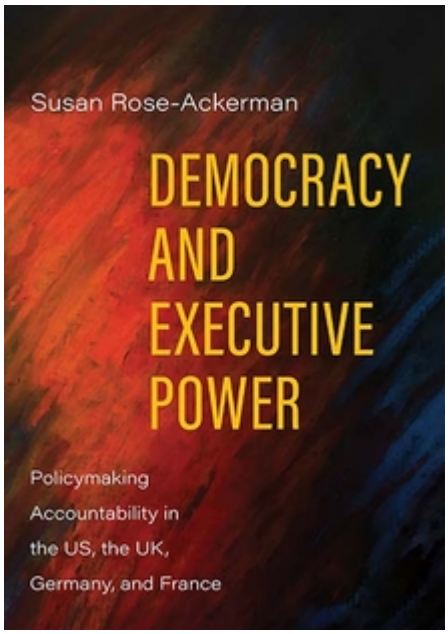
# British Association of Comparative law




# Towards future-proof comparative administrative law?, by Pieter Van Cleynenbreugel

*March 18, 2022February 24, 2022*

## A review of Susan Rose-Ackerman's *Democracy and executive power : Policymaking accountability in the US, the UK, Germany and France* (Yale University Press, 2021)

It cannot be denied that executive power in all its varieties plays an increasingly important role in the operations of modern democratic states. The governance of public health in the wake of the Covid-19 pandemic or calls for action to address climate change across the globe are only two illustrations of seemingly increasing missions conferred on executive organs of different shapes: governments at large, ministerial departments, expert bodies or agencies deciding on or limiting policy options. Although those different actors take decisions profoundly shaping or influencing people's lives, the legitimacy of

their actions remains contested, as freedom protests against public health measures or public manifestations for further climate actions illustrate. Given the importance of executive decision-making, it is not surprising that new questions arise on how to make such decision-making more accountable.

Two solutions have traditionally been considered in that context. A first solution would be to concentrate executive decision-making more firmly within a unitary executive (a strong President or cabinet), which is ultimately accountable to Parliament and/or the Electorate. Individual rights infringed by the executive would need to be safeguarded by the judiciary. By contrast, the overall process of executive decision-making would be legitimised by virtue of the electoral or parliamentary mandate the executive benefits from.[1] In that constellation, administrative law processes enabling more active participation from stakeholders or interested citizens within the context of executive decision-making would seem unimportant. A second solution would be to reinforce the framework in which the legislator delegates decision-making responsibilities to the executive. In that understanding, the legislator itself would remain responsible for the ultimate executive policy choices. Doing so would avoid that special interests capture the executive decision-making process and would make sure that expert proposals remain subject to democratic validation. Judges play a more limited role in that constellation, as the legislator, a body the democratic accountability of which stands beyond doubt, would take decisions validated by the majority of representatives of the People. In practice, however, it would be unlikely that legislators alone would be able to comfortably play that role in specific, highly technical cases. Majority-based legislative interventions do not guarantee that certain vested interests of those in need of protection, yet part of a minority, will prevail. The solution to address those issues, would then consist in entrusting (constitutional) judges with the protection of democratically outvoted minorities with a legitimate interest.[2]

These two solutions are well-known in (comparative) constitutional law. In both these solutions, however, administrative law – understood as the rule-based framework accompanying administrative processes and ensuring the review of these processes – plays a rather limited role. Susan Rose-Ackerman's important book *Democracy and executive power (https://yalebooks.yale.edu/book/9780300254952/democracy-and-executive-power)*firmly calls for administrative law to be taken more seriously as an instrument ensuring the accountability of executive policy-making. To do so, executive policy-making processes would have to be embedded in a firm legal framework that does not solely focus on individual rights and harms, but also on participation from stakeholders and other interested citizens. At present, such participation-oriented mechanisms still remain in their relative infancy or fail to be recognised as constituent instruments of administrative law. When they exist, they are often accompanied or replaced by cost-benefit analyses or impact assessments that do not allow for truly participative processes to come to fruition. Different legal orders with different constitutional structures have experimented with participatory or impact assessment processes, but no one-size-fits-all solution seems to be available as of yet and different forms of executive decision-making remain characterised by different uses of those techniques. Notwithstanding that diversity, Rose-Ackerman convincingly identifies the possibility for a more developed use of participatory techniques supported by and embedded within a more mature administrative law framework. In this review, I will retrace the main argument the book makes and the important lessons it contains for making comparative administrative law future-proof.

