DEMOCRATIC LEGITIMATION OF DELEGATED LEGISLATION—A COMPARATIVE VIEW ON THE AMERICAN, BRITISH AND GERMAN LAW

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Abstract This article addresses the problem of democratic legitimacy posed by the executive branch's use of delegated legislative powers. After some remarks on the need for delegated legislation and the problem of legitimation the study identifies in a comparative perspective three approaches of ensuring that delegated legislation carries sufficient democratic legitimation. A first means of democratic legitimation is parliamentary predetermination of the executive role. German law proves that the proper legislature under the Damocles sword of unconstitutionality is in many cases well able to prescribe for the executive a substantive programme of delegated legislation. A second technique of democratic legitimation is that parliament in some way participates in the rule-making procedure. German and British law show that by means of subsequent approval the proper legislature assumes political responsibility for subordinate legislation beyond the original empowerment. The US Supreme Court, however, considers the legislative veto to be unconstitutional. Therefore, American law developed a third approach to solve the problem of democratic legitimacy. American experience makes clear that the democratic legitimation of secondary legislation can also be secured by means of comprehensively involving the public in the delegated legislative process. The author assesses the different models for legitimation and explains that the different approaches suggest valuable solutions to each country's problems.

I. INTRODUCTION: THE NEED FOR DELEGATED LEGISLATION AND THE PROBLEM OF LEGITIMATION

All countries that adhere generally to the principle of separation of powers find themselves in a dilemma. To an increasing extent, law in these countries is made not by the proper legislature, that is the elected parliament, but rather

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by the executive branch. The exigencies of modern States have led legislators to transfer much of their lawmaking powers to administrators. These developments have placed administrators in a very powerful position. Thus, it has become one of the major tasks of constitutional and administrative law to channel this power. All jurisdictions acknowledge the departure from the traditional doctrine of separation of powers, but equally have to ensure that delegated legislation carries sufficient democratic legitimation.[1] To exemplify this, the following comparison focuses mainly on the law governing a subordinate legislation[2] in the US ('rules'[3]), Britain ('statutory instruments'[4]) and Germany ('*Rechtsverordnungen*'[5]). Other countries and EU Law will be referred to *en passant*.

Constitutional purists may complain about the shift of lawmaking authority from the legislative to the executive branch. It is at odds with the idea of the separation of powers, an idea that is considered a major guarantee for freedom. The constitutional purist may also mourn that the authority shift departs from the basic principle that '*delegatus non potest delegare*'. As John Locke said in 1690[6]: 'The Legislative cannot transfer the Power of Making Laws to any other hands. For being but a delegated Power for the People, they, who have it, cannot pass it over to others.' These considerations, however, have long been bypassed by the need for administrative institutions to exercise lawmaking authority. The German Constitution, the '*Grundgesetz*' (Basic Law), explicitly states in Art 80 paragraph 1 sentence 1 that '(t)he federal government or a Federal Minister . . . may be authorized by statute to issue rules having the force of law'. It is the purpose of the norm to disencumber the legislature.[7] The US Supreme Court acknowledges that '(i)n our increasingly

[1] For a broader comparison of the American and German law see H Pünder, *Exekutive Normsetzung in den Vereinigten Staaten und der Bundesrepublik Deutschland* (1995) with a summary in English.

[2] This article treats delegated, subordinate and secondary legislation as synonymous. The study does not, however, cover executive norms which are directed primarily toward the internal affairs of the agency as such internal rules may not need specific legislative delegation. Furthermore, the comparison is restricted to rule-making by the executive branch, and does not include the delegation of legislative powers to parliamentary institutions like the Scottish parliament. Compare in this context McHarg, 'What is delegated legislation?' (2006) PL 539 ff.

[3] In the US the terminology is 'neither consistent nor scientific'. See Schwartz, *Administrative Law* (3rd edn, 1991) 143. A rule may be a decision, a decision may be an order, an order may be a rule. The most significant attempt to define basic administrative law terms was made in 1946 when Congress enacted the Administrative Procedure Act. The following study, therefore, will follow its terminology.

