Contemporary Lawmaking and Public Trust: Challenges, Threats and Opportunities

Suzanne Comtois*

This book, as well as the research seminar that preceded it, explores ways in which lawmaking is changing under various pressures and examines the impact of such changes on the law itself, on the lawmaking processes, and on the role of decision-makers (judges, public administrators and stakeholders). It also questions the legitimacy and impact, on the public’s trust and confidence, of the new governance tools that have emerged from this transformation.

1. The transformation of lawmaking

Over the last decades, the evolution of public law has been marked by a trend towards the diversification of the sources and forms of law, processes and governance tools. In our ever more globalized world, various factors (such as the increasing importance of European law, international law and fundamental rights, as well as the greater prevalence of social and economic concerns) have tended to justify the need to harmonize legal norms and practices and, thus, to open the borders of legal normativity. The increased interaction between legal systems and other sources of normativity has led to the coexistence of a diversity of normative authorities (ranging from civil society and the industry itself, to European and international organizations). It has also resulted in the emergence, within domestic law, of a broad range of norms grounded in different sources of legitimacy and with varying degrees of normative force, not merely constrained to the narrow formal definition of “legal norm”.

Within the judicial branch, the creation of judges’ international networks, together with their common interests and the development of a European or international judicial culture, has led to the increasing use of foreign legal material (binding as well as non-binding) by the highest courts when interpreting vague statutes or dealing with difficult cases.¹ Canadian courts, for example, have used foreign

---

legal material in cases dealing with a wide range of topics, including environmental protection, international trade obligations, constitutional issues related to war crimes and crimes against humanity, extradition to countries where the death penalty may be imposed, and deportation of refugees to areas where they risk torture. The growing influence of these external sources (international, European or other foreign legal material) is a subject of debate among scholars and among judges themselves. At the center of this debate is the tension between diverging views on the role and limits of the national courts with respect to upholding the rule of law and promoting core democratic values. More specifically, as pointed out by the authors LeBel and Chao, there is a “tension between the democratic principle underlying the internal legal order and the search for conformity or consistency with a developing and uncertain external legal order”.

Likewise, at the administrative level, especially in states with liberal market-oriented economies, the quest for superior performance and the development of a new culture has transformed the legal landscape. Laws and direct regulations are

---

2 See namely: 114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Ville), 2001 SCC 40, in which the Supreme Court of Canada discusses the interpretative role of the international law precautionary principle.


still important but now form only part of the picture. To improve efficiency and adapt state action and practices to ever-changing contexts, public administrations have sought alternatives to traditional command-and-control regulation. New forms and methods of regulation and practices that promote greater flexibility, responsibility and technical expertise, rather than control, have emerged. These include smart regulation, principles-based regulation, self-regulation, negotiated norms, soft law, procedural safeguards and various other forms of participative democracy. Last but not least, the transformation of lawmaking cannot be properly assessed without a clear account of the soft law phenomenon, that is the production, by the public administration itself, of an abundance of administrative norms, (often called “soft law”) not binding per se, but often interpreted as such for the sake of coherence.

In contrast to the binding character of traditional regulation, these new public governance tools put greater emphasis on social dialogue and objectives such as flexibility, fairness, transparency, participation, accountability, justification, consensus, collaboration, effectiveness, consistency, legitimacy and social acceptability. For instance, in many sectors, such as public transportation, financial markets, agriculture and some industrial branches, various forms of co- or self-regulation and soft law have replaced or supplanted general state rules. In other sectors, such as energy, natural resources and watershed management, participatory decision-making processes have been introduced to give stakeholders (First Nations, citizens, industry actors, public interest groups, etc.) a stronger voice at the various stages of the lawmaking process, from the elaboration of the norms to their application in individual cases. In other settings, like pollution control, a combination of policy tools including market incentives (pollution permits, carbon exchange and voluntary measures6), complement regulatory frameworks.

At first glance, this evolution may appear beneficial for the field of administrative law, in that it reflects a spirit of adaptation and a greater concern for efficiency and values such as cooperation and communication in the development of new policy instruments. However, the increasing use of new types of norms flowing from various normative systems or attached to other sources of legitimacy raises serious questions as to their place with respect to national legal systems. Their growing influence not only blurs the boundary between law and non-law, but also

---

creates new challenges when it comes to their integration into domestic law and the means of ensuring their legitimacy through proper democratic checks and balances. Soft law, for instance, is usually considered as being outside of the recognized categories of positive law, unlike traditional laws and regulations that are binding and enforceable against third parties. Yet, the use of soft law is broadly acknowledged and, under certain conditions, even legitimized and encouraged by courts as a flexible means of controlling the use of discretionary powers and curtailing arbitrariness in administrative decision-making. As a result, despite its lack of binding force or legal status, soft law often has important impacts on the individuals, the businesses or even the member states (EU) to which it applies.

