Strengthening Access to Information and Public Participation in Government Decisionmaking in Transition Countries:

Procedural Underpinnings of Enhanced Regulatory Reform and Administrative Accountability

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I INTRODUCTION

The ability of individual citizens and businesses to obtain information about Government operations generally and the impact on them of particular government programs, policies, and decisions represents a fundamental element of accountable governance. So too is the ability of the public to challenge administrative actions, and to have a say in the development of policies, laws, and regulations through means other than indirect pressure through elected representatives. These rights, which are important in engendering trust between the state and civil society and in legitimizing a country’s various regulatory systems, are particularly underdeveloped in transitional countries where the administrative state was essentially unconstrained. Limiting the arbitrary exercise of bureaucratic power represents a signal challenge for these countries. This is where the state’s fidelity to the Rule of Law or lack thereof is most likely to be experienced by the average citizen.

Although many of these topics are often subsumed under the rubric of administrative law and procedure, in fact they implicate a wide range of sometimes disparate laws and concepts, only some of which bear on administrative law as it is understood in most civil law systems, especially those with a parliamentary system of
government. Among the institutions promoting transparency and public participation in executive branch decisionmaking are government-civil society councils or other consultative mechanisms, laws affording the public access to government information, processes facilitating public input into the rulemaking process, and administrative procedure laws facilitating citizens’ ability to challenge bureaucratic decisions within agencies or in the courts.

These institutions represent fundamental building blocks of a legal framework for public accountability – building blocks that rest on direct civil society oversight (so-called ‘vertical’ accountability) rather than on intra-governmental checks and balances (‘horizontal’ accountability through executive branch control, legislative oversight, or special audit bodies).¹ By limiting bureaucratic discretion in this complementary, potentially more cost-effective fashion, such institutions have the possibility simultaneously to increase the predictability and fairness of regulatory processes across the full spectrum of public sector agencies. In theory, information asymmetries can be reduced and regulatory transaction costs lowered, strengthening the kind of supportive roles for civil society – emphasizing ‘voice’ and partnerships – that are emblematic of so-called Second Wave public sector reform.² This has important implications for economic growth and democratic reform alike.

¹ The terms 'vertical' and 'horizontal' accountability were first coined by Guillermo O'Donnell. A thorough discussion of these concepts appears in Andreas Schedler, “Conceptualizing Accountability,” in Andreas Schedler, Larry Diamond, & Marc Plattner, eds. 1999. The Self-Restraining State: Power and Accountability in New Democracies, pp. 12-28 (Boulder: Lynne Rienner).

This paper represents an introduction to examining certain vertical accountability mechanisms as a potentially promising means of advancing regulatory reform and good governance in transition countries -- notably those that have evidenced meaningful progress toward contested government and respectful government-civil society interaction. The paper advances the thesis that in comparison to hierarchical executive control, legislative oversight, or judicial review – all of them classic checks on bureaucratic power – these mechanisms offer a complementary, and largely unappreciated means of limiting excessive administrative discretion in these countries. Indeed, such civil society-oriented accountability tools may in the short run prove even more effective than more traditional intra-governmental constraints due to the former’s relative cost-effectiveness and decentralization. They can reduce the susceptibility of regulatory reform to inertia and clientelism, respectively. They can also generate valuable social capital and provide civil society organizations with discrete, tangible opportunities to influence government policy. Perhaps most critical, they are primary accountability vehicles – e.g., requirements for the affirmative provision of government information or procedures for internal agency appeals – that assist or underlie more prominent and often more sophisticated bureaucratic controls such as legislative oversight hearings or judicial challenges to agency action.

To explore the potential utility of these mechanisms in greater depth, the paper first considers the nature of administrative law reform in transition countries. Then it identifies five different forms of vertical accountability in terms of their relevance to this reform challenge. These five mechanisms are discussed elsewhere in depth, using Latvia --where these mechanisms were assessed as part of a larger public sector reform initiative
under Bank auspices -- as a case study. These mechanisms include (1) advisory councils and other consultative mechanisms; (2) the affirmative provision of information by government agencies; (3) public participation in agency rulemaking; (4) responsive provision of information by the government upon request; and (5) a system of administrative procedure. For purposes of this paper, such mechanisms are merely introduced to show the range of subjects encompassed by what can loosely be termed administrative law.