[4] In the UK there is also a 'bewildering variety' of names for delegated legislation. See Craig, *Administrative Law* (5th edn 2003) 370–371. The term 'statutory instruments' refers to rules governed by the Statutory Instruments Act 1946. For the classification of primary and delegated legislation (esp to Acts of the Scottish Parliament) see McHarg (n 2).

[5] German terminology in contrast is clear. '*Rechtsverordnungen*' have the same legal effect as '*Gesetze*' but are made by a part of the executive branch.

[6] J Locke *Two Treaties of Government* (1690) Second Treatise, Ch XI § 141.

[7] Compare BVerfGE (*Bundesverfassungsgerichtsentscheidungen*) 7, 267, 274; 8, 274, 311, 321; 42, 191, 203; 55, 207, 228, 241.

complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power . . .'.[8] Similar reasoning governs British Law.[9] It seems to have been generally, if reluctantly, accepted that the complexities of modern government require the creation of an ever greater body of legislation, and that a parliament is too cumbersome to act as sole legislator in all areas of law. Also, European law acknowledges that the delegation of legislative power from Council to Commission is necessary (Art 202 ECT).[10] It is simply not possible to govern a highly interventionist state solely through primary legislation. After all, in all countries compared, administrative law-making powers became the rule rather the exception. Administrative legislation completely dwarfs primary legislation in numbers.[11] Delegated legislation, in other words, matters, and matters increasingly. Sometimes the empowering legislation even allows the executive to amend the primary statute, or some other statute, through delegated legislation (in the UK nicknamed '*Henry VIII* clauses'[12]).

The separation of powers was originally rooted in the fear of tyranny. Montesquieu stated 1748 in his considerations '*De l'esprit des lois*'[13]: '*Si le monarque prenoit part à la législation par la faculté de statuer, il n'y auroit plus de liberté.*' There is an echo of this in the *Blackstone*'s *Commentaries*.[14] However, these concerns have in the meantime lost their significance, as the executive branch itself carries democratic legitimation. Nevertheless, the whole scale of delegated legislation still raises fears that we are about to be

[8] *Mistretta v US* (1989) 488 US 361, 371–372.

[9] Compare eg Craig (n 4) 369–370; Griffith 'The Place of Parliament in the Legislative Process' (1951) 14 Mod. L Rev 279, 292 ff; O Hood Phillips, P Jackson and P Leopold, *Constitutional and Administrative Law* (8th edn 2001) 668 f; I Loveland, *Constitutional Law, Administrative Law and Human Rights* (3rd edn, OUP, Oxford, 2003) 132 ff; EC Page, *Governing by Numbers* (2001) ch 2. See also Donoughmore Committee on Ministers' Powers, *Report Presented by the Lord High Chancellor to Parliament by Command of His Majesty* (1932) Cmd. 4060; and the compilation of the justifications of delegated legislation in the *Sixth Report form the Select Committee on Procedure*, HC 539 of 1966–7, Appendix 8: Memorandum by Mr Speaker's Counsel, para 6.

[10] See also the Council Dec 99/468 laying down the procedures for the exercise of implementing powers conferred on the Commission as amended by Council Dec 2006/512/EC. Compare PP Craig and G de Búrca, *EU Law* (4th edn 2007) 118 ff; S Smismans, 'Functional Participation in EU Delegated Regulation: Lessons from the US at the EU's "Constitutional Moment"'(2005) 12 Ind J Gobal Legal Stud 599 ff.

[11] Compare the compilations of primary and secondary legislation in the US (http://www.gpoaccess.gov/legislative.html), UK (http://www.opsi.gov.uk/legislation/uk.htm), and Germany (http://www.gesetze-im-internet.de). Note that while the statistics are indicative of overall proportions, the definition of secondary legislation to an extent varies between the compared jurisdictions.

[12] The term refers to the Statute of Proclamations 1539, giving Henry VIII extensive powers to legislate by proclamation. Compare to the nomenclature in Loveland (n 9) 135 f.

[13] Charles de Montesquieu, *De l'esprit des lois* (1748) Livre XI, Ch. VI.

