



CORRUPTION, PUBLIC POLICY, AND  
PUBLIC PARTICIPATION  
SUSAN ROSE-ACKERMAN

---

Susan Rose-Ackerman is the Henry R. Luce Professor of Jurisprudence (Law and Political Science) at Yale University. An economist by training, she works at the intersection of three fields. She has published widely on corruption, comparative administrative law, law and economics, and environmental policy. Her most recent books are *Due Process of Law-making: The United States, South Africa, Germany, and the European Union* (2015, with Stefanie Egidy and James Fowkes) and *Greed, Corruption and the State: Essays in Political Economy* (2015, edited with Paul Lagunes). Her 1999 book, *Corruption and Government: Causes, Consequences and Reform*, has been translated into 17 languages. A second edition with Bonnie Palifka will be published in 2016. She holds a Ph.D. in Economics from Yale University. – Address: Yale Law School, PO Box 208215, New Haven, CT 06520-8215, USA. E-mail: susan.rose-ackerman@yale.edu

I have long been intrigued by tensions between democratic accountability and technical competence. In 1991/92, when I was a Wiko partner, I did research for a book that compared environmental policymaking in Germany and the United States. It was published as *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States* (1995). Part of my interest in returning to Berlin in 2014/15 was to study public participation in the making of environmental policy and to compare current practice with the early 1990s. Thus, much of my time at Wiko was spent researching that topic through published articles, public documents, and interviews with academics, public officials, and civil society actors.

When I questioned people about current policy controversies, what stood out was the German shift to renewable energy, the *Energiewende*, and the phase-out of nuclear power. Thus, I concentrated on the role of public participation and expertise in that area, and it proved a rich and contested subject. I learned that the basic difference that I identified in 1991/92 still holds. The processes by which general rules (*Rechtsverordnungen*) are made are not subject to a general, legally enforceable framework, as in the United States. The American constitution is silent on this matter but the Administrative Procedures Act of 1946 sets out the essential requirements of notice, hearings, and reason giving, followed by judicial review. The German *Grundgesetz* or constitution includes a clause that permits delegation so long as its “content, purpose, and scope” are articulated in the law, but the procedures are not specified either in the constitution itself or in a framework statute. German administrative law is mostly about the implementation of the law in particular cases and about the violation of rights. Nevertheless, considerable consultation with the public, with business and labor, and with other organized groups does occur, especially for big infrastructure projects, and consultation is required by statutes in particular substantive areas. Recently, the need to obtain public input has been on the agenda of German government bodies, especially in the aftermath of the controversy over the proposed expansion of the Stuttgart railway station. That project proved especially contested, provoking street protests and an aggressive police reaction. The German railroad claimed to have obtained all the required permits, but in the conflict’s aftermath, German governments have taken steps to involve the public at the earlier stages of project design. Generally, however, judicial review is lacking, except perhaps at the very end of the process. However, in the environmental area access to the courts is assured in many cases by a treaty that deals expressly with public input into government decisions.

My research while at Wiko began to explore these new developments in public participation and input. My interviews opened up many interesting lines of inquiry, but my work is not complete. I arrived home with a large computer file of notes, a pile of articles to read, and a list of contacts. One issue that I want to confront is the aim of public participation. Is it, in practice, merely palliative, designed to soothe ruffled feathers, or does the process actually provide needed information about substance and public attitudes? Who participates and what is the mixture of organized business, labor, and civil society compared with individuals? When does participation occur in the development of a policy or the approval of an infrastructure project? In the shift to renewable sources of electric power, consultation could deal with general policy choices or the subsequent distribution

of costs, given a policy choice. In practice, for wind energy, the major controversy is not over the general policy but over decisions about where to site the pylons to carry the power from the windy north to the industrialized south – a pure NIMBY [Not in My Backyard] decision. To me the most important area for public input is at the policy design stage, not at the time of detailed implementation. Policy ought to be made by public officials informed by such input. If participation is concentrated at the later NIMBY stage, much of the input will not be about the public good but simply about who will bear the costs – an important issue, but not one that can be resolved merely through public hearings or local focus groups. I want to think and learn more about these issues, and my plan for the coming year is to continue that research. I plan to write a book about public participation and competent policymaking that draws on my past work on alternative systems of public law as well as my research while at Wiko that concentrated on the German case.

Research on German public law competed with two other projects and two Wiko activities. In the fall I completed *Due Process of Lawmaking: the United States, South Africa, Germany, and the European Union*, with Stefanie Egidy and James Fowkes. This book contrasts legal constraints on the legislative process with those on administrative policymaking in the four polities listed in the title. Thus, it provided background for the Wiko project described above. The book was written before I arrived, but my co-authors and I needed to review the final proofs. I also gave a number of lectures in Berlin, in the rest of Germany, and elsewhere in Europe that summarized our arguments with the hope of generating interest in the book.

The second, more time-consuming project was completion of the second edition of my 1999 book *Corruption and Government: Causes, Consequences and Reform*, with my co-author, Bonnie Palifka. This project was initially supposed to have been completed in the summer of 2014, but the huge explosion of research on corruption slowed us down. The result is an essentially new book built on the framework of the original. We turned in the manuscript in mid-July, with the published book available next spring. My perspective on corruption is compatible with my work in public law. I stress that criminal law is not sufficient to deal with systemic corruption. Rather, reformers need to understand what benefits are obtained in return for bribes and kickbacks. Reform needs to restructure public institutions to reduce the incentives to pay bribes by, for example, clarifying laws and rules, limiting discretion, increasing transparency, increasing the supply of scarce benefits, and sometimes even legalizing payments that allocate scarce public benefits. The

last policy, of course, only makes sense if the public program is not meant to benefit the needy or those with particular qualifications, e.g., public housing or places in university.

The two Wiko activities were, first, study of German language. I arrived early to be part of the two-week intensive German course organized before the start of the Wiko year. My fellow students in our class and I had all studied German in the past, but had forgotten or never learned key aspects of the language. Throughout the year we met each week to read poetry, discuss current events, recount our own activities, and also to learn more grammar. This regular immersion in German helped me on a day-to-day basis living in Berlin and in my research. Our class was together for the year, with all of us outside of our usual comfort zone. With the help of our excellent teachers, we plunged into German and into getting to know each other and had a good time in the process.

Second, given the euro crisis and other anxieties surrounding the European Union, I organized a discussion group on the European Union with several Fellows and Permanent Fellows. Beginning in November, we met every two or three weeks to discuss a topic, with reading distributed in advance. The discussions were enlightening, wide-ranging, and fascinating. I am not an expert on the EU, but I had come to it in the past mostly through my study of administrative law. Some of the ideas that surfaced in our discussions will be helpful to me as I carry forward my research, but the topics ranged more widely. We discussed the opinion of the European Court of Justice that found fault with the Commission's plan to accede to the European Code of Human Rights. We ended our discussions with the ECJ's judgment on the first-ever referral from the German Constitutional Court to the ECJ. The ECJ upheld the EU legislation in question with what seemed to us a rather pragmatic understanding of the situation in the eurozone.

Overall, it was a productive year, but also one in which Bruce and I had time to explore Berlin, attend concerts and operas, and welcome family and friends. The Wiko staff made everything easy, first as we settled into Berlin and later as we began to use the library and IT services and to get to know the other Fellows and their partners.