Theoretical Inquiries in Law 6.1 (2005)

The Administrative Process as a Domain of Conflicting Interests

*Daphne Barak-Erez**

The article presents the argument that administrative decision-making should be understood as devoted to balancing between conflicting interests of individuals or groups, usually when none of the affected parties has predefined legal rights that are relevant to the substantial content of the administrative decision. Administrative decisions often have a direct effect not only on human and civil rights issues, but also on matters bearing on the quality of life, living conditions, prices of regulated products, and the allocation of government funds. Since the decision as to which interest should prevail in the conflict is a distributive one and has many possible answers, the role of administrative law is primarily to ensure that these decisions are made fairly, with due weight given to the conflicting interests of the various groups and individuals involved. With this as background, the article shows how the doctrines of positive administrative law are designed to meet the challenge of coping with conflicting interests in the administrative decision-making process, using such examples as the prohibitions against decision-makers' conflicts of interest and the rules regarding interest representation and judicial review.

In the second part, the article applies the interest perspective to the administrative decision-making process in order to analyze the highly extensive regulation of land resources in Israel. The analysis concentrates on the Israeli Supreme Court decision in one of the

---

* Associate Professor, Faculty of Law, Tel Aviv University. I thank Matthew Adler, Eyal Benvenisti, Yishai Blank, Aeyal Gross, Roy Kreitner, Ariel Porat, Arianne Renan-Barzilay, and Yair Sagi for their comments on an earlier draft.

most controversial petitions brought before it: against administrative decisions on the development (toward urbanization) of formerly agricultural lands (the Mizrahi Democratic Rainbow case).

INTRODUCTION: ADMINISTRATIVE DECISIONS REGARDING CONFLICTING INTERESTS

The main argument put forth in this article is that administrative decision-making is a paradigmatic example of decision-making regarding conflicting interests of individuals or groups when none of the affected parties has predefined legal rights that are relevant to the final decision.[1] Administrative decisions often have direct effects not only on human and civil rights but also on matters bearing on the quality of life, living conditions, prices of regulated products, and the allocation of government funds, that is to say, on the interests of the parties affected by the regulation. This understanding of administrative decision-making highlights its distributive function and, therefore, mandates that administrative decisions be made fairly (in the procedural sense), while due weight and voice be given to the interests of the various affected groups and individuals. Where there are no definitive criteria for determining the most just balance among the relevant interests, issues of procedures and due representation become acute. Therefore, I maintain that the main objective of administrative law doctrines is to ensure a decision-making process that is best equipped to cope with the need to balance among the various interests at stake.

Some examples can illuminate this basic argument. A regulatory decision on acceptable levels of pollution is not expected to infringe upon human and civil rights if it does not allow a health-threatening level of pollution. Nevertheless, it is an act that affects wealth distribution and access to public resources. It might impact the profits of local industry and determine the quality of the home life of individuals living nearby. Decisions regarding the allocation of educational resources (for example, the size of classes) can

---

1 This distinction between rights and interests does not contradict the view that rights also represent interests. In other words, I accept the observation suggested by Raz that "an individual has a right, if an interest of his is sufficient to hold another to be subject to a duty." Joseph Raz, Ethics in the Public Domain 268 (1994) (Chapter 12: Legal Rights). Still, once some interests are recognized as rights, they are treated by the legal system differently and enjoy a presumed advantage when they clash with other interests.

also crucially affect the interests of disempowered groups. They influence individuals' life opportunities and the potential for communal and cultural development. In most cases, none of the parties to be affected by the decision has a right that gives him or her presumable advantage in the process of balancing the various relevant interests. For instance, there are several levels of pollution that could be considered reasonable; there could be different allocations of educational resources that may be deemed reasonable (e.g., balancing between the resources allocated to inner-city schools and to special education).

The task of balancing between conflicting interests is characteristic of the legislative process. Legislation is a process aimed at balancing between the interests of various groups. No one can claim a right to the legislation of a statute favorable to his or her interests. In contrast, the judicial process is based on the premise that the court has to decide on the proper application of a legal right to the facts of the case.[2] In so doing, the court takes into consideration competing social interests, but the underlying assumption is that rights, and not only interests,[3] govern the decision. In the context of constitutional adjudication, the starting point of each deliberation is the existence of a given constitutional right, such as freedom of speech. Indeed, this right has to be balanced against public interests in order to see whether any of them is important enough in the circumstances of the case to be given priority over the right. The very existence of the right is, however, a vital starting point, as well as a compass. The right enjoys a presumption of precedence, and those who seek to curtail it in the circumstances of the case bear the burden of justifying their position. The same is true in the context of private law adjudication, where the assumption is that one of the rival parties has a legal right and the task of the court is to decide who should prevail in view of this right. Legal recognition of contractual rights serves social interests, as does the recognition of a tort cause of action. The court, however, is expected to decide which right prevails, not which interest prevails. Indeed, in tort law, where the court has to decide if a given act was negligent, although it does so

---

2 This view was best expressed by Dworkin, who argued that "even when no settled rule disposes the case, one party may nevertheless have a right to win." Ronald Dworkin, "Hard Cases" Taking Rights Seriously 81 (1977).

