THE CHOICE OF DECISIONMAKING METHOD: ADJUDICATION, POLICIES AND RULEMAKING

*Hudson N. Janisch**

The point at issue here has nothing to do with the question of whether the regulations justifying the actions of government are uniform for the whole country or whether they have been laid down by a democratically elected assembly. There is clearly need for some regulations to be passed by local ordinances, and many of them, such as building codes, will necessarily be only in form and never in substance the product of majority decisions. The important question again concerns not the origin but the limits of the powers conferred. Regulations drawn up by the administrative authority itself but duly published in advance and strictly adhered to will be more in conformity with the rule of law than will vague discretionary powers conferred on the administrative organs by legislative action.

Friedrich August von Hayek[1]

1. *Introduction*

One of the most distinctive aspects of the administrative process is the flexibility it affords in the selection of methods of decisionmaking. While a legislature must normally confine itself to the declaration of generally applicable standards of conduct and a court must deal with a problem as defined by the particular controversy before it, an administrative agency may often choose between these approaches or may even reject

**Faculty of Law, University of Toronto.*
I would like to thank Scott Martin (U of T Class of 1993) for his research assistance and John Evans and Harry Arthurs for their insightful comments. I remain, of course, solely responsible for any errors, omissions or misconceptions.

[1] F.A. Hayek, *The Constitution of Liberty*, (Chicago: Henry Regnery, 1972) 226.

them both in favour of more informal means of decisionmaking. Indeed, it was this freedom to choose between rules, policies and adjudication (along with the power to investigate and prosecute) which caused John Willis to characterize the administrative tribunal as "government in miniature".[2]

I propose in this lecture to develop the thesis that we place too much emphasis on adjudication and not enough on policies and rulemaking. Rulemaking, it will be suggested, remains singularly underdeveloped in Canadian administrative law while policies, where resorted to, are not always readily reconcilable with the grant of legal authority.[3]

I will, of necessity, have to pitch my argument at a fairly high level of generalization. This may prove my undoing because,as the title to this iteration of Special Lectures, "Administrative Law: Principles, Practice and Pluralism", suggests, a degree of desirable tension exists between general principles of administrative law and the actual practice of particular administrative agencies. This means that one may only generalize at one's peril. However, I set off on this journey in part because as an academic whatever comparative advantage I possess suggests that I would be wise to avoid the particular and cloak myself about with a protective mantle of generalization, and in part because I believe that the wide variety of administrative functions does not preclude the existence of common ground. Indeed, I would urge that respect for pluralism should never lead to an entire abandonment of common underlying principles.

To a considerable extent, I am emboldened in my determination to generalize about the choice of decisionmaking methodologies, even in the face of an assertion of pluralism, by the comforting presence of commen-

[2] J. Willis, "Three Approaches to Administrative Law: The Judicial, The Conceptual And The Functional" (1935) 1 U.T.L.J. 53 at 56. While Willis did not address the issue of choice directly, having recognized that legislative powers to set new standards and adjudicative powers to decide particular cases, ("functions traditionally exercised by separate arms of government") had been combined in the administrative tribunal, it followed that choices would have to be made as to which way to proceed.

[3] See H.N. Janisch, "Reregulating the Regulator: Administrative Structure of Securities Commissions And Ministerial Responsibility," in Special Lectures of the Law Society of Upper Canada 1989, *Securities Law in the Modern Financial Marketplace*, (Toronto: De Boo, 1990) 78.

Rulemaking has for many years been a central issue in the study of administrative law in the U.S., and choice of decisionmaking methodology a staple in public policy discussions. However, as the General Counsel of the U.S. Administrative Conference has noted: "It is a challenge to address the recurring dispute over the agency's freedom to choose between rulemaking and adjudication as a means of developing policy. The subject is, as we know, a hardy perennial in administrative law, but inasmuch as the features and relative advantages of rulemaking and adjudication are constantly subject to change, it is doubtful that the issues surrounding the choice between them will ever be put to rest". R.K. Berg, "Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication" 38 Admin. L. Rev. 149 (1986).

sts who come from the more practical side of the admin-
ld. Should we combine our insights into the relative roles
and adjudication, the whole, I am sure, will prove greater
he parts thereof!

