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Review of Rulemaking, Participation and the Limits of Public Law in the USA and Europe by Theodora Th. Ziamou and Review of Governing by Numbers: Delegated Legislation and Everyday Policy-Making, by Edward C. Page

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THEODORA TH. ZIAMOU, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe*. Aldershot: Ashgate, 2001, 270 pp., \$104.95 (pbk).

EDWARD C. PAGE, *Governing by Numbers*. Oxford: Hart Publishing, 2001, 256 pp., £22.50 (hbk).

In Europe, administrative procedure has become the stuff of high politics. The Charter of Fundamental Rights of the European Union proclaims the right to good administration. In response to calls from Member States, the European Union has adopted legislation requiring the Commission to make information about regulatory proceedings readily available to the public. Tony Blair's Labour Party rose to power on a platform that included legislation on access to government information, a campaign promise that finally materialized in 2000. In doing so, the United Kingdom followed the example of a number of European countries that had already adopted freedom of information legislation, starting with France in 1978.

It is said that greater openness, fairness, public participation and devolution are responses to the dwindling legitimacy of European administration, both in Brussels and in national capitals. To get beyond alarmist statements of legitimacy crisis and empty promises of openness and access, however, rigorous scholarship is needed to explore the extent of the problem with administration in Europe and whether any of the solutions proposed will indeed improve matters. The two books under review do some of the hard work.

Rulemaking, Participation and the Limits of Public Law in the USA and Europe is a welcome contribution to the comparative literature on public law. As the title indicates; the focus is rulemaking, that is, the process by which the public administration determines the future rights and liabilities of a class of individuals or firms, generally pursuant to statutory instructions. Rulemaking is one of the major sources of confusion in comparative administrative law, mainly because in some places, including Europe, it is left entirely to the interaction of legislative and executive politics and in other places, namely the United States, it is highly regulated by the law and the courts. To put it slightly differently, an area that employs thousands of American lawyers at a cost of millions of dollars does not even count as law in Europe.

Ziamou compares the law of rulemaking in the United States, Germany, Greece and England. Among the topics covered are the distinction between administrative rules and other types of administrative acts, the constitutional law of rulemaking, rulemaking procedure, the ability of private organizations to adopt rules that bind themselves and third parties, and judicial review. For the American lawyer, puzzled and handicapped by the lack of attention to rulemaking in the major European textbooks, Ziamou's careful analysis is highly instructive and, for the European lawyer, her comprehensive description of the American system is a good starting point for further exploration.

That being said, the ambitious scope of *Rulemaking, Public Participation and the Limits of Public Law* is also a source of frustration. The basic premise of the book is that the European system of accountable administration through direct parliamentary control, ministerial responsibility and judicial protection of individual rights has failed and that the American rulemaking system, which legally guarantees public participation, can serve as a source of inspiration for rulemaking reform in Europe. Ziamou, however, does not adequately use this premise to organize and analyse the wealth of information contained in the book. For instance, she describes at length the distinctions between binding rules and non-binding statements of administrative policy, i.e. non-binding rules, in the four countries. Only much later in the book does she make a cursory argument that public participation should be required even for non-binding rules, without carefully considering the loss of administrative flexibility that might result and the serious consequences for the rule of law ideal if administrators respond

by abandoning rulemaking altogether and employing more discretionary forms of administrative action.¹ As a result of the book's loose analytical framework, the reader is left with a better understanding of American and European rulemaking but is not convinced that Europe has a problem or that the American system is any better.

Governing by Numbers is also about rulemaking in Europe, specifically Great Britain, but from the very different perspective of qualitative political science. Rather than explanations of abstract legal rules, the reader is treated to accounts of tormented civil servants trying to get the size of mail envelopes right and plagued by doubts in the middle of well-deserved bubble baths. For anyone interested in comparative politics or public law, the picture of the British administrative process that emerges from Page's interviews, surveys and careful review of a government database is absolutely fascinating.

Page focuses on rules, known in Britain as delegated legislation or statutory instruments, because they allow him to study the broader phenomenon of what he calls 'everyday politics', that is, matters that do not mobilize political parties and cause partisan debate in Parliament and the press but that are, nevertheless, significant. The specific question that guides Page's research is whether and how the influence of civil servants, interest groups, ministers and Members of Parliament over statutory instruments differs from the influence they exercise over primary legislation. The empirical research primarily comprises 46 detailed case studies of statutory instruments ranging from a temporary ban on cod fishing to ensure respect for European Community fishing quotas to the elimination of height and other physical criteria for firefighter employment, thus affording women equal employment opportunities.