Through comparative administrative law survey of four States (the United States, the United Kingdom, France and Germany), the book identifies the gaps and possibilities for a more enhanced administrative law framework in that context. More particularly it starts from the premise that executive decision-making is inevitable and that ways to ensure its accountability need to be found. The notion of accountability itself is clouded in uncertainty and subject to different interpretations in different legal

orders. Prior to questioning the role administrative law can play in this context, chapter 1 of the book zooms in on the notion of accountability itself. Linking accountability to the 'way the government explains and justifies its actions, not just through balance sheets and income statements but also through rules that influence private-sector behaviour' (p. 17), Rose-Ackerman distinguishes three types of public accountability: performance, rights-based and policymaking accountability. She focuses on the last one. According to the author, policymaking accountability 'aims to inform citizens and interest groups that a policy choice is imminent and to give them an opportunity to express their opinions' (p. 19). To make this happen, different models can be distinguished in an abstract manner. The first chapter distinguishes those models, prior to concluding that, in practice, legal systems make use of a mix of those ideal-types of accountability mechanisms. The question therefore arises to what extent common underlying principles of administrative law could be found to improve, strengthen or even streamline those accountability practices. It is against that theoretical background that the book further develops its analysis and argument on three levels.

First, chapters 2, 3 and 4 set out the institutional frameworks in place in which executive policymaking can take place. In chapter 2, Rose-Ackerman identifies and distinguishes the legal orders of the United States, United Kingdom, France and Germany. She carefully criticises the reliance on traditional comparative law categories (presidential *versus* parliamentary systems, common law *versus* civil law traditions) that add little to a meaningful comparison of executive policymaking initiatives in place. Instead, the author calls for a perspective informed by the political economy of States' constitutional and administrative law systems. In doing so, a meaningful comparison would focus on the particular features, but also historical, economic or political reasons for which certain States adopted certain solutions. Categories from the past are not always useful in that endeavour and could in some contexts even impede meaningful comparison. It would be necessary therefore first to establish what happens and why that happens in different states prior to engaging in a full comparison of their executive policymaking initiatives. Rose-Ackerman masterfully explains the rationales behind different types of policymaking accountability frameworks and sets the scene for a mutually reinforcing, cross-country learning experience. Chapters 3 and 4 particularly zoom in on the ways in which executive policymaking takes place at the executive level and in the hands of independent agencies. The author's discussion on the latter is particularly illuminating. It turns out that all legal orders analysed rely in some ways on independent agencies to fulfil certain roles. Among the EU Member States included in Rose-Ackerman's sample, the impact of EU law on the need for such authorities is an additional factor to take into consideration. However, the practical understanding of such independence as well as the need to establish and hold accountable such agencies markedly differ across legal orders. Exposing those rationales again shows the possibilities for improving accountability mechanisms in light of the particular context in which those agencies operate.

Secondly, chapters 5, 6 and 7 zoom in on the ways in which executive rules are adopted and the participation possibilities that accompany them. Here Rose-Ackerman is particularly critical of increased reliance on cost-benefit analysis or, within the EU and its Member States, impact assessments. Although those techniques are meant to limit the discretion of executive policymakers and to ensure their accountability, the author points at the inherent shortcomings and limited worldviews underlying them. As a result, those techniques do not guarantee that intergenerational or minority-protective considerations are sufficiently taken care of throughout executive policymaking. Chapter 6 further adds that existing, often disparate, participation procedures, remain cloaked in a social planner's preference for impact assessments or cost-benefit analyses. As a result, general participation mechanisms only play a limited role or are completely absent in the overall setup of the four administrative law regimes studied. The limited role accorded to general participation mechanisms also has an impact on the ways in which judicial review of administrative action is perceived. Chapter 7 retraces the role and limits of

judicial review and paints a picture of diversity, grounded in different institutional settings and preferences.

