

1 The judicialization of administrative governance

Causes, consequences and limits

Tom Ginsburg

In recent years, there has been increasing attention to the phenomenon of judicialization, the expansion of the range of activities over which judges exercise significant authority. Judges around the world now routinely make important policy decisions that only a few years ago would have been seen as properly the purview of bureaucrats, politicians, and private actors.¹ Beyond the direct involvement of judges in decision-making, judicialization can also refer to the expanding use of trial-like procedures for making governmental decisions and the extension of law-like processes into new social spheres.

Whereas recent studies have examined judicialization in a variety of regional contexts,² the overwhelming emphasis is on judicialization in Europe and the United States.³ But of course there is far more to the world than the North Atlantic. One of the motivations for this volume is to ask whether and to what extent judicialization has occurred in East and Southeast Asia. It analyzes this issue in a particularly crucial context: the sphere of administrative law and regulation. Though much more attention in the nascent judicialization literature is devoted to constitutional issues,⁴ most citizens are far more likely to encounter the state in the routine matters that are the stuff of administrative law rather than in the rarified sphere of constitutional law.

Administrative law is a mode of “regulating regulation”,⁵ a particular way of ensuring that government observes certain rules in its interaction with society. I characterize administrative law as operating at two levels: retail and wholesale. The retail level concerns administrative interaction with private parties, what is called administrative justice in the UK. The wholesale level, which is less uniformly conceived as part of the domain of judicial control, concerns the formation of sub-legislative rules. Despite continuing doctrinal divergences and quite different institutional structures, there has been substantial convergence in the core elements of administrative law systems, with a right to present one’s case before agencies, to receive reasons for adverse decisions, and the right to challenge administrative decisions before third party decision-makers. Particularly when judges have the power to review decisions of regulators, administrative law provides a crucial locus of state–society interaction, a channel for determining how and if participation can occur and rights can be protected. Judicial review

2 *Tom Ginsburg*

of administrative action and enforcement of constitutional guarantees of fair procedures have been an important constraint on regulatory decision-making.

East and Southeast Asia provides an important regional context for examining administrative law and regulation. For many years, the dominant trope in discussions of the Asian state was the developmental state,⁶ an image of state-led economic growth in which bureaucratic supermen used vast grants of discretion to pick economic winners and losers. A large debate concerns the extent to which this imagery matched reality, but the very existence of the debate suggests that there was the appearance of substantial state discretion, in contrast with conventional economic theory. However, in the mid-1990s, as a result of several forces, this image began to lose power and East Asian states began to transform toward a more liberal regulatory model. This model included privatization, establishment of administrative procedures acts, and the emergence of greater constitutional constraint on regulatory actors.

This shift has significant consequences for law and courts. Although law was not a major concern for first-generation analysts of the Asian state, the developmental state model contained an implicit model of law in general and administrative law in particular. Administrative law in the region tended to be formalistic and to govern a relatively small range of transactions. A paradigmatic practice, known in Japan as “administrative guidance” and by other euphemisms elsewhere, consisted of government suggesting a course of action by private parties that would be followed even if government lacked the formal legal power to force the course of action it was suggesting. Contrary to some imagery, such behavior is hardly the exclusive competence of Asian bureaucrats, but is found in virtually every regulatory system to one degree or another. Nevertheless, the notion that Asian bureaucracies during the high growth period exercised a lot of discretion remains powerful. The statutory frameworks governing bureaucratic action were not extensive. The powerful Northeast Asian economies of Japan, Korea, and Taiwan did not even pass their first general administrative procedures acts until the 1990s.

Beyond this, judicial authorities would tolerate fairly vague legislative pronouncements that empowered bureaucratic authorities. Particularly when compared with vigorous systems of administrative review by courts that operated under the American, French and German constitutional traditions, Asian courts seemed to be reticent to become involved in regulatory governance. Administrative courts did exist in some countries but the combination of judicial deference and powerful bureaucracies meant that their scope was not extensive at all.

This structural feature had consequences for firm strategy. With relatively underdeveloped formal legal guarantees, firms had to invest in specific relationships with regulatory authorities. Firms were dependent on state authorities for information, access to markets, and even capital during the high-growth period. Their investment in such relationships meant there was a corresponding disincentive to push for change. There was thus no winning domestic coalition supporting more transparent and open styles of regulation. So long as bureaucratic-business relationships were stable, the legal equilibrium was sustainable as well.

A number of factors, explored in great detail in the case studies in this volume, combined to put pressure on this situation. This chapter first describes the concept of judicialization, with special attention to the context of administrative governance. It next describes the various theories of why the shift is occurring, focusing on three categories of explanation: politics, economics and general features of the global environment. The chapter then considers some of the consequences of the shift and speculates briefly on the limits of judicialization. The discussion is generic in the sense that it does not purport to explain any single country experience, but rather to provide some considerations that may operate to a greater or lesser extent in various contexts.

The concept of judicialization of governance

The judicialization of politics is now an established concept, with an expanding literature tracing the myriad spheres in which courts are now making and influencing policy decisions that previously had not been within their purview.⁷ By judicialization of governance, we have in mind a broad conception of the expansion of judicial involvement in the formation and regulation of public policy. Expanded judicial power may come at the expense of bureaucratic power, as in the establishment of vigorous systems of judicial review of administrative action and judicially policed processes of sub-legislative rule formation. It may come at the expense of politicians, so that political decision-making is shaped and constrained by higher order principles articulated by judges. And it may come at the expense of private actors, who find their own freedom to create and organize rules is constrained by judicially created or enforced public policies.

Judicialization involves more than simply the direct articulation and application of rules by judges; it also involves decisions by other political actors made in the shadow of judicial processes. An agency that refrains from certain conduct, or provides extensive legal justification for actions that it does take, or introduces trial-like processes to defend itself from claims of arbitrariness, may be acting to avoid being brought before courts. In this sense the sphere of judicialized governance is broader than it might initially appear and it may also be difficult to trace its precise boundaries.

