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NEW FORMS OF ADMINISTRATIVE LAW IN THE AGE OF THIRD PARTY GOVERNMENT

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Abstract: This paper explores the democratic values underlying public services when they are outsourced. Building on Rosenbloom and Piotrovsky's (2005) theoretical and empirical framework, we examine whether and how administrative law norms – that serve as central democratic governance and accountability mechanisms in the administrative state -- are extended to the new (private) frontline service providers. Through a study of the regulation of the privatized welfare-to-work program in Wisconsin, we find that new forms of administrative law are evolving in third-party government which differ from administrative law as it usually applies to public agencies in several important aspects. The study highlights the much more active role of legislative and administrative mechanisms in the promotion of these new forms of administrative law; and it enables a better understanding of the transformations that administrative law norms undergo in this new structure of public governance.

Key words: Contracting out, Privatization, New public management, Administrative law, Accountability, Public service norms, Social services, Welfare reform, Wisconsin Works, Democratic governance, Regulation & Governance

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New Forms of Administrative Law in the Age of Third Party Government

The wide expansion of "third party government" (Salamon 2002; Posner 2002) profoundly challenges the democratic governance of public services. As New Public Management and Reinventing Government reforms strive for greater efficiency and cost-effectiveness, public services and functions are rapidly being contracted out to private contractors who become the new frontline service providers (Donahue 1991; Kettl 1993; Savas 2000). At the same time, administrative law – one of the main democratic governance and accountability mechanisms in the administrative state – is applied according to the traditional public-private divide and thus it usually does not apply to the new private actors of the third-party government. Moreover, the strong adherence to managerial and market-based values inherent in these reforms might come at the expanse of democratic values – such as transparency, due process and equal protection – that were for long time a major concern.

Nevertheless, the issue of what happens to democratic values in the era of contracting out has largely been neglected by public administration scholars (Lynn Jr 2001; exceptions are: Moe and Gilmour 1995; Gilmour and Jensen 1998; Sellers 2003).[1] A few years ago Rosenbloom and Piotrovsky (2005a) put this issue back at the forefront of public administration scholarship. In their eminent research they created a theoretical and empirical framework for the exploration of the prospects for outsourcing constitutional and administrative law norms to private third-party contractors. Recently there has been a growing scholarly interest in the underlying values of third party government (e.g., Bumgarner and Newswander 2009; Dubnick and Frederickson 2009; Heinrich, Lynn, and Milward 2010; Rosenbloom and Hahm 2010), and Osborne suggests that the "values question" is one of the most intriguing questions in the current study of public administration (Osborne 2010, 418).

This paper seeks to explore further the question of the values underlying the new forms of public administration. Following Rosenbloom and Piotrovsky, we ask whether and how administrative law norms are outsourced to the new private actors in the public services arena. More specifically, we examine the application of four core

administrative law norms – transparency, privacy, due process and equal protection – to private contractors that operate public services. In order to portray a lucid picture of the dynamics of administrative norms extension we examine these questions through a case study of the Wisconsin Works program (W-2), which is widely acknowledged as one of the leading experiments in outsourcing and market-based management of public services (Lens and Vorsanger 2005; Heinrich and Choi 2007; Benish 2010). The findings are based on an in-depth analysis of these four core administrative law norms in the W-2 legislative, administrative and contractual regulation for five contracting cycles from the program initiation in 1997 until 2009.

The next section of the paper presents the concept of administrative law, its development over time and the questions that the new structure of public services raises. The second section presents the W-2 program and the third elaborates the research design and methodology, including the definitions of the administrative law norms we analyse. The research's main findings are presented in the fourth section and they are discussed in the fifth. We conclude with more general conclusions and questions for further research.

Administrative Law in an Era of Privatization

Rosenbloom defines administrative law as the body of constitutional provisions, statutes, court decisions, executive orders and other official directives that: (a) regulate the procedures agencies use in making rules and related policy decisions, (b) control the exercise of their authority to enforce laws and regulations, (c) govern the extent to which administration is open to public scrutiny; and (d) provide for review of agency decisions respecting these matters (Rosenbloom 2003).

Administrative law norms are underpinned by the fear that executive power can be abused and by the idea of accountability of the administration to the citizens (Diller 2000). To this end, administrative law regulates administrative actions to ensure that policies are developed, adopted, and implemented in ways that are fair and that permit public participation, and it also addresses issues of accountability for decisions that affect individuals, ensuring that they are treated fairly.