[14] Blackstone *Commentaries on the Laws of England* (1765) as cited by Phillips, Jackson and Leopold (n 9) 12: 'In all tyrannical Governments . . . the right of making and of enforcing the laws is vested in one and the same man, or the same body of men; and wheresoever these two powers are united together there can be no liberty.'

ruled by bureaucracy. Lord Hewart once voiced these fears castigating the development of executive legislation as '*New Despotisms*'.[15] Although this analysis seems to be hypercritical[16], one cannot deny the need for special democratic legitimation as the delegated legislation is further remote from the source of democratic legitimation, the people, than parliamentary law-making. As a general rule executive officials are not responsible at the polls as are elected representatives. Paul Craig states:[17] 'We are concerned about rule-making . . . because our ideas of representative government tell us that legislative norms achieve validation and legitimacy through the expression of consent in the legislature itself. The existence of rules of a legislative character, other than primary statutes, poses the problem of how the validation . . . is to be accomplished.' One might object that as the executive branch is better suited to make technically sound rules, delegated legislation carries legitimacy by rationality.[18] But the rationality of government decisions will always be questionable. There is no absolute truth in policy-making. The relevant facts, their assessment, the policy's goal, and the appropriate way to achieve it are the object of political struggle. Thus, executive rules must be legitimate beyond their technical soundness. Democratic legitimation is necessary.[19] In the long run, no government can overcome a want of legitimacy by reliance upon coercion.[20] The primary source of democratic legitimation is the people. The source can be used either indirectly by relying on elected representatives or directly by an effectively regulated public participation in rule-making. It can broadly be said that Germany and the UK use mainly the first way to democratic legitimation (see II B and C) while the United States follows the second path (II D).

II. DEMOCRATIC LEGITIMATION BY PARLIAMENTARY PREDETERMINATION OF THE EXECUTIVE RULE

In all the countries compared, however, enabling statutes provide for a basic democratic legitimation of executive rules. In the US, as in Germany, the executive has no inherent legislative power.[21] As a general proposition, the executive can exercise only such legislative powers as are specifically

[15] Lord Hewart, *The New Despotism* (1929).

[16] Compare for an early response Donoughmore Committee on Ministers' Powers (n 9). See also Griffith (n 9) 279, 294 f; J Kersell *Parliamentary Supervision of Delegated Legislation—The United Kingdom, Australia, New Zealand and Canada* (1960) 2.

[17] Craig (n 4) 368.

[18] Compare A Bonfield, *State Administrative Rule Making* (1986) 145; J Kersell (n 16) 2 ff.

[19] Compare for a broad view on the legitimacy D Beetham, *The Legitimation of Power* (1991).

[20] Dahrendorf, 'Effectiveness and Legitimacy' (1980) 51 Political Quarterly, 393, 409, warns, that 'the response to a crisis of legitimacy will be authoritarianism and illiberty'.

[21] See for the US eg *Bowen v Georgetown University Hospital* (1988) 488 US, 204, 471; and for the German law BVerfGE 34, 52, 59–60.

delegated by the legislature. In this respect German and American law clearly differ from French law which recognises an inherent power with the executive to legislate through regulations ('*réglements*') with respect to all matters not specifically assigned to the legislature.[22] Portugal for example follows a comparable approach.[23] British law is more similar to the German and American legal systems putting aside an exceptional and very limited power of legislation under the prerogative[24] (which can also be found in Italy[25] and Spain[26]), the British executive can legislate only if authorized to do so by Parliament. As Cecil Carr poetically phrased it, delegated legislation 'is directly related to Acts of Parliament, related as child to parent . . .'[27] Consequently, in all jurisdictions the terms of secondary legislation are subject to judicial review to ensure that they do not exceed the competence the proper legislators have granted in primary legislation. While the necessity of a delegating statute is shared in the compared countries, the requirements on its content diverge.

A. The German Approach: Forcing Bundestag to Make the 'Essential' Legislative Decisions

The German legal system relies primarily on substantive parliamentary predetermination of the executive rule.[28] The statute is considered to be the 'central building block of the democratic constitutional structure'.[29] Thus the *Bundestag* is constitutionally required to define the 'content, purpose and scope' of legislative powers which are delegated to the executive (Art 80 paragraph 1 sentence 2 Basic Law). These requirements can similarly be found in Swiss constitutional law[30]—as well as in the judicature of the European

[22] Art. 34, 37 of French Constitution. Compare eg Favoreu et al. *Droit constitutionnel* (10th edn, 2007) 197 ff, 777 ff, Chapus, *Droit administratif general*, vol I (15th edn, 2001) 209, 652 ff; Gaudemet, *Droit administratif* (18th edn, 2005) 252 ff; and Schwartz, *Administrative Law and the Common Law World* (1954) 89 ff; O HoodPhillips, P Jackson and P Leopold (n 9) 11; LN Brown and J Bell, *French Administrative Law* (5th edn, 1998) 11; P Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s' (2003–2004) 13 Yale L J 1341, 1404 ff.