A related concept is that of juridification: the spread of legal discourse and procedures into social and political spheres where it was previously excluded or was minimal.⁸ Hirschl notes that this has long been a concern of social theory, as rationalized processes. A particularly interesting contribution is exemplified by Morgan⁹ who identifies the spread of cost-benefit analysis in the economic sphere as a kind of quasi-judicialization, in which technocratic discourse is employed to evaluate individual cases against “higher” criteria of rationality. We focus instead on judicialization, not because juridification is unimportant, but because judicialization is one window on the broader and more amorphous process of juridification.

The most elaborate elucidation of the judicialization concept is by Stone Sweet, who roots the concept of judicialization in dyadic social relationships and a shift

4 *Tom Ginsburg*

to third parties.¹⁰ Dyadic social relations are sustained by reciprocity. Reciprocity can be stable for a very long time, but sometimes it can break down, as parties disagree over rights and obligations. Once conflict occurs, one party might be able to force its view on the other, but if not, the dyad is likely to turn to a third party to help resolve the dispute.¹¹ When a third party enters the picture to resolve disputes and help the dyad partners coordinate their expectations, governance begins.

The triadic structure of dispute resolution involves, inherently, the articulation of rules and the generation of a normative structure that helps guide future behavior. This also engenders a discourse about the application of rules that itself becomes embedded into the reasoning and strategic calculus of the governed. Future dyadic interaction occurs in light of this normative structure, and a feedback cycle develops whereby new conflicts that emerge are again sent to the triadic dispute resolver, with the questions becoming ever more refined over time. This is the process of judicialization.

In the Asian context, one can view relational, reciprocity based networks of exchange as being essentially dyadic in character. Firms contract with each other, and enforce the contracts through reciprocity-based sanctions. Firms also interact with government in essentially dyadic ways, with each firm seeking to establish relationships and norms of cooperation with government actors. Judicialization involves the partial displacement of relational governance with more arms-lengths transactions, both among firms and with the state. Arms-lengths transactions require triadic dispute resolution—a third party to help the dyad coordinate their actions and understandings. This role can, and increasingly is, played by courts.

Two issues, however, are not fully specified in Stone Sweet's theory. The first concerns the *timing* of judicialization. Why does judicialization emerge when it does? This issue is raised in Hirschl's account of constitutionalization, in which he argues that departing hegemonic elites are likely to turn over power to independent courts as a way of governing in the future.¹² When one thinks one will be out of power, governing by independent courts becomes a way of ensuring that one's policies are not overturned. Does the same logic apply in the administrative sphere?

A second issue not fully clear from Stone Sweet's work is whether or not judicialization is a one-way process. That is, once a political system has allowed courts into various spheres of governance, is there a way to put the proverbial humpty-dumpty of state discretion back together again? Stone Sweet's theory is not teleological, but does suggest a kind of developmental trajectory in which judicialization, if unchecked, is a continuously expanding process. On the other hand, a large institutionalist literature on courts has established that courts are embedded in broader systems of governance.¹³ Judicial decisions constrain other political actors, but are also constrained by them in important ways. Other actors have in their power myriad tools to constrain the operation of courts and to shape the sphere of judicialized governance.¹⁴ Can they ever reverse the process? A complete account of judicialization in spheres of governance would include not only a discussion of its establishment but also of its endurance.

To really understand the issues of timing and whether judicialization is reversible, one needs an understanding of its origins and consequences. It is to these issues that we now turn.

Causes of judicialization

One can trace three separate categories of explanation for the expanded role of courts in governance generally. We focus on economic, political and international factors.

Economic factors

Economic globalization is an important force in the judicialization of national regulatory processes. The rapidly intensified scope and scale of global transactions, combined with liberalization of trade and capital flows, has allowed new entrants to appear in many domestic markets. These actors had less extensive relationships with the local bureaucracies, and indeed suffered comparative disadvantage *vis-à-vis* favored local actors who were embedded in networks of reciprocity. The new players may have been less willing to trust the word of a local bureaucrat potentially connected to the firm's competitors. This meant that administrative informality and reciprocity-based political economy had less efficacy for these "outside" actors. Instead, new entrants were likely to view their relationships with bureaucracy in formal terms. They were more likely to rely on legally defined rights and duties, to demand transparency in rule formation and application, and to challenge "guidance" that did not benefit them.

We have few studies of how the entry of new firms from outside changes local firms' regulatory strategies, but one can imagine that the dynamic is epidemiological in character. Conceiving of pre-judicialized governance as a stable equilibrium of reciprocity-based contracting arrangements, one can suppose that new entrants might disrupt the equilibrium. Demands for transparency, initiated from outside, decrease bureaucratic leverage over local firms as well as foreign firms, and may shift power toward business in general. A bureaucracy that cannot manipulate information is one that is weaker. Thus strategic moves that originate with foreign or outside firms (such as aggressively collecting on bad loans in mid-1990s Japan) can become rational for local actors as well. If new strategic equilibria emerge, and these rely on courts to a greater extent, judicialization may resemble a process of infection (though I don't intend the pejorative normative implications of that term).

An underappreciated factor in globalization discourse is that it is a two-way street. Capital not only flows into economies from outside, but "inside" capital can also flow out. This shifts the balance of power in business-government relations. Regulatory demands are constrained by the ability of firms to exit when demands are unreasonable, empowering business *vis-à-vis* the government. Arguably, the great shift in Japan in the 1990s to switch from "ex ante planning" forms of regulation to "ex post correction" reflected this dynamic of shifting incentives.¹⁵

6 *Tom Ginsburg*

The former model requires firms to invest in specific relationships with bureaucrats to gain information, while the latter more legalistic model allows firms to plan rationally on the basis of objective language, and gives access to courts for ex post correction of arbitrary policies.

Liberalization also means that vital services—telecommunications, electricity, health care, working-class housing, transportation systems, financial services—are increasingly provided by privately owned companies rather than government monopolies. Where government has less involvement in direct service provision, it has less leverage over private parties to informally contain conflict among businesses, punish misbehavior, or forestall insolvency. This in turn places new demands on the courts, and reduces the relative power of agencies to resist challenge.