The origins of the US administrative law can be traced back to the 1870s and 1880s with the rise of the "administrative state" (Rosenbloom 2000), but the concept was significantly extended in the New Deal era when democratic anxieties about "administrative absolutism" intensified with the introduction of a raft of new powerful and independent federal agencies (Stewart 1975). This led Congress and state legislatures, especially from the 1940s, to invest considerable effort in developing and applying democratic-constitutional constraints to public administration thorough Administrative Procedure Acts (APAs), Freedom of Information Acts and others. Courts also played a major role in the development and application of administrative law constraints. Since the 1950s, the federal judiciary created and developed a vast array of new constitutional rights, such as procedural due process and the equal protection doctrines, in order to protect individuals in their encounters with public administrators (Rosenbloom 2003, 29-31).

However, over time the accumulated layers of administrative law constraints were harshly criticized for creating inefficiency, unnecessary red tape and waste and for encumbering public services, discouraging innovation, and impeding entrepreneurial behavior by public managers (Breyer 2006, 28). This led in turn to "Reinventing Government" and "New Public Management" (NPM) reforms, which rely on ideas such as separating purchasing from providing and incorporating private sector principles and practices into public management (Boyne 2002). These reforms advance contracting out, decentralization, deregulation and afford greater managerial autonomy and flexibility to street-level agencies in the belief that this might promote efficiency, productivity, entrepreneurialism and customer satisfaction (Frederickson and Ghere 2005).

These reforms, and especially their strong reliance on private actors for the operation of public functions, pose significant challenges to the democratic governance of public services. This challenge stems from the fact that according to the current application of the “state action” doctrine by the courts, administrative law norms are applied in line with the traditional public-private divide. Hence they usually do not apply to private actors, even when they exercise public power, and are funded by government (Barak-Erez 1995; Metzger 2003).

There is an ongoing scholarly debate as to the effects of these reforms on democratic governance and accountability. Two main theses can be identified. The first, which can be described as *diminishing publicness*, raises the concern that the publicness of public services would be diminished in terms of institutional and normative identity (Haque 2001; Frederickson and Ghere 2005). The assumption of this thesis is that NPM leads to the erosion of public service norms, and legal constitutional and democratic norms would be marginalized, if not entirely replaced, by managerial and performance-oriented norms.

The second thesis, which can be described as *publicization*, argues that rather than compromising public norms, privatization may trigger a process in which administrative law norms would be extended to private actors who operate public services. Judy Freeman, after extensive theoretical discussion of the publicization thesis, concludes that it is *theoretically* feasible (Freeman 2000; Freeman 2003). Rosenbloom and Piotrovsky develop a similar framework while adding significant empirical examples (2005a; 2005b). And recently, Bumgarner and Newswander (2009) further demonstrate that ironically NPM leads to the expansion of public service norms to private actors.[2]

Beyond the question of whether administrative law norms will be extended to private contractors, the academic literature also raises questions as to *how* and to *what extent* this will happen. One central issue is whether the extension of the administrative law norm will be done by the judiciary or by other players. Here the general expectation is that the courts, mainly through the development of the "state action" doctrine, will apply administrative law norms to private contractors who carry out public functions. As Freeman explains, due to their insulation from electoral politics, courts are more likely than the legislature or executive to extend public law norms to private actors (2003, 1335). Rosenbloom and Piotrovsky point out that public officials and administrators have largely ceded this process to the federal and state judiciaries (2005a, 110) and they call them to take much more active role in this process.

Another question is, to what extent administrative norms can and should be extended to private contractors. As Rosenbloom and Piotrovsky (2005a, 118) mention, “[c]onstitutional and administrative law norms need not be applied across

the board to all contractors or to none at all". In other words, in this view the scope of application should be adjusted to the features of each case of outsourcing. According to Freeman (2003), the strongest cases for publicization are in instances when the third-party contractors are engaged in a field where constitutional rights are at risk; when services are highly contentious, value-laden, and hard to specify; when providers enjoy significant discretion; when services affect vulnerable populations with few exit options and little political clout; and when the motivation for privatization is explicitly ideological. The case studied here, as we will present it in the next section, is clearly a strong case for publicization according to this framework.