[23] The room for inherent legislation, however, is rather limited. Compare to the '*decretos-leyes*' eg JJ Gomes Canotilho, *Direito Constitucional* (4th edn 1989) 649 ff.

[24] See for instance O Hood Phillips, P Jackson and P Leopold (n 9) 318 ff; C Turpin, *The British Government and the Constitution* (5th edn, 2002) 415 ff.

[25] Compare on the '*decretazione d'urgenza*' eg P Caretti and U de Sievo, *Instituzione di diritto pubblico* (1992) 273 ff; Baschiera, 'Introduction to the Italian Legal System: The Allocation of Normative Powers' (2006) 34 Int'l J Legal Info 279, 289 ff.

[26] Compare on the '*decretos-leyes*' Santamaría Pasto, *Fundamentos de Derecho Administrativo*, vol I (1988/1991) 627 ff.

[27] C Carr, *Delegated Legislation: Three Lectures* (1921) 2.

[28] See Pünder (n 1) 53 ff.

[29] EW Böckenförde, *Gesetz und gesetzgebende Gewalt* (2nd edn, 1981) 381.

[30] Compare the decision of the Swiss *Bundesgericht* (1978) BGE 104 Ia, 305, 310–311. See also U Häfelin and W Haller, *Schweizerisches Bundesstaatsrecht* (3rd edn, 1993) 449, 450 ff.

Court of Justice[31] (and in the European Constitutional Treaty, Art I-36 CT).[32] As the German *Bundesverfassungsgericht*, the Federal Constitutional Court, puts it: The legislature is obliged itself to make 'significant' decisions (so-called '*Wesentlichkeitstheorie*').[33] If the enabling legislation does not fulfil these criteria, the statute is void.[34] In this way it is to be guaranteed that the parliament elected by the people bears political responsibility for all laws, including those created by the executive. Accordingly democratic legitimation is achieved by the complex parliamentary procedures directed towards the aims of transparent decision-making, a balance of interests, and participation by political minorities. Against this background it is accepted in Germany (albeit not without controversy) that a delegating statute might even empower the executive to amend primary legislation.[35] In addition, under German law all executive bodies with legislative powers are ultimately politically answerable to parliament. Delegates may only be the Federal government, Federal ministers and state governments (Art. 80 paragraph 1 sentence 1 Basic Law).[36] All of them are directly monitored by parliament.[37]

B. The American Approach: The Non Delegation Doctrine' is 'Moribund'

Originally American law was similar to German law. According to the so-called 'non delegation doctrine' the role of Congress was to make the 'important choices of social policy'. The Supreme Court once forced Congress to set 'standards' by means of delegating statutes for the executive regarding the extent legislative powers conferred upon it.[38] The parallel is striking but not surprising, since American law was to a certain extent godfather at the birth of the actual German constitutional law after the Second World War.[39] In

[31] cp to Art 202, 211 ECT – ECJ (1970), C-25/70 (Köster) ECR, 1161, 1172; ECJ (1979), C-230/78 (Eridana), ECR, 2749, 2765; ECJ (1992), C-240/90 (Germany/Commission), ECR, I-5383, 5434; ECJ (1995), C-417/93 (Parliament/Council), ECR, I-1185, 1219; ECJ (1996), C-303/94 (Parliament/Council), ECR, I-2943, 2969. Note, however, that the ECJ has never annulled so far a measure on these grounds.

[32] Compare Craig and de Búrca (n 10) 139 f; Smismans (n 10) 623 ff.

[33] Compare eg BVerfGE 7, 282, 302; 33, 125, 158 ff; 40, 237, 249; 49, 89, 126 f; 58, 257, 278; 80, 1, 20; 85, 97, 105. See also Cremer 'Art 80 und Parlamentsvorbehalt' (1997) 122 AöR, 248 ff; Lindseth (n 22) 1395 ff.

