30. Implementation: Facilitating and Overseeing Public Services Street Level

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Implementation is a key concept in the language of public policy as a field both of practice and of scholarship. The concept is less well developed in administrative law, but can be put to use in examining the daily practices of street level bureaucrats in giving effect to government programmes in such areas as welfare, housing, health, industrial policy, transport and so on. A focus on implementation takes us to what are frequently for administrative lawyers ‘the dark and windowless areas of the administration (Harlow and Rawlings 2009: 201), since they are not very visible from the perspective of a court-centred approach to administrative law which largely focuses on judicial review. Today, of course, the development of a wide range of mechanisms for supporting the achievement of administrative justice means there is a greater focus by lawyers on such ground level decisions and actions which constitute the implementation of government programmes. The literature has largely focused on the broadening range instruments of accountability and control for decisions rather than primary decision making itself. Arguably, if the architecture of accountability and control was working well, administrative decisions would be properly made and would not need to call on such external scrutiny frequently. A key function of administrative law and administrative justice is to support decisions being made and implemented well on the ground. There is a potential tension between managerial concerns with effective and efficient decision making, on the one hand, and public law values of accountability, equality and legality on the other (Christensen, Goerdel et al. 2011). The focus of this chapter is on that first level implementation of administrative decisions and actions. I have aimed to pitch the analysis at a level of generality such that it captures key questions and trends relating to implementation across contemporary public administration within the member states of OECD. But the analysis has the potential to illuminate the core functions involved in implementation and the variety in how those functions are executed in terms of levels of government, actors and modes across any system of government. The Chapter concludes with an assessment of the role both of proactive and reactive modes of accountability and oversight in supporting legitimate and effective street level implementation.

1. **Defining Implementation and Administrative Law**

The concept of implementation implies the existence or establishment of a regime of objectives, expectations, norms or rules which require to be implemented. Thus it is possible to make a central distinction between objectives/norms on the one hand and implementing actions on the other. Within administrative law we might traditionally conceive of this as the distinction between rule-making and application of the rules (though implementation may in fact go beyond the simple application of rules, for example extending to the development of administrative guidance which affects the meaning of the rules). Implementation involves the establishment of apparatus through which the actions anticipated by the regime can be carried out including the establishment of budgets, requisition of buildings, appointment and training of staff, and communication with those who are affected by or subject to the regime. Critically, implementation is not necessarily about any particular piece of legislation. The configuration of agencies and other administrative units generates a set of practices the purposes of which typically go beyond implementing any particular legislative regime to cover agencies take on a degree of authority and purpose which typically has a larger mission (Page 2006:221). We must also recognize that the way in which a policy is implemented can frequently serve, in turn, to shape the policy both informally (in the sense that the meaning of the policy is determined in part by the way in which it is implemented by street level bureaucrats) (Lipsky 1980) ; and, second, in the more formal sense that the experience of implementation frequently feeds back into review and revision of the policy either *ad hoc*, to address particular concerns which have been identified, or more systematically as an aspect of periodic review and revision. Review and revision has become an increasingly significant aspect of public policy doctrines, such that implementation experience should be regularly and routinely feeding into enhancement of public policy regimes overall. With both the informal and formal linkage between implementation and policy making, implementation is a key source of learning within the policy process (Freeman 2006). A central challenge for administrative law is to develop better understanding as to how mechanisms for accountability and oversight of implementation may better feed into those learning processes.

Implementation is a purposive action, directed towards achieving the objectives set down for the regime. A key aspect of administrative law is concerned with allocating powers and functions to public authorities and to others to get the business of the state done. A view of administrative law as facilitating state activity is consistent with the ‘green light theory’ of administrative law propounded by Harlow and Rawlings (Harlow and Rawlings 2009) and which draws on both British and American traditions dating to the first half of the twentieth century. The American New Deal of the 1930s provides a key example of the expansion of administrative law to meet purposive objectives across a wide range of sectors, just as the development and expansion of the welfare state in twentieth century Europe underpins the development of a purposive or materialized administrative law (Cranston 1985, Zumbansen 2008), concerned not with regulation of procedures, but rather with the delivery of legislative programmes devised to improve society across one or more dimensions such as housing, welfare and education. Some legal systems, such as that of the US, have moved more towards prioritizing the purposive functions of law (Atiyah and Summers 1991, Horwitz 1992). However the changing context and demands of public administration have tended to create a tension between a contemporary outputs/outcomes-based focus on efficiency and effectiveness in public management (sometimes referred to as representing a ‘new public management’ (Hood 1991)), on the one hand, and inputs-based public law values of accountability, equality and legality on the other (Christensen, Goerdel et al. 2011).