The Case Study: Welfare reform in Wisconsin

The 1996 federal Welfare Reform Act, and the Temporary Assistance to Needy Families (TANF) program that it created, proved in hindsight to be a major reform in the realm of state welfare programs (Hasenfeld 2000; Handler 1998; Brodkin 2007). On the policy level, the federal legislation pushed a strong emphasis on work-related requirements and for the adoption of a "work-first" philosophy while responding to individual needs through a system of rules and financial incentives.[3] On the administrative level, the federal legislation enabled and encouraged devolution of the operation of welfare services to local and private contractors (Diller 2000; Brodkin 2007; Super 2008).

The W-2 Act was enacted as Wisconsin's main TANF program in 1996. A pilot was implemented in March 1997, and the program was extended statewide in September 1997. The W-2 is widely recognized as a leading experiment in the new forms of public management, and it is famous in its far-reaching use of contracting out and market-based and outcome-oriented governance tools (Lens and Vorsanger 2005; Heinrich and Choi 2007; Benish 2010). This is reflected in the program manual that states: "W-2's objectives are best achieved by working with the most effective providers and by relying on market and performance mechanisms.W-2 is designed to use private as well as public service providers and establishes market mechanisms based on outcome-based performance standards rather than the rules of a bureaucratic program." (DWD 2003a §1.1.0(8))

The hybrid public-private setting of the program operation relies on a central state agency, which contracts out program operation to local and private actors through competitive tendering. At the state level, the program was administrated by the Wisconsin Department of Workforce Development (hereinafter DWD or the department), and from July 2008 it has been administrated by Wisconsin Department of Children and Families (hereinafter DCF or the department). The department is responsible for policy development, managing the competitive sourcing, and monitoring the contractors. At the local level, the program is administrated by public County human or social services agencies and mainly by private for-profit and nonprofit agencies. The W-2 agencies are responsible for determining whether applicants are eligible for benefits and for placing participants into jobs. So far, there have been five complete full contracting cycles between 1997 until 2009, and the sixth contract cycle will end in 2012.

The W-2 act and regulations delegate significant decision-making powers to the winning contractors and their workers in order to carry out their tasks. For instance, the agencies' managers can decide the budget allocation and they play a substantial role in determining the agency's internal procedures and policies (LAB 1999, 17). Therefore, they can significantly influence the type and amount of services provided to the participants (LAB 2005, 29). Moreover, the agencies' caseworkers can determine the applicants' eligibility for income support benefits, child care subsidies, and job access loans; they can determine the employability plan that participates are bound to follow; they can impose sanctions or other penalties on participants who fail to comply with their employability plan or with other program requirements without a "good cause"; they determine whether and to what extent participants receive work support services, such as transportation assistance; and they can require participants to submit personal information.

Research Design and Methodology

This research is based on a content analysis of the W-2 program regulation from its first implementation in 1997 until 2009. These regulatory materials contain the W-2 legislation and the W-2 administrative code (including their amendments over the

years); the W-2 policy document, released in June 1997, and ten releases of the W-2 manual starting from January 1998 until November 2009; and the W-2 contracts between the department and the contractors for five contracting cycles of the program (1997-1999, 2000-2001, 2002-2003, 2004-2005 and 2006-2009).[4]

The content analysis of these regulatory materials refers to four core administrative law norms: transparency, privacy, due process and equal protection. These norms were chosen since they are central to the concept of administrative law, and at the same time they are relatively well defined and specific so they can be clearly identified in the program regulations. First, we defined each of these norms as they usually apply to public agencies according to the American administrative law. Then we analyzed and coded the W-2 program regulations in order to examine if and how these norms were substantively applied to the private contractors that operate the program.

The four core administrative law norms that were analyzed:

(1) *Transparency*. Freedom of Information Acts (FOIAs) both at the federal and the states levels are usually the main avenues for promoting government transparency by giving any individual a legal right to access governmental records subject to some exceptions. Usually FOIAs are not applicable to private contractors' records, unless the records are in the physical possession of a governmental agency and they are not exempt from disclosure as "trade secrets and commercial or financial information" of the contractors (Rosenbloom and Piotrowski 2005a, 114).

(2) *Privacy*. The issue of the collection, management, and release of information regarding individual citizens and permanent residents is primarily regulated through the Privacy Act (Rosenbloom 2003, 128). In the aspects that are relevant to our inquiry, the privacy act ensures that individuals generally have a right to review their records held by an agency; that public agencies must develop safeguards against inaccuracies and misuse of their records; and it secures the confidentiality of personal records as disclosing these without prior consent is prohibited. The act does not apply to corporations, associations and other organizations and therefore it would not normally apply to the contractors.

