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ORIGINAL ARTICLE

The enactment of public participation in rulemaking: A comparative analysis

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Abstract

This study analyzes the enactment of public participation in rulemaking within the European Union and the Organization of Economic Cooperation and Development countries. It relies on an original dataset of administrative procedural acts and administrative laws concerning the making of delegated legislation. As 12 out of 39 countries enacted a procedure of notification, publication, and consultation between 1995 and 2015, the study focuses on courts while controlling for other domestic institutional determinants of legislative adoption and countries' interdependence. The empirical findings show that countries with a highly independent judiciary system are less likely to enact a comprehensive provision for public participation in rulemaking. This finding highlights a paradox, namely that political systems are more likely to adopt rulemaking to enhance democratic legitimacy if they are characterized by a judicial system that does not actively pursue the legality of rulemaking.

Zusammenfassung

Diese Studie untersucht, wie die Öffentlichkeit an Rechtsetzungsverfahren in den Mitgliedstaaten der Europäischen Union und der OECD mitwirken kann. Hierzu verwendet sie einen neuartigen Datensatz, der Informationen zu den entsprechenden Verwaltungsverfahrensakten und Verwaltungsgesetzen enthält, die die rechtliche Grundlage hierfür schaffen. Zwischen 1995 und 2015 haben 12 der 39 untersuchten Staaten ein entsprechendes Notifizierungs-, Veröffentlichungs- und/oder Konsultationsverfahren eingeführt, was uns dazu bewogen hat, den Untersuchungsfokus dieser Studie auf die Rolle von Gerichten zu legen. Gleichzeitig kontrollieren wir für den Einfluss von alternativen institutionellen Erklärungsfaktoren. Die empirischen Befunde zeigen, dass Länder mit unabhängigen Justizsystemen seltener der Öffentlichkeit die Möglichkeit einräumen, sich an Rechtsetzungsverfahren zu beteiligen.

Dieses Ergebnis ist dahingehend paradox, dass solche politischen Systeme dazu neigen, Vorschriften zur Beteiligung der Öffentlichkeit zu erlassen, die ein Rechtsystem besitzen, welches die Rechtmäßigkeit der entsprechenden Vorgaben nicht aktiv verfolgt.

Résumé

Cette étude examine la manière dont le public participe au processus législatif dans les états membres de l'Union Européenne et de l'OCDE. Pour ce faire, l'étude utilise un nouvel ensemble de données contenant des informations sur les actes de procédure administrative et les lois administratives correspondantes. Étant donné que 12 pays sur 39 ont introduit une procédure de notification, de publication et/ou de consultation entre 1995 et 2015, la présente étude se concentre sur les tribunaux, tout en contrôlant l'influence des autres facteurs institutionnels potentiels. Les résultats empiriques montrent que les pays dotés de systèmes judiciaires indépendants sont moins susceptibles d'offrir au public la possibilité de participer aux processus législatifs. Ce résultat est paradoxal dans la mesure où les systèmes politiques sont plus enclins à légiférer pour renforcer la légitimité démocratique lorsqu'ils sont caractérisés par un système judiciaire qui ne suit pas activement la légalité des prescriptions juridiques.

KEYWORDS

administrative law, consultation, courts, judicial review, judicial independence

INTRODUCTION

In many advanced democracies, the power of lawmaking has shifted significantly from the legislative to the executive branch (Adam et al., 2017; Jakobsen & Mortensen, 2015; Kosti et al., 2019; Limberg et al., 2021). Delegated by the legislature, the executive can make regulations with the same legal force as enabling statutes.[1] It is foremost because of the sharp increase in its use that delegated legislation and its democratic legitimacy have been the subjects of extensive debate (Pünder, 2009; Smismans, 2016; Wagner, 2016).

As the delegation of legislative authority to executive agencies is broad, leaving large room for discretion, public participation and citizen engagement in rulemaking have emerged as a source of democratic legitimation (Rose-Ackerman, 2021).[2] When established within administrative law, public participation in rulemaking equates to a procedure that ensures direct accountability to citizens (Pünder, 2009) and limits the discretion of executive agencies (McCubbins et al., 1999). Affected parties (i.e., regulatory targets) and the general public are empowered to oversee executive agencies (Wagner, 2016) and to be consulted (Rose-Ackerman, 2021). As a 'judicially-policed process' (Ginsburg, 2008, p. 6), the observance of procedural requirements is ensured through judicial review (Jordao & Rose-Ackerman, 2014; Pünder, 2009, 2013; Wagner, 2016). As a result, the formalization

[1]Delegated legislation is enacted by the executive branch as the exercise of a legislative power conferred by or under an act of parliament. This legislation stipulates general and impersonal rules applied to indefinite and future cases (see, e.g., Mattei, 2005, p. 19–20). Following Pünder (2009, p. 354), this article treats regulation as well as delegated, subordinate, and secondary legislation as synonymous.