Tensions between new public management’s efficiency/effectiveness values and the more procedural accountability/legal values of public law only seem greater when we observe that implementation involves a good deal more than simply the legislative empowering of the state to undertake defined tasks. Typically implementation is likely to involve varying degrees of discretion and the deployment of resources going beyond simply having the legal authority to act. These resources are explored in the next section of the chapter. Key principles of administrative law include norms around holding government administration within its legal mandates, and ensuring fairness, reasonableness and proportionality in the exercise of administrative power. Traditional administrative norms have been supplemented in many jurisdictions, and also at the level of the EU, by a range of other principles overseen by specialist bodies, including principles of good administration (overseen by public sector ombudsman schemes), value for money (overseen by supreme audit institutions) and better regulation (overseen by specialist units of various kinds). Arguably these newer values, partly associated with the NPM movement (but good administration predates the NPM movement) are not entirely juridical in character, but nevertheless constitute key aspects of the normative environment for contemporary administration. I consider in the third section how discretion is perceived across a range of different modes of delivery for public services, before addressing oversight and accountability in the final substantive section.

1. **Resources and the Building of Capacity to Implement**

As noted above, implementation of any given regime whether referring to welfare, housing, transport, taxation or regulation requires a good deal more than simply the legal authority to act. State capacity for acting to improve society is contingent on a number of different elements which can be separated for heuristic purposes but which tend to overlap on the ground. In his work on ‘The Tools of Government’ Hood argues that all state capacity can be described in terms of four basic concepts, Nodality, Authority, Treasure and Authority, generating the acronym, NATO (Hood and Margetts 2007). The NATO acronym here does not refer to the well known North Atlantic Treaty Association, but rather the key concepts which characterize state capacity. Whereas administrative law tends to focus on Authority to act, any comparative approach to implementation must seek to understand the nature the other three sources of capacity and their positioning within administrative law.

* 1. **Nodality**

Nodality refers to the unique positioning of government in a society which enables it both to collect information and to disseminate, distribute or publish information, ‘information management’. In her contribution to this volume (Spiecker 2020) notes that the regulation of information management in most systems is quite limited and fragmented, with a primary focus in some systems on the use of personal information, but not overall oversight of the way governments manage information . This is somewhat surprising given that the collection and distribution of information has been a core function of the state ever since censuses were established to better understand the location of citizens, their liability to tax and so on. During the 19th century the emergent modernity of states was, in part, defined by the development of apparatus for statistical collection and analysis to underpin public policy. James C. Scott describes a system of beliefs, “high modernism”, which conceive of the contemporary state as able to enhance societies through their purposive actions to collect information, to understand society and to hand out information in conjunction with the use of other state capacity. These practices including creating standard time, standardizing such things as languages (for example with respect to French and Chinese languages) and weights and measures, and the development of national postcode systems which uniquely identify locations of people and businesses. High modernism and practices of standardization by the state have, to some extent, given way to a more fragmented approach to state actions such as delivery of public services and the increasing tendency towards private or market driven standards processes, frequently, but not invariably subject to market competition and innovation rather than standard provision within state or private monopoly provision. One implication of this fragmentation for administrative law is that if it maintains an exclusive focus on formal power of the administrative state it will lose relevance. Whilst the Global Administrative Law movement has recognized the importance of developing and applying administrative law norms to the organs of inter-governmental decision making and action, for example with respect to the standards developed by the International Labour Organization, we increasingly recognize also the role of non-state or private actors and organisations both at national and transnational level in key aspects not only of setting but also implementing norms (Krisch 2010) . Such implementation by non-state actors frequently occurs through supply chain contracts – a central instrument for the exercise of (private) administrative power (Cafaggi and Iamiceli 2014).

Administrative law has, traditionally, not paid so much attention to the collection and dissemination of information. Information law is emerging from trends towards mandating access to information held by governments and rules on processing personal information and data privacy. A global trend towards development of freedom of information laws, requiring goverments to make available at least some classes of information they hold, through a combination of publication schemes and responses to requests for information, significantly affects the ways that governments may hold and process information (Ackerman and Sandoval-Ballesteros 2006). Further change has arisen from the increasing importance given to privacy norms in the European Union and, through their extraterritorial effects, more widely (Spiecker 2020). Some forms of information actions do not come within the realm of privacy law, for example the use of general information to encourage changes in behaviours, sometimes referred to as public service information, but increasingly seen as part of the set of behavioural instruments some of which may be referred to as nudges (John, Cotterill et al. 2011).

Nudges are instruments for implementing policy by acting on the behaviours, typically of individuals. Nudges are defined as not restricting choice, but changing the choice architecture to encourage better choices (Sunstein and Thaler 2008). Information-based nudges include the re-writing of letters to include information which encourages particular behaviours such as the payment of tax bills, and the use of signage to promote compliance with statutory requirements such as payment of television licences. Nudges can also use other state capacities such as authority to auto-enrol employees into pension schemes by default (with the possibility of opting out), authority to require application of taxes to discourage harmful behaviours such as cigarette, alcohol and fuel consumption and the use of plastic bags. In this case the price elasticity (sensitivity to price) is different for different kinds of product, such that the nudge is felt more powerfully with consumption of plastic bags than of cigarettes.

