



WG1. Weak Rule of Law, a threat to Citizen Security
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How Administrative Justice and Security Are Related

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Defining citizen security in the context of the rule of law can embrace a number of different concerns. If we posit that the rule of law, at its core, is a set of democratically achieved laws administered in a fair and transparent manner, three categories of justice and security can be identified. Criminal justice, civil justice, and administrative justice all directly impact the lives and security of citizens.

The most obvious perhaps is criminal justice, where the rule of law both protects innocent citizens from unlawful state activity and assures their security through the fair and efficient enforcement of criminal laws, protecting them from the criminal conduct of other citizens. Civil justice secures the rights of citizens in disputes with neighbors, family members or business partners through fair and accessible dispute settlement mechanisms, providing security in their property and contract rights.

Administrative justice is the most neglected manifestation of the rule of law but in many ways is also the most pervasive. Arbitrary application of government procedures for individual benefits such as employment, unemployment, pensions, and medical services, as well as individual business and professional licenses and permits deprives citizens of fair protection of their livelihoods. Failure of the rule of law in the administration of government not only threatens the wellbeing of citizens, it undermines their confidence in the government and creates openings for petty corruption to secure benefits denied by failed administrative systems.

Administrative justice also involves more state actors than either criminal or civil justice. While the judiciary plays a pervasive role in sustaining the rule of law in all three sectors and shares that responsibility with the prosecutors in the criminal justice context, in the provision of administrative justice the role of the courts has less impact than in the other two areas. Administrative justice combines the efforts of the legislators, the executive and government, as well as the judiciary. Thus it is the domain that is most vulnerable to weaknesses in the functioning of all three branches of government under the rule of law, while at the same time being the area that has the broadest impact on the citizenry.

This paper will explore the dimensions of administrative justice and the how a weak system adversely affects the people of a state. It will then discuss those elements of an effective system of administrative justice and the benefits they provide to a nation and its citizens. Obviously many of the concerns raised here are valid for government regulation of larger businesses and corporations, but the focus of the discussion will be on how individuals are affected, as they are the most vulnerable to weaknesses in the fabric of the rule of law.

The Scope of Administrative Justice and Citizen Security

In their relationship with their government, individuals are more affected by administrative justice than any other aspect of the legal system. From the pervasive public benefit programs to individual permits or licenses, to regulatory regimes such as environmental restrictions, citizens come in contact with the government on a regular basis. What these diverse forms of interaction all have in common is their origin

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in actions of the legislature, their implementation by the government through the adoption of sub-legislative acts (rules and regulations) and individual determinations, and the possibility of some kind of redress or review of denials through the courts. At each stage in the process weaknesses in the rule of law can seriously affect the rights and livelihood of the individual.

Failure to enact rational and effective laws underpinning these programs and poorly executed regulations implementing them provide a weak basis for their administration. Arbitrary, incompetent, or corrupt decision-making by the government administrators deprive individuals of the intended benefits of the enacted laws, while limited access to judicial review offers no relief from government maladministration. Thus the justice sector with the broadest impact on individual citizens is the most vulnerable to weaknesses in the rule of law because of its need for accountability and transparency across all three branches of government.

Public Benefits Programs

Public benefit programs designed to sustain citizens are the broadest and most representative example of this problem. These programs may include payments for those unemployed, pensions, family support payments, food assistance payments, educational benefits or any of a variety of other programs. The potential problems highlighted in this discussion apply to the permitting and regulatory regimes as well, although issues unique to those schemes will be discussed separately. The benefits programs originate with decisions of the legislature, sometimes grounded in constitutional guarantees, to provide for the minimum well-being of the citizens. At the drafting stage of these laws budgetary and policy considerations are balanced with broader goals of support. Questions relating to geographic distribution of benefits, special treatment of certain special populations, or other particularized concerns can impact the final statutory scheme. Opaque proceedings by the drafting body, either within the legislature or the government, unchecked special interests, and poor drafting can result in the foundational laws providing a weak basis for implementation.

The most critical part of the process is the work of the state administrative bodies to provide the rules and procedures for distributing the benefits and then making the individual decisions for eligibility. This aspect of administrative justice is probably the least recognized, as it takes place within bureaucracies that tend to fall outside public scrutiny. Yet the potential for distorting or weakening even the most skilfully drafted laws is substantial, as these rules will provide the basis for the individual decisions. One of the hallmarks of the rule of law is transparency, and implementing rules prepared outside the public view invites poor drafting at best, and special treatment or corruption at worst. For example, rules may create barriers through the application process for benefits, either inadvertently or intentionally to discriminate against certain populations. Without a transparent process this impact may go undetected and deprive intended citizens of their benefits.