Economic complexity is another structural factor that was no doubt at work in recent years. When Asian economies were primarily engaged in primary production or simple industrial manufacturing, regulatory decisions were relatively simple in character. As an information and service based economy came into effect, the old models of regulation proved inapposite. No regulatory agency, even one staffed with bureaucratic supermen, is able to anticipate all the changes in a complex, global economy. Information about regulatory needs is thus scarcer, creating pressure for new more flexible forms of regulation and the delegation of more decisions about implementation to private parties. On the other hand, complex economic circumstances require ever more expert technocratic solutions to unanticipated problems. Furthermore, ordinary citizens have a more difficult time evaluating the effects of regulation.

One way to resolve this tension is to allow for new and flexible forms of regulation, but to set up a second actor to monitor the performance of the primary regulators. A guardian institution becomes almost necessary in a situation which both demands highly technical solutions to complex problems, but is pervaded by distrust of the authorities to always implement the solutions on their own.¹⁶ As in standard principal-agent theory, a simple solution is to hire a second agent to watch the first, to provide a second look at the decisions of the regulators.

We thus see powerful economic forces at work that encourage the development of judicial review of administrative action. The dynamic I have described is one of secular increases in economic complexity, combined with the entry of new firms, putting pressure on old systems of relational governance.¹⁷ As demands for regulatory transparency, initially championed by outsiders, take root, local actors may change their strategies and become less willing to abide by the implicit terms of relational regulation. A dynamic of judicialization ensues.

Political factors

The above account can explain forces pushing for change, but does not explain the particular timing of changes in particular countries. Here a number of specific political factors may be necessary to provide local impetus for the shift. In Japan, a combination of bureaucratic scandal and incompetence, as well as the failure of

the vaunted Ministry of Finance to cope with the popping of the financial bubble in the early 1990s, put pressure on the systems of relational governance. The brief loss of power of the long-ruling Liberal Democratic Party further ruptured the link between politics and bureaucracy, and provided the impetus for the passing of more transparent governance framework. This in turn changed the strategies of private actors, who no longer had to rely on government for crucial regulatory information.

The Asian Financial Crisis of 1997, which began in Thailand and spread most profoundly to Korea and Indonesia, provided further impetus for breaking old networks of business–government collaboration.¹⁸ Many of these relationships had been sustained by implicit promises of government assistance and favorable action in return for overall deference by firms. As the crisis erupted, implicit and explicit promises were broken, providing an impetus for major political reform in some countries, such as Thailand (where the 1997 “People’s Constitution” was passed) and Indonesia (where Suharto’s 30-year dictatorship began to rapidly erode, ultimately falling two years later).

These stories highlight the importance of the political dimension of economic regulation. Politics, both in the narrow interest sense and a broader structural sense, have a profound impact. A good amount of research has tied the expansion of judicial power to fragmentation of political power.¹⁹ As it becomes more difficult to produce legislation, courts have more policy space in which to insert themselves into policymaking without fear of legislative correction or discipline by other political actors.

The chief factor fragmenting political power in Asia in recent years has been the wave of democratic consolidation. It is seldom appreciated that East and Southeast Asia is the main region of the world in which third-wave democracies have in fact become consolidated.²⁰ Since the mid-1980s, the Philippines, South Korea, Taiwan, Indonesia and Thailand have all become democracies, and only Thailand has suffered any significant backsliding (though it remains to be seen what the long-term implications of that backsliding will be).

Democracy, by definition, implies political competition and is typically associated with the structural fragmentation of political power. Compared to autocratic regimes, this means that courts have more room in which to work. Furthermore, there is more demand for judicial monitoring of bureaucrats in democracies than there is in dictatorships, because the time horizons of rulers are typically shorter. A bureaucrat who does not like the instructions coming from her political superiors need only wait until the next election, when the superior may be out of power and a new boss in place in her stead. Principal-agent problems are thus exacerbated by democracy and competition for political power.

Democracy, however, cannot explain the expansion of judicial power in one-party states such as Vietnam, China and Singapore, to the extent it has occurred. In these countries, political and economic factors suggest a different logic. All-powerful parties face difficulties making credible commitments to economic actors that they will not expropriate wealth.²¹ Even if the central sovereign is committed to market oriented policies, lower level bureaucrats may seek to

abscond with wealth. The regime thus faces principal-agent problems, and these are exacerbated in an era of economic complexity, as described above. Setting up an independent court system with the power to publicly constrain lower-level state actors may in fact enhance economic growth by providing credible commitments to economic actors. This “hand-tying” aspect of judicial power is well known among scholars of administrative law, and is particularly resonant with the adoption of administrative law systems in authoritarian countries such as China and Indonesia under Suharto.²²

This political story seems to differentiate the functions of judicial oversight of administrative governance in dictatorship and democracy. Whereas in democracies, courts are needed because of extensive principal-agent problems associated with the competition for political power, in dictatorships they are needed precisely *because* political power is so concentrated. Since it will govern for a very long time, the Chinese Communist Party cannot credibly promise not to interfere with local property rights; an independent public review of alleged bureaucratic wrongs helps to make the Party’s promises more believable, and enhances the central regime’s ability to implement uniform policy throughout a large country.

In short, specific political coalitions may be necessary to trigger a shift toward judicialized governance. Once in place in the regulatory realm, however, judges provide important services for sovereigns. Judicialization is remarkably adaptable, thriving in a wide range of political environments.

It is perhaps telling that the rule of law discourse has become so ubiquitous that, like markets, no one questions its relevance. Not only was the rule of law a crucial component of the Washington Consensus, but it also seems to be a component of the so-called “Beijing Consensus.”²³ While the Washington Consensus featured democracy, law and markets as the three interlinked components, the Beijing Consensus substitutes autocracy for democracy. The consensus among consensuses is that judges are important actors in the structure of governance.