Thirdly, chapter 8 offers a more concrete way forward. Building upon the previous chapters and presenting a more global outlook, Rose-Ackerman identifies a series of guiding principles for states looking to enhance public participation through administrative law. According to the author, '[t]he need to balance technocratic knowledge with public accountability is a fundamental requirement for any nation struggling to sustain a credible democracy, regardless of its geographical location' (p. 244). Given that this ambition is shared by a relatively large number of states, it would be worth examining whether a series of common principles, guiding questions or legal possibilities exist for enhancing policymaking accountability. In doing so, the author distinguishes her approach from the traditional focus on legal traditions and their impact on economic growth or on the almost natural tendency of states towards convergence in their administrative functioning in response to global social, economic and political forces. Instead, the author argues that careful attention needs to be paid to the historical and constitutional traditions of every state. Considering those traditions does not make it impossible to identify a series of converging policymaking accountability principles, but those principles need to be translated further in the specific institutional context of each state concerned. The author makes a most balanced proposal, identifying seven types of reform that could be embedded within existing historical or constitutional traditions and that would require new types of governance arrangements between legislature, executive and the judiciary. Although the book does not contain – and does not aspire to offer – tailor-made solutions for the legal systems under scrutiny, it offers a roadmap that allows national scholars and social planners clearly to reflect upon the accountability mechanisms in place and the possibility to use administrative law to further enhance them.

Overall, *Democracy and Executive Power* makes an important case in favour of a more developed administrative law systems underlying a balanced participatory decision-making framework. That system complements existing rights-based and legislative accountability structures but places administrative law more centre-stage. The book invites deep reflections on how administrative law can be refined in this sense and calls on comparative legal scholarship to analyse and address how those questions have been dealt with across the globe. To find the most desirable balance, it is useful to look at other administrative law frameworks against the background of their own constitutional structures and traditions. Rose-Ackerman convincingly shows that this kind of inquiry can bring legal policy debates to a new level. Her book is to be read and discussed widely, both by theorists and practitioners of administrative law and by social planners looking to enhance the accountability of executive decision-making.

Beyond its very powerful core argument, the book contains an additional important lesson for the field of comparative administrative law in general. The argument developed fully makes clear that well-conducted comparative legal research in the field of administrative law cannot simply rely on traditional legal traditions or families. Every state is the product of its own constitutional, political and historical tradition and has established bureaucratic or executive institutions in light of those traditions. At first sight, the existence of those traditions may make any comparative legal analysis of administrative law mechanisms less relevant. Rose-Ackerman masterfully demonstrates how, despite different constitutional traditions, different states are confronted with the same questions and address those questions in different or similar manners. In the same way, she shows how an international organisation such as the European Union has an impact on reforming some administrative procedures or practices. At the same time, such organisations do not as such directly and completely change the institutional fabric in the context of which national administrative laws have taken shape. The purpose of comparative law should not be to offer a one-size-fits-all solution or to identify the best legal system

around, but to incite debates on how legal systems can be refined to respond to the identified problems. Identifying those problems requires an extra-legal perspective.

From that point of view, Rose-Ackerman's book is also a call for more input from other social sciences – not just economics – in identifying and framing the problems the law aims to resolve. Comparative law does not operate in a vacuum, but needs to take place in constant dialogue with scholars from related disciplines. Although most comparative legal researchers are very much aware of this, the book practices what it preaches and shows the usefulness of in-depth comparative legal research in this field. Taking those lessons seriously makes comparative administrative law a future-proof and promising way to address some of the most fundamental challenges democratic societies face. Rose-Ackerman's impressive ability to gain in-depth understanding of the four legal systems shows that there is and will remain a future for this type of social sciences-informed comparative legal research.

Posted by Pieter van Cleynenbreughel (University of Liège)

---

[1] See for the United States, Cass Sunstein and Adrian Vermeule, 'The Unitary Executive: Past, Present and Future' (2021) *The Supreme Court Review* 83-117.

[2] This understanding is classic in constitutional jurisprudence, see also the well-known theory of judicial review by John Hart Ely, *Democracy and Distrust* (Harvard University Press 1978). It deserves to be highlighted that Ely did not have in mind the particularities of executive decision-making when he formulated his theory of judicial review at the constitutional level.

*Posted in: Book Review, Comparative administrative law, USA*