3 It is important to clarify once again that I use the distinction between rights and interests as it is applied in positive law. I fully accept the criticism that rights are only manifestations of interests that have gained enough support to be given the status of a legal right. Still, the distinction does influence the way courts decide cases.

by balancing between various social interests,[4] the underlying assumption is that the injured party has a right (in the typical case, a right to bodily integrity and security of the person). This right does not always prevail, since tort law does not seek to bar any activity that bears some risk. The right of the damaged party is, however, the backdrop to the decision-making process.

With this in mind, the resemblance of the administrative regulatory process to the legislative process becomes evident. Both processes are aimed at balancing between conflicting interests, and both are clearly distributive. Indeed, administrative regulatory decisions are formally subject to the dictates of the empowering legislation, but due to the usually broad formulation and scope of the latter, the decision-making process of the administrative agency in actuality entails a fundamental balancing of conflicting interests, similar to that conducted by the legislature. In both processes, different outcomes that can all be considered legitimate are possible.[5] In addition, the product of the regulatory process, just like that of legislation, is the creation of previously unrecognized, new rights (to clean air under the regulatory standard, for example).[6]

It is not my claim that administrative decisions always relate to interests rather than to human and civil rights. The examples above entail a distinctive human and constitutional rights dimension, concentrating particularly on social rights (such as the right to education). In other cases, regulatory decisions have an impact on constitutional property rights. It is important to emphasize, however, that, quite often, administrative regulatory decisions do not have a rights dimension of this nature, and in such cases, they are even more distributive, as they do not rest upon a prior distribution that allocated the rights against which the interests involved are being balanced.

---

4 *See* Ariel Porat, *The Many Faces of Negligence*, 4 Theoretical Inquiries L. 105 (2003).

5 Lon Fuller related this to the well-known capture theory in the following way:

> I suggest that the cause may lie in a desire to escape the frustration of trying to act as a judge in a situation affording no standard of decision. To escape from a moral vacuum one has to identify oneself with something, and the most obvious object of identification lies in the regulated industry.

Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 375 (1978).

6 Once an administrative standard has been adopted by a regulatory agency, the individual to which it applies has a right to its implementation. *See* Cass Sunstein, After the Rights Revolution: Reconceiving the Regulatory State (1990). However, it is important to make the distinction between rights granted by the administrative state and rights that are presumed to exist even without the modern regulatory state: human rights and constitutional civil rights.

In its formative years, the traditional model of administrative law focused on the threat the administrative state poses for individual rights, primarily to liberty and property. Today, however, it is clear that the concern with infringement of rights is only one aspect of administrative law and definitely not its main concern. Even when administrative power does not affect rights, it is imperative to guarantee a fair process,[7] to exclude bias, and to take all relevant factors into consideration. In American administrative law, for example, the scope of judicial review under the Administrative Procedure Act is not restricted to administrative decisions that are "contrary to constitutional right, power, privilege, or immunity," but, rather, extends also to decisions that can be characterized as "arbitrary" or "capricious."[8]

In the most general terms, the rationale underlying the existence and operation of administrative agencies is that they serve the so-called "public interest." This public interest is, however, an aggregation of interests of individuals and groups that form society. In its decision-making process, the administrative agency has to define the public interest and, for this purpose, to weigh various conflicting interests presented to it by several groups or individuals. The task of the administrative agency is to reconcile conflicts of interest that arise within the public.[9] Quite often, an administrative agency has to decide which interest prevails when none of the parties has a recognized right that can serve as a guideline in the balancing process. For example, a planning authority may wish to prevent the expansion of an industrial park, even when it does not pose a danger to the health or bodily integrity of the park's neighbors. An administrative agency, whose mandate is to promote the public interest, should not confine its consideration of the matter only to the potential effect of its decision on rights. On the contrary, it is expected to weigh such factors as the preservation of recreation areas for the welfare of society and the quality of life (in its broad sense) of the neighbors of industrial areas. The reach of administrative decisions stretches much farther than the scope of the territory ruled by tort law, and consequently, administrative agencies are

---

7 The procedural aspect is especially important assuming that all the conflicting interests are legitimate, and therefore several alternative decisions are possible.

8 5 U.S.C. § 706 (2004).

9 I use the term "conflicts of interest" here not in its usual sense, namely, when a decision-maker has a personal interest that clashes with the interest she must advance in her official capacity. Rather, the term is used here in its broader sense, referring to the clash between the various interests affected by the administrative decision. I intend to argue further on that there are vital connections between the rule against conflicts of interest in the narrow sense and the task of administrative agencies to balance among conflicting interests.

frequently faced with the challenge of balancing among interests that do not strictly constitute legal rights.

This article examines the implications of this understanding of the regulatory process for the realm of administrative law, which governs the process. At the outset, I argue that the doctrines of positive administrative law are, indeed, designed to meet the special task borne by administrative agencies: balancing and deciding among conflicting interests. I first illustrate this argument with examples from American administrative law. These examples are not intended to give a full picture of American administrative law but, rather, to sketch the general direction of my argument. I then apply this interest-based perspective to administrative law in analyzing the highly extensive regulation of land resources in Israel, examining the Israeli Supreme Court decision in one of the most controversial petitions ever brought before it: administrative decisions on the development (toward urbanization) of formerly agricultural lands.