But what kind of judges? There are obviously vastly different conceptions of the proper role of the judge in different systems. Legal traditions may provide ideational structure that constrains and facilitates judicialization, though it is my own view that legal traditions and legal origin provide much less of a constraint than typically imagined. We have seen the emergence of vigorous constitutional and administrative courts in civil law jurisdictions and these have had profound impact on the administrative state.²⁴ Still, ideas about the proper role of judging matter, and can be viewed as ideological structures within which judges must operate.

Perhaps more important than broad traditions are local interest-group structures. Epp²⁵ focusing on what he calls the Rights Revolution, emphasizes that judges cannot insert themselves into new policy domains without demand from the public, and without the crucial intervening variable of “support structures.” By this he means a relatively independent bar and interest groups that are willing to utilize the courts to advance their own strategic goals. Clearly the passive structure of judicial decision-making relies on others to bring cases to courts, and so courts must form alliances with interest groups and the bar in order to be in a position

to influence policies. These “support structures” are mutually constitutive of judicialization: judges need the support structures, but the availability of litigation-based possibilities for social change will in turn encourage extra-judicial actors to bring cases to court.

No doubt the internal politics of the legal system itself, or what Halliday *et al*²⁶ call the notion of the “legal complex,” provide resources and constraints in this regard. For example, the creation of *new* administrative and constitutional courts may provide a conducive environment for judicialization, as judges seek to articulate a role for themselves and cannot rely on old patterns of deference or ducking the tough cases. The emergence of new constitutional courts is particularly important. Direct examination of administrative action for constitutionality is part of the general trend toward judicialization. If a court can set aside legislation passed by a democratically elected parliament because of its non-conformity with the constitution, surely a court can also set aside actions of unelected bureaucrats for the same reason. The same logic leads toward expanded judicial supervision of administrative actions under delegated statutory authority. If judges can examine administrative action for conformity with the constitution, it is hardly objectionable that other judges examine the same action for conformity with the statutory dictates of the legislature itself. Now the courts are not attacking the legislature but serving it. So the expansion of constitutional review, by increasing the prestige of courts and their reputation as guardians of rights, may naturally lead toward greater supervision of administrative action.

International factors

We would be remiss not to discuss certain international factors at play in the governance shift. These have two components: institutional and ideational.

The chief institutional force for greater judicialization is the emergence of supranational regulatory regimes that constrain domestic policymaking. Trade and investment regimes typically involve supranational adjudication and review of local governmental practices.²⁷ As explicitly discriminatory practices shrink in scope, these regimes have increasingly confronted regulatory decisions previously thought to be “domestic” in character. This process has developed further outside Asia, which still lacks equivalent regimes to the North American Free Trade Agreement and the European Union. The GATT/WTO regime, however, has had a profound impact on Asian political economies. The shift from the GATT to the WTO had significant consequences for domestic regulatory organization. Article X of the GATT 1994 requires that “Laws, regulations, judicial decisions and administrative rulings of general application [...] shall be published promptly...” and administered “in a uniform, impartial and reasonable manner”, notably by independent administrative tribunals or procedures.²⁸ Similar requirements for independent and transparent regulation are found in the newer agreements on services and intellectual property. It is thus clear that international commitments expand the scope of judicial oversight at a national level.

While the WTO Agreements do not explicitly require institutional change in non-trade related sectors, in some countries, notably China, they seemed to trigger broader institutional reforms. China agreed to impartial and uniform implementation of its commitments and of trade-related laws; to substantial transparency and notice and comment procedures of those laws, regulations, and measures; and most dramatically, to set up and maintain impartial judicial review of all administrative action. The WTO became, in essence, an amendment to the Chinese constitution. Internal forces wished to “lock in” commitments before they could be whittled away at the local level, and third-party monitoring, locked in by international agreements, provided the mechanism.

The Chinese commitment illustrates also that the international commitment device can help provide transparency *within* a country, enhancing predictability for domestic actors by constraining government. Thus WTO requirements of publication of laws and regulations; notice of new measures and provision for comment; and independent adjudication and sites of appeal will have substantial effects on administrative law systems. The WTO secretariat itself claims that transparency is especially important with respect to domestic regulations aimed at legitimate public policy objectives that might have an effect on international competition, such as public health or protection of the environment.²⁹ By extending the right to comment on new regulatory measures to those outside national borders, the WTO expands judicial or at least adjudicative evaluation of rule-making.

Beyond the institutional impact of the international environment on local regulatory systems, there is an ideational element to the spread of judicialized governance. The salience of the legal solution increases as it becomes adopted in more and more countries. This represents a process of policy diffusion, in which the probability of a country adopting a policy or institution increases with the number of similar countries that adopt the solution.

A simple explanation of the diffusion process is that it represents a kind of trend, in which countries copy institutions that appear to have worked in other countries. Sociologists might attribute this to the emergence of a world society, in which certain norms and institutions become standard scripts and signs of modernity.³⁰

A more optimistic take is that diffusion follows from a process of learning. When confronted with similar problems of economic complexity, transnational regulation, and political diffusion, it makes sense to adopt the judicial “solution” of monitoring bureaucratic performance. The fact that other countries have delegated decisions to judges, and the particular solutions adopted by judges have not produced unmitigated disaster, provides information to the later adopter. In some cases, the adoption of an institutional solution in one country can also increase the costs and benefits for other countries considering reforms. An intriguing possibility is that law, globally, represents a kind of network good, in which legalization or judicialization in one country makes it more desirable for neighbors or similar countries to adopt the same solution. As one country adopts judicialized governance, it gains access to the global “conversation” of judges that have analyzed similar problems.

Regardless of whether the network conjecture is correct, there is little doubt that international factors do affect the conception of the proper role of the judge in domestic legal systems. Both the “legalization” of world politics and increased transnational exchange among judges help shape views of the judicial role.