[2]Rulemaking is a general (administrative law) framework for the making of delegated legislation (Kerwin, 2003). Rulemaking and delegated legislative processes are used here synonymously as the process of sub-legislative rule formation (Ginsburg, 2008, p. 6).

of public participation in legislation encompasses both elements of adversarial legalism: This American style of policymaking not only entails the legal formality of regulatory consultation, but also provides dissatisfied interest groups with the opportunity to challenge executive regulations (Barnes & Burke, 2020; Burke & Barnes, 2017; Kagan, 1991).

Three decades ago, Martin Shapiro predicted that among industrialized states, popular distrust of 'bureaucratic discretion based on claimed expertise' would lead to an increase in citizens demanding greater transparency and participation in rulemaking (Shapiro, 1993, p. 45–46; see also Pünder, 2013, p. 961). The yellow-vest movement in France, local opposition to wind farms and new electric transmission lines in Germany, and anti-vaccination protests around the world are cases in point of the need for 'policymaking accountability' (Rose-Ackerman, 2021). Promoted by international organizations such as the Organization for Economic Cooperation and Development (OECD, 2020) and the World Bank (Johns & Saltane, 2016), procedural requirements of openness and consultation in rulemaking are considered as the most feasible solution to democratize modern regulatory states. This is because they ensure pluralism (Rose-Ackerman, 2021) or deliberative democracy (Hunold, 2001).

However, Shapiro did not specify which political system is more likely to shift toward a more adversarial and American style of governance (Barnes, 2021; Barnes & Burke, 2020; Burke & Barnes, 2017). So, which political system is most likely to adopt an administrative law that compels executive agencies to notify and publish regulatory proposals and receive comments from the public? That is the puzzle of this paper.

Scholars of comparative administrative law rely on theories from political economy to argue that the stronger separation of powers in presidential systems provides incentives to enact public participation in rulemaking. Other scholars argue that distinctive legal orders (Sordi, 2010) and administrative traditions matter (Painter & Peters, 2010). By relying on a systematic content analysis of administrative laws concerning the formation of delegated legislation across the European Union (EU) and the OECD member states, this study goes beyond these conventional explanations. It finds that between 1995 and 2015, the twelve EU and OECD countries that enacted a rulemaking procedure tended to have a less independent judicial system (see also Garoupa & Mathews, 2014).

This study not only contributes to an emerging literature that studies administrative law through methods of comparative policy analysis (Baum et al., 2016; Damonte et al., 2014; Dunlop et al., 2020; Jensen & McGrath, 2010; Page, 2010, 2012), but also highlights the paradox that political systems more likely to adopt rulemaking to enhance democratic legitimacy are characterized by a judicial system that would not actively pursue the legality of rulemaking. This indicates the complexity of designing an effective administrative law that facilitates public participation in rulemaking (see also Rose-Ackerman, 2021, p. 257-260).

The next section reviews the current state of comparative analysis of administrative procedures. The subsequent section introduces judicial independence as a theoretically relevant constraint on the legislative adoption of public participation in rulemaking, and we then describe the concepts, operationalization, data, and methods of the adoption models, before presenting the statistical results. The final section concludes by proposing recommendations for regulatory reform.

INSIGHTS ON THE ENACTMENT OF RULEMAKING IN PARLIAMENTARY SYSTEMS

Administrative law concerns the trade-offs between bureaucratic expertise and democratic legitimacy and between efficiency and administrative transparency. Within the traditional doctrine of separation of powers, democratic legitimacy concerning delegated legislation is indirect and relies on the role of legislatures in prescribing accurate and detailed parameters by which executive agencies can regulate (Bugaric, 2004; Pünder, 2009). Democratic accountability is ensured by parliamentary oversight and the approval of delegated legislations (Pünder, 2009), while judicial review ensures the consistency of regulations with the enabling legislations (Edgar, 2017).

However, the complexity of modern life requires rapid, precise, and large-scale regulatory interventions that parliaments (which lack time and technical expertise) are not able to provide. Accordingly, policy scholars consider it as a necessity for generalist parliaments, which establish policy aims, to delegate legislation to an executive branch that provides day-to-day regulation (Wiener & Man, 2019). This over-reliance on the executive branch (which enjoys a significant degree of autonomy but often lacks democratic legitimation) requires interest groups and citizens to scrutinize and engage with regulatory proposals.

Ultimately, procedural requirements of openness and consultation in rulemaking complement other good governance rules, such as access to government documents (Berliner, 2014), lobby registers (Crepaz, 2017; De Francesco & Trein, 2020), and impact assessments (De Francesco, 2012; Hironaka, 2002). Together, these form an ecology of institutions (Damonte et al., 2014; Dunlop et al., 2020) and a more adversarial style of rulemaking that is characterized by highly detailed and transparent administrative procedures (Kagan, 1997, 2007; Kelemen, 2006, 2012; Kelemen & Sibbitt, 2004).