I. The Challenge of Conflicting Interests in Administrative Law

I begin by discussing several American doctrines of administrative law that help administrative agencies to cope with the task of balancing among conflicting interests. The analysis of these doctrines will better explain the model of administrative law proposed here and will highlight the difference between this model and the model of interest representation in administrative law set out in Richard Stewart's groundbreaking article.[10] Stewart concentrated on what he identified as a new judicial trend toward strengthening participation rights in the administrative process and evaluated the relative advantages and disadvantages of this approach (including the problem of partial representation of the interests involved and the cost in terms of time and budget for the administrative decision-making process). In contrast, I assess the development of participation rights in the administrative process (and in the subsequent proceedings of judicial review, in the form of standing) from a broader perspective. First, I argue that administrative decisions regarding conflicting interests are more difficult to make than judicial decisions that balance among interests, because in the former case, there are usually no predefined legal rights applicable to the decision. Second,

10 Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975).

I argue that the emergence of participation rights in the administrative process is only one manifestation of the need to balance among conflicting interests in administrative decision-making. In order to conduct this balancing process properly, it is essential to hear individuals and groups that might be affected by the administrative decision. Broad participation rights are, however, only one element of a broader system consisting of doctrines aimed at adapting administrative law to its purpose: to serve as a foundation for decisions that balance among conflicting interests. Third, in contrast to Stewart, I stress that, despite its disadvantages, the interest representation model is indispensable: interest representation is vital for any decision-making process that has to balance among interests.

A. Assessing the Justifications for Regulation

There is a growing tendency to consider administrative law in light of the economic and social justifications of regulation.[11] Examining the justifications for regulation is not only an academic endeavor, but also has practical implications. Regulation affects the interests of individuals and groups, just as abstention from regulation affects various interests. Therefore, it is important to consider the justifications for regulation during every legislative process aimed at empowering administrative agencies to regulate in a particular area. It is imperative that identifying the justifications for regulation be part of the legislative process so that enabling statutes will not be general and vague, but, rather, will explicitly state their purpose and scope.

---

11 For a discussion of the argument favoring the focus on regulation over the traditional focus on administrative procedures and judicial review, see Robert L. Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 Nw. U. L. Rev. 120 (1977); Joseph P. Tomain & Sidney A. Shapiro, *Analyzing Government Regulation*, 49 Admin. L. Rev. 377 (1997); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1 (1998).

There are types of regulation that even free-market economists accept and support — regulation focused on monopolies, public goods, externalities, ensuring the availability of information (for instance, through requirements to publish product specifications) and resolving coordination problems (between broadcasting stations or air routes). *See, e.g.*, Stephen Breyer, Regulation and Its Reform 15-35 (1982); Anthony I. Ogus, Regulation: Legal Form and Economic Theory 27-46 (1994). Economic reasons, however, cannot, alone, provide the basis for the full scope of administrative activity, which is partly driven by social distributive considerations (particularly in the area of welfare). *See* Tony Prosser, *Regulation, Markets, and Legitimacy, in* The Changing Constitution 229, 230-34 (Jeffrey Jowell & Dawn Oliver eds., 4th ed. 2000); Ogus, *supra*, at 46-54.

Sweeping delegations of power to administrative agencies make it easier for organized interest groups to influence the administrative decision-making process; accordingly, the non-delegation doctrine can be understood, at least partially, as barring against this danger. At a later stage, in the course of judicial review of administrative decisions, a major question is whether the administrative power was exercised for the fulfillment of legitimate regulatory purposes or, rather, was manipulated by the activities of organized interest groups.[12] In fact, analyzing the justifications of each regulatory program is important also for processes of review conducted within the executive, such as the review of regulation by the Office of Management and Budget ("OMB") in the United States.[13]

The justifications for regulation are usually evaluated in states that undergo processes of privatization and deregulation. More concretely, reformers ask whether the traditional role government has played in many economic areas is, indeed, vital in terms of the recognized justifications for regulation.

B. The Rules against Conflicts of Interest of Decision-Makers

The rules against conflicts of interest of administrative decision-makers are of the utmost importance simply because the subject-matter of their decisions touches on interests and not predefined rights. There may be legitimate controversies regarding the proper balance to be struck between the interests the given agency is in charge of. There is no objective standard to evaluate which is the ideal regulatory alternative. With this in mind, the only real safeguards to secure decisions that would serve the public interest are procedural ones, the first being prohibiting administrative decision-makers from letting a personal interest tip the scales when weighing the relevant interests.

We find in positive law a number of expressions of the principle against conflicts of interest. Obviously, a decision-maker cannot have an economic

---

12 Theorists in the field of public choice have discussed the role of interest groups, which attempt to tilt the use of administrative power to their own benefit. For a general review, see Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction (1991); Symposium, *The Theory of Public Choice*, 74 Va. L. Rev. 167 (1988); Ogus, *supra* note 11, at 55-75.