Conclusion

Reviewing these various causes suggests that no single theory can explain variation in the timing and extent of judicialization. What I have suggested instead is that it is the interaction of local political conditions (including politics within the legal system) with structural constraints in the economy that lay the basis for judicialization. Many of the pressures for transferring power to judges are global in nature, driven by international regimes and economic forces. At the same time there are numerous contingencies that constrain and dictate the process, including the patterns and performance of business–government relations,³¹ local political coalitions, and the structure, role conception and preferences of the judiciary itself.

Consequences of judicialization

A separate concern of many of the papers in this volume is to understand the consequences of the shift to judicialized governance. This raises tricky methodological issues. It is difficult to measure the impact of judicialization in any given policy area, because the consequences extend beyond the cases decided by judges. Changes in regulatory behavior that occur in the shadow of judicial decision-making, that is in response to *potential* decisions by judges, have an equally profound effect and ought to be considered in any complete account of judicial impact. More loosely, one might include the process of juridification, the expansion of “legal” modes of policy justification and discourse within the regulatory sphere.³² Juridification focuses not on the mere achievement of judicial policy preferences but rather on a shift in the way policies are articulated and constructed.

The normative debate over judicialization is perhaps best developed in the context of the American administrative state, the national context in which judges have played the most visible and sustained role in supervising the administrative state. Some suggest that the judicial “solution” to problems of administrative governance will engender as many problems as it resolves. Others are more optimistic, seeing judges as crucial defenders of rights whose role in governance is on the whole positive. This section begins by describing the American experience and then moves on to look at broader concerns.

An American interlude

It is perhaps worthwhile to consider the American experience briefly to better articulate the critiques. The American administrative state arises somewhat later

than its continental counterparts, in part because of the constitutional jurisprudence of the Supreme Court which viewed regulation as an interference with the twin values of property and freedom of contract. It took a massive and sustained political coalition in the wake of the Great Depression to overcome this resistance, after which the Supreme Court acquiesced to administrative regulation.³³ The New Deal then granted large amounts of administrative discretion to expert agencies on the basis of broadly worded statutes and minimal judicial review. Opponents of the regulatory state were able to push for the adoption of an Administrative Procedures Act (APA) in 1946, which represented a compromise set of constraints on regulation.

Toward the late 1950s and early 1960s, there was a shift in the underlying politics of administration in the United States. President Eisenhower's address at the close of his administration warned Americans of the takeover of government by an "industrial-military complex."³⁴ An academic book, *Silent Spring*,³⁵ detailed how industrialization was creating incredible environmental problems. And the "cultural revolution" of the counter-culture and free speech movements created great distrust in traditional institutions. In short, there was fear that the expert administrators who were running the government were not doing such a good job. Furthermore there was a fear that they were regulating not in the interest of the general public, but in the interest of the various parties they were supposed to regulate. Policymaking was a closed circle in which the general public lost out.³⁶ In short, distrust set in.

Interestingly, the courts seemed to respond to this shift by increasing the rigor of judicial review. The first steps were to demand more record-keeping by agencies. In a case involving highway traffic safety regulation, *Automotive Parts and Accessories Assn. v. Boyd*, the court dealt with an argument from a private party that the agency had not clearly responded to comments given in the "notice-and-comment" process. The court warned the agency that its statement of policy that accompanied the final rule must allow courts to see "major issues of policy" and why the agency reacted to them as they did. In another case, *United States v. Nova Scotia*, the court demanded that the agency also make a record of the underlying science on which it based its own regulations—even though the APA had imposed no such requirement.³⁷ The rationale for these shifts was that the courts had a statutory requirement to engage in the process of judicial review on the basis of the whole record. If an agency did not keep a record (as the Food and Drug Administration did not in the *Nova Scotia* case) then the court would be unable to properly evaluate the agency action and thus would not be able to accomplish its own duty. Thus the courts began by demanding greater records from agencies—without any clear statutory basis.

The next step was to scrutinize the records with more rigor. And here too the courts began to act more aggressively. Led by the United States Court of Appeals for the DC Circuit (which is in fact the final court of appeal for much administrative action because of the Supreme Court's discretion not to take cases), the courts began to find an increasing range of administrative actions to be "arbitrary and capricious."³⁸ They did so, nominally, as a procedural matter, by saying that the

agencies needed to take a “hard look” at the evidence before them. In practice, this also meant that the courts too would take a “hard look” at the agency’s actions. The Supreme Court redefined arbitrary and capricious review to include a requirement that courts undertake a “substantial inquiry” and conduct a “searching evaluation” of the evidence.³⁹ This included an inquiry into whether the agency has acted in the scope of its authority, and whether on the facts, the decision is reasonably within the range of discretion. It would be arbitrary and capricious if an agency has not considered relevant factors and clear error of judgment. All these moves tended to blur the line between the supposedly deferential “arbitrary and capricious” test and the more intrusive “substantial evidence” test.⁴⁰ Those who opposed particular regulations were happy to have courts intervene to ensure their participation and to ensure that agencies evaluated evidence properly.

Ultimately, of course, administrative decision-making involves policy choices among many competing alternatives. Deciding what level of public safety merited what level of requirements on manufacturers involves complex tradeoffs of risk, price and technical feasibility. No matter what decision is made, someone will be unhappy and will utilize the availability of judicial review to challenge that decision. Thus the shift toward activist judicial review inevitably involved the courts deeply in policy. And this, of course, led to the question asked since the time of the Romans, namely, who guards the guardians of legality?⁴¹

Gradually, the United States Supreme Court, which became dominated by conservatives beginning in the 1980s, began to cut back on the “activist” approach of courts. First, they told the lower courts to stop imposing new procedural requirements beyond the scope of the APA onto regulated parties.⁴² Then, in one of the most important administrative law decisions known as *Chevron*,⁴³ the Supreme Court announced that, when agencies were involved in interpreting the laws they were supposed to apply, courts should to defer to agency interpretations of law. This decision obviously shifted the balance of power back to the agencies, away from the lower courts. It reflected a judicial philosophy on the Supreme Court that wanted to let the administrators be administrators, and keep judges from the fundamental policy choices. It also kept judicial review focused on the one thing judges could do with confidence: evaluating whether the statute was unclear. Henceforth, courts that wanted to limit agencies would have to focus on questions other than the substantive interpretation of agency statutes; instead they would have to look at issues like the agency findings of fact, the procedures to be used and the reasons given for governmental action.⁴⁴