[34] See for examples in the constitutional judicature Rubel, 'Art 80' in Umbach and Clemens (eds) *Grundgesetz* vol. 2 (2002) 25 ff.

[35] Compare BVerfGE 8, 155, 171; Ramsauer, 'Art 80' in Denninger et al. (eds) *Grundgesetz* (3rd edn, 2001) 41.

[36] Compare BVerfGE 8, 155, 163.

[37] It should, however, be recognised that the accountability of government and ministers is limited due to the governmental dominance of the legislature.

[38] Compare *Wayman v Southard* (1825) 23 US, 1 ff; *Field v Clark* (1892) 143 US, 649 ff; *Consolidated Coal Co. v Illinois* (1902) 185 US, 203 ff; *Grimaud v US* (1911) 220 US, 506 ff; *J.W. Hampton Co. v US* (1928) 276 US, 394 ff; *US v Chicago M St P & P R Co* (1931) 282 US, 311 ff; *Panama Refining Co. v Ryan* (1934) 293 US, 388 ff; *A.L.A. Schechter Poultry Co. v US* (1935) 295 US, 495 ff.

[39] Compare Mössle, *Inhalt, Zweck und Ausmaß* (1990) 42 ff; B Wolff, 'Ermächtigung zum Erlass von Rechtsverordnungen' (1952–3) 78 AöR, 194, 197; Tilman Pünder, *Das Bizonale Interregnum* (1966) 223 ff; Lindseth (n 22) 1392 ff.

fact, the wording 'content, purpose and scope' in Art 80 Basic Law can be traced back to the post-war Office of the Military Governor of the US (OMGUS). In the meantime, however, American law has diverged significantly from the German approach. The Supreme Court has given up enforcing the 'non-delegation doctrine'.[40] Congress tends to use the given leeway extensively by delegating largely unlimited legislative powers to the executive. Such delegations are characterised by Davis in view of the frequently applied 'public interest standard' as 'Here's the problem—deal with it' empowerment.[41] The 'non-delegation doctrine' is—as seen by Chief Justice Marshall—'moribund'.[42]

In addition, American law does not require that delegated legislative powers are exclusively exercised by executive bodies that are as in Germany and in Britain answerable to a parliament. Rather, 'insulation from the democratic process' is intended to guarantee that executive legislation is made free from political considerations and solely with regard to objective considerations and the public interest.[43] This element of 'anti-democratic distrust of political government'[44] and reliance on administrative 'expert managers' has a long history in the USA and—while somewhat controversial—is valid to this day.[45] The Supreme Court emphasises: 'Broad regulatory powers . . . were most appropriately vested in an agency . . . relatively immune from the "political winds that sweep Washington".'[46] Congress generally mandates 'independent regulatory commissions' to undertake legislative tasks, and these commissions—unlike the 'executive branch agencies'[47]—are politically unaccountable either to Congress or the President. According to the Supreme Court, their legislative activity is 'free from executive control',[48] and may not

[40] See eg *Yakus v US* (1944) 321 US, 414 ff; *Lichter v US* (1948) 334 US, 742 ff; *American Trucking Assn v Atchison* (1967) 387 US, 397 ff; *NAACP v Federal Power Commission* (1976) 425 US, 662 ff; *Industrial Department AFL-CIO v American Petroleum Institute* (1980) 448 US, 607 ff; *American Textile Manufacturers Institute v Donovan* (1981) 452 US, 490 ff; *Mistretta v US* (n 8) 361 ff; *Touby v US* (1991) 111 Sup Ct, 1752 ff. Compare generally Aman and Mayton, *Administrative Law* (2nd 2001) 9 ff.

[41] Davis, *Administrative Law Treatise* (2nd edn 1978) 27. Similarly Ely, *Democracy and Distrust* (1980) 132 ('Find the problems in this area and solve them'); *Central Forwarding, Inc v Interstate Commerce Commission* (1983) 698 F 2d, 1283 (5th Cir: 'Go forth and do good').