Where nudges deploy authority instruments then they are likely to be subject to normal administrative law procedures about the application of rules to citizens. But in the case of information based actions the reach of administrative law appears much more limited, especially in the case of general information measures that do not depend on information about particular citizens. This is a matter of concern because nudges can be seen as manipulative in some contexts and, as an exercise in public or private power, deserve greater scrutiny (Hansen and Jespersen 2013).

* 1. **Authority**

Authority refers to the use of law by the state. Whilst some scholarship conceives of law constraining the state, focusing on the hedging the exercise of state authority with controls, other strands of scholarship see law as facilitating state action, as noted above. Within the NATO scheme, authority is facilitative, enabling state authorities to undertake certain actions such as collecting taxation and delivering services. Administrative law has a good deal to say about the deployment of authority through principles of administrative law and administrative justice which apply to state actions. So, for example, the assignment by state agencies of rights to citizens including the right to use land in particular ways , for example for the construction of buildings, may also be subject to the rights of others to contest the proposed building scheme. In this instance of polycentric decision making planning law tends to set down the conditions under which third parties can participate in land use planning decisions and the principles to be operated by decision makers in handling the competing interests of individuals vis-à-vis each other and with respect to society at large. With respect to authority permitting payments to citizens or organisations, administrative law principles may more directly relate to the relationship between the citizen/organization and the state, setting down principles on the basis of which any discretion is exercised.

* 1. **Treasure**

Treasure refers to the set of instruments involving the collection and deployment of funds to achieve purposes. Any state action involving employment of people, taking of facilities, and so on, clearly requires some expenditure. But the treasure-based instruments are conceived of as those which centrally use funds to achieve their objectives. Key examples here include transfer payments to citizens for welfare purposes, and to organisations for delivery of services (including both direct provision through state bodies and subsidies to non-state bodies). The collection of funds through taxation of various kinds also falls within the Treasure-based instruments. Administrative law rules in relation to taxation and expenditure have traditionally been regarded as rather specialized, but enter the more general territory of administrative law when involving the exercise of discretion, for example in relation to the rationing of services on expenditure grounds and also with respect to the contractual arrangements for contracting out services, which may affect not only users of services but also employees affected by changes in provision for direct organization to contracting out. The importance of the exercise of public power through use of funds and contracts was recognized in the claim that ‘government by contract’ represented a form of new prerogative in the UK (Daintith 1979). Within civilian systems special rules governing government contracts have sought to assert key aspects of administrative law doctrine apply to decisions and the EU has increasingly sought to assert the importance of market-preserving values with procurement contracting (Bovis 1998). Set against the imposition of market values on procurement contracts, is the long-standing recognition that decisions by public bodies about who to purchase from and on what terms can be deployed to achieve wider social objectives such as more equal pay and conditions for employees or sustainability of resources (McCrudden 2004) .

* 1. **Organisation**

The deployment of organization-based capacity may involve some authority (to establish an agency, for example) and treasure (to pay for space, facilities and wages) but its hallmark is the use of direct service organization to deliver services such as transport, health and housing, noting that each of these forms of service can typically be delivered by non-state providers, with or without subsidy. The New Public Management ideology, initiated in the 1980s period of neoconservative governments, notably in the US and the UK, and labelled in the early 1990s, increasingly tested received wisdom about the structures for providing services which had frequently been the preserve of state (or sometimes private) monopolies in areas such as telecommunications, energy, airlines, local transport and even provision of prisons. Both public ownership and monopoly provision were increasingly questioned, such that many public monopolies have given way to mixed public-private competitive markets or wholly privatized markets. Many services which are notionally retained in the public sector are being implemented through a variety of contractual forms by private providers, whether cleaning, refuse, transport, prisons, or customs services.

As noted throughout this discussion, implementation actions frequently involve a combination of two or more of the four key resources. Furthermore, it is increasingly important to understand that the state does not have a monopoly of any of these resources, though it does have a distinctive position in respect of each. Even with authority, there is ample evidence of businesses, associations and NGOs setting down and implementing norms in the manner of private legislation both through the instrument of collective contract, in the case of associations and NGOs, and through bilateral contracts and supply chains in the case of businesses (Scott 2002). Businesses and others clearly also have organizational resources, capacity to gather and dispense treasure, and capacity to gather, analyse and disseminate information. Indeed, a central feature of contemporary concerns about ‘big data’ is that large tech companies increasingly rival governments in their ability to gather and analyze large quantities of information about people’s movements, families, consumption habits, health, and so on, that would once have been the preserve of government census programmes.

1. **Discretion in Implementation**

A central feature of contemporary public service implementation and a key function of administrative law, relates to discretion. The US literature distinguishes discretion to make legislative-like rules from discretion to implement the rules. Much US administrative law is concerned with the supervision of rule making. However, the delegation of rule making powers is less common outside the United States and has been a lesser feature of administrative law elsewhere and I do not address it in this chapter.

