountability in the exercise of executive power. Her objective is to highlight the need for representative democracies to go beyond elections, representative legislatures, and the establishment of political parties, important one might add as these are. Can referenda be added? The United Kingdom (UK) Brexit referendum was, according to one view, a vast exercise in democratic involvement promoting *vox populi*; or a sham based on lies, deceit, gross exaggeration and distortion. Both Remainers and Leavers were largely too inept to explain coherently the benefits or disadvantages of membership of the European Union (EU). Six years after the vote, the government has still not explained realistically what the future role of the UK in the world will be or what benefits will accrue. 'Free at last, free at last, great God almighty free at last' is not a justification for such a context-changing decision.

In short, this book addresses executive power, its operation and effective public involvement in that process to reinforce democratic values in fora

and settings beyond representative legislatures. The author's chosen models are the United States of America (USA), UK, Germany and France although other examples are taken on board.

Administrative power, the author observes on page 1, has concentrated on individual rights and ignores the way law can further democratic values in executive policy-making by encouraging consultation, participation and reasoned explanations for regulations, actions or decisions. Not all administrative lawyers have taken an individualistic approach to their subject, although the courts by tradition and dominant culture look for rights to fasten onto when intervening in executive decision-making. Their reluctance to foster surrogate political processes has not, in the UK, prevented them extending the grounds for judicial review and who has standing to bring judicial review in public law. In England and Wales, two Johnson government reviews and consultations on judicial review have been motivated by accusations that English judges have abused their position by extending the parameters of judicial review into the political, accusations that have already shown an emerging caution in judicial approaches to *locus standi* in British courts. Reform of human rights legislation has also been subject to a similar review and consultation (on judicial review, see Birkinshaw 2021).

Given the dramatic developments in executive power in the USA with the unitary executive and President Donald Trump's abuse of office and excesses (still a work in progress) and Boris Johnson's grandiloquent autocratic tendencies in the UK, one might have expected an examination of how the core executive is made more accountable in its operations beyond periodical elections. The author's focus is upon the way that power is delegated by the executive and legislatures, and how those bureaucratic structures may be made accountable and *democratized*. The paradigm is the federal agencies that operate in the USA and the Administrative Procedure Act of 1946 (APA), judicial review and agency rule-making. The author is correct in locating the real power of government in the bureaucracy. Long ago we learned in our constitutional history that the Normans introduced in England a system of governance through a bureaucracy so powerful and durable that it survived weak kings, foolish kings, despotic kings and absent kings.

It is also refreshing to see some erstwhile traditional areas of concern back in the spotlight. The world we inhabit has been dramatized by governmental excesses and scenes of bewilderment and outrageous behaviour. It is fitting to ask how delegated power operates and how its *modi operandi* are, and can be, made more democratic. The power, and powers delegated, are enormous.

Bureaucracy has its enemies and is an easy butt of populists and demagogues. Supply-side economists, the Alt-right and Ronald Reagan's claim that the most terrifying nine words in the English language 'I'm from the government and I'm here to help' (well, wasn't that Reagan's own message?) helped foment not just opposition but antipathy to regulation and its faceless functionaries. Rose-Ackerman is well aware of this and covers the ways in which regulation is opposed, not simply ideologically but through counter-technological and technicist initiatives.

On a personal note, early in my academic career I was intrigued by US administrative law and procedures, rule-making, notice and comment and hybrid procedures, judicial review in a common law system based in written constitutional foundations, substantial evidence, freedom of information legislation and, not really mentioned in this book, government in the sunshine and federal advisory committee legislation. It was a system grappling with capitalist, commercial and private power. For a young public lawyer these contained so much more than the meagre offering of English administrative law in a system built on secrecy (watch proposed UK reforms to official secrecy laws and freedom of information legislation the latter introduced in 2000). My colleague, Norman (Douglas) Lewis and I were taken to task for advocating rule-making procedures which American lawyers claimed had become sclerotic or which English lawyers claimed were too culturally steeped in US legal heritage to be exportable.

Well, those procedures, and many other participatory exercises, are here in this book. Rule-making procedures are, under the APA, the most developed and sophisticated means of sounding out and engaging in public participation in policy development. What the author does is examine the context of APA practices in the USA and attempts to curtail such regulation through devices such as cost-benefit analysis, removal of two regulations for every one proposed (as adumbrated by the *Taskforce on Innovation, Growth and Regulatory Reform* in May 2021[1] in relation to removing EU regulations and directives post Brexit) and explain the weaknesses and shortcomings affecting such procedures. She then analyses whether there are analogues in the systems under study along with the USA: the UK, Germany and France.

The USA is the most developed model for participation, but other systems offer examples of participatory practices, particularly in the field of the environment and the Aarhus Convention. In England, government

[1] Paragraph 10. In H M Government (2022: 27), the government did not recommend this: see details of the taskforce at Taskforce on Innovation, Growth and Regulatory Reform.

invariably does not want the merits of major policy proposals examined in fora outside Parliament where Members of Parliament (MPs) (government MPs forming a majority) can be whipped by government into supporting its proposals. The government learned over many years that inquiries at which the public made representations and examined proposals could all too easily drift into examination of policy, and sometimes very effective examination of policy.