(3) *Due Process*. In the well-known *Goldberg v. Kelly* (397 U.S. 254 [1970])

case the US Supreme Court held that welfare benefits should be regarded as property, rather than privilege or gratuity, and as such welfare benefits are covered by the constitutional due process clauses, which protect against the deprivation of property rights without due process of law. The root requirement of the due process clauses is that an individual must be given notice and an opportunity of a hearing prior to being deprived of public assistance. The evaluation of due process requirements usually focuses on the timing of the notice and hearing requirements – prior or after the deprivation of public assistance payments; and the intensity of these requirements – how formal and trial-like they are. In the *Kelly* decision the US Supreme Court set the bar for the deprivation of welfare benefits quite high. After balancing the interest of welfare recipients, the risk of erroneous terminations, and the governmental desire to avoid administrative burdens, the court decided that the notice and hearing opportunity should be given *prior* to the termination of payments, and that appeals should be held in a *trial-like setting* (the appellant has the right to be heard; the decision-maker should be impartial; the decision must include reasons and must be based on record; the appellant can call and confront witnesses and can appear through counsel)(Lens and Vorsanger 2005; Lens 2005).

(4) *Equal protection*. The equal protection doctrine significantly constrains the ability of government agencies to discriminate and to classify people according to characteristics such as race, sex, wealth, residency or age, explicitly or implicitly, in policy or its implementation.

The next section presents the application of these core administrative law norms to the W-2 private agencies.

Findings

Transparency

The examination of the W-2 regulations reveals that W-2 agencies are subject to significant transparency and openness requirements. First, the program's administrative code states that: "[I]ndividuals may examine program manuals and policy issuances which affect the public, including rules and regulations governing

eligibility, participants' rights and responsibility and services offered. These documents may be examined at W-2 agency offices or the department's state or regional offices on regular work days during regular office hours." (Wis. Admin. Code DCF §101.07). Moreover, the program's contract make it clear that "[e]xcept as required by laws providing for the confidentiality of personal information, the Wisconsin Open Records Law, sections 19.31 through 19.39 of the Wisconsin Statutes, applies to the Contract." (DWD 2003b §33). The Wisconsin Open Records Act, Wisconsin's main freedom of information legislation, states that generally "contractors' records" are not exempted from the law, and that "each authority shall make available for inspection and copying … any record produced or collected under a contract entered into by the authority with a person other than an authority *to the same extent as if the record were maintained by the authority*." (Emphasis added; Wis. Stat. §19.36(3)). This provision in the Open Records Act applies the freedom of information norm to the W-2 contractors. Nevertheless, it should be noted that the application of the norm to the contractors is different from the way it applies to public agencies in at least two main aspects. First, the norm is applied to the contractors only *indirectly*. Since private contractors are not considered an "authority" under the law, an individual cannot submit an information request directly to the contractor as if it were a public agency (*WIREdata, Inc. v. Village of Sussex*, 310 Wis.2d 397 [2008]). Secondly, the department has interpreted this requirement in a way that allows contractors to claim that certain materials are exempt from the duty of disclosure because they qualify as *trade secret*s according to Wisconsin Open Records Law (DWD 2003b §35). Public agencies (to which we compare the contractors) cannot withhold their own materials on the basis of the "trade secrets" exemption. Therefore, the freedom of information requirement is applied to the contractors only indirectly and somewhat differently from public agencies.

Another form of transparency requirement that is applied to the contractors concerns their openness towards the department and other audit bodies. The W-2 Act states that the department may require the contractor to submit an annual audit (Wis. Stat. Wis. Stat. §49.143(A)(4)), and it also may request and inspect any information that the department determines appropriate and necessary for the overall administration of the program (Wis. Stat. §49.143(A)(5)(b)-(c)). The law also provides that the Legislative Audit Bureau of the state of Wisconsin may inspect at

any time any W-2 agency's records that the legislative audit bureau determines appropriate and necessary (Wis. Stat. §49.143(A)(5)(d)). The program's administrative regulations, under the agency responsibility section, state that the agency must open all records and make reports necessary for the department to exercise its supervisory functions (Wis. Admin. Code DCF §101.05). These requirements appear also in the program contracts (i.e., DWD 2005 §15), and the contracts add also disclosure requirements on issues such as the economic interests of the contractors and their connection with state public officials (DWD 2005 §52) .