Opening Word (or Two) for Rule-making

e outset to call attention to two forceful proposals that
encies make greater use of rulemaking in their day to day
ry contemporary and specific; the other somewhat less
ıt much broader-based. I believe that both will be useful
e overall context in which I would urge that the choice of
ıate be conducted. The first is to be found in the June 26,
he Ontario Human Rights Code Review Task Force,
ty: A Report on Human Rights Reform. The second was
985 *Report on Independent Administrative Agencies, A
Decision-Making* of the Law Reform Commission of

ɔrce, in what I shall call the "Cornish Report" after its
ɔrnish, concluded that the Ontario Human Rights
become "...little more than a claim processing unit".[4]
·gy and resources have been dissipated in an endless task
up with the volume of claims:

> en reactive, not proactive, and geared to individual cases of dis-
> ɔt systemic discrimination. Placing almost all resources into pursu-
> claims and leaving out a broad, strategic approach is costly, time-
> ıd unlikely to bring about positive results. Even if an individual
> ssful, it usually changes the circumstances of the individual only
> e difference in overcoming widespread, systemic discrimination in

legal tool to be relied upon in a shift from a reactive to a
was rulemaking. At present, the Commission does not
o make regulations. The *Code* allows only the govern-
d then only in relation to relatively minor matters. Even
ation-making power has never been used.
d that, under the *Canadian Human Rights Act*,[6] the
Rights Commission has the power to make "guidelines"
ɔn Human Rights Tribunals and that this power had been

y: A Report on Human Rights Reform, 67.

Rights Act, R.S.C. 1985, c. H-6, s.27.

widely employed. It was also noted that agencies responsible for human rights in the United States, such as the Equal Employment Opportunities Commission, have "a long tradition" of making regulations to enforce human rights laws.[7]

In a research paper for the Task Force, Robert Reid stated:

> In ordinary constitutional and administrative law practice, general initiatives are not accomplished by decisions in individual cases, but by regulation. I do not know how the Commission was expected to carry out its broad mandate without wider powers of regulation-making than what at present may be accomplished under s.48, which deals with relatively trivial matters. *The Commission was given a sweeping mandate to eradicate discriminatory practices in this province, but no apparent power to carry it out.*[8]

The Task Force concluded: "The setting of regulations will create clear standards that will bring about systemic change. Pursuing a great many individual cases can take many years and have haphazard effect".[9] In coming to its recommendation that a reconstituted agency, Human Rights Ontario, "...be given the express power to issue legally binding rules and regulations in order to carry out its mandate to advance full and effective achievement of the *Code's* purposes",[10] the Task Force quoted with approval a fulsome American assessment of the manifold benefits of rule-making.

> ...The rulemaking process can be both fairer and more efficient than case-by-case adjudication. Rulemaking proceedings can put all affected parties on notice of impending changes in regulating policy, and give them an opportunity to be heard before the agency's position has crystallized. A rule can also resolve in one proceeding issues which might remain unclear for years if the case-by-case approach were followed. A clear general rule can produce more rapid and uniform voluntary compliance... than standards which are linked to the facts of particular cases.[11]

Whether it is compatible with the traditions of Canadian parliamentary government to grant extensive rulemaking authority to an independent administrative agency, and whether the benefits of rulemaking are quite as compelling, are matters to which we shall have to return. In the meantime, the Cornish Report may act as a forceful contemporary call to rulemaking arms.

In turning to the Law Reform Commission of Canada's report, it should be borne in mind that it grew out of a decade of extensive empirical

---

[7] See, *supra*, note 4 at 68.
[8] *Ibid.*, at 69. Emphasis added.
[9] *Ibid.*, at 68.
[10] Recommendation 7 at 70.
[11] The quote was from Ernest Gellboir and Barry Bayer, *Administrative Law and Process in a Nutshell* (Culest Publishing, 1982) 237-238.

research (which included detailed examinations of 11 federal administrative agencies) and widespread consultation. This process reflected an ambitious response to the Commission's recognition that "...the practice of a tribunal cannot be understood without reference to its context and the legal framework for a tribunal makes little sense without an understanding of its practices".[12]

The Commission noted that no provision of an agency's formal mandate, whether embodied in a statute or a regulation, is so precise that the agency need not interpret it. In many situations an agency must exercise considerable discretion when applying governing provisions to specific situations. "In administrative law", as Frankfurter had noted, "we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions".[13] Nevertheless, it was thought that agencies should be encouraged to work, both formally and informally, at structuring their discretion and at communicating the criteria upon which they base their decisions.