13 *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 3 (1995); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821 (2003).

interest in the outcome of a given decision.[14] In addition, she is prohibited from having any inappropriate *ex parte* contact with any of the parties involved[15] or from being tainted by undue bias in the matter before her.[16] In addition, the danger of administrative decision-making being influenced by personal interests is guarded against by specific rules that mandate detailed reports on financial and institutional responsibilities and post-employment constraints of civil servants.[17]

C. Interest Representation and Voice in the Administrative Process

Since administrative decisions have implications for various interests, it is important to establish administrative procedures that give voice to the bearers of those interests. The rules against conflicts of interest are negative in character (that is, they limit the involvement of interested parties in the administrative decision-making process). It is important to have also positive rules that guarantee participation in the administrative process for the bearers of relevant interests.

There are important examples of procedures in American administrative law that are relatively open to voices from the outside, far beyond the basic demands of due process, such as a hearing accorded to an individual directly affected by a specific decision (e.g., regarding the revocation of a license). As is commonly known, since the late 1960s, the administrative process in the United States has become more open to the representation of the public interest by NGOs and advocacy groups[18] (when the problem of agency

---

14 *See* Tummey v. Ohio, 273 U.S. 510 (1927). For a more general survey, see Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113 (1963).

15 5 U.S.C. § 557 (d)(1)(B) provides:

> No member of the body comprising the agency, administrative law judge or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding.

16 *See* United States Steel Workers v. Marshall, 647 F.2d 1189 (1980). Of course, applying these easily-stated principles is a problematic and complex matter. *See* Peter L. Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 Colum. L. Rev. 990 (1980).

17 *See* Ethics in Government Act of 1978, 92 Stat. 1824. For discussions of this legislation, see Thomas D. Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters before an Agency*, 1980 Duke L.J. 1; Robert H. Mundheim, *Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 Creighton L. Rev. 707 (1981).

18 A classic description of this development is found in Stewart, *supra* note 10.

"capture" by the regulated industries gained recognition).[19] It is important to note, however, that the achievements of that period — open administrative process and public accountability — are under threat today due to government contracting-out of public tasks and services. In the framework of contracting-out, private bodies make decisions that have an impact on the lives of citizens, often without open procedures. Therefore, a major issue addressed by many scholars in recent writings is the challenge of accountability, responsiveness, and information with regard to private entities performing public tasks.[20] Another challenge is that posed by international arrangements that impact domestic affairs.[21]

Indeed, interest representation is not only a blessing. Organized interest groups may excessively overuse participation privileges. In many respects, the influence of interest group politics in the administrative process is even more dangerous and effective than in the legislative arena. Lobbying in administrative agencies can be directed at a limited number of decision-makers and, therefore, is cheaper and more focused. In addition, it can be managed in a more discrete manner, since the administrative process is relatively less open to media coverage than the legislative process. Over the years, organized interest groups have proved to be successful in using administrative law in ways that disproportionately benefit them — both in the regulatory process and in the courts.[22] The relaxation of the standing doctrine has had the important effect of enabling more voices to be heard with regard to administrative decisions. However, it is now clearly evident also that organized interest groups tend to make disproportionate use of the litigation opportunities that have emerged due to the relaxation of the standing doctrine,[23] which has made it easier for them to be repeat players.[24] Other problems relate to the price of participation in time and money. These are grave concerns. They should not, however, weigh against the principle of

---

19 For a description of the phenomenon of "capture," see Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 448-49 (1987).

20 *See, e.g.*, Alfred C. Aman, *Globalization, Democracy, and the Need for a New Administrative Law*, 10 Ind. J. Global Legal Stud. 125 (2003).

21 *See* Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 Mich. L. Rev. 167 (1999).

22 For Stewart's early criticism in this context, see Stewart, *supra* note 10, at 1762-70.

23 *See* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal. L. Rev. 1309 (1995).

24 *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

participation, but, rather, should lead to monitoring of the level of participation sanctioned by law.

Despite these justified reservations and concerns, interest representation in the administrative process has not been abandoned, and rightly so. Interest group politics will necessarily be involved in administrative decisions, with or without rules of participation. Therefore, it is better to acknowledge this reality and give all relevant groups a chance to participate rather than limit participation only to those individuals and groups that can be heard due to political "connections," even when legal doctrine does not recognize participation rights. Therefore, one of the present challenges of administrative law is to develop new forms of participation and improve existing ones, rather than abandon entirely the idea of participation. For example, negotiated rule-making is a relatively newer form of participation that was not yet in practice when Stewart wrote his seminal article.[25] In addition, rules prescribing the availability of information to the public should be understood as important also in the context of promoting the potential of public participation in the administrative process, since limited access to information is a significant barrier to effective participation.[26]

Participation and representation cannot guarantee a balanced decision. It is clear, however, that lack of representation and voice can guarantee an imbalanced decision. Moreover, it is important to stress that rules regarding representation and voice are potentially more effective when the administrative agency is not biased by self-interests or locked in its views. Therefore, they should be read and understood with the assumption that they are applied together with the rules against conflicts of interest for administrative decision-makers.