Delegation of power is as old as government. It is a necessity and often perceived as an evil. Critics of administrative power have a long lineage. Lord Hewart and his *The New Despotism* (1929) certainly did not accept the *dicta* of Lord Shaw in *Local Government Board v Arlidge* that if 'administration is to be beneficial it must be master of its own procedure' [1915 AC 120]. The emphasis was on the centrality of liberty and property as the basis of our civil society. Fine if one was a person of substance. Everywhere the reliance on expertise and scientific rationality is decried by those who see a threat to their freedom and property by action or regulation in the public interest. Covid restrictions, libertarians proclaim, are part of the deep state's conspiracy to lead us back to a new feudalism. Environmental protection and climate control are a part of a subterfuge to keep us cold and impoverished. Equality and equal protection are a Woke attempt to thwart those whose wealth and privilege would ensure they sat, or should sit, at the summit of human hierarchies. These movements are invariably assisted by social media platforms, themselves a prime candidate for better regulation to protect the public. The target of attack (abuse) are the *soi-disant* experts and scientists and regulators who are seeking to advance the public welfare. One only has to recall the graphic images of Chris Whitty's (England's Chief Medical Officer) assailants besetting him in a London park at the height of the Covid outbreak.

Law should not only limit administration to its authorized parameters. It should assist administration and help make it more effective. It should achieve this, in the words of Rose-Ackerman, by helping to democratize the process of delegation.

A recent book by Elizabeth Fisher and Sidney A Shapiro, *Administrative Competence: Reimagining Administrative Law* (2021), explains how Donald Trump found administrative agencies an easy target for his fake news allegations and simplistic exaggerations. The mixture of rhetoric and ignorance of the details of what is actually the subject of deregulation has been a common feature of these attempts. Attacking 'big government' may be popular, but the public, let alone the former president, have little idea of how public administrators work and the way they assess risk to the public in the activities they seek to regulate on behalf of public welfare.

Fisher and Shapiro explain that, on 29 February 2017, President Trump issued Executive Order 13778, 'Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States"' (82 Fed Reg 12497 (3 March 2017)). The purpose of his Order was to demand the reconsideration of a 2015 regulation—the 'Waters of the United States' rule, known as the 'WOTUS' rule. The rule adopted a definition of the term 'waters of the United States' to define the jurisdiction of the US Army Corps of Engineers and the Environmental Protection Agency (EPA) under the Clean Water Act. Trump claimed that the EPA engaged in a massive power grab by deciding that 'navigable waters can mean every puddle or every ditch … it was a massive power grab' (Lee 2017).

Fisher and Shapiro explain in detail how Trump's exaggerations were themselves part of fake news and gross misdescription. The 2015 rule had been promulgated after repeated calls for a more precise definition of 'waters of the United States' so as to enhance regulatory certainty and reflected evolving science and the difficulty in defining navigable waters. The term was used in a Congressional statute (Clean Water Act (CWA) in 1972) with an explicit objective to 'restore and maintain the chemical, physical and biological integrity of the Nation's waters' against discharges. The alternatives: do nothing in the first place; achieve a definition which misses many of the problems and which is useless or next to useless; or develop a definition which protects the public interest. Of course, the determination of the public interest is not a self-defining or incontrovertible matter. An effective definition capturing the problem is central to environmental health. It will also likely upset powerful industrial and commercial interests, as we know only too well in the UK. The 2015 reformulation was the result of years of legal precedent, peer-reviewed science and agencies' technical expertise and extensive experience in implementing the Act over four decades. Where the public engage in this legitimate and necessary exercise, and engage effectively, is Rose-Ackerman's burden.

Administrative law should be about both the capacity of agencies to perform their legislation missions, starving them of appropriate funds is the easiest way to stymie them, and their authority to do so. Rose-Ackerman's brief is to see where in this process the public can best contribute to policy development, and under what conditions—eg openness, explanations, expert assistance—so as to further the democratic ideal. That is, in short, to get those involved and affected in a programme to assist in its unfolding.

Her objective is to explore comparatively how four legal and political systems achieve, or could be made to achieve, greater democratic

accountability, not simply *ex post facto* but *ex ante* by introducing more participatory procedures for greater contribution from the public. Questions are raised about common and civil law background influences. At various stages she examines EU practices, and those in comparable and less-developed backgrounds. Of course, this begs the question of who is invited to participate, at what stage in the process (usually too late), how open will the decision-making basis be? How widely circulated will information be and what is held back and why? What standard is required in the giving of reasons for decisions or rules—should we expect reasons for the reasons? Are reasons simply facilitators of appeal or should they assist in genuine transparency? How independent should the decision-makers be?—the author has written widely on corruption in officialdom. When many years ago I studied possible reforms in prison grievance and disciplinary hearings in England I was taken by examples from California. The running of prisons by 'self-interested hustlers' was a widespread phenomenon. What of those who need assistance beyond affected commercial interests (anti-regulation or pro-regulation affecting competitors), professional lobbyists, interest groups, neighbourhood groups and those representing the public interest. Lawyers do not come cheap (usually) and participants need expertise and guidance to match that of officialdom to tackle quantitative assessments of cost–benefit analysis, impact assessments and sheer technicality. What form of judicial review would best assist democratic involvement and are the courts up to this?