In his key contribution to thinking about challenges of administrative discretion in implementation Davis states that ‘an officer has discretion whenever the effective limits on his [sic] power leave him [sic] free to make a choice among possible courses of action or inaction’ (Davis 1969). Looking at discretion over implementation it is possible to distinguish different degrees of discretion. De iure discretion arises where the implementing authority has formally been assigned discretion to decide whether to act and how to act in specified circumstances, for example where professional discretion is to be applied to determine the appropriate rate of a welfare payment. De facto discretion arises where, irrespective of formal grant of discretion, the implementing authority is able to apply discretion to the process deciding whether and/or how to act because the actions are not sufficiently overseen to prevent this and such discretion may be necessary to make a mandate workable. Street-level bureaucrats frequently have discretion to determine how to deploy limited resources to aid achievement or organisational goals .

In German administrative law, different grades of discretion are recognised and overseen somewhat differently from each other. German law, like Italian law, distinguishes between various forms of openness of legal texts, and unlike the French approach or the Court of Justice of the EU, does not treat all as discretion. For example, German courts submit all legal interpretation to full judicial review, even openly formulated ones (Unbestimmte Rechtsbegriffe). With respect to the ‘input’ side of decision-making (Beurteilungsspielraum), this is also generally subject to intense judicial review. Only the ‘output’ side of a decision, choosing which of several possible solutions to take is treated as discretionary (Ermessen). Wide discretion includes discretion to act or not (Entschliessungsermessen); discretion to choose from a range of actions (Auswahlermessen); discretion to choose with a framework (eg which penalty within the range to apply) (Rahmenausfüllungsermessen). German courts very closely look at what kind of discretion has been conferred on the administration and only grant the most narrow of discretionary powers in the specific context of those categories (Schmidt and Scott 2017). Research on implementation, as noted above, suggests that the mode of implementation (including how discretion is exercised) frequently shapes the policy itself, at least informally, suggesting that discretion is of even greater significance than is frequently conceived of in administrative law scholarship.

Recognising the wide discretion involved in implementation and also the diffusion to a wide range of different organisations and actors, there is a challenge for administrative law, in that such discretion for administrators risks offending against rule of law principles relating to fairness and transparency in the application of power (McDonald 2004). These risks can be addressed in a number of ways, none of which is mutually exclusive (Bugaric 2004). A first option is to seek to constrain discretion through procedural norms backed up by judicial control. Norms on administrative procedures (whether specified through legislation or judicial precedent) set down what is required to be done to make a legitimate decision in terms of participation and hearings for those affected, duties to consider evidence and to give reasons, and to avoid bias, and typically provides for ex post judicial control. Whereas some controls are quite well developed in some presidential systems of government, such as the United States (eg through the Administrative Procedure Act), less emphasis is paid to such oversight within parliamentary systems, where courts are characterized as showing greater deference to those exercising executive power(Ip 2020). The English courts, for example, have tended to adopt norms against permitting agencies to fetter their own discretion through developing their own procedures and commitments(McHarg 2017) . As noted above, such procedural controls are somewhat inimical to public management doctrines which emphasise economy, efficiency and effectiveness, in particular because they may invite delay and give priority to rights (sometimes of only a few affected) over outcomes (potentially for a wider section of the population). This concern to prevent individual rights from undermining the effectiveness of state welfare and other policies predates NPM concerns, but remains a key tension for administrative law thinking (McAuslan 1983).

A second strand of thinking is to defer to professional judgement in the exercise of discretion, as with decisions on health, welfare and education (Evans 2016 (Orig publ 2010)). This has increasingly been challenged as state administrations have placed less confidence in self-regulation and the role of professionals, putting in place new oversight over professions sometimes characterized as reducing trust in a way that represents a challenge to the role of expertise modernism (Moran 2003).

A third strand of thinking is to establish greater openness and participation in implementation processes, concepts which are arguably more in tune with the market-oriented approaches of contemporary public management. It has been noted that the European Union administration has progressively moved towards principles of openness and participation as underlying their legitimacy, in a context where there is a particular challenge of democratic deficit (Bugaric 2004).

1. **Levels and Structures of Implementation**

Implementation, if we limit it just to government mandated programmes, typically occurs at a different levels of government, with considerable variety in apportionment between local and regional governments and central government. Whilst intergovernmental activity has become increasingly important for defining key regimes both within the EU and and a global basis, very few intergovernmental regimes involve the development of their own implementation machinery, and implementation substantially remains a matter for national governments. The same is not true for private administrative regimes, some of which are national, but many of which are implemented transnationally through supply chain contracts and other arrangements with relatively little governmental involvement, but some evidence of collaborative or hybrid arrangements (Scott, Cafaggi et al. 2011).