Scholars have also analyzed efforts to balance the trade-off between regulatory governance efficiency and democratic accountability from a comparative perspective. Both comparative administrative law and comparative public policy attempt to explain the longitudinal change as well as the institutional variance across units of analysis. They rely on positive political theory that 'attempts to model state behavior in terms of the self-interest of the actors involved' (Rose-Ackerman & Lindseth, 2010, p. 5). In a principal-agent model, rulemaking is a procedural fire alarm that organized interest groups can activate by instigating judicial review. Following this logic, parliament would permit a judicial review of rulemaking in order to: i) gain control over executive rulemaking; ii) prevent bureaucratic agencies from drifting; and iii) "lock-in" the actual policy against future changes in government by constraining both future political principals and bureaucratic agencies (McCubbins et al., 1999).

This model, which originally emerged to explain the rise of the American administrative state (McCubbins et al., 1999), has been tested in different constitutional settings. Variation in rulemaking has been explained by differences in constitutional structures across various states (Rose-Ackerman & Lindseth, 2010). The common expectation is that rulemaking is more likely in presidential political systems, where there is clear competition between the legislature and the executive over the control of bureaucratic agencies (Magill & Ortiz, 2010; Moe & Caldwell, 1994). This competition is less evident in parliamentary systems, where the political majority usually controls both constitutional branches; thus, the uncertainty created by legal intervention could be detrimental to the interest of the political principal.

This theoretical expectation has been tested using small-N comparative analyses, enhancing our understanding of the rationale behind the adoption of rulemaking. Baum analyzed the institutionalization of administrative procedure acts (APAs) in the presidential systems of the Philippines, South Korea, and Taiwan (Baum, 2007), as well as Mexico (Baum & Rios-Cazares, 2009), and contended that when facing intra-branch conflicts, presidents (and not only parliaments) have an interest in promoting administrative reforms that limit bureaucratic drifts. In other words, in presidential systems the enactment of APAs is a way for a political principal to control regulators.

Baum, Jensen, and McGrath (2016) applied the principal-agent model for discerning cumulative and cross-sectional adoptions of administrative procedures when examining a large-N sample of parliamentary democracies. Without distinguishing between adjudication and rulemaking, they found that in an electoral competitive environment, there is a strong incentive for incumbents to enact an administrative procedure that would increase the political costs for future governments. By doing so, incumbents can 'lock in' their policy preference, and are willing 'to trade current policy loss for future gain' (Baum et al., 2016, p. 417). This finding illustrates that the above explanation for the adoption of APAs is not exclusive to presidential systems. However, this methodological setup does not allow us to assess which constitutional system is more likely to adopt an administrative procedural act.

Cross-sectional variation in the legislative adoption of public participation in rulemaking may also be explained by the common "enduring affinities" of "families of nations" (Castles, 1998; Castles & Obinger, 2008) and by legal origins (La Porta et al., 1999). Explanations deriving from historical

institutionalism are common in economics (La Porta et al., 1999; Parisi & Fon, 2009), while comparative administrative law relies on taxonomy as 'the grammar of legal discourse' (Mattei, 1997, p. 5; see also Van Hoecke & Warrington, 1998; Bignami, 2011). Furthermore, the concept of legal origins also captures the transplantation of institutional solutions within compatible legal frameworks (Lalenis et al., 2002, p. 34; Mattei, 1997, p. 7). Different historical paths of state formation have resulted in distinctive legal orders (such as the French *droit administratif*, the German *Rechtsstaat*, and English administrative law based on rule of law), which may shape different administrative procedures differently (Amaral-Garcia, 2021; Painter & Peters, 2010; Sordi, 2010).

The executive agencies in Germanic countries are characterized by a strong legalistic orientation. Civil servants are trained to make decisions on the basis of public interest and legality (Halligan, 2021), while detailed and precise legislative frameworks restrict administrative discretion. The English administrative tradition is characterized by 'a civil service system that has the primary role of executing the will of the government of the day' (Halligan, 2021, p. 168). Accordingly, administrative law is less developed than other administrative traditions as the machinery of government routinizes changes in policy agendas, though this is also thanks to the adaptive nature of common law (Halligan, 2021, p. 168). The Nordic or Scandinavian administrative tradition (Lægreid, 2017) is characterized by a policy style based on administrative openness and a transparent form of policymaking that allows stakeholders to engage in policymaking through other types of fire-alarm mechanisms, namely access to government documents and informal consultation within executive agencies.

Countries with a French legal origin or Napoleonic administrative traditions are characterized by the presence of the Council of State, which can be generally considered as 'a super watchman over the activities of the administration to keep it within the law' (Gauropa & Mathews, 2014, p. 20). Although Councils of State have significant independence from political branches, they are part of the executive branch. For this reason, one may expect them to undertake broad judicial review, as Councils of State tend to be more reliable than other administrative courts in other administrative traditions.

Finally, the prevailing view on Central and Eastern European countries (CEECs) turns on the political-economic argument that the formalization of public participation in rulemaking is expected to occur only when there is fierce institutional competition over the control of regulators. As the transition to democracy encourages political competition and the fragmentation of political powers, there has been high demand for the judicial review of bureaucratic discretion in CEECs (Ginsburg, 2008).