And yet, despite recalibration by the Supreme Court, the judiciary remains deeply involved in regulatory governance. It is a case of one step back after four steps forward. It is thus not surprising that the United States has been the locus of massive debates about the proper role of judges. Many asked why it was that that courts ought to be able to substitute their own vision of policy for those of “expert” administrators. The logic of having a second body review the decisions of a primary regulatory depends on the second body *sometimes* over-ruling the first. If courts do not do this, then their utility as a mechanism of accountability is lost. But, being non-expert, judges are always subject to critiques when they

do intervene. One might see the judicialization of administrative governance as inherently unstable—it responds to felt needs, but generates its own challenges.

Costs and benefits

What are the consequences of judicialization? Critics have identified several. First of all there are the decision costs associated with overly involved procedures.⁴⁵ Comparative studies of regulation repeatedly find that, across advanced industrial democracies, the substantive outcomes of regulation are frequently the same, but that the costs and manner of obtaining these outcomes differ dramatically across regulatory systems.⁴⁶ The American system is particularly costly, contentious and wasteful in achieving regulatory goals, with conflict pervading the process from rule formation to enforcement. This entails potentially serious delays and expense, with repeated re-consideration of issues in different fora.

Besides the decision costs, Kagan's magisterial critique (2002) of American "adversarial legalism" suggests that over-judicialization entails costs in terms of legal uncertainty. The possibility of judicial over-turning of decisions made at the bureaucratic and political levels mean that there is inherent uncertainty in the regulatory process. Legal norms in such circumstances may be particularly malleable and indeterminate, ultimately undermining the utility of law for social and economic ordering. Rather than serve to constrain bureaucratic discretion, legal uncertainty may perversely empower bureaucrats by discouraging parties from undertaking costly and unpredictable challenges.

Finally, Kagan critiques what might be called cultural consequences of over-judicialization, helping to perpetuate a legal culture of "adversarial legalism." As private actors respond to institutional structure, they entrench adversarial patterns of behavior that promote defensive regulation and over-proceduralization. Instead of seeking cooperative and mediate solutions, parties will use the availability of courts to make unbending rights-based demands. These patterns then become the norms expected for future regulatory iterations.

To these challenges and critiques, a number of sophisticated defenses of judicial involvement have emerged. The most common one, though difficult to evaluate empirically, is that judicial involvement as a monitor of regulatory processes and a guarantor of transparency leads to better quality and more legitimate regulation. Decisions that agencies know will be reviewed will be written in such a way as to justify their outcomes and reasoning, perhaps more so than decisions taken solely by a primary actor without review. This may result in better justified, more legitimate governmental processes.

In another context, I have offered an Asian or "Confucian" defense of judicial involvement in constitutional government.⁴⁷ To the extent that traditional ideas about government still play a role in attitudes toward government in Asia—a highly contestable assertion—government by judges is consistent with traditional notions of meritocratic rule in Confucian thought.

A sophisticated institutional proposal, associated with Dorf⁴⁸ emphasizes the potential role of courts in participating in broader processes of democratic

experimentalism. Institutions are sites for deliberation, experimentation and transformation, and courts have certain unique qualities that render them skilled in this regard. One should not, then, throw out the baby with the bathwater—some of the benefits from judicialization, including more reasoned and better justified policies, and presumably also procedural fairness, ought to be sustained and indeed extended.

Another line of defense is to note that the purported excesses of judicial involvement in policymaking are overstated. Positive political theorists have provided the most recent elaboration of an old institutionalist argument that observes that courts are always embedded in larger political contexts. Preferences of bureaucrats and politicians matter. Political authorities in particular have myriad tools to discipline courts and to shape the realm of judicial involvement in terms of which issues courts can hear and at what stage. Because other actors can constrain and correct courts, judicial involvement should not be such a great concern, for it is always shaped by the preferences of other actors. In the administrative sphere, this argument typically emphasizes that judges are ultimately subject to control by politicians⁴⁹ and so are less likely to undertake truly unpopular policies.

This raises the question of whether judicialization is a one-way street, or whether it is in fact reversible in some fundamental sense. Once one moves to a system of governing with judges, can one ever return? What are the limits of judicialization? These questions are particularly important for understanding how regulatory systems may evolve in the future.

Limits

To understand the limits of judicialized governance, one must consider which of the various driving forces described above are truly primary. If one believes that the main causes of judicialization are global and economic in character, one might expect little scope for reversal or change. Indeed, one might predict convergence across countries in the trend of judicialization, for most countries are embedded in both global regulatory regimes and the global economy. On the other hand, if one believes that local politics are the key factors, one might anticipate more possibility for variation. For example, dominant political actors (such as the Chinese Communist Party) may be able to expand the scope of bureaucratic informalism, (re-) constructing tight links between regulators and regulated parties and relying on such tools as administrative guidance. They may do so to capture the benefits of flexible, even responsive, regulation in circumstances of dynamic change. Furthermore, dominant parties have the ability to use the Party apparatus itself to monitor and punish bureaucratic errors and malfeasance. This means there is less need to use third-party monitoring in the first place.

Still, administrative law frameworks, like primary regulatory rules, have the quality of establishing their own communities around them once in place. The much-criticized Administrative Procedures Act in the United States has never been changed despite numerous proposals to do so. Interest groups develop around the legal opportunities that are made available to them, and may resist efforts to restrict

their access (or expand access for their opponents). Nor is it likely that specialized administrative courts can be disbanded without a major constitutional revolution. While we have seen the establishment of *new* administrative courts and specialized benches (e.g. in Korea, Indonesia and Thailand, with similar proposals circulating in Japan), it is rare to see an administrative court merged into the ordinary court system. In short, then, inertia can make switching costs of change prohibitive and the disbanding of institutions difficult. When judicial control becomes an effective solution to the problem of regulatory power, it itself becomes resistant to easy change.