[42] Marshall in *Federal Power Commission v New England Power Co* (1974) 415 US, 352. But note the application of the non-delegation doctrine in *South Dakota v Department of Interior* (1995) 69 F3d 878 (8th Cir). Furthermore in the states the non-delegation doctrine is used rather extensively so that 'there has never been a suspicion of its death'. See Aman and Mayton (n 40) 27. Compare Pierce, Shapiro and Verkuil, *Administrative Law and Process* (3rd edn, 1999) 60 ff.

[43] See *Synar v US* (1986) 626 F Supp 1374, 1398 (D C Cir).

[44] Aranson, Gellhorn and Robinson, 'A Theory of Legislative Delegation' (1982) 68 Cornell L Rev 1, 25.

[45] The ideological foundations were laid by Woodrow Wilson, 'The Study of Administration' 2 (1887) Pol Sci. Q 197 ff.

[46] *Commodity Futures Trading Com'n v Schor* (1986) 478 US, 833.

[47] Compare in this context for example Senate Committee on Governmental Affairs, *Study on Federal Regulations* (1977–1979) Doc No 26, 95th Cong, 1st Sess, vol I, 95 ff.

[48] *Humphrey's Executor v US* (1935) 295 US, 602 ff.

stand 'under the Damocles Sword of removal by the President'[49]. Not the least for this reason, the 'independent regulatory commissions' are among the most powerful official bodies in the US. McGarity explains:[50] 'Economic regulation is typically implemented through "independent" commissions composed of several members who are not subject to the direct control of the President. These commissions are typically given a broad mandate to regulate in the "public interest"'.

C. The British Approach: Parliamentary Sovereignty and 'Skeleton Legislation'

British state practice on delegating legislative powers seems to be similar to the American. Constitutional law rests on the doctrine of unlimited sovereignty of Parliament. Safeguards like those provided in the constitutions of the US and Germany are unknown in this country. Thus there are no constitutional restrictions on the delegation of legislative powers (comparable to the pre-war German Law[51]). Unlike the German *Bundestag* the Westminster Parliament is not constitutionally forced to itself make the 'significant' decisions on the regulatory field. Contrary to the actual German law the passage of 'skeleton legislation' is as legally acceptable in Britain as it is in the US. Much of the broadly delegated legislation is of real importance.[52] The power given to the executive not merely to fill in technical details, but also to decide broad issues of policy, leads in the United Kingdom to a consequential shift in the balance of power between Parliament and the executive.[53] Of special concern is the increasing use of so-called '*Henry VIII* clauses' which allow the executive to amend primary legislation.[54]

[49] *Wiener v US* (1958) 57 US, 349, 358.

[50] McGarity, 'Regulatory Reform in the Reagan Era' (1986) 45 Md L Rev, 253, 254 (providing for further references).

[51] Compare eg C Schmitt, 'Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen' (1936) VI ZaöR, 252 ff; Jellinek, *Gesetz und Verordnung* (1887) 333, 338; Lindseth (n 22)1357 ff.

[52] Compare Report of the Hansard Society Commission on the Legislative Process ('Rippon Commission') *Making the Law* (1993) 89. See also Hayhurst and Wallington 'The Parliamentary Scrutiny of Delegated Legislation' 1988 P L, 547 ff; Wade and Forsyth, *Administrative Law* (9th edn, 2004) 860 ff; Page (n 9) 35 ff; McHarg (n 2) 556–557.

[53] Craig (n 4) 370. See also Ganz, 'Delegated Legislation: A Necessary Evil or a Constitutional Outrage?' in Leyland and Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (1997) 63–64.

[54] The use of such clauses has increased as of late. Compare eg Lord Rippon, 'Henry VIII Clauses' (1989) 10 Stat L Rev 205; Barber and Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' (2003) P L, 112 ff. The Deregulation and Contracting Out Act 1994 and the Regulatory Reform Act 2001 are notorious in this context. See Ganz (n 53) 65–66; McHarg (n 2) 539 ff; Freedland, 'Privatising Carltona: Part II of the Deregulation and Contracting Out Act' (1995) P L 21, 21–22. Note, however, that courts have indicated that a power to modify the provisions of a statute by delegated legislation should be narrowly and strictly construed. See for references Hood Phillips, Jackson and Leopold (n 9) 671.