The accountability element of the rule of law can also be weakened in this process. Procedures that provide no meaningful avenue of internal review of denials precludes the administration from identifying and correcting its mistakes, and forces injured applicants to choose between no appeal and the expensive judicial review process. This result may be inadvertent or intentional, but in either case it reduces the accountability of the bureaucracy and may deny an intended beneficiary. Similarly, implementing rules that fail to provide for internal redress against bureaucratic mistakes such as consistently late or missed payments, or unlawful reduction or termination of benefits reduces the security of the beneficiary in the program.

The second, co-equal part of the administration of public benefits programs is the actual application, review, and award or denial of benefits. While the first step, the adoption of implementing rules, is an extension of the legislative process, this second step is more like adjudication as it is an individualized determination based on discrete facts. Arbitrariness, inefficiency or corruption at this stage can frustrate the most well-constructed set of procedural regulations. Here again transparency in terms of process and

criteria, and accountability through internal review of decisions exemplify the application of the rule of law. A third element is required at this stage though, that of the right of the applicant to be heard, both through the application process and in response to an adverse determination. Breakdowns in any of these elements can jeopardize the delivery of the intended benefits.

The final actor in the administration of public benefits programs is the judiciary. The opportunity for judicial oversight and correction of unlawful acts by the bureaucracy is a central element in applying the rule of law to these programs. Weaknesses at this stage involve the possible preclusion of court review, barriers to access to the courts based on cost, geography or legal requirements, and unjustifiable levels of deference to decisions of the bureaucracy. Some of these issues are addressed in statutes and rules governing judicial procedure or in the laws creating the benefits programs. Others arise through long-time, unexamined practices of courts. From whatever source however they can frustrate the statutory intent by denying substantive review of actions of the bureaucracy.

Individual Licensing and Permitting Programs

As mentioned above, all of the considered actions that fall under the category of administrative justice involve similar actions by the three branches of government: The enactment of program statutes; the implementation by the bureaucracy; and judicial oversight in some fashion. The potential weaknesses in these processes are similar for each activity, but it is important to discuss the differences in fundamental aspects of the administrative activity to fully appreciate the risks of a weak rule of law environment. While not as pervasive as public benefits programs, individual licensing and permitting regimes have a direct and often very substantial impact of the economic security of citizens. They are administered at all levels of government and can range from street vendors permits to professional licenses including doctors and lawyers.

As with public benefits programs, pressure points include the application process, the review and award or denial, and the opportunity for review of an adverse decision. Policing the appropriate use of the permit or license adds an arguably greater administrative dimension than review of benefits abuse, and one that calls for regular and transparent procedures. Pursuing the effective application of the rule of law in this area of administrative activity presents serious challenges because of the wide economic disparity in subject matter of the licenses or permits. While licensing medical professionals may justify detailed and complex rules, issuing a permit to a vendor for a market stall should be a much simpler process. Concerns about transparency, accountability, and the opportunity to be heard however are fundamentally the same.

Regulatory Programs with Individual Impact

The final broad area of administrative activity impacting on the security of individuals is health, safety, environmental or economic regulatory activity, including taxation. This is an area where much of the impact is felt by businesses and larger organizations. However, where individuals are directly confronted by the regulatory process, the lack of effective standards and procedures can be devastating. It is also an area rife with corruption in many societies where recourse to lawful means of resolution is unavailable, impractical or expensive. For example, a food vendor or small dining establishment suddenly confronted by a health inspector closing them down for violations may be ruined before the matter can be resolved. The absence of effective procedures in these situations creates the opportunity and incentive for corruption. The transparency element is very critical in these activities, as those regulated must know the rules and standards they must meet to avoid sanctions. Equally important is the opportunity for review in an expeditious manner, arguing for a well-developed system of internal appeals prior to seeking judicial review. In the regulatory area, the quality of controlling statutes and regulations and the transparency and accountability of the regulating agency are critical. The courts may provide more relief in this area than in the public benefits or individual permitting actions because the economic stakes are higher, but any

administrative system that routinely relies on the judiciary to assure its accountability is a weak or failing system. How to prevent this from happening is the subject of the next section of this paper.

The Application of the Rule of Law to Administrative Justice

As is apparent from the above discussion, there are three key elements of the rule of law that directly apply to the system of administrative justice: Transparency; the opportunity to be heard; and adequate avenues of redress. This section will discuss how these elements manifest themselves in administrative justice and how their role can be enhanced through procedural requirements.