On this point a recent judgment of the English and Welsh Court of Appeal[2] has questioned whether a non-profit group set up to act as a defender of the public interest has *locus standi* to question the allocation of government contracts for communications' services by the highly controversial special adviser to the Prime Minister, Dominic Cummings. The group was a 'complete stranger' to the contract, and the question of standing was ripe for review (paragraph 6). Was it right that a third party who is not a potential bidder has a right to come to court, the Court of Appeal pondered? One had hoped this thinking had disappeared and that government contracting should be seen as an essential means by which government achieves its policies (Birkinshaw 2006) and which amounts to billions of pounds of public expenditure *per annum*. For the Good Law Project was the matter simply a *res inter alios acta* in private law? The judgment was followed by another in which the High Court ruled that highly controversial public appointments by ministers of individuals to

[2] *R (The Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21 on appeal from O'Farrell J in *R (The Good Law Project) v Minister for the Cabinet Office & Anor* [2021] EWHC 1569 (TCC).

central roles in the war on Covid in the early stages of the Covid episode in England could not be impugned by the Good Law Project. It lacked sufficient interest.[3]

All four countries under the comparative spotlight are experiencing not dissimilar problems in tackling executive power and its delegation although their constitutional foundations and expectations differ. Rose-Ackerman provides a wealth of detail of the practices in operation and in private sector analogues (pointed out many years ago by Lewis & Ors 1990). On page 266, she offers seven models of reform for rule-making procedures.

Perhaps the shape of US administrative law dominates the book's perspective? My eyebrows were raised at certain points: I did not notice reference to the 1893 Rules Publication Act in the UK which offered a far more public-spirited stage for making delegated legislation in England. The Act was repealed just as the USA introduced the APA! Although prerogative is vitally important in foreign affairs, it is suffused throughout our public life as *R (on the application of Miller) v The Prime Minister and Others* [2019] UKSC 41 testifies on the proroguing of Parliament by Boris Johnson. Is France really devoid of a legal vocabulary and conceptual framework for monitoring the democratic and technical legitimacy of policy-making inside the administration (page 227)?

There is also the deeper question that what has brought about (in the USA and UK, and France and Germany perhaps to a lesser extent though perhaps not) our scepticism of public power is the demotion of representative democracy and the desire to litigate, to confront personally and to win conflicts of belief and ideals absolutely, as in a referendum. Representative democracy is able to depersonalize conflict and achieve outcomes that are based on rational debate, balanced reflection and an element of compromise, one might claim. Opening up the policy-making process to the participatory pressures and inputs described by Rose-Ackerman will personalize differences of opinion, bring about undesirable delay and will not guarantee even and balanced representation and reflection, her antagonists will argue.

To which the reasonable response is that the representative process is heavily networked, partisan, subject to powerful self-interested lobbyist

[3] *R (Good Law Project & Anor) v The Prime Minister & Anor* [2022] EWHC 298 (Admin) where the GLP was ruled to lack sufficient interest; see paragraphs 16-29. The Runnymede Trust, a body established 'specifically to promote the cause of racial equality' (paragraph 59) did have *locus standi* to challenge the appointments under the public sector equality duty. See *R (GLP et al) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC) and *R (GLP et al) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) paragraphs 77-108.

groups, remote, tending to the secretive and inherently preferential. Surely, she is right to argue that bureaucrats and political appointees will invariably occupy and preside over the vast ranges of policy-making and the task is to encourage a public law that enhances their democratic accountability in a manner which complements the legislature. Those who are interested in such an objective will derive much benefit from this book. Those who are sceptical should nonetheless read *Democracy and Executive Power*. Whether she convinces the reader or not, there is a wide and deep body of material on participatory procedures in the four countries she examines and insightful analysis of the issues raised. The book deserves to be read and studied widely, not simply by public lawyers, but by political scientists and government servants and advisers.

About the author

Patrick Birkinshaw *is Emeritus Professor of Public Law at the University of Hull. He was Editor in Chief of the quarterly journal* European Public Law *between 1995 and 2018. He has authored numerous books including* Government and Information *(with Dr Mike Varney, Bloomsbury Professional 2019) and* European Public Law—The Achievement and the Brexit Challenge *(Alphen aan den Rijn: Wolters Kluwer 2020). He worked as a specialist adviser to the Commons Public Administration Select Committee and frequently acted as a government adviser. He was a member of the transparency team for Nirex and the Nuclear Decommissioning Authority where he was an ombudsmen on information requests. He has worked on several national research councils.*

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