D. Comparative Assessment of the Different Approaches

The development of American law of delegated legislation and the British example could lead in Germany—as in Switzerland—to an argument for waiving the strict requirements on parliamentary predetermination of the executive norm. Thus calls are heard to abolish the restrictive delegation standards laid down in Art 80 Basic Law, so as to afford the parliament an unlimited right of delegation. The question of what parliament should itself regulate is said by some German scholars to be one not of constitutional law but rather of constitutional policy, to be addressed by parliament itself according to political criteria.[55] Similar reasoning governs British law ('sovereignty of parliament') and is common in the US ('judicial self-restraint').[56]

1. No relief without good cause of the parliament's responsibility for substantive legislation

Adopting the American and British regulatory approach under German law nevertheless seems inappropriate. The loose requirements on the delegating statutes have led in the USA to a 'crisis of legitimacy' and are subject to strong criticism as 'legiscide'.[57] With limited substantive demands made upon them, the 'independent regulatory commissions' are seen as politically independent 'principalities of power'.[58] American courts, however, despite hefty criticism[59] and without addressing the issue, have accepted the situation. They are reluctant to declare the 'fourth branch, a haphazard deposit of irresponsible agencies and uncoordinated powers'[60] as unconstitutional.[61] The independent

[55] See eg Magiera, 'Allgemeine Regelungsgewalt zwischen Parlament und Regierung' (1974) 13 Der Staat, 1, 22 (with further references).

[56] See Bickel, *The Least Dangerous Branch* (1962) 111 ff; Stewart, 'The Reformation of American Administrative Law', 88 (1975) Harv L Rev 1669, 1696 ff; Choper, *Judicial Review and the National Political Process* (1980) 123 ff; Sargentich, 'The Delegation Debate and Competing Ideals of the Administrative Process' (1987) (1987) Am U L Rev 419, 430.

[57] See Wright, 'Beyond Discretionary Justice' (1972) 81 Yale L J, 575 ff; Jaffe, 'The Illusion of Ideal Administration', 86 (1973) Harv L Rev, 1183 ff; McGowan, 'Congress, Court, and Delegated Power', 1977 Colum L Rev, 1119, 1132 ff; Freedman, Crises and Legitimacy (1978) 6–7; Lowi, *The End of Liberalism* (2nd edn, 1979) 92 ff; Harter, 'Negotiating Regulations—A Cure for Malaise', 71 (1982) Geo L J 1, 17 ff; Aranson, Gellhorn and Robinson (n 44) 1; Schoenbrod, 'The Delegation Doctrine—Could the Court give it Substance?' (1985) 83 Mich L Rev 1223; Mayton, 'The Possibilities of Collective Choice: Arrow's Theorem, Art I and the Delegation of Legislative Power to Administrative Agencies' 1986 Duke L J, 948, 962–3; Gellhorn, 'Delegation of Powers to Administrative Agencies—Returning to First Principles' (1987) 36 Am U L Rev 347 ff; Sarvis, 'Legislative Delegation and Two Conceptions of the Legislative Power' (2005–2006) 4 Pierce L Rev 317 ff. For a summary of the debate, compare Sunstein, 'Nondelegation Canons' 67 (2000) U Chi L Rev 315, 317 ff.

[58] Justice Douglas, cited after Dolzer, 'Verwaltungskontrolle in den Vereinigten Staaten' (1982) DÖV, 578, 579.

[59] See above all the Symposium on 'The Uneasy Constitutional Status of the Administrative Agencies' (1987) 36 Am U L Rev.

[60] The President's Committee on Administrative Management: *Report with Special Studies*, 'Brownlow Report' (1937) 39.