D. The Role of Judicial Review

The special task of administrative agencies to decide among interests influences also the role of the courts in reviewing the agencies' decisions. Whereas in other branches of law, controversies are decided primarily by the courts, in administrative law, the agencies themselves make the

---

25 *See* Negotiated Rulemaking Act of 1990, 104 Stat. 4969.

26 In this context it is important to mention the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 256 (1966) (codified as amended at 5 U.S.C. § 552 (2004)), and the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b (2004)). For the understanding of these laws as part of "the administrative decisionmaking process climate" that facilitates participation, see Croley, *supra* note 11, at 125-26.

primary decisions on conflicting interests and the courts only review these decisions rather than re-decide *de novo*. I argue that this decision to endow the agencies, and not the courts, with the primary decision-making power is understandable if we consider that administrative decisions are usually about interests and not about rights.[27] Administrative agencies are, indeed, not experts on legal rights, but they are relatively better equipped to evaluate social and economic interests because of their professional competencies and due to their procedures that give voice and representation to relevant affected groups. At the same time, since these administrative decisions are made in an environment of lobbying and interest-group pressure, judicial review has an important role. The reviewing court has to make sure that administrative decisions were not tilted by irrelevant interests. Judicial precedents, which require consideration of all relevant facts and reasoned explanation of administrative decisions,[28] should be understood with this concern in mind.

II. THE REGULATION OF LAND IN ISRAEL AS AN ARENA FOR CONFLICTS OF INTEREST

In this part, I analyze the administrative process as an arena of conflicting interests by examining the test-case of land regulation in Israel at one of its crisis points: the administrative decisions of the Israel Land Council regarding the development (toward urbanization) of agricultural lands.

Under the Basic Law: Israel Lands, 1960, ownership in public lands (comprised mainly of state lands and lands owned by the Jewish National Fund), which constitute approximately 93% of the territory of Israel, is non-transferable.[29] In this way, the principle of public ownership of land is retained in Israel, and land is only leased to interested parties for pre-prescribed periods of duration. With this as the constitutional baseline, an administrative agency had to be formed to administer the land. To this end

27 I assume that some interests not yet recognized as rights may be given greater weight in the future and eventually would gain recognition as rights. This process of development of interests into rights has influenced the growing tendency to recognize social rights, which represent important social interests such as education. It is also in full accordance with the understanding of rights as interests considered by society as important enough to impose duties on others. *See supra* note 1.

28 *See* Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608 (1965); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (1977); Motor Vehicle MFRS. Ass'n v. State Farm Mut. Life Ins. Co., 463 U.S. 29, 42-43 (1983).

29 Basic Law: Israel Lands, 1960, § 1, 14 L.S.I. 48 (1960).

the Israel Land Administration Law, 1960, was enacted. This Law established the Israel Land Administration and empowered it to administer Israel's public lands[30] according to the policy set by the Israel Land Council ("the Council"), to be appointed by the government.[31] Throughout the years, this policy was directed at encouraging the establishment of agricultural settlements on the vast majority of the lands, in line with the Zionist ethos of re-cultivating the Land of Israel. Thus, the lessees of a substantial part of the land in Israel have always been agricultural settlements, mainly *kibbutzim* and *moshavim* (communal agricultural settlements). According to the standard leasing contracts, the agricultural lessees are under duty to return the land to the state in the event of a change in the intended use of land in the area, with guaranteed compensation for their agricultural investments in the land.

In the 1990s, economic conditions as well as the public agenda changed significantly in Israel. Following the waves of immigration from the former USSR, an urgent need for urban development of land (for residential purposes) arose. At the same time, the agricultural agenda went into retreat, and the agricultural settlements sought new economic opportunities. Entrepreneurs also had weighty interests vested in the new opportunities for land development projects. These needs and interests culminated in new policy decisions by the Israel Land Council, which enabled enhanced development of the traditionally agricultural lands by means of several incentives, first and foremost, by securing compensation to the agricultural lessees with respect to the new value of the land after re-zoning (according to compensation formulas detailed in the decisions). The agricultural lessees, who expected to benefit significantly from these decisions, strongly supported them. However, these decisions came at the expense of other considerations: environmental concerns regarding the increased destruction of Israel's scarce open land resources, as well as social concerns regarding the rapid enrichment of a relatively small group of people (entrepreneurs and former farmers) from public resources. In this sense, these were paradigmatic regulatory decisions regarding conflicting interests, with clear distributive effects, in the sense described in this article.

A few petitions were filed in this matter to the Israeli High Court of Justice. The public and legal campaign against the decisions was led mainly by the *Mizrahi* Democratic Rainbow Group ("the Rainbow"), an association of intellectuals, descendents of Jewish immigrants from Arab ("*Mizrahi*") countries, who claim to represent the relatively impoverished sectors of the

---

30 Israel Lands Administration Law, 1960, § 2, 14 L.S.I. 50 (1960).

31 *Id.* § 3.

Israeli (Jewish) population. The main argument put forth by the Rainbow was that the Council's decisions had distributed a major source of public wealth to a relatively small segment of society, thereby increasing social disparities. The Rainbow campaign was supported by other associations and public interest groups, such as the Society for the Protection of Nature in Israel, the country's leading environmental group, but for entirely different motives.[32] In a precedential decision, the Court decided to uphold the petitions brought against the Land Council's decisions. I will discuss this complicated legal affair by applying the analysis of administrative law presented thus far.