It is evident that two different clusters of administrative traditions arise from the political necessity of relying on rulemaking as a direct accountability mechanism to control bureaucracy. On the one hand, countries of French legal origin and CEECs may be more likely to enact public participation in rulemaking; on the other, countries of German, English or Scandinavian legal origin tend not to do so.

This review of empirical analyses of cross-sectional variation in rulemaking indicates that the dominant institutional explanation for enacting public participation revolves around the difference between presidential and parliamentary systems. The literature tends to agree that legislatives and executives of presidential systems would reap greater rewards by legislating rulemaking than would legislatives and executives of parliamentary systems. Further, administrative traditions and legal origins, which serve as proxies for the historical institutionalist explanation, may matter for the adoption of rulemaking.

However, even though courts act as crucial actors in fire-alarm mechanisms (McCubbins et al., 1999; Garoupa & Mathews, 2014), most studies have neglected them. Therefore, the next section discusses courts and their independence as the main explanation for the enactment of public participation in rulemaking.

THE EFFECT OF JUDICIAL INDEPENDENCE ON THE ENACTMENT OF RULEMAKING

Empirical analyses have attested that in parliamentary systems, too, courts control and limit the discretion of the executive branch, since they supplement the role of parliaments in holding the executive accountable (Zwart, 2010). As stakeholders are increasingly seeking judicial redress for procedural correctness in executive policymaking, courts 'are increasingly demonstrating a willingness to take

it upon themselves to scrutinize executive action in the absence of effective legislative oversight' (Zwart, 2010, p. 149). This compensatory role of courts (Flinders, 2001, p. 54–71) provides a new conception of judicial review: Courts review not only the legality of administrative actions that violate the interests and rights of individuals, but also conduct a systematic and structural assessment of whether the executive branch remains within its own constitutional role (Zwart, 2010, p. 149).

In reviewing administrative processes, judges retain 'a sense of law's ultimate supremacy', which manifests itself in their normative commitments to ensure regulations comply with legislative mandates (Zwart, 2010, p. 183). Judges are motivated to deliver justice and promote systematic legitimacy, as shown by several studies. For instance, Magill and Ortiz (2010) have found that British, French, German, and US courts exhibit similar levels of activeness in their reviews of reasonableness. Accordingly, courts need to be considered when explaining cross-national variation in the decision to legislate public participation in rulemaking.

To do so, Garoupa and Mathews (2014) combine the distinction between the low and high autonomy of bureaucratic agencies (the standard explanation in the framework of positive political economy) with the distinction between the low and high autonomy of courts (the contribution of their model). These two dimensions allow them to derive four different configurations of institutional arrangements according to exogenous, constitutional-level features.

Based on a strategic game played by parliament, the bureaucratic agent, and the court, Garoupa and Mathews' model explains the extent of delegation to bureaucratic agencies as well as the extent of judicial review. They argue that for the legislature, 'a low-autonomy court is, all else equal, a more reliable monitor of agency performance than a high-autonomy court: the court faces real costs for defecting from its responsibility, either by privileging its own policy preferences or shirking its responsibility to carry out a meaningful review' (Garoupa & Mathews, 2014, p. 62).

By adopting rulemaking through primary legislation, the legislature opts for a broad scope of judicial review and at the same time procedurally constrains executive agencies to notify, publish, and consult on regulatory proposals. Low-autonomy courts are expected to align with the parliament's policy goals by intervening only when executive agencies exceed the scope of their mandate (Gauropa & Mathews, 2014, p. 16). Only in jurisdictions with low judicial independence does the legislature benefit from empowering courts to monitor executive rulemaking. Indeed, allowing for the judicial review of procedural values expands a court's capacity to subvert the political principal's policy agenda. This risk is much higher in the presence of highly independent courts that are a source of uncertainty in policymaking (Garoupa & Mathews, 2014, p. 4; Ginsburg, 2008, p. 22; on the judicial independence of administrative courts, see more generally Amaral-Garcia, 2021).

Garoupa and Mathew's model, however, needs to be adjusted to the findings of comparative analyses that have shown that both parliaments and executives may benefit from controlling regulators. Through the legal adoption of public participation, the political principal (either the parliament independently or in coalition with the executive if political preferences are closely aligned) can design and calibrate the degree to which court action affects rulemaking. Accordingly, moving beyond the assumption of parliament as the political principal which initiates the legislation of public participation in rulemaking, the main adoption hypothesis is that the greater the independence of courts, the higher the cost that a political principal has to trade off for judicial fire alarms. Thus, our hypothesis is that judicial independence is negatively correlated with the legislative adoption of public participation in rulemaking.

CONCEPTS, OPERATIONALIZATION, DATA, AND METHODS

Dependent variable

The dependent variable of this analysis captures the legislative adoption of rules concerning the notification, publication, and consultation of public participation in rulemaking. Rulemaking is an organic framework for facilitating delegated legislation that can be enacted through an APA. Although an APA

establishes a process designed to facilitate judicial review (West, 1984, p. 344),[3] public participation in rulemaking can be ensured by courts on the basis of other primary legislations, too.