Transparency

No system can expect compliance with rules that the subjects are not aware of. Similarly, there can be no adequate avenue of redress unless reasons for adverse decisions are provided. These are two central tenets of the transparency requirement in administrative justice. It is axiomatic that laws must be public and available to those governed by them. It is equally important but less likely that regulations will be readily available to those affected by them. This applies not only to regulatory restrictions, but to the rules for filing application, and the procedures and criteria for awarding public benefits, licenses and permits. Thus an administrative system that relies, for example, on publication of rules in a national gazette, is unlikely to be able to count on wide-spread awareness or knowledge. While in many states now statutes are routinely available via the internet, regulations are less often included. Couple this with the limited access to the internet among the populations most likely to need public benefits, and the challenges for achieving transparency are evident. Special systems for the delivery of notice about the opportunities and eligibility for public benefits are essential. Similar efforts are needed for notification of requirements for permits and licenses. While these public information activities are not technically “legal” requirements they constitute critical elements of the effective rule of law.

The second aspect of transparency in administrative justice is the need to provide explanations for adverse decisions. Denials, revocations or imposition of regulatory sanctions have substantial legal and economic consequences. The affected parties need to have knowledge of the basis of the adverse decision to correct their application or conduct, or to seek review either internally with the government agency or to the courts. While this seems like a fundamental requirement, it is often unavailable at the level of basic public benefits or licensing/permitting procedures. Without any kind of substantive justification, the frustrated applicant has nothing to base a request for review on, but is left guessing what issues to address in an appeal. The explanation need not be detailed to satisfy this need. For example, some agencies have adopted a check-off card system where one or more common reasons for denial are indicated on a postcard, providing the applicant with some notice of where to begin their review process.

There are other aspects of transparency beyond the two discussed here, including the access to government information laws, that have dramatically opened government records to the public. The principle is clear. The effective rule of law requires that those who are subject to the law have full knowledge of how it impacts upon them

Opportunity to be heard

In addition to receiving information from the government, those engaged in the administrative justice system also require the opportunity to present their views. This is essential in the context of responding to adverse government action. A person seeking review of a benefit or license denial must be able to present their reasons to a neutral decision-maker. This opportunity can also be extremely valuable in the preparation of regulations. By soliciting and considering public comments in the development of implementing regulations and procedures, the government has the opportunity to identify practical problems before they become enshrined in law. The participation of those most affected by the regulations at this early stage can increase both the awareness and support for the final rules. While the

United States pioneered “notice and comment” rulemaking as this process has been called, it has become a staple in numerous countries and certain multinational agreements.

Avenues of Redress

The third key application of the rule of law to administrative justice is the opportunity to seek redress against adverse government action. As illustrated above, having recourse to an unbiased reviewer is critical for accountability within the administrative system. Such review within the agency benefits both the individual and the government, as the agency has the opportunity to correct its errors and maintain consistency in its decision-making. This review only works if the review is to an uninterested official who can make an assessment that is both fair and perceived as fair. Otherwise, recourse to the courts must be made as easy and inexpensive as possible for individuals.

High volume decision-making, such as many public benefits programs, may require a form of institutionalized review that can be accessed by those turned down without the need for legal counsel. As these disputes will rarely make it to the courts, fairness requires a simple and meaningful review within the government body to assure appropriate facts were noted and standards fairly applied.

Benefits of a System of Administrative Justice Consistent with the Rule of Law

Addressing weaknesses in the rule of law in the administrative justice sector can have significant benefits beyond better government. Because more people come in contact with the administrative justice system than either the criminal or civil systems, improvements resonate more broadly among the citizenry. Reforms that provide greater security for people in their public benefits or licenses and permits also instill greater confidence in the government in general. By reducing perceptions of secretiveness and arbitrariness in these processes citizens may come to view other functions of government as fairer and in the interests of the broad public rather than an elite few.

Improvements in transparency and accountability can also serve to reduce opportunities for petty corruption. Well-publicized rules and standards, and ready access to higher government officials for review of adverse actions can reduce the ability of first level government employees, including inspectors, to seek bribes based on arbitrary decisions. While no panacea, administrative justice reforms can constrain the discretion of these officials and increase their accountability.

Administrative justice is often neglected in discussions of the application of the rule of law. As this paper illustrates, this neglect can jeopardize the economic security of citizens in ways that often go unnoticed. Better rules and more transparent practices can address these weaknesses in the rule of law and enhance the protections the rule of law provides for every citizen.

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