There is considerable empirical and theoretical discussion about delegation of government authority, the appropriate level for implementing government programmes and whether to favour public or private provision in monopoly or competitive markets. Each of these choices has generated a substantial literature concerned with identifying the most efficient means of governance and also how to avoid risks of capture, shirking from responsibilities, and agencies drifting from their assigned missions (Horn 1995).

Practical discussions and changes in the implementing structures for public services are closely associated with the ‘new public management’ revolution in government identified in many OECD member states, especially the English-speaking ones, with reverberations which have affected all. Neoliberal governments in the US and the UK in the 1980s were increasingly dissatisfied with the size, cost and performance of the state administration. In the United State the clarion call was for a process of “reinventing government” (Osborne and Gaebler 1992). NPM or reinvention prioritises values of economy, effectiveness and efficiency, and seeks to put users of services (whether retail or wholesale) in the position of demanding consumers. Thus the emphasis is on the results or outcomes, rather than the processes or inputs. Such outcomes are the product of the deployment of markets and market-instruments which may involve privatization, contracting out, the separation of policy making from implementation (through establishing delivery agencies), or the governance of relationships with contracts and quasi-contracts, specifying outcomes and penalties(Rosenbloom, O'Leary et al. 2011). Accountability mechanisms were also re-specified, to emphasise the new values of economy, efficiency and effectiveness alongside values of good administration. Increasing use was made of market-like evaluations such as scoreboards and league tables, which, when they work well, are claimed to enable users to make more informed choices as to where to get their services, whether in a competitive market for telecommunications or energy, or in less competitive markets for schools and hospitals. Thus there is a shift from social contract (which all are obliged to subscribe to and act and within which the state provides for all) to individual contracts which enable citizens as consumers to exit arrangements which do not satisfy their requirement and secure their services from alternative providers with potential for greater variation in provision.

The procedural values of public law are potentially problematic within an NPM orthodoxy. Notably NPM tends to advocates a deregulation of the public sector, for example with respect to uniform rules on such matters as employment terms and conditions and procurement, even though such systems were put in place to prevent corruption and ensure financial regularity(Rosenbloom, O'Leary et al. 2011: 9). A related phenomenon is creating ‘chief executive’ type responsibility in public agencies, freeing them and insulating them to an extent from political intervention/control. ‘Post-NPM’ thinking on governance draws attention to the emergence of networks of interdependent actors as a key mechanism to address fragmented governance not with hard law but rather with soft coordination (Christensen and Laegrid 2012). Such networks, whether of public bodies such as regulators, or of private organisations such as trade associations, constitute a distinctive governance challenge for administrative law (Saurer 2010) (Curtin and Senden 2011).

Many governmental activities mandated centrally are delivered by local and regional governments with varying patterns across different countries with respect to such services as health, education, social services, waste and refuse collection, and water and certain regulatory matters such as land use planning. The trend in local and regional government has been to move services away from monolithic provision within local and regional government departments towards specialist agencies, with some centralization, and also towards private providers in such areas as housing, social services and refuse collection. This has led to the growth of powerful transnational companies with key roles in what was previously defined as public service provision across a range of countries and sectors, and which largely fall outside the scope of administrative law.

Most central government activity historically originated with government departments or ministries and historically ministries have been directly responsible for implementation of a wide range of government programmes. The US New Deal legislation of the 1930s saw the development of independent federal agencies as a key model for regulating services and, to some extent, delivering public services. Under NPM ideologies in the 1980s onwards governments in other OECD member states looked to transfer both regulatory and delivery functions away from ministries towards more specialized agencies and, in some cases, to private providers (Thiel, Verhoest et al. 2012).Within the European Union the establishment of agencies, distinct from the European Commission, has been a matter of controversy since the 1970 on the basis that it jeopardises the institutional balance between Commission, Council and Parliament (Bergström and Rotkirch 2003). Whilst this resulted in a tendency towards giving agencies very limited powers (focusing on advice and information – nodality tools), awareness of holes in supervision of systemic risk in the financial sector exposed by the financial crisis of 2008 has led to the establishment of a suite of more empowered regulatory bodies in this area (**Moloney** 2010) .

 A key rationale for these changes was to enhance efficiency through targeting and accounting for delivery in a more focused way than is possible in a large multi-function ministry. Accordingly service-level agreements, quasi-contracts, contracts and licenses became key instruments for more precisely specifying the expectations of state and non-state organisations delivering public services. Administrative law has not developed so much for oversight of these coordination instruments as the relational character of such arrangements, as with long term contacting in the private sector, tends to reduce incentives and opportunities for disputes to spill out of the relationships into external adjudication (Macaulay 1963).