II THE CHALLENGE OF ADMINISTRATIVE LAW REFORM IN TRANSITION COUNTRIES

Consideration of any particular bureaucratic control mechanism cannot take place without reference to the broader context of administrative law reform in transition countries. These countries have special problems associated with the legacies of tyrannical bureaucratic organizations and debilitated civil societies, as well as current difficulties that include weak governmental capacity and scarce human and material resources. They also have underdeveloped and fragmented administrative law traditions that have tended to facilitate, rather than constrain, bureaucratic power. This context differs markedly from that in which Western administrative law has developed.

A. Controlling Administrative Discretion: Western Approaches and the Situation Facing Transition Countries

The defining objective of administrative law and procedure in Western democracies is controlling administrative discretion. This involves “reconciling
technocratic knowledge with the concerns of ordinary citizens,” and rendering “democratic values operational in modern states where hierarchy and expertise cannot avoided.”4 This struggle to harmonize technical competence and democratic legitimacy has grown throughout the Twentieth Century as the state has assumed enormous power and influence over the production, consumption, and redistribution of material resources. The legal challenge has grown commensurately as the state’s expanded regulatory role has manifested itself in a steady stream of decrees, regulations, and other legal norms.

This challenge of democratic legitimacy looms even larger in the former communist countries, where the state’s share of the economy was often all-encompassing, the bureaucracy dominated the lives of individual citizens, institutional checks and balances were largely nonexistent, and civil society was extraordinarily and purposefully enfeebled. In most communist countries, ‘administrative law’ came to be primarily associated with an Administrative Violations Code, a wide-ranging collection of quasi-criminal infractions whose primary purpose was to regulate a wide range of personal behavior and enforce lower-level norms promulgated by administrative agencies. The emphasis was on enforcing social control of the population through the agency of regulatory inspectors and the police rather than on holding bureaucrats accountable for their actions. Citizens’ procedural protections were limited, and only some appeals could be taken to the courts, whose effectiveness was itself compromised. While the institution of the Procuracy was charged with rooting out administrative abuses, in fact the exercise of such power was rare and subject to political manipulation

by the Communist Party. Even in the post-communist era, as the right to bring a wider range of administrative appeals to the courts became available in most transition countries, problems of legal coverage,5 conflicting norms,6 and court weakness7 continued to undermine tentative efforts toward administrative law reform.

In the West, two broad methods of institutional control of the bureaucracy have presented themselves: control by representative institutions (legislative oversight) or review by the courts or specialized administrative tribunals. A third option, not necessarily formalized, and usually considered supplemental in nature, involves direct citizen pressure on the bureaucracy through consultative mechanisms and various forms of activism and lobbying informed by a vibrant news media.

Based on historical and cultural traditions and the strengths of their particular institutional endowments, Western democracies have relied on different combinations of these control mechanisms to rein in bureaucratic discretion and provide more popular


5 For example, while the 1993 Russian Law on Citizens Appeals permits full judicial appeal of most administrative decisions, it specifically excluded the Russian Administrative Violations Code as falling within a category of existing legislation that already provided for judicial review, albeit only first instance review. The Law also by its terms applies only to appeals by individuals, not legal or judicial persons. Ved. RF 1993, No. 19, item 685, “Law of the Russian Federation on Appealing to Court Actions and Decisions Violating the Rights and Freedoms of Citizens of 27 April 1993.

6 In many transition countries, there has been piecemeal administrative law reform in which new norms (esp. those in the commercial or business regulatory sphere) have been superimposed on an existing legal infrastructure without adequate efforts toward harmonization having been taken. This is also true in the case of new procedural norms that may conflict with Administrative Violations Code norms still on the books. See Howard Fenton, “Administrative Law in the Former Soviet Union,” The Journal Of East European Law, vol. 7, pp. 75-77 (2000). In some cases – Latvia is such an example -- a Cabinet-level regulation purporting to govern general aspects of an agency’s administrative procedure might often gives way to procedures governed by special regulations of that agency.