Another form of openness that is applied to some extent to the contractors is openness towards competitors. For instance, according to the program contract "[t]he W-2 Contract Agency must cooperate with all partner agencies and with any successor agency" (DWD 2005 §21.1). Moreover, as the contract makes all data, documents and innovation the property of the state (DWD 2005 §39), the contractors' practices might become, at least indirectly, open to their competitors.

Privacy

The W-2 program raises significant issues of privacy as program participants must provide any information required by the W-2 agency. The examination of the program regulation reveals that to large extent the principles of the privacy act are extended to the program contractors. At the individual level, according to the program's administrative code, "[a]n individual or the individual's authorized representative may review the individual's entire case record to verify that the content accurately reflects statements and documentation of facts. The W-2 agency may not withhold any part of the record during preparation for a review of a W-2 agency decision [in an appeal]" (Wis. Admin. Code DCF §101.07(3)). Moreover, according to an amendment to the program manual, starting in March 2004, all participants also have the right to a copy of their own record from the case records when preparing for a review (DWD 2004a §19.2.5). Due to the relatively wide right of participants to appeal for a review, as will be discussed bellow, for all practical purposes the full records can be quite easily reached by individuals. Therefore, in practice the right of participants to review the

contractors' record on them resembles the arrangements in the privacy act that apply to public agencies.

As to the confidentiality of agencies records, this issue was regulated in the program contracts and manuals. The first contract (1997 – 1999) stated that "[t]he W-2 agency agrees to comply with the applicable federal and state laws, rules and regulations concerning confidentiality of records as specified in the Department's policies and procedures. (DWD 1997 §11.4). This provision was repeated in sequential contracts and in the 2006-2009 contract it states even more broadly that: "[e]xcept as provided by Wisconsin Statutes, the W-2 agency shall keep participant records confidential and shall properly dispose of them in accordance with State and federal rules and policies" (DWD 2005 §15.4). The program manual also provides that in principle information concerning W-2 applicants and participants must not be disclosed for any reason except when it is necessary for the administration of the program or under certain circumstances, when requested by law enforcement officers (DWD 2004a §4.7.2).

Due process

In the W-2 program, procedural due process requirements were applied to the contractors from the initiation of the program, and these requirements have intensified over time. However, these requirements are different in some significant aspects from the "fair hearings" procedures prior to welfare reform. According to the W-2 Act, as it was first enacted in 1997, a participant who is displeased with the contractor's decision can petition for review (Wis. Stat. §49.152(1)). The W-2 Act creates a two level review process. At the first, the participant can appeal for a "fact finding" review within the W-2 agency (Wis. Stat. §49.152). This is conducted by a "fact finder", who works for the contractor, but cannot be the same person who took action in the case. The petitioner can present her case by herself or by a representative and she also can cross-examine the case manger, who made the decision. The fact-finder must give reasons for the decision and compile a complete and thorough fact-finding file with the information that was presented in the process and on which the decision is based. At the second level, participants or contractors who are displeased with the fact-

finder's decision may appeal to the Department (which has delegated its authority to decide appeals to the Department of Administration's Division of Hearings and Appeals (Wis. Admin. Code DCF § 101.22). This stage amounts to an appellate type of review: to a large extent the Department's decision to review the fact-finder's decision is discretionary; it is limited to matters raised in the record of the initial hearing (Lens and Vorsanger 2005, 435-6); and it may either be a desk review of the fact-finding case file or it may involve a teleconference to gather further information.

Moreover, an important additional due process requirement was added in 2005, about eight years after the implementation of the program. The amendment spelt out the duty of the agency to give the participant a written and oral notice, with reasons, before the agency can take certain important decisions, such as sanctions and benefit reductions (Wis. Stat. §49.153).