As noted above intergovernmental regimes rarely involve the development of supranational machinery for implementation. Even in the most developed intergovernmental governance structure, that of the EU, EU level implementation machinery is the exception rather than the rule (for example in the area of the Common Agricultural Policy). The European Commission has very limited organizational resources, and only 32,000 employees,[[1]](#footnote-1) such that most of its programmes are delivered through authority, information (nodality) and/or funding (treasure) which is delegated to the member states for implementation. Implementation of EU measures in the member states is a key mechanism for governance but also a key challenge for the EU institutions with much legislative, administrative and juridical effort devoted defining what effective implementation of duties to the EU looks like and how to steer non-compliant members states towards compliance (Smith 2018).

Shifts away from centralized state provision, moves to shrink the state, have seen a marked fragmentation in the institutional arrangements for delivering public services across most OECD member states and beyond. It is an important question to ask to what extent administrative law has been cognizant of these changes and has sought to follow the power towards its new locations in order to undertake its traditional functions of holding those with such power within legal mandates and exercising powers in ways that fair, reasonable and proportionate.

Patterns of organizational arrangements for delivery of utility and network services are highly fragmented. In some countries such as the United States and Spain private provision has traditionally been the norm. But monopoly private providers have progressively come under pressure from more liberalized markets. In many other European countries liberalization of markets (mandated by the EU for communications services and energy) has been accompanied by privatization of traditional state owned enterprises in many cases. Duties on providers of public services relating to transport, communication and energy have historically been defined, with varying degrees of intensity, within public service law. Key duties including providing equal access to facilities and services and non-discrimination are today reflected in EU legislation relating to sectors such as energy, communications and transport implemented into national law of the member states(Prosser 2001).

As noted already there has been a strong trend towards contracting out of public services such as transport, street cleaning, refuse collection, and so on and significant growth both of national and transnational companies with considerable expertise in delivering services in these markets under contracts (Freeman 2000, Vincent-Jones 2002, Vincent-Jones 2006) (Auby 2010) . Countries with limited state capacity frequently contract out what are regarded as key state functions, such as administration of tax and customs duties, issuing of passports and the provision of prisons. Other core functions, such as delivery of prisons have been contracted out in different forms in a smaller number of countries such as the US and the UK, for efficiency rather than capacity reasons. A complex set of reasons underlie the contracting out of military services by the US and other governments (Dickinson 2010). It can be quite challenging to maintain duties on private providers equivalent to state providers whilst at the same time subjecting the providers to contractual duties on service delivery.

More broadly governments sometimes legislate to impose public responsibilities on companies and others which go beyond standard tax and regulatory requirements, and are more concerned with meeting wider public objectives. Key examples include duties on banks, other financial institutions and professional services firms to report suspicious transactions in the context of money laundering and duties on airlines not to carry passengers without evidence of appropriate immigration status. In the latter case, airlines have effectively become the frontline of immigration enforcement, but without having all the responsibilities that states have with respect to how they make decisions, the giving of reasons, appeals, and so on (Gilboy 1997). This invisibility to administrative law in front line decision making is a matter of concern given the importance of challenges of public decisions about immigration matters in many countries.

1. **Oversight of and Accountability for Implementation**

It was noted earlier that from one perspective administrative law can be seen as facilitating state action to implement public policy commitments through assignment of powers, specification of processes to be followed and provision of legitimating mechanisms such as appeals. A more orthodox alternative is to see administrative law as providing mechanisms of oversight and accountability with respect to the implementing actions of the government administration. Whilst a principal focus of such accountability mechanisms has traditionally been conceived of comprising a range of judicial processes, including judicial review, the sporadic and reactive nature of litigation gives an incomplete picture. This is not to deny that judicial review is an important aspect of rule application and rule development. Administrative law also asks how ground level decisions are shaped and managed, what are the routine opportunities to check actions which contravene not only traditional administrative law values, but also new values such as good administration and value for money? And in respect of this broader range of values what are the mechanisms of oversight and accountability exercised internally and by external agencies beyond the traditional courts and tribunals? Within changing doctrines of public policy, a wide range of risks are identified with respect to public administration, constituting variants of the principal-agent problems associated with more extensive delegation to public and private bodies. Principal-agent risks include the potential for agencies shirking – that is, not carrying out their responsibilities – and drifting away from the responsibilities set for them by governments and legislatures, or that they may carry out their functions with excessive resources and cost (Horn 1995). Much of the elaboration of oversight of public (and private) administration can be seen as a response to newly identified or emphasized risks associated with delegation of responsibilities beyond central government departments.

Thus there has been considerable development both of values and institutional structures giving a richer pattern of oversight and accountability. Thinking back to the NATO acronym, it is possible to arrange norms and mechanisms of accountability with reference to the key resources deployed by the administration.

When agencies deploy legal authority in making decisions with respect such matters as who shall have a school or a home, what is someone’s tax liability, or how much welfare payment is due key choices for administrative law structures include who may challenge decisions (just parties directly affected or more widely?), under what conditions (for example within what time limits?) and through what organizational structures (specialist tribunals or general courts?). Within civilian legal systems special structures have operated whereas common law systems have tended to work with structures of general courts with some movement towards more specialized tribunals (notably in Australia).