> Administrative agencies are not courts. They are not required to rely on the evolutionary, case-by-case method traditionally associated with court process in the common law world. They are not, and should not be, faced with the same constraints on prejudging the meaning of a legislative provision. The emphasis should be on administration, not dispute resolution writ large. While adjudication is, and will remain, an important aspect of agency process, there is ample scope for the agency to play a normative role that complements adjudicative discretion.[14]

Given the potential of this broader and more flexible approach, the Commission urged that agencies, especially those which handle large volumes of cases, should consider carefully "...the advantages of developing policy statements about how they will exercise their discretion or interpret their legislation, before they are required to do so in a specific application".[15] It was suggested that policies could be developed outside of the context of specific applications in what might be called "generic hearings".[16] It was recognized, however, that there would be many decisions which cannot be reached by resorting solely to pre-established standards, either because there has been insufficient accumulated experience on

---

[12] *Second Annual Report 1972-73* (Ottawa: Law Reform Commission of Canada) 24.

[13] F. Frankfurter, "The Task of Administrative Law" 75 U. Penn. L. Rev. 614 at 619 (1927). He then added a cautionary admonition of particular relevance to the choice between rulemaking and adjudication. "Here we must be especially wary against the danger of premature synthesis, of sterile generalization unnourished by the realities of 'law in action'."

[14] *Report 26, Independent Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1985) at 29

[15] *Ibid.*, at 30.

[16] *Ibid.*

which to base a general policy or the heterogeneity of those subject to regulation makes the imposition of inflexible standards either impossible or undesirable. Nevertheless, the Commission urged agencies to overcome their reluctance "...to signal in advance their general approach to issues falling within their range of discretion".[17]

The Commission recognized that no specific legislative authority is needed for policy statements and that the Supreme Court of Canada had recognized them as not only permissible but "eminently proper" under existing law.

> We would go even further, and suggest that agencies should be authorized to issue binding policy statements...to structure, in a definitive way, areas of discretion left to the agency by Parliament. Working criteria expressed in non-binding policy statements should be allowed to crystallize into binding ones wherever an agency has a firm view of what ought in all cases to condition the exercise of its discretion. This eliminates needless and repetitive argument in individual cases about the appropriateness of the policy.[18]

At the same time as it urged greater reliance on policies and rules, the Commission conceded: "We sense a strong bias towards the case-by-case exercise of discretion. Most agencies as yet display only a cautious willingness to structure discretion, and then only informally through non-binding statements."[19] What I hope to do in this lecture is to further explore this reluctance. But before this can be done, we must grapple (for a time at least) with the issue of definitions.

3. *Of Regulations, Rules, Policies and Adjudication*

The essence of a rule, as opposed to an adjudicative order, is that the former lays down a norm of conduct of general application while the latter deals only with the immediate parties to a particular dispute. Of course, some rules may only affect a very limited class of persons and, in a regime of precedent, an adjudication may affect many persons. Nevertheless, it is usually true that a rule is of general application and an order of particular application.[20]

---

[17] *Ibid.*, at 31.

[18] *Ibid.*

[19] *Ibid.*, at 33.

[20] Breyer and Steward suggest that "rulemaking" and "adjudication" are useful and familiar paradigms of law-making whose distinguishing features can be briefly stated. "Rulemaking consists in the promulgation of generally applicable requirements or standards governing future conduct. Adjudication consists in determining the legal consequences of past events in a particular controversy between specific parties." S.G. Breyer & R.B. Steward, *Administrative Law and Regulatory Policy* (Boston: Little Brown, 1979) 398.

Let me expand somewhat on this. A rule is therefore an agency statement of general applicability and future effect. It is binding on all those to whom it is addressed - including the agency itself. It may be possible, however, to waive a rule under some circumstances. Absent waiver, a rule is law that is directly binding on all those within its terms, whether or not they participated in the rulemaking proceeding from where the rule originated. An adjudication leads to an order of particular application determining the rights of specific parties on the basis of their special circumstances. Adjudication allows for the *ad hoc* adoption of principles of law that are necessary to solve specific cases, but they may serve as precedent in similar future cases. Strictly speaking, any order which flows from an adjudication is not directly binding on any persons other than the parties to that particular case. Other persons are entitled to argue that the agency should consider *de novo* the principle on which the precedent rests. In practice, principles of law declared in particular cases can come to have the same effect as rules. This is because once decided upon, tribunals tend to follow an established principle uncritically and apply it without serious re-examination in all similar future cases.[21] To that extent, the practical effect of law issued in the form of orders pursuant to an adjudicative methodology or rule pursuant to a rulemaking methodology may be essentially similar.