A. Assessing the Justifications for Regulation: The Lack of Clarity Regarding the Purposes of the Regulation of Land

An initial question the analysis must contend with is the eclectic purposes of the regulation of the land market in Israel. The Basic Law: Israel Lands does not state the reasons for the regulation, which can be uncovered only by recourse to history. In fact, this constitutional principle was influenced by the centralized method of land acquisition prior to the establishment of the State of Israel; the socialist orientation of the political leadership during the State's formative years; and, no less, by national considerations in the context of the Israeli-Arab conflict, since public ownership of land is a highly efficient tool for guaranteeing national hegemony of the land.[33] Some of these considerations have obviously lost their force and relevance with time. Others (mainly those relating to the Israeli-Arab conflict), although sadly still valid, may justify government ownership but do not indicate how the land should be administered. In other words, even if there are reasons to maintain government ownership in the land in order to prevent purchase by foreign citizens, this consideration has no bearing on the way these lands will be administered once they are owned by the government. How are they going to be leased and to whom? Should agriculture be given priority, or should

32 To be more precise, although this case is mainly an example of the regulation of conflicting interests, and not of conflicting rights, it can be understood as also touching on rights. The Rainbow argued that the decisions of the Council were discriminatory in that they preferred the agricultural landholders over other citizens, whereas the lessees presented arguments based on contract and property rights. At any rate, there is no doubt that the argument raised by the Society for the Protection of Nature in Israel against the decisions was based on the public interest in preserving Israel's scarce land resources.

33 *See* Joshua Weisman, *Israel's State-Owned Land*, 21 Mishpatim 79 (1991) (Hebrew); Baruch Kimmerling, Zionism and Territory 143-46 (1983).

urbanization and industrial development be preferred? To what extent should the administration of the land be guided by environmental considerations and by social considerations of improving access to housing for the needy?

With no legislative directives and with such great wealth at stake, the administration of Israel's lands has become a nightmare of interests. The case law includes examples of land leased to individuals and groups with "the right connections" in government, without any sort of bidding process conducted.[34] The Annual Reports of the State Comptroller show that the agricultural lobby was traditionally over-represented among the members of the Council.[35] In addition, it has been argued that the goals that are best attained by public ownership, such as environmental preservation (for example, by establishing national parks on public land), were not a main concern of the Israel Land Council.[36] On the contrary, planning for the future, including for the preservation of open land, has always been dismally lacking in Israel,[37] the result being too much suburban development at the expense of dwindling open space, which a small country like Israel cannot afford.

The first lesson in this context is, therefore, that in the absence of clearly-stated regulatory purposes, administrative power is doomed to be exploited. Indeed, the original sin in this context was committed by the legislator. However, the administrative agency discussed here, the Israel Land Council, contributed to the problem in abstaining from defining for itself its regulatory purposes and adopting policies and methods to fit such purposes.

From a theoretical perspective, the conclusion could have been that the land market should be privatized (except in special cases, such as national reserves). Specific problems such as the purchase of land by foreigners can be resolved through specific legislation.[38] Such reform, however, is not expected in the present Israeli political climate. The result is that Israel's lands have, indeed, been privatized since the 1990s, but without official acknowledgement

---

34 H.C. 5023/91, Poraz v. Minister of Hous. & Constr., 46(2) P.D. 793; H.C. 6176/93, Elyakim v. Israel Land Admin., 48(2) P.D. 158. *See also* Daphne Barak-Erez, *"An Acre Here, An Acre There" — Israel Land Administration in the Vise of Interest Groups*, 21 Tel Aviv U. L. Rev. 613 (1998) (Hebrew).

35 44th State Comptroller Annual Report 226-27 (Hebrew).

36 Rachelle Alterman, *Who Can Retell the Exploits of Israel Lands Authority? From the Aspects of Justifying the Continuation of Local Ownership of Land*, 21 Tel Aviv U. L. Rev. 535 (1998) (Hebrew).

37 *See* Daphne Barak-Erez & Oren Perez, *Planning in Israel Lands: Toward Sustainable Development*, 7 Mishpat Umimshal 865 (2004) (Hebrew).

38 *See* Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 Am. J. Comp. L. 39 (1980).

of this change. Public lands are leased to private entities (including promoters and building contractors) for prolonged periods, and public ownership is retained only at the abstract level.