While the capacity for judicial review or external appeal is important, arguably internal processes for review of decisions are statistically more significant, since the range of decisions and actions can be seen as the large end of a funnel in which, we must assume, no challenge to a decision reaches the narrower external review/appeal stage without having first been reviewed internally. Such internal reviews sit narrowing section of the funnel, as we must again assume that in many cases an internal review disposes of the matter either because the complainant is satisfied by the outcome or because they run out of energy, knowledge or means to pursue the matter further. Research on internal review with respect to homelessness cases started from the premiss that it was surprising that a greater proportion of adverse administrative decisions on housing were not challenged even by seeking an internal administrative review (Cowan and Halliday 2003). The Australian Government has over a long period sought to improve the quality of internal reviews to seek to provide better satisfaction for citizens but also to prevent the spilling out of all but the most difficult decisions to more costly external review processes (Administrative Review Council 2000).

The introduction of ombudsman schemes and other non-judicial grievance handling authorities has not only reduced the complexity and cost of external processes for challenging the administration, but has also drawn a wider range of norms, notably centred on the concept of ‘good administration’. ‘Good administration’ generally draws in traditional administrative law values such as impartiality, fairness and duties to give reasons but adds wider values of transparency and timeliness (Ombudsman nd: Arts 12,17).[[2]](#footnote-2) Timeliness and other less justiciable concepts such as courtesy create an underpinning of concern for ombudsman and related schemes which go beyond the role of courts and tribunals. Critically, the norms overseen and developed by ombudsman schemes are increasingly seen as proactive and regulatory in character, intended not only to provide a basis for complaint, but also to shape ground level administrative actions. The European Ombudsman’s *Code of Good Administrative Behaviour*, first issued in 2001, is characterised as sharing of best practice in pursuit of the highest values of public administration, ‘integrity, dedication and humanity’(Ombudsman nd). National initiatives by ombudsman schemes have similarly engaged the administration with clearly articulated norms, typically drawn from the experience of addressing complaints, such that the administration can understand proactively the duties of good administration going beyond traditional administrative law values.

With respect to treasure (the collection and distribution of financial resources) from an administrative perspective the use of authority is generally central to decision making, with some special rules, for example related to tax collection, disbursement of benefits and payment of money under procurement contracts. Thus such decisions and actions typically fall within the range of instruments for accountability of authority. The development of public sector audit, traditionally concerned with the regularity of public expenditure (ensuring public money is spent for the purposes for which it was allocated by government or parliament, typically through annual financial audit), has seen audit develop to one of the central organisations concerned with overseeing value for money and, more broadly, performance of public bodies (Scott 2003). Recent initiatives of INTOSAI, the peak international body for national supreme audit institutions, have included measures to support review of government administrations for developing coherent policy actions to implement the UN Sustainable Development Goals.

With respect to the use of organizational capacity, both ombudsman and audit mechanisms are centrally concerned with how public sector bodies behave with respect to their actions and expenditures. The elaboration of such schemes to take in concepts of good administration which go beyond administrative law values and beyond regularity audit make for a more central role for such oversight, consistent with the approach of NPM which tends to assign greater responsibility and freedom to public agencies, whilst also transferring key responsibilities to private organizations in some cases. Privatization takes a number of forms, including sale of publicly owned companies, public-private partnerships for development of public infrastructure, licensing and contracting out (Barak-Erez 2010). A key concern with privatization of public services is that it tends to put them out of reach of public sector oversight mechanisms, leading to greater dependence on sectoral regulators, where they exist, or loss of oversight where there is no such sectoral regulation (Barak-Erez 2010). The loss of oversight with respect to ‘public values’ is a key challenge where services are contracted out, with dependence on the purchaser to incorporate public values into the contract and then to enforce them against the private supplier (to the extent that this is permitted) (Auby 2010) .Alongside administrative law, civil liability mechanisms can be seen primarily as addressing the organizational capacity and actions of public bodies rather than their deployment of authority. Indeed, in many jurisdictions public bodies have some protection from tort actions in respect of their exercise of statutory duties, but not in respect of their operational activities. Within many jurisdictions the provision of public healthcare involves substantial engagement with the tort system in respect of negligent provision and its adverse consequences for patients. Other public services, too, have to work with risks, for example relating to negligent design or maintenance of roads and pavements (Halliday, Ilan et al. 2011). The tort system has complex interaction with insurance provisions, since insurers facing substantial financial risks are increasingly likely to want to engage with those they insure, acting as a form of regulator over standards of public service provision (Ericson, Doyle et al. 2003).