Public participation is essentially composed of three basic requirements: notification, publication, and consultation on regulatory proposals (Base, 2020). These are the main dimensions of public participation in rulemaking as acknowledged, for instance, by the World Bank. Collected between September 2017 and April 2018, the global indicator of regulatory governance focuses on notifying the public of a proposed regulation, publishing its text, and requesting comments on it. These make up three of the five core dimensions of citizen engagement in rulemaking (Johns & Saltane, 2016).[4]

Besides public participation, the other pillar of rulemaking is related to judicial review. As a mechanism of legal accountability (Black, 2008), judicial review is 'scrutiny by the judicial branch of government of decisions and actions of the executive branch to police compliance with rules and principles of "public law"' (Cane, 2004, p. 16). We limit our observation to the presence in administrative laws of a provision of judicial control on procedural requirements for rulemaking, that is, procedural safeguards for participation. We exclude from our analysis the substantive review of rulemaking (Jordao & Rose-Ackerman, 2014). In case the legislation enacting rulemaking does not refer to judicial review, we assume that when activated by stakeholders, courts would ensure compliance with the legislation enacting the rulemaking procedure. If the exclusion of judicial review is expressly stated in the legislation, our dependent variable assumes no adoption, regardless of whether the legislation establishes notification, publication, and consultation on regulatory proposals. In other words, we assume adoption when rulemaking is established by primary law that does not exclude judicial review.

To ascertain the year in which each country enacted public participation in rulemaking, we rely exclusively on a content analysis of the 'administrative law on paper' (Wagner, 2016) database and assess the presence of 'minimal textual requirements' (Watts, 2014) for notification, publication, and consultation. We do this rather than follow the doctrinal evolution of rulemaking, which is difficult to operationalize in a variable.

Our dataset covers 39 EU and OECD member states and the frameworks they adopted between 1995 and 2015.[5] We have excluded Norway and the US from our analysis as rulemaking was established within APAs in those countries in 1967 and 1946 respectively, meaning they adopted their frameworks significantly earlier than when our observation period begins. The dependent variable has a value of 0 if a given country did not adopt in a specific year a primary legislation establishing a comprehensive procedure for notifying, publishing, and consulting on regulatory proposals, and a value of 1 if there was such an enactment.

Independent and control variables

This paper aims to assess judicial independence (*Independence*) as the constraint on the enactment of public participation in rulemaking. We utilize Linzer and Staton's (2015) global measure of latent judicial independence for the operationalization of our hypothesis. All other variables entered into the model function as controls.

[3]For example, the Estonian Administrative Procedure Act (APA), which defines rulemaking as 'a uniform procedure which allows participation of persons and judicial control' (Art. 1 of the Estonian Administrative Procedure Act).

[4]We did not consider the other two questions on the reporting of consultation results and on regulatory impact analysis as there are only a few countries in our sample that have adopted these requirements through primary legislation. This definitional choice excludes the American APA requirement to provide a 'statement of basis and purpose'. However, this requirement can be considered as a functional equivalent of the explanatory memorandum when a delegated legislation is tabled to parliament (Karpen & Xanthaki, 2020) or embedded in the regulatory impact analysis. Both practices are now diffused among all EU and OECD countries.

[5]Australia, Austria, Belgium, Bulgaria, Canada, Chile, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, South Korea, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

To obtain data on political systems, we integrate Cheibub et al.'s (2010) Democracy and Dictatorship dataset (1995-2008) with Version 3.0 of Bormann and Golder's (2020) dataset on Democratic Electoral Systems, which covers democratic elections until 2016, assuming no changes were made in the regime type between the elections held between 2009 and 2015. To capture effects of the political regime, we rely on a binary variable which assumes the value 1 for parliamentary systems (*Parliamentary*) and 0 otherwise. We coded this data using the two-way classification offered by Schwindt-Bayer and Tavits (2016, p. 38-39). With this time-invariant classification system, semi-presidential systems, such as Poland, are either assigned to the category of a parliamentary or a presidential system, depending on their concrete institutional features. Given the small number of countries and the even smaller number of semi-presidential systems in our dataset, this approach appears reasonable to us.

We use the approach of La Porta et al. (1999) for classifying countries according to their legal origin in order to capture legal and administrative traditions. We differentiate between *French*, *German*, and *Socialist* legal origins. The original classification also includes the English and the Scandinavian legal origins. But in light of our country sample and the models fitted with the data, we had to exclude these two categories from our analysis.

Finally, we control for additional explanations related to countries' interdependence. One can expect a more open economic system to be positively correlated with a higher probability of enacting public participation in rulemaking. Economic globalization compels national policymakers to establish pro-business institutions, rather than consciously calculating the benefits and costs of installing a fire-alarm mechanism to control executive agencies. Specifically, the enactment of rulemaking can be interpreted by national reformers as an instrument to curb the excessive burdens on firms and signal administrative state modernity to global investors (De Francesco, 2012; Lodge, 2005). From another perspective, foreign businesses as new entrants have 'less extensive relationships with the local bureaucracies' and tend 'to demand transparency in rule formation and application' (Ginsburg, 2008, p. 8).