In Canada we still tend to think of the universe of "rules" as being coextensive with formal "regulations" made in accordance with the federal *Statutory Instruments Act*,[22] or the *Regulations Act*[23] in Ontario. We have relatively little experience of agency-made binding rules because, without legislative authority, this could amount to an unlawful fettering of discretion. An example of statutorily authorized rules already mentioned are guidelines made under the *Canadian Human Rights Act*[24] and rules and guidelines to be issued under the new *Immigration Act*.[25]

Non-binding rules or policies are part of what the Law Reform Commission of Canada felicitously called "law-elaboration".[26]

> Law-elaboration amounts to a quasi-legislative power and involves both the making of policy by an agency and the articulation of that policy through rulemaking. The ensuing rules and standards will represent the agency's own interpretation of its parent statute. They will be used to guide and structure the agency's regulatory

[21] It would seem likely that agencies which sit in panels will give more weight to rules promulgated by the agency as a whole than by an individual panel in the course of an adjudication of a dispute.
[22] *Statutory Instruments Act*, R.S.C. 1985, c.S-22.
[23] *Regulations Act*, R.S.O. 1990, c.R-21.
[24] *Supra*, note 6.
[25] Bill C-86, First Reading, June 16, 1992, s.55.
[26] *Working Paper 25, Independent Administrative Agencies*, (Ottawa: Law Reform Commission of Canada) at 23.

> decision-making. ...This process of law elaboration is a major function of independent regulatory agencies involving the translation of a general legislative mandate into specific policies and rules of conduct for those to be regulated.[27]

Terminology here is very fluid as "policy" may include "manuals", "guidelines", "standards" and the like. Nothing turns on the precise term employed. The important thing is that unless an agency is given legislative authority to make binding rules, it must always consider exceptions to its general approach. However, as we shall see, the modern law on fettering allows for a good deal of structuring of discretion so that in practice administrative agencies may approach, but not fully achieve, what the Law Reform Commission called structuring "in a definitive way".[28]

4. *In Praise of Rulemaking*

In a valuable article in a recent issue of the *Administrative Law Review*,[29] Professor Bonfield of the University of Iowa Law School documented a number of justifications for his contention that, "State agencies should normally elaborate their law by rule rather than by ad hoc order". These included:

(1) Public participation

(2) Legitimacy

(3) Visibility

(4) Comprehensibility

(5) Efficiency

---

[27] T.H. Jones, "Regulatory Policy and Rule-Making" (1991) 20 Anglo-American L. Rev. 131 at 132.

[28] *Report 26*, *supra*, note 14 at 31.

[29] A.E. Bonfield: "State Administrative Policy Formulation and the Choice of Lawmaking Methodology" (1990) 42 Admin. L. R. 121 at 122-131. In this regard it is most interesting to keep in mind an observation in L'Heureux-Dubé J.'s dissent in *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1026 in which she indicated that an agency's novel interpretation of its statute that has a wide-ranging impact is more likely to attract judicial deference if adopted after hearing from, not only the parties to an adjudication, but also those likely to be affected by the agency's interpretation. Here, the labour relations board had sought, by way of adjudication, to fill in a void in the labour code. "The Board's policy decision goes well beyond the specific interests of the parties before it and acquires an importance akin to the enactment of a new legislative provision. This additional significance accentuates the necessity for the Board to meet head on the arguments based on the development of harmonious labour relations" (at 1031-1033). And this broader perspective could only be attained by a broadening of the scope of participation.

(6) Abstraction
(7) Appropriate Factual Basis
(8) Initiative
(9) Easier Participation
(10) Prospective Application
(11) Consistency

(1) Public Participation

Normally, only those persons who are actually parties to a particular dispute giving rise to an adjudication are notified of, or have a right to participate in, that proceeding. This means that other persons who may subsequently be affected by the precedential value of a particular adjudicative decision will not usually have an effective opportunity to participate in its formulation. It also means that members of the general public do not have an opportunity to influence law made on a case-by-case, precedential basis. More liberal rights to intervene and to file amicus briefs in adjudications will not be substitutes for a direct opportunity to participate in rulemaking proceedings. As Glen Robinson has succinctly put it: "Notice and opportunity to participate are commonly regarded as among the foremost advantages of rulemaking proceedings."[30]

(2) Legitimacy

Trial-type procedures tend to protect agencies seeking to implement their own policy preferences while notice and comment procedures provide an opportunity to block, through the use of external political pressure, agency preferences that are inconsistent with the will of the community at large as reflected in the balance of power in current interest group politics.

This is, of course, a particularly American view of legitimacy. To the extent that we give the matter any thought, we probably subscribe to a delegation theory of legitimacy - the popularly elected Legislature has delegated authority to deal with essentially technical matters in a manner which dictates a relatively narrow range of results. But the reality is that modern legislative delegations tend to be very imprecise and vague and

[30] G.O. Robinson, "The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedural Reform" (1970) 118 U. Pa. L. Rev. 485 at 514.

that legitimacy may only be achieved by way of a decision-making methodology which allows for the reflection of the same forces that work upon the popularly elected Legislature itself. This will, undoubtedly, make Canadian administrative lawyers nervous as we have inherited more hierarchical, less fragmented and overtly political notions of administrative law-making. However, it will be my contention towards the conclusion of this lecture that we now live in a far more interest group dominated political context than our established institutions acknowledge.