7 There is a vast literature on the challenges of reforming transition country judiciaries to rid them of the lack of professionalism, corruption, and political dependence that characterized the Soviet era. One particularly good volume in this subject area, addressing the Russian judiciary, is Peter Solomon and Todd Foglesong, 2000. Courts and Transition in Russia. (Boulder: Westview Press).
input into policymaking and regulation drafting. Most continental European countries
with parliamentary systems and strong civil service traditions rely principally on
legislative and executive oversight. Judicial review is largely available to dispute
individual administrative decisions on substantive grounds; challenges to the
promulgation or enforcement of regulations by interested parties on procedural grounds
are generally not facilitated by the legal system. In the United States, by contrast, a
culture with less faith in civil service expertise and intra-governmental oversight has
come to rely on the courts and special interest groups to curb administrative
overreaching.\(^8\) The judiciary not only figures as a forum for redress of individual
grievances but a battleground for outside groups to challenge the development of rules on
largely procedural grounds.

Steeped in civil law traditions and having largely adopted parliamentary or quasi-
parliamentary systems, most transition countries have tended to embrace a formal
framework for bureaucratic control that favors legislative oversight buttressed by judicial
review in individual cases. Among the Central and East European countries seeking EU
membership, these general preferences have been bolstered by various EU directives and
general guidance from EU administrative law experts.

\(^8\) Some observers, like Susan Rose-Ackerman, believe that even European countries could benefit from a
greater emphasis on special interest group monitoring at the regulatory agency level, since incentives are
weak for citizens to inform themselves about the stakes of regulatory policy generally, and to attempt to
conduct such monitoring through efforts directed at elected representatives in the legislature in particular.
Susan Rose-Ackerman, “American Administrative Law Under Siege: Is Germany a Model?” *Harvard Law
Review*, vol. 107, pp. 1279, 1280 (1994). Others point out that European parliaments may in fact be quite
responsive to citizen concerns, so that most substantive disputes over policy are waged in the legislative
branch rather than at the agency level. See, e.g., Peter Lindseth, 1996. “Comparing Administrative States:
Susan Rose-Ackerman and the Limits of Public Law in Germany and the United States,” *Columbia Journal
of European Law*, v. 4, no. 1 (Spring/Summer 1996).
In reality, however, the institutional endowments of these countries, and particularly those of the former Soviet republics, make excessive near-term reliance on such mechanisms problematic. Parliamentary structures and party organizations may both be immature, leading to less than robust oversight practices. Moreover, the very nature of parliamentary governance may in certain contexts lead to a form of clientelism where dominant political parties are rewarded with leadership of certain ministries and it is understood that executive branch agents are to be left to their own devices with minimal or no political supervision. Even were such supervision to assume more vigorous forms, disorganized, demoralized, and underfunded civil service systems in most transition countries would complicate or subvert parliamentary intentions.

Meanwhile, similarly weak judicial capacity and the significant human and material resources necessary to overcome it, renders meaningful judicial review of administrative action a longer-term prospect in many transition countries.9

Based on these institutional deficiencies – and on the low esteem in which government institutions are held generally by the public – it is perhaps not coincidental that many transition countries have consciously or unconsciously benefited from formal or semi-formal mechanisms to strengthen direct civil society oversight of public sector agencies. These mechanisms include legally-sanctioned consultative commissions, more extensive intra-agency appeals procedures, increased opportunities for public comment on draft regulations, and various access to information requirements. By facilitating governmental transparency and public participation, such mechanisms have bolstered

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9 Based on the need for high levels of technical expertise and significant expenditure of funds, the judiciary may not be a feasible option as the centerpiece of accountability in transition countries, although
various kinds of public-private partnerships in policymaking and policy execution that have emerged in many Central and Eastern European countries to try to close the gap in public sector resources and expertise. In some cases, these mechanisms are more progressive than those existing in Western Europe, at least on paper. To realize their promise, however, requires the building of capacity in state institutions and non-governmental organizations to enable them to interact responsibly and intelligently in the regulatory arena. In most cases, NGOs (ranging from public interest groups to business associations) have farther to travel in this regard: there are numerous organizational and financial obstacles to sustainability, as well as deep public skepticism about most NGOs’ professionalism and political independence. Much of the public in these countries views present-day NGOs as front organizations for political interests in a manner reminiscent of the highly manipulable ‘social organizations’ of the communist era.

While the weights accorded the foregoing types of control mechanisms may vary from one transition country to another during the reform process, it makes intuitive sense that none should be neglected in a reform program portfolio. Support for formal or quasi-formal mechanisms that encourage more direct civil society interaction with, and oversight over, executive agencies may, however, represent the type of reform initiative deserving of the greatest relative increase in government and donor funding. One might base such a conclusion on (1) the cost of such legal frameworks and implementation activities relative to more expensive civil service or judicial reform initiatives (although to be sure, the latter may be necessary in order to ensure the ultimate success of the

former in any given country); (2) the relative neglect of programs strengthening bottom-up civil society engagement with state institutions, particularly in countries with strong statist traditions and compartmentalized bureaucratic routines; and (3) the collateral benefits and incentives that such programs can generate in terms of greater participatory democracy, performance-based service delivery by public agencies, and investor-friendly regulatory processes.