The key variable, then, may be the political communities that grow up around judicial structures. If a strong independent bar develops, for example, it may find that there is good business to be done using administrative law tools to obtain benefits for private parties. Interest groups may develop litigation-based strategies for shaping regulatory outcomes. And, to the extent that judicialization delivers better and more legitimate policies, as the proponents of extensive judicial involvement have argued, the public may play an important role as a bulwark against interference with judicial involvement. All these actors can help defend courts against overt political interference.⁵⁰

Stone Sweet models judicialization as a feedback cycle, of continuous articulation and refinement of governance. His stylized model does not purport to examine the endurance of judicialization, but suggests that the continued viability of judicial involvement in regulatory governance depends on the specific political configurations in place. Judicialization is sustained by concrete actors who rely on it in strategic encounters. If these actors are or become powerful enough, the feedback cycle can indeed become embedded and resist change. On the other hand, the scope of judicial power in the regulatory arena is subject to ultimate control by strong political actors. A dominant political coalition can limit and shape the scope of judicial involvement in governance. Whether it wishes to do so, though, may depend on the deeper processes of juridification. If judicial articulation of normative structure becomes taken for granted and part of the culture, dominant parties may accept it as part of the landscape, an unquestioned constraint. When this happens, judicialization is indeed irreversible.

Conclusion

Many of the writings on judicial involvement in regulatory governance concern the European Union and the United States, large federalisms with multiple different regulators in non-hierarchical relationships. The papers in this volume will consider the extent to which similar phenomena have occurred in the context of nation-states in Asia, where regional architecture is still in a nascent phase. They have described administrative law frameworks, many of which are in flux, that have for the most part seen greater involvement by judges in constraining regulated parties.

This chapter has considered, at a broad level, some of the causes and consequences of judicialization of administrative governance. It has speculated

that judicialization is a process with multiple causes whose interaction dictates the scope of judicial involvement. Though international factors and economic change play an important role in pressuring systems to move toward judicialization, local political circumstances play a crucial role in dictating the timing and scope of judicialized governance. More importantly, local factors may dictate the sustainability of the judicial solution to problems of bureaucratic oversight.

As for the normative question about whether all this is a good thing, much depends on where one stands. As a positive matter, we can say that judges who insert themselves into the regulatory process are likely to be seen as performing a crucial role in governance, and if they are doing their jobs properly, will occasionally be criticized for over-stepping their “natural” boundaries. Criticism comes with the territory, and is a sign that judges in the region are becoming more like their counterparts elsewhere.

Notes

- 1 N. Tate and T. Vallinder, *The Global Expansion of Judicial Power*, New York: New York University Press, 1995.
- 2 See especially: R. Sieder et al., eds., *The Judicialization of Politics in Latin America*, Basingstoke: Palgrave Macmillan, 2005; Also: R. Gargarella et al., eds., *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, Aldershot: Ashgate Publishing, 2006.
- 3 J. Ferejohn, “Judicializing Politics, Politicizing Law”, *Law & Contemporary Problems*, 65, 2002, pp.41–68; A. Stone Sweet, *The Birth of Judicial Politics in France*, New York: Oxford University Press, 1992.
- 4 R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge: Harvard University, 2004; T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, New York: Cambridge University Press, 2003.
- 5 T. Ginsburg and R. Kagan, eds., *Institutions and Public Law: Comparative Approaches*, New York: Peter Lang, 2005.
- 6 C. Johnson, *MITI and the Japanese Miracle*, Stanford: Stanford University Press, 1982; K. Jayasuriya, ed., *Law, Capitalism and Power in Asia*, London: Routledge, 1999.
- 7 A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, New York: Oxford University Press, 2000; J. Ferejohn, and P. Pasquino, “Rule of Democracy and Rule of Law”, in J. M. Maravall and A. Przeworski, eds., *Democracy and The Rule of Law*, New York: Cambridge University Press, 2002; N. Tate and T. Vallinder, *The Global Expansion of Judicial Power*, New York: NYU Press, 1995; Hirschl, op. cit.; M. Shapiro and A. Stone Sweet, *On Law, Politics, and Judicialization*, New York: Oxford 2002; J. Ferejohn, “Judicializing Politics, Politicizing Law”, *Law & Contemporary Problems*, 65, 2002, pp.41–68; R. H. Pildes, “The Supreme Court, 2003 Term: Foreword: The Constitutionalization of Democratic Politics”, *Harvard Law Review*, 118, 2004, pp.29–154.
- 8 R. Hirschl, “The New Constitutionalism and the Judicialization of Pure Politics Worldwide”, *Fordham Law Review*, 75, 2006, pp.723.
- 9 Morgan, “The Internationalisation of Economic Review of Legislation: Non-Judicial Legalisation”, in T. Ginsburg and R. Kagan, eds., *Institutions and Public Law: Comparative Approaches*, New York: Peter Lang, 2005.
- 10 Stone Sweet and Shapiro, op. cit.
- 11 M. Shapiro, *Courts: A Comparative and Political Analysis*, Chicago: University of Chicago Press, 1981.

