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French Yearbook *of* Public Law

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Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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Book review: Susan Rose-Ackerman, Democracy and Executive Power. Policymaking Accountability in the US, the UK, Germany and France[1].

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1 New Haven, Yale University Press, 2021, p. 476.

In this monograph, Susan Rose-Ackerman, Professor at Yale University, undertakes the comparison of four established democracies – France, Germany, the United Kingdom, and the United States – with regard to their efforts in ensuring the accountability of executive policymaking.

From the outset, one should stress that Professor Rose-Ackerman is eminently suited to perform this task by both approach and experience. She has a strong background in political economy and shows full awareness of the limitations of certain strands in law and economics, which neglect the importance of collective interests such as environmental protection. She has taught administrative law in the US and has conducted research in the other three countries. She is also an editor of one of the most recent treatises of comparative administrative law. The legal systems selected for comparison, moreover, are well chosen and seem particularly promising to me. Not only are both common law – UK and US – and civil law jurisdictions – France and Germany – covered, but all four chosen systems have developed systems of judicial review designed to protect the individual whose rights or interests are susceptible to be adversely affected by executive decisions. At the same time, those systems differ not only from an institutional perspective, as they range from presidential systems to parliamentary democracies, but also from the viewpoint of the rules governing administrative procedure. Most of them have adopted some kind of administrative procedure legislation, while there is no such thing in the UK. Instead, the courts in the UK seem more willing to relax the requirements for standing than they seem to be in Germany, for example. This procedural differentiation has only partly resulted from traditions. When the US adopted the federal Administrative Procedure Act (APA) (1946), this was the result of a policy change. The vast powers exercised by administrative agencies during and after the New Deal period required a procedural framework which would ensure both accountability as well as the protection of the individual.

At the outset, Professor Rose-Ackerman observes that bureaucrats are more important than the traditional 'transmission-belt model' (to borrow Richard Stewart's well-known metaphor), according to which they mechanically grant benefits and impose costs, would suggest. She argues that policymaking 'necessarily requires discretion and judgment inside' the various public authorities, as legislation more often than not delegates authority through open-textured provisions and broad policy goals (p 2). However, the author adds, 'too often administrative law limits itself to the protection of individual rights and ignores the way in which the law can further democratic values in executive policymaking' (p 1). She is equally critical of the fact that too often bureaucracy is criticized by populist leaders in a generic manner. She stresses that the real challenge is, however, to establish a public law that enhances the democratic accountability of bureaucrats and political appointees.

The book is divided into eight chapters. Chapter one presents the traditional view according to which enforcing the rules of law is meant to hold the government to account, but also acknowledges the difficulties that arise in the real world. The chapter distinguishes three types of accountability: performance, right-based and policy-oriented. While the first two are well established in public law discourses, it is the last one that is emphasized, with a view to understanding the ways in which public law – as distinct from private law – can promote democratic legitimacy and effective policy design. It serves, for example, 'to inform citizens and interest groups that a policy choice is imminent and to give them an opportunity to express their opinions' (p 19). As a result, 'law has a role in constraining and managing government performance and policymaking'.

The second chapter discusses some constitutional paradoxes. It considers the relationship between constitutional structures and executive policymaking and criticizes the widely held view that there is a sharp distinction between presidential and parliamentary systems. Interestingly, the comparative horizon is broadened as the author expands the range of aspects to consider, particularly administrative procedure legislation, which focuses on the APA and judicial review of compliance with procedural rules in the US. This model differs from that of the UK and Germany, where the APA applies to individual administrative decisions rather than regulations. However, the German Constitutional Court has recognized that rulemaking can better protect fundamental rights than case-by-case adjudication. Similarly, French courts have required public input into regulatory policymaking, initially in the environmental field.

Chapter three examines policymaking within the executive from the twin angles of democratic accountability and competence. The comparative analysis shows that major public infrastructure projects, as well as local development plans are subject to public input, but in a variety of ways. For example, while in the US legislative requirements apply, in the English legal system there is governmental guidance to public authorities, and in France legislation requires public authorities to hold public debate with all interested parties ("*débat public*"). Interestingly, this has been considered as a model within other European legal systems. EU law as well as the Aarhus Convention are other important factors of diffusion of information and participation.