Wisconsin is unusual in using a contractor-level review process to resolve participants' complaints,[7] and it was criticized because the timing of the hearing *after* the deprivation of the benefits does not meet the standards of the *Kelly* decision (Scanlan 1998; Metzger 2003, 1493). But at the same time the agencies are subject to a grievance model that to a large extent replicates the governmental fair hearing process and that strongly resonates the court-like setting that was decided upon in the *Kelly* case. The fact-finding process gives the petitioner an opportunity to present her side of the dispute, it allows her to bring an advocate to the hearing and to question the witnesses; and it also requires the fact finder to be neutral and to give a reasoned and record-based decision. Moreover, the due process requirement added in 2005 is clearly in line with the *Kelly* definition of adequate notice. However, it can be questioned whether entrusting the representative of the private agency with the pivotal fact-finding review, has the same effect as putting it into the hands of a public servant. It was argued that the *Kelly* decision, which approved similar mechanisms in public agencies, does not fit privately-owned agencies which may have financial incentives to free their caseload of hard-to-serve participants (Scanlan 1998, 193).

Equal Protection

The application of equal protection requirements by the W-2 contractors was altered

significantly and made more explicit due to a high profile scandal during the program's implementation. In February 2002, the American Civil Liberties Union (ACLU) and the Milwaukee branch of NAACP filed a complaint with the federal Officer of Civil Rights, alleging racial discrimination in the application of sanctions against the program's participants. As a response the department issued a study of the sanctioning practices of W-2 agencies (DWD 2004b). This document spells out clearly the department's expectation that the contractors will carry out their tasks in a manner that is "fair and equitable" (DWD 2004b, 2). This policy of the department relies on federal civil rights law, according to which programs that receive federal funds cannot distinguish among individuals on the basis of race, color or national origin, either directly or indirectly, in the provision of program services or benefits (DWD 2004b). The study found clear indications that black W-2 participants were sanctioned at a higher rate than their white counterparts and so the department increased its monitoring of the contractors.

Another aspect of the "fair and equitable" treatment of participants which the program regulation strongly emphasizes is *equal access*. For instance, the program manual provides that "[t]he W-2 agency assures that services are equally available to everyone by … [p]roviding equal access to all programs, services or activities, including but not limited to eligibility, treatment, staff assignments, outreach, intake, diagnosis, assessment, evaluation, research, days and hours of service, facilities assignments, communication of information and referrals to other services" (DWD 2004a Appendix II).

Discussion

Our findings show that despite the prominent managerial and market-oriented philosophy of the W-2 program, administrative law norms were extended to the private contractors, at least to some extent, through a web of laws, administrative code provisions, manuals and contracts. Already at the beginning of the program's implementation, in 1997, some administrative law constraints were applied on the private actors, such as due process and privacy requirements. This web of constitutional-democratic constraints was intensified over time when additional

administrative law norms and procedures were applied. Thus, generally our findings support more the publicization thesis than the diminishing publicness thesis.

The increased importance of democratic values in the W-2 program's governance is best illustrated by a noticeable change in the "philosophy and goals" section in the program's manual. After seven years in which this section focused entirely on the programmatic objectives of the welfare-to-work agenda and on the importance of efficiency and the market-oriented operation of the program, on March 2004, for the first time, this section was amended to include the notion of fairness in its constitutional-democratic meaning, and the following statement was added: "[a]ll programs and services shall be rendered in a *fair* and *just* manner, including adverse actions such as denials and sanctions, and participants will be informed of their appeal rights." (Emphasis added; DWD 2004a §1.1.0(6))

Why is this happening? At least partly it was a response to public criticism and a decrease of the department's trust in the contractors due to the exposure of unacceptable behavior by the contractors.[6] It seems that in their pursuit of greater control and legitimacy of contractors' actions, legislators and especially administrators turned to administrative law norms. Administrative law norms have at least two major advantages in this respect: First, although public administrators are many times accused of not paying enough attention to administrative law, at the end of the day it is at the core of public administrators' education and ethos; therefore, it is only natural that they will turn to it when trying to fix old as well as new problems of accountability and legitimacy; Second, and maybe more important, administrative law is also what the public at large is familiar with and therefore expects in the exercise of power. Since legitimacy is mainly based on expectations, applying administrative law norms and mechanisms to the private actors is probably the most efficient way to legitimize the contractors' actions and the government's decision to contract out these functions.

In addition, it is important to notice that the findings show that the outsourcing of administrative law norms to the private contractors was promoted mainly by the Legislature and the Bureaucracy and not by the Judiciary. Although the program enables judicial review as part of the due process proceedings, in practice very few cases in the W-2 program actually reach judicial review.[7] Therefore, contrary to many

scholars' expectations, the process of publicization has been promoted through mechanisms other than judicial review.