Page concludes that, in the British parliamentary system, the Government dominates both high politics and everyday politics. However, he finds that, as might be expected, in the world of everyday politics, the most important players are not Cabinet ministers, top-ranking government officials and large, corporatist interest groups, but junior ministers, low-level civil servants and highly specialized lobbying groups such as the National Association of Cider Makers. Moreover, Page argues that the obscurity of statutory instruments enables the executive branch to engage in broad consultation of interest groups because political parties and ideology generally do not have much to say about technocratic matters.

Although *Governing by Numbers* is primarily an empirical study, Page also considers whether, given his findings, the British rulemaking system is satisfactory from the perspective of democracy. He acknowledges that greater parliamentary oversight would be desirable but takes the view that, on the whole, British bureaucrats are publicly accountable. According to Page, the same political forces oversee and direct both high politics and everyday politics – Government, Parliament and interest groups – and attempts to encourage more involvement from politicians would inevitably run into the real-world problem of a political agenda limited in the time and space it can dedicate to codfish quotas and firefighter recruitment.

Page's sanguine view of government by administration is not entirely supported by his evidence or by the evidence from other studies of British administration. He argues that interest groups are satisfied with the opportunities for participation in the rulemaking process, notwithstanding the highly informal and discretionary nature of the executive's consultation of interest groups. Yet 41 percent of the 382 interest group surveyed said that the government 'nearly always' or 'frequently' published statutory instruments before they had even heard about them (*Governing by Numbers*, p. 141). In several cases, the administration went ahead without consultation because the significant decisions had already been made by government ministers (*Governing by Numbers*, p. 132). And, when interest groups are consulted, Page reports that administrators expect them to contribute technical expertise rather than their views on policy choices. As he puts it, '[s]wallowing the principle and

arguing the detail is an important ground rule for groups participating in everyday politics' (*Governing by Numbers*, p. 147). It might very well be true that the dominance of junior ministers and low-level civil servants is good for the quality of British policy making, but it is hard to believe that pressure groups are happy with the status quo.

The limited role for interest groups in rulemaking also affects parliamentary oversight. Page shows that Members of Parliament can, through a variety of formal and informal mechanisms, bring pressure to bear on the Government and alter the contents of statutory instruments or stop them altogether. In most of the episodes that he describes, however, interest groups were the initiators of parliamentary opposition. MPs took action only after receiving complaints from interest groups – what Page describes as moving an issue from everyday to high politics and what American public choice scholars Matthew McCubbins and Thomas Schwartz call alarm-bell ringing. How much stricter would parliamentary scrutiny be, then, if pressure groups were better informed about rules and able to bring more complaints to the attention of MPs?

Lastly, Page neglects to alert the reader to an aspect of everyday British politics that is even more invisible than delegated legislation: case-by-case standard setting. The British regulatory style has been characterized by David Vogel (1986) and others as highly informal compared to the United States and other European countries. What is done through rulemaking in the US and the Continent is often achieved by other means in Britain. (Although the growing body of European Community legislation has led to significant changes in British administration, the United Kingdom's regulatory style is still distinctively informal.) Take environmental policy. Emissions limits are negotiated factory by factory by public authorities and company representatives, with no public participation. Even if one accepted Page's view of British rulemaking, to come to any conclusion as to whether everyday policy making is sufficiently open to public scrutiny, it would be necessary to understand the extent and accountability of these informal processes. This is not to claim that the informality of British regulation is illegitimate or produces bad results. Indeed, while Vogel concedes that the lack of political conflict over air and water quality can be partially attributed to the low visibility of the regulatory process, he finds that the public, and not simply industry, is generally content with the process (Vogel, 1986: 102). It is as well to caution, however, that, before concluding that all is well with the everyday politics of the administrative process, it is necessary to cast the net more widely and consider the variety of ways in which we are governed by bureaucrats.

NOTE

1. Jerry L. Mashaw and David L. Harfst have demonstrated that this was one of the results of the rise of proceduralism in American rulemaking in the 1970s (Mashaw and Harfst, 1990).

REFERENCES

- Mashaw, Jerry L. and David L. Harfst (1990) *The Struggle for Auto Safety*. Cambridge, MA: Harvard University Press.
- Vogel, David (1986) *National Styles of Regulation*. Ithaca, NY: Cornell University Press.