B. Rules against Conflicts of Interest of Decision-Makers: Between Personal Interests and Representation

As already noted, traditionally many members of the Israel Land Council were affiliated with the agricultural sector in Israel. The result was that the Council served as an extreme example of "capture" theory. In fact, the Council was not only "captured," it was in fact "conquered" by representatives of the group for whom the regulation was most significant — the agricultural sector. In the 1990s, when the time had come for significant decisions to be adopted regarding the future of Israel's agricultural lands, this disproportionate representation became an especially acute problem. Initially, the decisions regarding the compensation to be awarded to the agricultural lessees were accepted by the Council following discussions in which members who were representatives of the lessees (*kibbutzim* and *moshavim*) participated, refraining only from the formal voting. These decisions were subsequently overturned by the High Court of Justice in its *Mehadrin* decision,[39] based on the rules prohibiting conflicts of interest. Justice Orr explained that the representatives of the *kibbutzim* and *moshavim* were potentially biased toward maximum compensation in their personal capacity, whereas in their formal capacity as members of the Council, they should have been inclined toward minimal compensation. This diagnosis of a conflict-of-interest problem in the process was right in principle, although not accurate in specific detail. It is far from clear that the members of the Council should have preferred awarding minimal compensation to the agricultural lessees, in disregard of their historic and national role in cultivating the land. At any rate, the Court's judgment did not rule out the possibility of Council decisions that would be adopted without the involvement of interested parties but, nonetheless, on the background of agency capture.

39 H.C. 5575/94, Mehadrin Ltd. v. Gov't of Israel, 49(3) P.D. 133.

C. Interest Representation and Voice in the Administrative Process: Over-Representation and Absence of Representation

The limitations of the *Mehadrin* decision, which was based on the relatively narrow ground of the prohibition against decision-making tainted with a conflict of interest, emerged within a very short time after it was handed down. Following this decision, the Council reconvened, without the participation of those representatives directly affected by the proposed decisions, and adopted the same decisions once again. The new decisions could not be invalidated based on conflict-of-interest doctrine in its strict sense. In fact, the main problem had not been the participation of representatives of *kibbutzim* and *moshavim* in the decision-making process,[40] but, rather, the lack of representation of other significant segments of Israeli society: residents of impoverished neighborhoods who could be dragged down even further economically when new residential areas would draw from them the relatively well-off; groups working for the preservation of nature and land resources; and so forth. Only recently did the Court accept a petition demanding representation of the large Arab population on the Council, after decades in which this sector had no representation on the Council whatsoever.[41]

The conclusion to be drawn in this context is that rules against conflicts of interest must be complemented by rules of equal representation and participation. Indeed, an administrative agency comprised of representatives of various groups can become bogged down by the web of conflicting interests. The way to correct this problem is not, however, to oppose the nomination of representatives of groups that have not been traditionally represented in the Council. If certain members of the Council represent certain interests, it is vital to apply the principle of representation and guarantee representation of other interests as well. At the same time, since it is far from clear what the proper mix of representatives of the various groups on the Land Council should be and what the criteria are for selecting "authentic" representatives of these groups, it may be preferable for the Council to comprise only professional members, and not members who are appointed according to their presumed affiliations. The voices of the

---

40 In fact, in line with the *Mehadrin* decision, the Legal Counsel for the Israel Land Administration instructed that members of the Council with pecuniary interests in agricultural lands be barred even from participating in subcommittee proceedings on their matters, though the subcommittee served only an advisory function. *See* H.C. 5734/98, Azriel v. Sub-Comm., 53(2) P.D. 8.

41 H.C. 6924/98, Ass'n of Civil Rights v. Gov't of Israel, 55(5) P.D. 15.

various interests can be heard by opening the Council's decision-making process to the interested groups, which could be invited to submit arguments and evidence, rather than by selecting the Council's members based on the dubious criterion of representation. For example, in a decision regarding a land project in the southern city of Eilat, Justice Heshin stated that the Israel Land Administration should consult with the local municipality when it decides on a land project falling within its territory.[42] His opinion in this matter serves as an example of broadening participation rights, since the municipality represents the interests of the local residents.[43]

At any rate, it is clear that the interests considered important by the Rainbow and the Society for the Protection of Nature in Israel were not duly represented in the Council when the decisions regarding the enhanced development of the agricultural lands were adopted. Since institutional changes toward more inclusive representation and modes of participation can never be attained immediately but, rather, are a slow and labored process, the measure chosen by the critics of the decisions was to submit petitions against them. In this context, the developments in the area of standing are significant and noteworthy. The expansion of the standing doctrine in proceedings of judicial review served as a partial cure for the problem of lack of representation in the administrative process itself. Those who were not represented in the administrative process and were given a chance to contribute to it by way of participation could at least be heard in court.[44]

---

42 Mun. of Eilat v. Israel Land Admin., 49(3) P.D. 749, 769.

43 It is illuminating to compare the petition in the matter of *Eilat*, *id.*, with a closely-related case involving the Ramat HaSharon Municipality, C.A. 5817/95, Rosenberg v. Ministry of Housing & Constr., 50(1) P.D. 221. The *Eilat* decision concerned a petition submitted by the Eilat Municipality against an Israel Land Administration land project that did not assign any privileges to the residents of Eilat. The Municipality obviously was never consulted regarding the preparation of the project. In contrast, in the Ramat HaSharon matter, the Land Administration did cooperate with the local municipality, which even provided some of the funding for the project, and the project assigned privileges to Ramat HaSharon residents. This comparison exemplifies the significance of having access to the administrative decision-making process.

44 *But see* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1311-12 (1976) (referring to the potential of the judicial process to enlarge the scope of participation in comparison to the administrative context).

