

ADMINISTRATIVE LAW IN AN EMERGING DEMOCRACY (1)

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Administrative law, as it is understood in the United States, concerns itself with the manner in which the administrative agencies of the executive branch of government administer governmental services to citizens and associations of citizens affected by its actions. The acts of administrative agencies constitute actions for or against citizens by the executive branch of government. Administrative agencies grant and deny licenses, permits, and other governmental benefits, establish and enforce standards for the protection of the health of citizens and for the enhancement of the environment in which such citizens live, and in some cases have the power to regulate the activities of entire industries.

The processes by which an administrative agency dispenses or denies the benefits it offers to citizens and the burdens it may impose upon citizens include both "rule-making", wherein the agency establishes a rule by which those citizens affected by its action must abide, and "decision-making" in a contested case proceeding, applicable to the facts of an individual request. In effect, such agencies carry out not only the functions of the executive branch of government, but in so doing exercise at the same time a legislative function (in making rules) and a judicial function (in deciding contested cases) all at the same time.

Students of the most elementary course in democratic principles would assert, however, that to eliminate the opportunity for tyranny inherent in the concentration of governmental power, the executive, legislative and judicial functions of government must operate as sepa

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rate powers. If administrative agencies, staffed by individuals who are neither elected by the people nor chosen by their legislative representative, can make rules, enforce them, and decide cases against citizens involving their breach, what protects the citizen against administrative tyranny ?

In the body of law known in the United States as Administrative Law, the protections against arbitrary action or injurious inaction on the part of the agency are built into the procedural requirements of administrative procedure acts at both the state and national level. Although such acts differ somewhat from state to state, they generally express certain common principles.

1- An agency is only empowered to make rules governing its affected constituency to the extent that the legislature has delegated such power to the agency in a specific statute referred to as the "enabling legislation". If an agency exceeds the scope of the delegated power, an affected party may appeal the application of the rule.

2- An agency must follow statutory rule-making procedure before applying a rule. Such procedures generally include publishing a proposed rule in a state bulletin and circulating copies of the rule to the affected constituency of the agency, together with an invitation to comment on the rule. After the agency publishes the proposed rule, it will schedule a public hearing in as many locations as possible to make it convenient for the affected constituents to attend. A representative from the agency will preside over the hearing, listening, taking notes, and asking questions. The purpose of the hearing is to gather as much information as possible from those who will be affected by the rule, concerning the anticipated effects of its passage. Often, the citizens will bring information to the hearing that will cause the agency to revise its proposed rule to correct a defect. citizens who

cannot attend such hearings may submit written testimony. It is the duty of the agency on the one hand to consider all of the testimony presented. On the other hand, the agency is not required to weigh the testimony as evidence or to defer to any of the points of view presented. Only after completion of this process, however, may the agency publish the final rule and compel those affected by the rule to comply with it. If the process is flawed and the agency attempts to enforce its will improperly, the action may be challenged in the courts through an appeal process.

3- An agency must follow an enforcement process which conforms with principles known in the United States as "due process" of law. For example, when a citizen asks the agency for an action, such as a permit, license, or other benefit, the citizen has a right to receive:

- a- a timely response, without delay;
- b- written notice of the agency 's proposed denial of the citizen 's request; and
- c- an opportunity to be heard before the agency issues a final denial of the request.

Such procedures are referred to as "administrative hearings" or "contested case proceedings". In fact, they are informal "trials", in which the hearings officer has an affirmative duty to conduct a full and fair hearing of all of the evidence. These are agency hearings, however; the hearings officer is neither a judge nor a neutral arbitrator. The person presiding over the agency hearing, will generally be someone from within the agency itself. After a record is made of all of the evidence presented, the agency must consider all of the evidence. It may choose to reverse its proposed denial or to issue a final agency order denying the request. After a citizen has received a final order of denial from the agency, and has exhausted all of the remedies available to him through the agency, the citizen has the right to appeal the matter to a court.

The citizen in some cases may have other remedies available to him against improper agency action. If the acts of agency or its representative, violate the civil rights of the citizen, the citizen may file a complaint for damages in a court. If the state in acting through its agency commits a tort against the citizen resulting in damage to the citizen, he may seek a judicial remedy against the state. Such proceedings, however, would take place in a court of law, not an administrative hearing. An administrative hearing may test the agency 's power to act within the scope of its statutory authority.

All of the previous discussion is by way of introduction to the main topic of this presentation: the special problems arising from the transition from any form of opaque administrative tyranny to a system of transparent administrative action. Ideally, in modern democracy, governmental action for or against a citizen must be based upon the rule of law. Hence, agency actions for or against citizens must be within the scope of the laws creating the agency and delegating legislative power to it in the form of rule-making. The process is transparent if the citizens have the right to see the rule being made, the right to comment on its prospective effect upon him, the right to notice when the agency decides to apply the rule against him, the right to have the agency hear his evidence and arguments against such a proposed decision, and the right to appeal the decision once it has been made.

While the principles of "rule of law" are most often discussed in the context of criminal cases in which the human rights of defendants are compromised by arbitrary application of the will of the state or its leaders, in fact most citizens will never face such a confrontation. In their day to day lives most citizens do not intend to commit crimes. These citizens are most likely to face the arbitrary will of the state in their frustrating daily confrontations with its administrative agents.

When the state allows such agents to make arbitrary rules, written or unwritten, to take action affecting citizens without notice, and to ignore a citizen 's desire to be heard in specific cases affecting the citizen 's interest, the state exercises a form of tyranny against the citizen.

The situation can be compounded by another factor, one found in countries in which there can be found a mixture of endemic administrative inefficiency, a pervasive inadequacy in the standard of living, and no means for the individual to escape the existing standard of living. In such situations, particularly in those situations where agencies of the state control most aspects of the citizen 's life through distribution and rationing of the available resources, the citizens compound the opaqueness of the administrative procedures by engaging in a system of bartering with the services of the state. If through their position they can trade the prompt installation of telephone service for access to a rationed item such as sugar or gasoline, the commerce in administrative services begins and the rule of law ends. Some would call this phenomenon "corruption"; in fact such a practice reflects the predictable desperation of citizens who live in a society where the rule of law does not govern the distribution or denial of government services through the actions of its administrative agencies.

Architects of new democracies, therefore, must not neglect to design a sound structure for delivery of government services through the administrative agencies of its executive branch. It is not enough to simply sound the words: liberty, equality, and fraternity. The citizen must be able to see these principles demonstrated in the actions of the government. he must be free to approach the government through with requests, knowing he will get an answer, have an equal opportunity to be heard and an opportunity for appeal. The "fraternity" and

"sorority" of citizens must not be undermined by an opaque and unresponsive public administration. The administrative structure must be transparent and the distribution of services fair and equitable within the economic capabilities of the state. For citizens to have a stake in the development of democracy in their country, they must believe that they have the power to participate in the process by which they are governed, and trust that they are able to see the process at work. In such a system, public administrators can build, reinforce and promote public trust in democratic government transparency and fairness in their delivery of public service.