The application of administrative law norms was done through a web of legislation, secondary legislation, manuals and contracts. Most of them were specifically designed for the W-2 program, but some are more general provisions in Wisconsin legislation (such in the case of Wisconsin Open Records Law that applies to all government contractors in Wisconsin) or general federal regulation (such as the civil rights requirement which attaches to all federally funded programs). The research especially draws attention to the centrality of contracts as regulatory tools. For instance, the confidentiality of the contractors' records about program participants, as part of the privacy norm, is regulated through the program contracts and to some extent in the program manual. Scholars have pointed out the changing role of contracts in the new structure of governance (e.g, Vincent-Jones 2005), and this study illustrates that change. It identifies a growing body of administrative law that is contractual.

Nevertheless, administrative law norms are not simply transplanted into the new hybrid setting. We identify that in the process of publicization the norms sometimes undergo transformations in their scope and meaning. The privacy and equal protection norms are applied to the same extent as they are applied to public agencies. The due process norm is applied slightly differently since the timing of the hearing is after and not prior to the benefit reduction or termination. The freedom of information demanded from the contractors to disclose their records is applied to the contractors only indirectly (through a request for information from the department) and to a somewhat lesser extent than public agencies, since the contractor's trade secrets are exempt from disclosure.

Several reasons might help explain these changes in the scope of application. First, it might indicate that the application of the administrative norms is sensitive to the fact that the service agencies are privately owned and the application of some administrative law norms is limited in order to respect the private actors' autonomy in managing their business or organization. Moreover, it might also reflect the fact that the contractors are subject to alternative accountability mechanisms that do not usually apply to public entities (Scott 2000). Secondly, it seems that norms that aim to

protect individual rights, such as privacy, equal protection and due process, are given more emphasis in the process of publiciztion than norms that aim to promote general democratic governance, such as freedom of information. This might stem from an approach that gives individuals rights and from the administrative law norms that secure them a higher priority than other more general norms regarding the public. Thirdly, it might also indicate that the administrative law controls that apply to the department's actions and rule-making indirectly also apply to the actions of the contractors. This *indirect* democratic control over the contractors might be perceived as sufficient.

Moreover, we see that in the process of publicization, the norms sometimes change their meaning. For example, usually the norm of transparency is focused on transparency toward individuals and the public at large. In our case we saw two additional aspects: transparency of the contractors towards the department itself and transparency towards other (private) agencies that operate job centers. Another example is the articulation of the equal protection requirements. We saw that program regulation emphasizes not only the usual meaning of equal treatment but puts special emphasis on *equal access* to the program and its services.

These transformations in meaning can be explained as adjustments to the new organizational structure of public services, in at least two ways: First, these are adjustments to the new insiders-outsiders organizational structure. In the traditional structure of public services the issue of openness to the other agencies is seen as an *internal* issue (See: Hood et al. 1999). In the new structure the contractors are outsiders and hence these internal arrangements of government become an issue of *external* regulation. Secondly, and more importantly, these changes in meaning of the norms might indicate an adjustment to the different incentives and logic of operation of private actors. While information and best practice sharing is (or should be) trivial among agencies within the public sector, it is contrary to basic business logic. Contractors tend to see their practices as part of their commercial advantage. Therefore, the understanding of the different logic of private agencies might have led the department to explicit articulation of the demand to share information with the department and with other agencies, which is less needed inside government. Similarly, business logic might incentivize agencies to engage in "cream skimming"

and treating only these with good employment prospects, especially in the case of for-profit contractors (Dias and Maynard-Moody 2007). Therefore, the fear from selective treatment might have pushed for special emphasis on the issue of equal access in the privatized structure of the services.

Conclusions

This research demonstrates that administrative law norms are not necessarily declining in third-party government. Indeed, there are indications that they are evolving and adapting to the new governance of public services. In the case studied here we identified a body of administrative law that applies constitutional-democratic norms to the new private actors in the administration of public services. This case strengthens the understanding that although efficiency and performance were proclaimed as the new legitimizing cornerstones of public services, they are not always sufficient. When significant individual rights and public interests are at stake, private action (just as public action) requires some demonstrable forms of democratic legitimacy; and in such cases the application of administrative law norms and mechanisms is probably one of the most efficient ways to gain it.