Chapter four takes an institutional perspective in that it considers the reasons why agencies charged with administrative functions and powers should be independent. Two types of bodies are examined: public agencies that regulate specific industries or sectors and quasi-public institutions that set standards or control access to an industry or profession. The US pioneered the development of agencies of the first type, but similar institutions have also been created in Europe, often in conjunction with liberalization determined by EU norms. Chapter five 'moves from process to substance' (p 13), in the sense that it examines the value and limits of cost-benefit analysis and impact assessment. Impact assessments often form a common basis for policy-making, but general principles, like precaution and proportionality, are equally important in this regard. Nevertheless, Professor Rose-Ackermann takes a critical stance towards the currently dominating role of cost-benefit analysis and impact assessment in government decision-making. She argues that, though cost-benefit analysis can be helpful, 'taken by itself it provides little guidance about how to make tradeoffs' (p 125). She convincingly adds that using money as a metric is questionable.

Similarly, chapter six considers critically recent efforts to involve citizens in public decision-making. Analytically, various forms of participation are considered, with and without deliberation, the former being the only one that deals with democratic accountability. The frequent critiques of public involvement are discussed, including costs and time, as well as the citizens' lack of knowledge and motivation. Chapter seven, in turn, focuses on the courts. Initially, it criticizes the traditional court-centered perspective that has dominated the debate on administrative law and analyses how the courts in different legal systems have been confronted with executive rulemaking. It then describes the varieties of judicial review and discusses the ways through which judges can provide oversight of the process without interfering with the policymakers' substantive choices. The final chapter serves to put the four national systems into a broader international context. It is argued that, though the analysis focuses on four legal systems, the outcome has relevance for representative democracies everywhere because 'all democracies face the same

basic challenges if they seek to institutionalize accountable executive policymaking processes'. Although each country needs its own diagnosis, there are several issues that recur and provide direction for reform, including, among other things, procedures for executive rulemaking, participation, balanced oversight of independent agencies, and judicial review.

Based on this brief description of the book, I would like to discuss three points of general interest. The first is descriptive. Professor Rose-Ackerman emphasizes a distinction in administrative procedures which we often blur. Administrative procedures exist in all the four legal systems, and more generally in modern administrative systems. Everywhere they are instruments of executive policymaking. However, while in the US policymaking, especially through rules and interpretative statements, is the dominant theme, as in the case of the Federal Communication Commission, we insist on adjudicatory procedures in Europe. Thus, for example, in both France and Germany judicial doctrines, legal scholarship and administrative procedure legislation focus on administrative acts, as distinct from rules. Professor Rose-Ackerman is well aware that the US model of notice and comment is criticized for being time-consuming and costly. However, she observes that empirical studies 'largely disconfirm the claim of excessive delay' (p 171). She suggests that delays are often driven by strategic considerations (p 174). She adds that business interests have a disproportionate influence on the outcome of administrative procedures. Given the heavy business involvement, openness and transparency are necessary. Comparatively, public participation has a lesser scope in Europe, though consultation is increasingly used to increase the public acceptance of major infrastructure project.

When we shift from administrative procedure to judicial review, another distinction arises. Standing requirements are interpreted more restrictively by US courts than by European ones. In the UK, for instance, one generation or two ago, some scholars were unhappy with the timidity of the English judges in limiting the possibility of judicial review of administrative action. However, the courts have now developed a broader notion of standing that explicitly covers third-party intervenors. Moreover, though there is no general common law duty to consult those who may be affected by a measure, several judicial decisions – including *Moseley* (2014) – have recognized the value of consultation (p 197). This is interesting in light of the author's remark that 'the British constitutional tradition is skeptical … of the democratic value of public participation in government' (p 7). This shows that traditions are not immutable, but can, and do, evolve. In Germany, though the focus is traditionally on the protection of rights, judicial review of executive rulemaking is not particularly frequent, except in the field of environmental law (p 216) which might be due to the Aarhus Convention. In France, judicial review of the administration is more open as the courts interpret the interest-based requirement generously. Thus, for example, a user of a public service was allowed to contest the organization of the agency entrusted with its delivery (*Syndicat des proprietaires et contribuables du quartier Croix de Seguey-Tivoli*). France also employs a rather favorable judicial policy as regards the admission of briefs from *amici curiae*. The seventh chapter, in particular, ends with an important remark; that is, while judicial review of administrative policymaking processes is linked to the country's constitutional structure, the courts often go beyond the protection of individual rights in fulfilling their oversight role. More generally, review of procedural requirements allows the courts to check the functioning of the regulatory state. One may be tempted, therefore, to argue that, while the three European legal systems have continued to focus on judicial review, the US took a partially different path

when it decided to adopt a general legislative framework governing administrative procedure, the same choice Austria had made earlier, in 1925.