To capture the extent of economic globalization, we use the scores for economic globalization as reported by the Swiss Economic Institute (KOF) globalization index. More precisely, we rely on economic globalization de facto (*KOF de facto*) and de jure (*KOF de jure*). De facto economic globalization includes variables that represent economic flows and activities, whereas de jure captures economic policies that, in principle, define economic flows and activities (Gygli et al., 2019).

We also control for country-to-country interdependence based on the number of neighboring countries that have enacted rulemaking prior to a given country (*Neighbors*) (Berry & Berry, 2018). This variable takes into consideration the prior adoptions by Norway and the United States. A given country's participation in OECD and EU networks (*Networks*) could be also positively correlated with the enactment of public participation in rulemaking. International organizations such as the EU and the OECD promote 'affinity groups and partnerships' on the basis of 'multilateral lesson drawing [that] has become more meaningful to institutional transplantation' (Lalenis et al., 2002, p. 49). Transnational networks of reform champions promote the adoption of administrative innovations through technical assistance, institutional and policy evaluation, and training (De Francesco, 2012). In this case, the varying influence of international organizations on countries' interdependence is captured by the number of years a given country has been participating in the OECD and EU networks for better regulatory governance (De Francesco, 2012; Wiener, 2013; Wiener & Ribeiro, 2016).

Tables 1 and 2 present the sources and details as well as the descriptive statistics of each variable. The descriptive information is presented in a manner that reflects the country-years included in the analysis, as this captures the notion of 'risk sets' that underlie event history models. Table 1 presents the information for the interval-level variables, and Table 2 the information for the binary variables.

Adoption models

Comparative analyses of legislative adoption are based on an event history analysis (EHA). The conventional assumption considers adoption as a non-repeatable event. In the EHA jargon, it is a 'single-failure' event. Accordingly, once a country has enacted public participation in rulemaking, the

TABLE 1 Descriptive statistics for interval-level variables.

Variable	Source	N	Mean	SD	Min	Max
Independence	Latent judicial independence between 1995-2015 as an updated version of Linzer and Staton's (2015) dataset	698	0.86	0.15	0.34	0.99
KOF de facto	De facto economic globalization between 1995-2015. An updated, 2021 version of Gygli et al. (2019), available at https://kof.ethz.ch/prognosen-indikatoren/indikatoren/kof-globalisierungsindex.html	698	65.63	15.17	27.67	92.74
KOF de jure	De jure economic globalization between 1995-2015. An updated, 2021 version of Gygli et al. (2019), available at https://kof.ethz.ch/prognosen-indikatoren/indikatoren/kof-globalisierungsindex.html	698	78.53	12.20	37.77	96.86
Neighbors	Counter of neighboring countries which enacted public participation in rulemaking. Authors' calculation	698	0.50	0.69	0	4
Network	Number of years of participation in OECD and EU better-regulation networks. Authors' calculation	698	8.81	6.41	0	21

TABLE 2 Descriptive statistics for binary variables.

Variable	Source	Response	Total	Percent	Cumulative Percent
Parliamentary	Cheibub et al.'s (2010, 69) Democracy and Dictatorship (DD) data (1995-2008) and Bormann and Golder's (2020) Version 3.0 of Democratic electoral systems (DES) dataset between 2009-2015	No (0)	280	40.11	40.11
		Yes (1)	418	59.89	100.00
French	La Porta et al. (1999)	No (0)	482	69.05	69.05
		Yes (1)	216	30.95	100.00
German	La Porta et al. (1999)	No (0)	622	89.11	89.11
		Yes (1)	76	10.89	100.00
Socialist	La Porta et al. (1999)	No (0)	523	74.93	74.93
		Yes (1)	175	25.09	100.00

procedure ceases to be considered at risk and the subsequent observations for the country concerned are dropped from the analysis.

Cox regression models offer an apt means of analyzing the impact of judicial independence while controlling for other internal determinants (parliamentary systems and administrative traditions on legislative adoption), as well as the geographical proximity of prior adopters, the influence of economic globalization, and transnational networks. Such models produce hazard ratios, which measure how much a covariate increases or decreases the 'rate' of a given event. The basic assumption of the Cox model is that the estimated parameters are not associated with time, which means that they should be proportional over time. Therefore, we must assess for any Cox model whether the proportional-hazards assumption holds.

While the Cox model represents the main technique of analysis, we also estimate Weibull models to check the robustness of the findings. These are very similar to Cox models, as they allow for the flexible inclusion of covariates. But in contrast to the former, Weibull models are parametric, meaning they are based on certain distributional assumptions. When these assumptions are met, Weibull models produce findings similar to those produced by Cox models.

We apply a second robustness check by fitting logit models with cubic splines. The cubic splines (t, t^2 and t^3) are necessary to account for the potential risk that observations could be temporally dependent (Buckley & Westerland, 2004; Carter & Signorino, 2010). A second issue with pooled

data is that they are highly at risk of correlated errors and therefore of violating the assumption of independence across observations, which could lead to biased estimates and misleading significance tests. Therefore, we compute robust standard errors clustered by countries to address correlated and non-identically distributed errors in the analysis.