D. The Role of Judicial Review: The Principle of Distributive Justice and Procedural Justice

As already stated, the Israel Land Council decisions that replaced those invalidated in the *Mehadrin* decision reiterated their content and, therefore, were a source of grievance to all those who had felt wronged by the original decisions. Their sense of injury served to motivate new petitions to the High Court of Justice in the same matter.

At this stage, the Court no longer contented itself with a decision based on the prohibition of conflicts of interest, but, rather, ruled on the merits of the case.[45] At the core of the Court's decision lies the principle of distributive justice, introduced into the domain of judicial review for the first time in this case. Justice Orr ruled that the Council's new decisions in the matter of the agricultural lands were flawed because they did not consider distributive justice, namely, their effect on the various segments of Israeli society. They disproportionately benefited certain groups (the current lessees) at the expense of other groups and the public interest at large (which entails the conservation of land resources for the future and refraining from overuse of the scarce land resource). In other words, the decisions did not balance properly between the various interests at stake.

The introduction of the principle of distributive justice in this context is very intriguing. It highlights the main argument made thus far: that administrative law should guarantee the fair distribution of resources between groups and individuals with different interests. The Court decision does not, however, give a detailed answer to the question of which criteria the Court will apply to determine whether an administrative decision complies with the principle of distributive justice. Such criteria will have to be developed over time, using theories of social justice from other fields as well.[46] In addition, emphasis should be put on the administrative decision-making process. In this context, the question should be whether the administrative agency gathered relevant data and was open to hearing various opinions in the matter before it. A closed decision-making process, in which only some interests are represented and evaluated, is doomed to lead, in most cases, to an imbalanced decision. True, a perfectly open administrative process may still produce an imbalanced decision, but this is less likely to happen.

---

45 H.C. 244/00, Ass'n for New Deliberation for Democratic Deliberation v. Minister of Nat'l Infrastructure, 56(6) P.D. 25.

46 For a theory of distributive justice in planning, see David Harvey, Social Justice and the City 101-08 (1973).

The Rainbow decision exemplifies the importance of judicial review in amending an imbalanced decision-making process. Still, it is vital to bear in mind that judicial review is only a partial answer to a flawed process. Review by the Court focuses on one point in time, whereas the administrative decision-making process goes on continuously. It is very difficult, and almost impossible, to fight an imbalanced agency by constant recourse to judicial review, even for organized public interest groups. The Rainbow decision exemplifies well this reservation. The celebrated High Court decision in this matter did not dictate any particular policy to the Israel Land Council. Rather, the matter was returned to the ordinary administrative decision-making process. At the same time, no fundamental change in the composition and orientation of the Council was effected either. In addition, the Court left it up to the Council to decide on transition rules regarding projects and contracts that were already made in reliance on the previous Council decisions. Very broad transition rules could encompass the majority of the lands with development potential, taking into consideration that they were the subject of negotiations and preliminary agreements that took place before the Rainbow decision. Indeed, the Land Council had initially decided to apply very broad transition rules that, to a large extent, neutralized the practical ramifications of the Court's decision. These transition rules were the subject of subsequent petitions to the High Court — submitted by the Rainbow association (which criticized the broad scope of the rules) as well as by farmers (who sought even broader rules). With the submission of the petitions, the Attorney General advised the Land Council to narrow the scope of the transition rules, and only after it had done so, the Court dismissed all the petitions in the matter.[47]

CONCLUSION: ADMINISTRATIVE LAW IN THE SHADOW OF CONFLICTING INTERESTS

I end with the argument presented at the outset of this article: administrative law should be understood as aimed at policing and criticizing the way agencies cope with the need to balance the demands and interests of various

47 H.C. 10934/02, Kibbutz Kefar Aza Assoc. for Joint Agric. Settlement v. Israel Land Admin. (unpublished decision from May 10, 2004). The continuous nature of the litigation in this context resembles other well-known instances in which judicial review had only limited success and a discrepancy between the court judgment and reality emerged. *See, e.g.*, Gerald N. Rosenberg, The Hollow Hope — Can Courts Bring About Social Change? (1991).

individuals and groups. The doctrines of administrative law have to be tailored to meet this challenge. Special emphasis should be placed on the norms governing the procedural aspects of the administrative decision-making process. There may be different views regarding the right balance among the various interests influenced by every administrative decision, and therefore, it is most important to guarantee at least a fair process — that decisions are not accepted by administrators tainted by personal interests or bias and that the decision-making process enables wide participation and representation. An inclusive process does not always guarantee good results, of course. A biased process may, however, guarantee bad results.[48] It is important to stress that "broad" participation is not tantamount to granting maximum rights of intervention to interested parties at any stage of the administrative process in a way that may block or significantly slow down any initiative. Wide participation must include, however, equal opportunities to participate for all interested parties.

---

48 A similar view advocating an emphasis on the administrative decision-making process was expressed by Croley: "[S]pecial-interest domination seems more or less likely depending on the procedural opportunities available to other interests." Therefore "the pressing question for scholars and policymakers ... becomes what procedural techniques for monitoring those delegated regulatory-decisionmaking powers would better ensure that the exercise of that power does not create more problems than it solves." Croley, *supra* note 11, at 167.