The second point I wish to make here is normative in nature. The purpose of Professor Rose-Ackerman's book is to develop a regime-based, comparative approach not only for those systems, but on a global basis, as far as democracies are concerned. In this respect, it is important to ensure that the executive is accountable, especially in democracies where the legislature has few resources to check executive action. *A fortiori*, this is all the more important in countries that are making the transition to democracy out of an authoritarian tradition, as in the cases of Hungary and Poland after 1989. In both countries the absence of procedures for executive rulemaking 'left a loophole for unaccountable executive policymaking' (p 250), which has been worsened by political leadership. The lack of consultation may, however, have other explanations. For example, in Germany, there is a strong focus on the chain of legitimacy that is based on representative institutions, as well as on the courts. The problem with both Hungary and Poland is that, in addition to the gaps in their administrative procedure legislation, the role of the courts is undermined by the political attempts to undermine judicial independence. Moreover, the court's capacity to hold governmental bodies accountable becomes difficult if legislation provides no duty either to consult – as is the case in Hungary – or to give reasons. Professor Rose-Ackerman feels quite correctly that, while criticism of certain ideas and beliefs that have emerged in some countries of Eastern Europe – for example, the idea of 'illiberal democracy' – are traditionally regarded from the viewpoint of political processes, a combined analysis of constitutional and administrative law is both important and fruitful, because it sharpens our capacity to identify the loopholes of national systems of public law. These loopholes include the lack of consultation, the inadequacy of safeguards against vested interests in public decision-making, as well as parliamentary oversight. It is always difficult, of course, to determine the impact of any formal legal instrument in a given situation. One can plausibly argue, however, that if legislation requires public authorities to furnish reasons for the choices they made, this enables the courts to check whether agencies have correctly followed pre-established procedures and whether the result is coherent with the objectives set out by the legislative branch. In this respect, the last chapter of the book provides readers with an interesting and helpful repertoire of instruments (listed at p 266) that can enhance accountability.

The third point I would like to raise is methodological in nature in that it concerns comparative legal analysis. In the concluding chapter, Professor Rose-Ackerman explains that her approach differs from two 'excessively deterministic strands that currently dominate the literature'. A first strand, which can be exemplified by some work in the field of law and economics, underlines the role of inherited traditions in setting present conditions. An example of this is the World Bank's *Doing Business* reports which consider only the impact of legal rules on the business environment, while ignoring the value of regulations with regard to environmental protection, occupational health and protection for consumers (p 245 and 353). The other strand, in contrast, considers a worldwide convergence on a common package of accountability methods and points out that new legal regimes create standards on regional or global level. In Professor Rose-Ackerman's view, this strand overstates 'the degree and type of convergence' even in places like the EU. However, she does not hesitate to acknowledge the importance of regional legal regimes. Thus, for example, in spite of the different constitutional justifications for independent regulators in Europe, their functional justification is 'very strong' (p 120), in light of the attempts made by the EU to liberalize public utilities such as gas, electricity, elec-

tronic communications, and transports. As observed earlier, environmental regulation is another example. In conclusion, both scholarly trends 'operate at much too high a level of generality' (p 245), while instead it is necessary to 'unpack the law' and distinguish between substantive and procedural aspects (p 246). I think that particularly this last observation is one we can all agree with. We must not be content with observing that liberal democracies protect and promote the rule of law and thus have a healthy dislike of arbitrary power, but we must also examine whether administrative procedures are fundamentally sound and whether they are used to the satisfaction of the citizens with whom the governments do so much business nowadays.

In conclusion, this book is a valuable advance in specificity with respect to principles and instruments that are frequently discussed without too much thought being given to their precise content and underlying rationale. It combines an empirical analysis with a discussion of normative views. As a piece of research it will be of equal value to public lawyers and other social scientists interested in government.