2. **The transformation of lawmaking and public trust**

The evolution of lawmaking and of the conception of law referred to above also raises questions about the impact of such a transformation on public trust and confidence in the law itself and in its processes, institutions and stakeholders.

It is well established that trust matters in lawmaking. For instance, the “decisions of legal authorities mean little if the members of the public do not follow them”.

Research has shown that compliance with laws and regulations rises when the level of trust and confidence is high. In less democratic societies, it may not be impossible to govern without trust or legitimacy but, in the absence of voluntary compliance, governments must resort to coercion and “expend enormous resources to create a credible system of surveillance through which to monitor public behavior, reward desired behavior, and punish rule violators”. On the other hand, voluntary compliance, obtained through trust or legitimacy, not only reflects our core democratic values, it “makes governing easier and more effective,” less costly, and it frees up state resources. In other words, voluntary compliance matters.

---

12 Id.; M. Jin, cited in note 10, 14.
Challenges, Threats and Opportunities

compliance with laws and regulations is crucial to both democracy and the efficient functioning of the legal system.\textsuperscript{15} In addition, research studies have shown that increased mutual understanding and trust foster cooperation.\textsuperscript{16} As such, trust and confidence facilitate social interaction, whether in the private sphere or in dealings with the state (through government agencies or other public authorities). On the contrary, a decrease in trust and confidence tends to negatively impact such relations.

Insofar as public trust and lawmaking are interconnected, ensuring public trust in lawmaking seems even more important today. In our globalized world, characterized by rapidly evolving technologies, highly complex scientific and technological developments, intricate financial systems, and so on, it is often an enormous challenge for even the most sophisticated experts to fully understand the stakes and make rational decisions. To the general population, most of it is simply incomprehensible. In some instances, it is difficult even for government authorities, judges and administrative decision-makers to fully grasp the underlying issues. In that context, individuals and decision-makers often have no other choice but to trust the experts to act in the public’s interest and not in their own self-interest. However, the magnitude of the scandals that have occurred over the last decades - be it in the industrial sector (such as the recent Volkswagen “diesel dupe” scandal) or in the financial sector (for example, the Lehman Brothers scandal of 2008, the unethical ABACUS deal of the Golden Sachs investment bank and the syphoning off of large corporations’ profits into off-shores bank accounts), as well as the numerous allegations of corruption, political traffic of influence, conflicts of interest, fraud and bribery voiced across the world - have weakened the public’s trust in both governments and experts, and called into question the motives behind their actions. Nonetheless, as governance is unlikely to become any simpler, it is essential to restore or enhance public trust and confidence in lawmaking, as well as in the processes and institutions by which laws, regulations and norms are applied. This observation, in turn, has implications for modern lawmaking, which needs to repair trust. Is it the case? Is public trust enhanced or undermined by contemporary lawmaking? Are the new governance tools trust-generating? For instance, does the increased reliance on self-regulation, negotiated norms, soft law, non-jurisdictional modes of conflict resolution and various procedural safeguards bolster public trust and confidence in the legal system, its processes and its institutions? Or else, is public trust and confidence being further undermined by such a diversification of sources and forms of lawmaking? If so, in what ways?

Some nineteen authors have shared their thoughts on these issues and discussed the threats and challenges that perhaps call for adjustments in the contemporary lawmaking processes. Their essays analyze changes in lawmaking and their

\textsuperscript{15} M. Jin, cited in note 10, 14.
impacts on public trust and confidence from various perspectives (such as ethics, rights, legitimacy, democratic responsiveness, checks and balances, legitimate expectations, public interest, capture, technical competence, legal certainty, costs and efficiency) and within a variety of issues and contexts, including: the Europeanization and internationalisation of administrative law (Jans & Outhuijse; Mendelts); the emergence of alternative modes of regulation and their trust-generating qualities (Westerman; Bröiring & Cherednychenko; Winter & Haarhuis); policy change and public trust (Lubach); the developing trends in access to justice in Dutch administrative law and practice, in the light of Jerry Mashaw’s theory of administrative justice (De Graaf & Marseille); the erosion of the welfare state, through a shift from rights to conditional entitlements (Schwitters & Vonk) and, from the point of view of the combination of statutory and private initiatives in domains such as social security (Tollenaar). The book also analyses the tension between juridification and socialization in social control (De Ridder); the psychology of trust within public organizations and the use of mediation as a way of repairing trust (Beaudin); legal uncertainties and mistrust in the tacit authorization system under GALA (Hoogstra); the effectiveness of citizen “participatory initiatives” under ECI (Zeegers) and other types of statutory consultations such as the ones conducted under the Waste electrical and electronic equipment Act, WEEE (Más). Finally, to conclude this book, a synthesis chapter will shed light on and draw attention to the key points developed in these essays (Hertogh).

We thank all the contributors for this opportunity to reflect on lawmaking and public trust and we are confident that the present book has much to offer to those interested in these issues.