B. Background Impediments to Administrative Law Reform in Transition Countries

Even in the case of a transition country willing to invest more heavily in improving its administrative law framework and various vertical accountability mechanisms, however, there exist a number of background impediments to this kind of reform – some conceptual, some bureaucratic, some political. In many ways, the most entrenched obstacles are conceptual in nature. That is, the focus of this type of reform agenda – various process-oriented mechanisms strengthening public participation and transparency – tends not to attract much interest relative to loftier or more technocratic subjects such as judicial or commercial law reform. Despite its importance in establishing certain rules of the game in state-civil society interactions, administrative law and procedure are often viewed as mundane, fragmented, and highly idiosyncratic subjects that even public administration specialists routinely ignore in favor of supposedly more engaging topics such as the New Public Sector Management (which
incidentally, may not be appropriate for transition countries if a proper administrative law framework is not already in place).\footnote{A good introduction to the NPM is Ferlie, Ewan, Lynn Ashburner, Louise Fitzgerald, and Andrew Pettigrew, 1996. The New Public Management in Action (Oxford: Oxford University Press).}

This blind spot extends to the bureaucratic politics that drive the design and implementation of reform programs. Among government reformers and donor agencies alike, administrative law does not fit neatly into democracy and governance or economic development stovepipes. Insofar as administrative law and procedure embody cross-cutting procedural principles, they lack natural, sectoral constituencies among a country’s ministries and agencies and among diverse individual and business interests focused on particular bureaucratic interactions. Each ministry or agency has special procedural norms and its own way of conducting regulatory business that tend to obscure the massive collective impact that such processes have on the daily lives of millions of citizens. Harmonizing or eliminating dozens or hundreds of such special norms to bring them into conformity with common democratic principles involves considerable legal and bureaucratic spade work.

Precisely due to the intimate connections between regulatory reform and administrative law and procedure reform – and the magnified impact that the latter may have on regulatory processes if implemented on a national scale – it is not surprising that the political prospects of such a reform program may also be quite unfavorable in most countries. Subscribing to more uniform, generally clearer procedural norms may involve the surrender of special knowledge and information asymmetries that are especially
conducive to rent-seeking opportunities. There may be additional costs involved in expanding participation, insofar as it usually enlarges the number of participants in, and lengthens the process of, policy formulation. At the most basic level, administrative law reform in transition countries usually involves the systematic transfer of some monitoring and control functions away from the executive and legislative branches (which may be closely aligned with one another in parliamentary systems) and over to the judicial branch or to civil society. One would not expect bureaucrats to cede such power readily; indeed, according to one specialist in comparative administrative law, only in polities with significantly contested government might one expect to find adequate political support for administrative law reform, as competing political parties that imagine finding themselves out of power in the near future seek to alter and strengthen the tools that constrain bureaucratic agents.

All of these factors suggest that administrative law reform may be not be among the highest priority legal reform investments in transition countries whose progress toward democratization has been slight, and whose professional bureaucracy, civil society, and media organizations remain significantly underdeveloped. A culture of impunity cannot be expected to change based simply on the enactment of certain formal or semi-formal rules and procedures promising to constrain certain types of bureaucratic behavior. Indeed, their passage and subsequent non-enforcement may tend in some cases

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11 Bureaucrats will tend to resist and resent such reforms because they provide superiors with alternative sources of information concerning their behavior. Blanca Heredia & Ben Ross Schneider, 1998. The Political Economy of Administrative Reform: Building State Capacity in Developing Countries, p. 12 (unpublished manuscript in possession of the author).

to camouflage such behavior and increase public cynicism about government abuses of authority. In the near term, reform monies might be better spent in some countries on developing a more pluralistic political party system and fostering the growth of civil society organizations, particularly grass roots groups.

On the other hand, for transition countries that have in fact demonstrated significant progress in the direction of democratization and produced a reasonably vibrant and pluralistic political system, administrative law reform may represent an especially cost-effective legal reform investment.