Our study indicates that after extensive writing about the *need* to transcend the traditional public-private divide, this might be actually happening. Norms are applied to private contractors according to functional rather than traditional public-private boundaries. However, this new body of administrative law differs in several important ways from administrative law as it usually applies to public agencies. First, it is much more fragmented. Instead of the usual across-the-board application of administrative law, the new body of administrative law is selective and more flexible. Norms are not always applied to contractors; and sometimes they are applied only partially or indirectly. Secondly, this is a legislator-driven and especially administrator-driven body of administrative law rather than a judicially-driven one; and accordingly it is rising especially in contracts and manuals, which are usually outside the formal mechanisms of democratic rule and decision making.[8] Finally, administrative law norms undergo some transformations in scope and meaning during the process of

publicization, and thus this is not simply a 'transplant' of norms from the public to the private sphere but rather a 'legal irritant' (Teubner 1998).

This new body of administrative law (or quasi-administrative law) can be seen as a "third way" that tries to strike a new balance between the traditionally opposing value of the state and the market. In this model administrative law norms are not abandoned; but they are extended to private actors with an attempt to avoid an overly legalistic approach to such extension by adjusting the scope of the norms applied in each case of outsourcing according to the scope of the accountability deficit that it creates (Freeman 2000).

Nonetheless, this potential resurgence of administrative law must raise a set of new critical questions: Do these findings and conclusions go beyond the case studied here? Does this leaner model of administrative law produce sufficient democratic accountability and legitimacy? Is this fragmented notion of administrative law that strives to tailor a special set of administrative law norms for each case of outsourcing a feasible and scalable system of democratic governance? And do we witness a real development in the application of democratic norms or just a symbolic and superficial rhetoric of norms? The last question is probably the most intriguing and substantively important since there are reasons to doubt whether private sector managers will seriously internalize administrative law norms due to their different ethos and sometimes conflicting interests, especially in the case of for-profit firms. These questions are still open to debate and further research is needed to address them.

Notes

1. Most of the attention to these issues has been paid by public law and public sector ethics scholars. Nevertheless, these studies tend to be theoretical and normative; only a few studies shed significant empirical light on the actual application of administrative law norms to third-party private actors (e.g., Guttman 2000; Aman 2005; Verkuil 2006; Dannin 2006). Moreover, legal scholars focus almost entirely on the role of the courts in applying public law norms to private contractors (e.g., Barak-Erez 1995; Metzger 2003; Donnelly 2007), while the role of legislatures and public officials is usually overlooked.

2. The publicization thesis is also in line with Barry Bozeman's "Dimensional Publicness" theory (Bozeman 2007) and with Colin Scott's assertion as to emergence of new accountability networks (Scott 2000).

3. The welfare-to-work policy trend (known in Europe as "activation policies") and welfare governance reforms are a global phenomenon. For comparative perspectives see: Van Berkel & Borghi, 2008; Van Aerschot, 2011; Verhoest & Mattei, 2010.

4. Contracts are traditionally a private law mechanism and hence they are usually not considered as regulatory materials. However, as the use of contracts for the provision of public services is expanding, it becomes clear that in these contracts the government pursues broad policy and democratic objectives (Vincent-Jones 2005, 893-4). Therefore, we decided to treat the contracts between the government and the third-party contractor as regulatory materials for this study in order to get a full grasp of the effects of regulatory actions by the government on the contractors.

5. Other states' TANF programs have usually retained the fair hearing process that had been used for the former AFDC program and that is still used for the Food Stamp, and Medical Assistance programs (LAB 2005, 92).

6. One central scandal, which was mentioned above, was the discriminatory sanctioning practices of W-2 agencies, and there were also other cases of unethical and even criminal practices of contractors. One case even ended with the imprisonment of a CEO of a contractor due to a conspiracy with a senator to obtain the W-2 contracts corruptly (See: *United States of America v. Carl A. Gee*, 432 F.3d 713 [2005]).

7. According to information we received from the Division of Hearings and Appeals (phone conversation with Joan Alt, April 9, 2008), during 2000-2006, 11 appeals were made to the circuit court on the Division of Hearings and Appeals decisions (3

appeals in 2000; 1 in 2001; 1 in 2002; 1 in 2003; none in 2003; 3 in 2005; and 2 in 2006).

8. This growing contractual rule-making strengthens the need to expand the participatory rights to public agencies' contracting procedures (See: Diller 2000; Aman 2002).

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