(3) Visibility

Rules are almost always more highly visible than agency case law to members of the public. Compilations of state administrative rules may be readily consulted in public libraries while case law is almost never published and is usually available only in the labyrinthine files of the agency. Given the continuing uneven publication practices of Canadian administrative tribunals, this argument for requiring agencies to make their law by rule is particularly compelling.[31]

(4) Comprehensibility

It is likely to be easier for members of the general public to discern current agency law from rules than from adjudication because decisional law is normally more difficult for lay persons to understand. The interpretation of adjudicative orders depends to a great extent on the particular facts involved in cases; rules are not as dependent on the particular facts from which they first emerge.

(5) Efficiency

Law-making by adjudication is likely to require litigation before the agency in a multiplicity of cases - a single rulemaking may settle the policy questions involved in many instances without need for litigation to resolve them. As well, law-making by rule is more efficient than law-making by order because it allows agencies to focus upon a few proceedings raising comparatively few, but major, policy issues. When agencies make law by adjudication, they often have to spread their attention thinly over

[31] While there has been some improvement in recent years, not as much has changed as one might have expected since the first (and only) comprehensive study of this issue. See A.H. Janisch, *Publication of Administrative Board Decisions in Canada* (London: CALL, 1972).

large numbers of cases that raise an even larger number of minor, as well as major, policy issues. As Robinson noted, "Rulemaking may be very efficient in eliminating the burden of individual case-by-case adjudications."[32]

(6) Abstraction

Rulemaking may be superior to adjudication for agency law-making because it requires the agency to focus on the issues of law that must be decided without being diverted, as in adjudication, by the more specific and parochial concerns of particular parties who wish to have their unique problems resolved. It may be argued that a general preference for law-making by rule is undesirable because it requires agencies to make decisions in the abstract, without the benefit of any actual case to test their wisdom or help clarify the issues involved. This, however, goes more to the issue of choice: the fact that rulemaking requires an agency to make its decision more in the abstract should be a factor that the agency considers in determining whether, in a particular situation, rulemaking is feasible or practicable.

(7) Appropriate Factual Basis

In adjudication, where the agency both makes the applicable law and determines whether it has been violated, there tends to be some confusion over the precise facts which must be established and the burden of persuasion for establishing them. The parties and decision makers in such a situation often confuse the necessary facts and burden of persuasion associated with the law-applying function with the necessary facts and burden of persuasion associated with the law-making function.

(8) Initiative

Law-making by rule may be more desirable than law-making by order because rulemaking allows an agency to initiate its own changes; in adjudication the initiative for change is left to private parties. Thus an agency need not await the occurrence of a set of facts involving a particular individual to make law by rule. Rulemaking, unlike adjudication, allows an agency to create its own law-making timetable and implement its own system of law-making priorities.

[32] *Supra*, note 30 at 516.

(9) Easier Participation

Informal notice and comment rulemaking procedures are generally more accessible to persons who do not have the assistance of lawyers and are less intimidating than formal, trial-type procedures. This argument in favour of rulemaking is especially compelling where individual matters dealt with are not of a sufficient financial value as to attract professional representation, although cumulatively they may be of the greatest overall importance to the achievement of a just society.

(10) Prospective Application

Rules are normally prospective - they indicate the law which the agency will rely upon in the future. Adjudication has the disadvantage of being inherently retrospective, declaring rights based on past acts. The most serious adverse effect of using adjudication for agency law-making is its retroactive effect on parties who may have legitimately relied upon the prior state of the law. This may lead either to unfairness to the parties or timidity towards change by the agency. Rulemaking avoids the problems associated with retroactive sanctions.

(11) Consistency

Primary reliance on rulemaking for agency law-making is more likely to ensure uniform treatment of similarly situated persons than is the use of adjudication for that purpose. All persons subject to a rule are affected at the same time and in the same way. Agency law-making by adjudication increases the likelihood that agencies will draw irrelevant distinctions between substantially similar cases. Adjudication is moreover a particularly inappropriate means of formulating legal principles applicable to a broad class of persons because it permits low visibility, differential agency decision-making of a potentially arbitrary or capricious nature.

5. *The Limits of Rules*

We must, of course, all "beware the man of one book". *To favour greater resort to rules is not to suggest that there is no role for ad hoc*