18 Tom Ginsburg

- 12 R. Hirschl, *op. cit.*
- 13 Ginsburg and Kagan, eds., *op. cit.*
- 14 Thus one should not speak of juristocracy (cf. Hirschl 2004) so much as judicial participation in broader patterns of governance.
- 15 Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century (June 12, 2001).
- 16 M. Shapiro, *Who Guards the Guardians? Judicial Control of Administration*: Athens: University of Georgia Press, 1988.
- 17 C. Milhaupt, "A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law", *Harvard International Law Journal*, 37, 1996, pp.3–64.
- 18 A. MacIntyre, *The Power of Institutions: Political Architecture and Governance*, Ithaca: Cornell University Press, 2003.
- 19 R. Kagan, *Adversarial Legalism: The American Way of Government*, Cambridge: Harvard University Press, 2002; J. M. Ramseyer, "The Puzzling (In)Dependence of Courts", *Journal of Legal Studies*, 23, 1994, pp.721–747; Ginsburg, *op. cit.*
- 20 A brief consideration of the democratic status in other regions of the world confirms this. Russia and the former Soviet Republics have settled into a pattern of renewed authoritarianism, albeit with the trappings of democracy; Latin America is undergoing a wave of populism and strongman rule; Africa has seen democratic stagnation; and democracy has been stillborn in much of the Arab world. Only in Central Europe and the Southern Cone of Latin America (with Brazil) has democracy been consolidated on any kind of large scale during the "Third Wave".
- 21 D. C. North and B. R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England", *Journal of Economic History*, 49, 1989, pp.803–832; T. Ginsburg and T. Moustafa, eds., *The Politics of Courts in Authoritarian Regimes*, forthcoming.
- 22 *Ibid.*; Jayasuriya, ed., *op. cit.*, p.17.
- 23 J. Cooper Ramo, *The Beijing Consensus*, London: Foreign Policy Centre, 2004; R. Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?*, New York: Cambridge University Press, 2007.
- 24 B. David, "Magic Memos, Collusion, and Judges with Attitude: Notes on the Politics of Law in Contemporary Indonesia" in K. Jayasuriya, ed., *Law, Capitalism and Power in Asia*, London: Routledge, 1999, pp.233–52; P. Leyland, "Droit Administratif Thai Style: A Comparative Analysis of the Administrative Courts in Thailand", *Australian Journal of Asian Law*, vol.8, no.2, 2005, pp.121–154; Ginsburg, *op. cit.*
- 25 C. Epp, *The Rights Revolution*, Chicago: University of Chicago Press, 1998.
- 26 T. Halliday et al., *Title*, Oxford: Hart Publishing, forthcoming.
- 27 J. Goldstein et al., "Introduction: Legalization and World Politics", *International Organization*, 54, 2000, p.385.
- 28 General Agreement on Tariffs and Trade 1994, 15 April 1994; Marrakech Agreement Establishing the World Trade Organization, Annex 1A, art X, 1867 UNTS 187, 33 ILM 1153 (1994). Note that Article X.3(c) qualifies the obligation so as not to "require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the Contracting Parties with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph".
- 29 WTO 1999, The Fundamental WTO Principles of National Treatment, Most-Favored Nation and Transparency.
- 30 J. Meyer, "The World Polity and the Authority of the Nation-State" in A. Bergesen, ed., *Studies of the Modern World-System*, New York: Academic Press, 1980, pp.109–37.

- 31 A. MacIntyre, *Business and Government in Industrializing Asia*, Ithaca: Cornell University Press, 1997.
- 32 G. Majone, *Evidence, Argument, and Persuasion in the Policy Process*, New Haven: Yale University Press, 1989.
- 33 B. Ackerman, *We the People Vol 1.*, Cambridge: Harvard University Press, 1992; but also for an account that emphasizes earlier developments see: S. Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920*, New York, Cambridge University Press, 1982.
- 34 Dwight David Eisenhower, Farewell Address, January 17, 1961 (“In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist”.)
- 35 Rachel Carson, *Silent Spring*, New York: Houghton Mifflin, 1962.
- 36 The economic theory of collective action, developed by Olsen 1971, provided intellectual underpinnings for this idea: since small groups with a lot at stake are likely to care more about policies than large groups like consumers or taxpayers, the interests of industry are likely to win out over the general interest.
- 37 568 F. 2d 240 (2d Cir. 1977).
- 38 E.g. *Motor Vehicle Manufacturing Assn v. State Farm*, 463 U.S. 29 (1983).
- 39 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).
- 40 *Association of Data Processing Service Organizations v. Federal Reserve Board*, 745 F.2d 677 (D.C. Cir. 1984).
- 41 M. Shapiro, *Courts: A Comparative and Political Analysis*, Chicago: University of Chicago Press, 1981.
- 42 *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).
- 43 *Chevron USA v. NRDC*, 467 U.S. 837 (1984). The issue concerned an environmental law that required the Environmental Protection Agency (EPA) to regulate emissions from each “stationary source of pollution” and said that new sources had to have the best available technology to minimize pollution. Previously, the EPA had interpreted “source” to mean each smokestack in a polluting factory. After the election of the pro-business President Reagan, the EPA passed a rule stating that manufacturers could treat each factory as a single source, so that new technology need not be used for every smokestack, but only where required if total pollution from the whole factory increased. In dealing with this question, the court announced a famous two-step test for considering agency interpretations of law. First, courts were to ask if the statutory language being interpreted was unclear. If the answer was yes, then the court was to defer to reasonable agency interpretations of the law. In other words, the agency was seen to have as much or more expertise in interpreting statutes than the court.
- 44 *Chevron* was thrown into some confusion by a later case, *United States v. Mead Corp.*, 120 S. Ct. 2164 (2001), and many scholars believe this will be subject to clarification by the Supreme Court in coming years.
- 45 A. Samaha, “Undue Process”, *Stanford Law Review*, 59, 2006, pp.601–72.
- 46 R. Kagan, op. cit. 2002; J. Wilson, *Bureaucracy*, New York: Basic Books, 1989; R. Kagan and L. Axelrad, *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism*, Berkeley: University of California Press, 2000.
- 47 T. Ginsburg, “Confucian Constitutionalism? Globalization and Judicial Review in Korea and Taiwan”, *Law and Social Inquiry*, vol.27, no.4, 2002, pp.763–800.
- 48 M. Dorf, “Legal Indeterminacy and Institutional Design”, *New York University Law Review*, 78, 2003, pp.875–981; M. Dorf and C. F. Sabel, “A Constitution of Democratic Experimentalism”, *Columbia Law Review*, 98, 1998, pp.267–473.
- 49 J. M. Ramseyer and E. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan*, Chicago: University of Chicago Press, 2003.
- 50 Epp, op. cit.