Other cross-government oversight affecting implementation includes better regulation regimes, designed not only to reduce burdens of regulatory rules, but also to enhance monitoring and enforcement practices, frequently following doctrines of responsive regulation. A partial solution to some of the challenges to the diffusion of what are traditionally thought of as public services is doctrines which establish reasonably common principles of service provision irrespective of who delivers them. Such common principles might include duties to inform citizen-consumers about who is delivering the service, how to contact them, what service standards are expected, how to complain, and details of remedies when services are not delivered well. Such principles underpinned the UK Citizens’ Charter Programme, introduced in 1991. Similar mechanisms have been widely adopted in Europe (eg Belgium, France, Portugal, Spain, Sweden) as well as in the US, Australia, Jamaica, Malaysia and India, amongst others. It has been noted that the lack of legal underpinning to these initiatives, together with their emphasis on individual over collective rights are problematic(Drewry 2005) .

The deployment of nodality, collecting and handing out information, would at one time have been regarded as a soft aspect of government, substantially beyond the reach of administrative law. As the importance of information to government, to industry and citizens has been increasingly recognized, so norms have developed governing collection, storage and dissemination of information. Information norms and institutions fall into broadly two classes concerned with transparency (or freedom of information) and, what appears to be its exact opposite, data privacy. Transparency norms and structures have developed to create presumptions within democratic states that official information should be available to those that request it (subject to significant exceptions) with machinery for supporting appeals against decisions to refuse requests to specialist FOI regulators over the public sector. Wider norms, less well policed, relate to consultations on new or reformed policies, with many governments setting down principles for consultation addressing such matters as publication of drafts, identification of consultees and receipt of comments. With respect to data privacy, the key norms relate to consent to collecting and holding information and limiting the use and sharing of personal information to the purposes for which it was given, again with specialist bodies overseeing the duties, both through complaint mechanisms, and through proactive reporting duties on both public and private bodies to notify breaches of privacy laws (notably under the EU regime encapsulated by the 2016 General Data Privacy Regulation). Norms with respect to information transparency and data privacy are quite variable, linked rather fundamentally to government types. More democratic systems have felt more pressure to support information transparency and data privacy.

1. **Conclusions**

Administrative law became an important counterbalance to the power and decision of much expanded state apparatus during the twentieth century. Before the century was finished the focus and scope of administrative law faced challenges from changing patters of state administration and service delivery. The focus of administrative law generally has been on input aspects of state actions, notably the way in which decisions are made – who is involved, what is the mandate, what is the relevant information to consider and what is the relevant information to disclose in respect of the matters to be decided?

 As states have sought to find new ways to deliver on more routine decisions and basic services there has been greater emphasis within ‘public management’ (no longer ‘public administration’) on output values, such as value for money the emphasis of administrative law on process has come under challenge to an extent. But this is not the end of relevance for administrative law. With respect to process-based changes to state activities continuing relevance is clear, even where new technologies are deployed such as algorithmic decision making. It is, in the case of this technology, still highly relevant to ask who can make decisions and what is relevant input and output information.

 In the case of complex and non-routine decision making an emphasis on process has much to commend it as process is supportive of participation which enables affected parties to reflect and to learn from each other to enable decisions which are liable both to be more legitimate in a procedural sense, but also more congruent with policy objectives because of processes of reflection.

With routine and day-to-day decisions there has always been a challenge around transparency and visibility and therefore amenability to challenge and review. With public sector bodies trends towards greater transparency, with freedom of information and data protection legislation, may support greater accountability. This is coupled with greater emphasis on providing transparent complaint and appeal mechanism, encouraged by external grievance handlers such as ombudsman. Some systems have developed an emphasis within administrative law, through statutory reform, under which the merits of some decisions may be challenged (and not simply the procedural dimensions) leading to a greater role for administrative law, not only within appeals and review, but also within a primary decision making structure where the potential for merits review must be taken into account.

Where decisions and actions which were once for state monopolies are now taken by a wider range of actors and frequently within more competitive environments created by liberalization, privatization or contracting out there may be somewhat less visibility and accountability. Trends towards non-state rule making and enforcement around key norms such as technical, environmental and labour standards present particular challenges. To the extent that such private norms are now embraced by bilateral contracts, they tend to fall outside administrative law. However, in those cases where new stakeholder groups emerge to develop and implement regimes, there is considerable potential for the development and application of procedural norms engaging both a form of constitutionalization and also a proceduralization akin to administrative law. This latter is an aspect of a global administrative law, global in the sense of applying to all who make administrative decisions affecting others, whether within public or private organisations.

Overall administrative law faces considerable challenges in understanding the changing dynamics of implementation, mechanisms to support stronger initial decision making, the diffusion of decision making and implementation capacity, and the best ways to drive accountability and oversight for structures which show increasing variety both in organizational terms and with respect to values.

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1. <https://europa.eu/european-union/about-eu/figures/administration_en> (visited 21 December 2019). [↑](#footnote-ref-1)
2. EU Charter of Fundamental Rights, Article 41.

 [↑](#footnote-ref-2)