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978-1-107-04367-1 - Due Process of Lawmaking: The United States, South Africa, Germany, and the European Union

Susan Rose-Ackerman, Stefanie Egidy and James Fowkes

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DUE PROCESS OF LAWMAKING

With nuanced perspective and detailed case studies, *Due Process of Lawmaking* explores the law of lawmaking in the United States, South Africa, Germany, and the European Union. This comparative work deals broadly with public policymaking in the legislative and executive branches. It frames the inquiry through three principles of legitimacy: democracy, rights, and competence. Drawing on the insights of positive political economy, the authors explicate the ways courts uphold these principles in the different systems. Judicial review in the American presidential system suggests lessons for the parliamentary systems in Germany and South Africa, while the experience of parliamentary government yields potential insights into the reform of the American law of lawmaking. Taken together, the national experiences shed light on the special case of the European Union. In dialogue with each other, the case studies demonstrate the interplay between constitutional principles and political imperatives under a range of different conditions.

Susan Rose-Ackerman is the Henry R. Luce Professor of Jurisprudence (Law and Political Science) at Yale University. She has published widely on administrative law, corruption, federalism, and law and economics. She is the author of *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (2005) and *Corruption and Government: Causes, Consequences, and Reform* (1999) (translated into seventeen languages; second edition, with Bonnie Palifka, forthcoming). Her current research and teaching interests are the comparative study of administrative law and public policy analysis, with a focus on the United States and Western Europe, and the political economy of corruption and its control. She directs the program in comparative administrative law at Yale Law School.

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Preface

This project began with a conversation among the three authors at Yale Law School about our joint interest in comparative public law, especially administrative law and the law of lawmaking. Over time it developed into a book manuscript as we shared drafts and discussed new issues. Our book's title is borrowed from the title of a seminal article by Hans Linde that was one inspiration for our project. That article, *Due Process of Lawmaking*, published in 1975, focused on judicial review of the legislative process at the federal and state levels in the United States. We build on his analysis to contrast the legislative with the administrative process and to compare the United States with Germany, South Africa, and the European Union.

One of us, Rose-Ackerman, has been interested in comparative administrative law and public policymaking since 1991–2 when she spent a year in Berlin under Fulbright and Guggenheim fellowships. The result was a book, *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States* (1995), that combines legal and social science analyses to contrast executive branch policymaking processes in the two countries. Ten years later she lived in Budapest and wrote a companion book on executive policymaking in Eastern Europe entitled *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (2005). With this background, she has developed a broader interest in comparative policymaking processes in the executive and in independent agencies, but the legislative process is, for her, a new topic.

Stefanie Egidy's and James Fowkes's comparative law interests were fuelled by their studies at Yale Law School combined with their research in their home countries of Germany and South Africa, respectively. Both have carried out research that complements the present study. Egidy's doctoral research analyzes German and U.S. policy during the financial crisis in 2008/2009. Government responses to that crisis raise fundamental questions

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about the constitutional requirements of the legislative process in urgent, multidimensional situations where legislative and executive powers interact. It reflects her deeper interest in the ways procedure can help safeguard constitutional values. Fowkes's doctoral thesis, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (J.S.D., Yale Law School, 2014), draws on both legal and political theory to understand the work done by the South African Constitutional Court since its creation in 1995 as well as the vital, underacknowledged role of the African National Congress government in constructing the country's celebrated constitutionalism.

Our conversations on the law of lawmaking were motivated by two constitutional law cases, one from Germany and one from South Africa, that are striking to an American scholar of public law. In the South African case, *Doctors for Life*, the Constitutional Court struck down two statutes because there was insufficient consultation before passage. In the German case, *Hartz IV*, the Constitutional Court voided part of a statute because the legislature did not articulate the factual basis of key provisions. These decisions contrast with the American case, where legislative procedures and reasons are seldom subject to court review. Of course, as we examined these cases and the legal landscape further, we discovered much nuance and complexity in all three legal regimes, a complexity that is also reflected in the experience of the European Union, a case that we added for contrast and because the German case operates with the European Union as a background.

We began with the goal of writing a law review article, but the project soon developed a logic of its own and grew to book length as we moved beyond our initial interest in judicial review of the legislative process. We saw that we also needed to draw on our interests in administrative law to compare democratic accountability, technical competence, and the protection of rights in both the legislative and the rulemaking processes in the executive and the independent agencies. The result, we hope, will provide insights not only to public lawyers and policymaking in our case study countries, but also to those in other polities seeking ways to enhance the democratic accountability of both the legislature and the executive without sacrificing competence or the protection of rights.

Several people commented on portions of the draft within their areas of expertise. We wish to thank Bruce Ackerman, Tom Ginsburg, Michaela Hailbronner, Jonathan Klaaren, Patrick Luff, Jud Matthews, Joana Mendes, Nicholas Parrillo, Matthias Roszbach, Ewold Sakkers, Johannes Saurer, Kevin Stack, Peter Strauss, and the Cambridge University Press referees for their essential help as the manuscript developed. We are also very grateful

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