EMPIRICAL FINDINGS

Estonia, Mexico, and South Korea have adopted administrative procedures that include rulemaking (see Appendix 1) and therefore correspond to the US-American approach. Nine other countries have adopted an APA functional equivalent. Bulgaria, Lithuania,[6] and Hungary define rulemaking within organic laws of the broader legislative process, which includes both primary and secondary legislation. In Spain, the law on government specifies the delegated legislation process. Good governance reforms played an important role in three further countries: While in Romania the law on transparency establishes rulemaking, in Poland it is defined within the lobbying act, and in Switzerland within the legislation on public consultation. Finally, in Croatia and Greece, rulemaking has been adopted through legislation on better regulation and regulatory impact analysis.[7]

Turning to the judicial-review component of rulemaking, our content analysis shows that most of the countries which adopt administrative law also specify judicial review in their texts. In the cases of Bulgaria and Hungary, we assume that a general judicial review would ensure the legality of the rulemaking process, which in turn would ensure the legality of delegated legislation. Finally, it is interesting to note that Australia and Chile exclude judicial review from their consultation process.

Table 3 presents the findings of our Cox models for 39 countries. The table includes a total of eleven models, which are estimated using a varying number of covariates. Model 1 includes *Independence* only as a covariate, but the subsequent models, model 2 to model 7, include *Independence* plus one additional covariate. Model 8 then includes two additional covariates, which capture the number of countries in the neighborhood that adopted rulemaking and the countries' participation in OECD and EU networks. Models 9 to 11 are more wholesome models and only exclude the variables for legal origin. The latter are excluded because two of the original types dropped out, which makes interpretation less clear when included jointly in a model.

The eleven models reveal a remarkably consistent finding, namely that one covariate succeeds in producing robustly significant exponentiated coefficients: *Independence*. In all models, the exponentiated coefficients suggest that a higher degree of *Independence* reduces the likelihood of adopting a legislative act on rulemaking. The Akaike Information Criterion (AIC) reveals that model 1, which includes only this covariate, has the best fit since lower values are associated with a better model fit. For all models, the proportional-hazards assumption holds, as the insignificant p-values of the corresponding test show.

Table A3.1 in Appendix 3 reveals that the Weibull models produce very similar findings. Table A3.2 presents the findings of the logit models with cubic splines, which produce the same overarching finding, though the coefficient for *Independence* in model 5 fails to reach conventional levels of significance. However, taken together, there is a remarkably consistent empirical finding, namely that latent judicial independence is the single most important factor for explaining the adoption of rulemaking in advanced democracies. Consequently, we can confirm our main hypothesis: Judicial independence is negatively correlated with the legislative adoption of public participation in rulemaking.

[6]Lithuania is the only country that has reformed its rulemaking twice: first, with a reform of administrative law enacted in 1999 concerning consultation; then by adopting fully fletched rulemaking (Law on the Legislative Framework of 2012).

[7]In the remaining countries, parliaments have chosen either to exclude judicial review from rulemaking legislation or not to legislate public participation in rulemaking. Appendix 2 shows that in a large proportion of EU and OECD countries, rulemaking is established through executive regulation or within the executive policymaking guidelines.

TABLE 3 Cox proportionate-hazards models.

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8	Model 9	Model 10	Model 11
	Exp(β)	Exp(β)	Exp(β)	Exp(β)	Exp(β)	Exp(β)	Exp(β)	Exp(β)	Exp(β)	Exp(β)	Exp(β)
Independence	0.037***	0.031***	0.034***	0.031***	0.097*	0.023***	0.035***	0.013***	0.019***	0.013***	0.019***
	(0.034)	(0.030)	(0.032)	(0.028)	(0.130)	(0.029)	(0.041)	(0.019)	(0.029)	(0.019)	(0.028)
Parliamentary		1.305								0.688	0.719
		(0.584)								(0.539)	(0.533)
French			0.656								
			(0.339)								
German				1.799							
				(0.905)							
Socialist					2.407						
					(1.316)						
KOF de facto						1.009				1.002	
						(0.014)				(0.017)	
KOF de jure							1.001		0.989		0.990
							(0.017)		(0.023)		(0.022)
Neighbors								0.646	0.655	0.598	0.609
								(0.244)	(0.248)	(0.298)	(0.298)
Networks								1.177	1.189	1.195	1.208
								(0.159)	(0.164)	(0.194)	(0.201)
n	698	698	698	698	698	698	698	698	698	698	698
N	39	39	39	39	39	39	39	39	39	39	39
AIC	85.294	87.182	86.872	86.801	85.419	87.112	87.291	86.830	88.691	90.674	90.568
PH Test	0.7864	0.5463	0.8159	0.6777	0.1991	0.6050	0.9623	0.7882	0.8853	0.1493	0.2246

Notes: * p<0.10, ** p <0.05, *** p <0.01; AIC = Akaike Information Criterion; PH Test = global test for proportionate hazards; total number of adoptions = 12. The table reports exponentiated coefficients.