First, many processes that fall under the rubric of administrative law may simply consolidate and formalize institutional patterns or rules of the game that have already emerged on a voluntary, quasi-self enforcing basis, e.g., various consultative mechanisms with key business and other civil society representatives. Placing these mechanisms on a more durable, legal footing may prove highly cost-beneficial and help inculcate greater reciprocal respect for procedural regularity.

Second, because administrative law and procedure (at least intra-agency procedures) can be implemented on a sectoral or agency-by-agency basis (even after a national law is passed), favorable political economies can produce individual ‘islands of reform’ or political openings that can have important local or demonstration effects.

Third, administrative law reform may advance particular sectoral regulatory reform efforts that are broadly popular (e.g., telecommunications, energy, or agricultural reform, depending on the circumstances), and may draw certain segments of the business community – especially new entrants in particular markets – into broad-based reform
coalitions. Such sectoral reforms and the social capital they generate may prove much more tangible than abstract democratization programmes targeting parliamentary or judicial reform at the highest levels of government.\textsuperscript{13}

\textbf{III. FIVE MECHANISMS FACILITATING ACCESS TO INFORMATION AND PUBLIC PARTICIPATION IN EXECUTIVE BRANCH DECISIONMAKING}

Many different types of formal or semi-formal institutions exist to enhance executive branch accountability and improve bureaucratic decisionmaking. Some principally focus on horizontal accountability between the branches of government. Others facilitate more direct, or vertical, accountability to the citizenry. Still others could be considered hybrid in nature; for example, the institution of an ombudsman, which focuses and often aggregates direct citizen complaints while lodging such grievances in a formal, yet non-binding manner with other government institutions.

Although these are treated in depth elsewhere in the context of an administrative law assessment in Latvia for the World Bank, for purposes of this introduction, there are five discrete types of mechanisms that are central to the promotion of vertical accountability. These include (1) affirmative, or so-called ‘active’ provision of information by the government to the public; (2) systematic gathering of public comments on draft legislation or regulations by the government; (3) use of various advisory councils or other consultative mechanisms to help inform the development of

policy, legislation, and regulations; (4) so-called responsive, or ‘passive’ provision of information by the government upon request through a formal access to information regime; and (5) a system of administrative procedure affording the public both administrative appeals of agency decisions and if desired, court appeals thereof.

Each of these types of mechanisms can influence and restrain executive branch decisionmaking at distinct stages of an agency’s regulatory process. Active information provision represents an ongoing background effort by a regulatory agency to provide the public with basic information about the agency and the regulatory process. The public’s provision of comments on draft legislation or regulations represents an opportunity to influence the terms of a new departure in the legal framework. Advisory councils and consultative mechanisms constitute channels of communication whereby stable, knowledgeable interest groups provide input into the application of new rules and the execution of policy by the agency. Responsive provision of information permits the transmittal of even more detailed information about an agency’s execution of policy. And administrative procedure permits affected parties to challenge concrete regulatory decisions in specific cases. The themes of transparency and participation run through each of these mechanisms, which supplement efforts to ensure accountability through pressure on elected officials.

There is another way of viewing these mechanisms, however, which is of some consequence to transition countries. One can conceive of them in an ascending order that roughly reflects the increasing time, resources, and legal formality and/or sophistication
that may be necessary to institutionalize their effective use. According to this perspective, one might consider each of the mechanisms in the following sequence: (1) advisory councils and other consultative mechanisms; (2) affirmative provision of information; (3) public participation in rulemaking; (4) responsive information provision; and (5) administrative procedure. This is the order in which this subject should most profitably be addressed.

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14 These are rough judgments based on what is necessary to create even a modestly functional process or institution. However, in gross terms, this ranking of capacity needs seems intuitively persuasive. For example, consultative processes can function quite effectively in the absence of formal procedures or decent funding. Capabilities and resources necessary to support the active provision of information can also be relatively modest in magnitude assuming the scope of voluntary information disclosure is relatively well circumscribed and commensurate with available government resources. Even a process of some kind of notice-and-comment rulemaking can prove relatively simple where draft regulations are published on a web site and comment opportunities (and interested parties) are easily identified at key junctures. By contrast, even a modestly functional responsive information access system or an administrative procedure law requires government-wide centers of expertise, the involvement of significant numbers of lawyers (and information and IT specialists in the case of a responsive information access system), and relatively large numbers of cases going to court. These all can require a considerable outlay of funds.