DISCUSSION AND CONCLUSION

By conducting an extensive content analysis of primary sources related to administrative laws concerning the way EU and OECD countries notify, publish, and consult on proposals for new delegated legislations, this study shows that the US model of rulemaking is not in fact unique. Since 1995, twelve countries have adopted a judicially supervised process of notifying, publishing, and consulting regulatory proposals.

The adoption hypothesis draws on an emerging political theory of comparative administrative law that emphasizes the judicial action in reviewing the legality of executive rulemaking. Lawmakers in countries characterized by an independent judicial system tend not to enact public participation in rulemaking; they thereby avoid a more adversarial form of regulatory governance by carrying out a procedural judicial review of how executives consult and engage citizens in delegated legislation. We were able to confirm this hypothesis while controlling for the conventional explanations of parliamentary systems and administrative traditions, as well as for neighboring effects, economic globalization, and the number of years a country has participated in transnational networks of regulatory reform.

Although qualitative evidence exists of transnational influence, such as in the cases of Greece (e.g., Danopoulos, 2015; Hatzis & Nalpantidou, 2007) and Croatia (e.g., Barić & Miloš, 2016), the statistical findings confirm on average that judicial independence is generally the main and only constraint for lawmakers to pass legislation that permits public participation in rulemaking. Further, seven out of the twelve countries that adopted such rules are CEECs. The transition to democracy of former socialist countries was a critical juncture that magnified internal as well as external factors for enacting rulemaking and allowing public participation. Both the administrative fragmentation inherited from the soviet regimes and the pursuit of EU membership allowed national and international promoters[8] of reforms to design a more open and transparent system for administrative rulemaking (see, e.g., Sarapuu, 2011).

Turning to the prediction of countries that would lag in enacting public participation in rulemaking and in providing room for a more adversarial form of regulatory governance, political principals within Westminster and Scandinavian parliamentary systems tend to rely on other cost-effective institutional solutions than judicial review to avoid agency drift. While Westminster systems rely on loyal civil servants and parliamentary control of the production of statutory acts, the actions of Scandinavian executives are generally open to scrutiny, and the openness and transparency of decision-making are high (Lægreid, 2017; Ziller, 2001).

As there are instances of adoption among countries of German and French legal origin, it is plausible that future adopters would be among these groups of countries with specialized administrative courts (Garoupa & Mathews, 2014). In particular, France and Italy conduct procedural judicial reviews of regulatory impact assessments. As these countries are also characterized by the existence of the Council of State, which belongs to the administration and is regarded as a low-autonomy court, they are the most plausible next countries to enact public participation in rulemaking (Garoupa & Mathews, 2014).

Public consultation in rulemaking is one of the main features of adversarial regulatory decision-making, as this entails more legal formalities and judicial review (Kagan, 1991). In his review of Kagan's work, Epp (2003, p. 766) argues that judicial checks are becoming increasingly common in countries traditionally characterized by bureaucratic approaches to regulatory governance. We found out that this occurs in countries with a low level of judicial independence. This is a novel contribution to the emerging literature of this field, which stresses the political nature of the dynamic relationship between the legislative and the executive, on the one hand, and the judicial branches, on the other. While researchers recognize that courts are embedded in a political system that constrains their action (McCubbins & Rodriguez, 2008), until now they have neglected the independence of

[8]In particular, the OECD-SIGMA program facilitated the promotion and adoption of comprehensive administrative reform (Demir, 2017; Goetz, 2005), including administrative procedural law (OECD, 1997; Rusch, 2009).

courts as the main independent variable of the design of administrative law and regulatory governance, especially when conducting a large-N comparison.

Overall, this study alerts advocates of national and international regulatory reform about the persistence of domestic institutions, especially of courts characterized by high-level of independence. While this institutional feature is a constraint in the pursuit of comprehensive packages of administrative reform, it does not matter for administrative innovations, such as regulatory and environmental policy appraisal systems. This results in a paradox: Political systems that are more likely to adopt rulemaking are characterized by courts which are less independent from political branches and consequently less likely to exercise meaningful scrutiny of executive delegated lawmaking. Accordingly, international organizations and transnational epistemic networks should be aware of the potential trade-off between policy programs that aim to enhance the independence of judicial systems and the rule of law and policy programs aimed at increasing citizens' engagement in rulemaking.

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This article has earned an Open Data badge for making publicly available the digitally-shareable data necessary to reproduce the reported results. The data is available at https://doi.org/10.15129/a86bb8f7-b33b-4e1d-b459-f6a0396effcc.

DATA AVAILABILITY STATEMENT

The data that support the findings of this study are openly and permanently available in the data repository of the University of Strathclyde: https://doi.org/10.15129/a86bb8f7-b33b-4e1d-b459-f6a0396effcc.

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SUPPORTING INFORMATION

Additional supporting information can be found online in the Supporting Information section at the end of this article.

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