[61] See *Humphrey's Executor v US* (n 48) 602, and Schwartz (n 3) 22.

regulatory commissions seem to be too strongly rooted in American state practice as the 'principal structural development' of the 20th century[62] and as 'part of legal folklore'[63]. Suggesting the German model of confining the empowerment to delegates which are directly accountable to elected representatives of the people does not seem to be very promising. The Supreme Court Justice O'Connor is said to be 'scared' by the idea that the traditional administrative structure could be unconstitutional.[64] Nevertheless, German state practice demonstrates that the proper legislature under the ever-present threat of unconstitutionality is in many cases well able to prescribe for the executive a substantive programme of delegated legislation.[65] This would well suggest that members of Congress are—as the British MPs—more unwilling than unable to decide 'hard cases' themselves.[66] The American legal position can only be understood against the historical background of Roosevelt's 'New Deal', when the President threatened the Supreme Court with his 'court packing plan'.[67] In recent times there has been no lack of attempts to resuscitate the 'moribund' non-delegation doctrine. But, even the energetic efforts of the former Chief Justice Rehnquist have failed to force Congress to decide on the 'important' or 'fundamental policy issues', and to declare as unconstitutional under the non-delegation doctrine any too far-reaching legislative enabling powers.[68] For the UK Paul Craig explains that for a government with an onerous legislative timetable, or only a small majority, there is always the temptation to pass skeleton legislation with important aspects to be sketched in by the Minister.[69] There are considerable objections voiced in Britain against ample delegations of legislative powers. The Procedure Committee concluded that there was 'too great a readiness in Parliament to delegate wide legislative powers to Ministers, and no lack of enthusiasm on their part to take such powers'.[70] Notwithstanding the 'proper purpose' doctrine (which should ensure that delegated powers are only used

[62] Starr, 'Tribute to Bernard Schwartz' (1988) Annual Surv Am L, XIII.

[63] Pierce, Shapiro and Verkuil (n 42) 103.

[64] So quoted by Schwartz (n 3) 22.

[65] See Staupe, *Parlamentsvorbehalt und Delegationsbefugnis* (1986) 322; Staats, 'Die Formelermächtigung' in Kindermann (ed) *Studien zu einer Theorie der Gesetzgebung* (1982) 192 ff.

[66] See also Cutler and Johnson, 'Regulation and Political Process' 84 (1975) Yale L J, 1395, 1400; Woll, *American Bureaucracy* (2nd edn, 1977) 173; Ely (n 41) 3; Fiorina, 'Legislative Choice of Regulatory Forms—Legal Process or Administrative Process' 39 (1982) Public Choice, 33, 46 ff, 53 ff; Dripps, 'Delegation and Due Process' (1988) Duke L J, 657, 668; Lowi, 'Delegation of Powers to Administrative Agencies—Two Roads to Serfdom: Liberalism, Conservativism and Administrative Power' (1987) 36 Am U L Rev, 295, 318; Sargentich (n 56) 430.

[67] See Schoenbrod (n 57) 1225.

[68] Separate opinion in *Industrial Department AFL-CIO v American Petroleum Institute* (n 40) 687 ff; dissenting opinion in *American Textile Manufacturers Institute v Donovan* (n 40) 490 ff.

[69] Craig (n 4) 370. Compare also Turpin (n 24) 404 ff.

[70] *Fourth Report* (1995–6) HC 152, para 14. Compare also *Report of the Inquiry into the Export of Defence Equipment and Dual-Use of Goods to Iraq and Related Prosecutions* (1996) HC 115 ('Scott Report'); Rippon Commission (n 52) 89–90.

for the purposes expressly or implicitly stated in the parent statute)[71] and the duty of the House of Lords' Delegated Powers and Deregulation Committee to report whether the provisions of a bill inappropriately delegate legislative power,[72] there is talk of 'downgrading the role of Parliament.'[73] Such criticism supports the approach of the German legal system, according to which the legislator is required to make a substantive decision and where the legitimation of executive delegated legislation is primarily a question of its basis in statutes.[74] This also corresponds to the German constitutional history, which in the context of the Weimar disaster (characterised by extensive use of '*Notverordnungen*', emergency rules, by the *Reichspräsident*[75]) and national socialist dictatorship (which was originally based on the extremely far reaching '*Ermächtigungsgesetz*' 1933[76]) is coloured by a conscious turning away from unlimited delegation powers of the legislature.[77] Parliament is elected by the people and should not without good cause be relieved of its responsibility for substantive legislation. Statutes as 'central regulatory instruments' form a basic model which is worthy of preservation.[78] To ensure that this is not undermined should in the US be the 'courts' job'.[79] In the light of parliamentary sovereignty in the UK, the German (and Swiss) model might be considered at least as a matter of political prudence by the Westminster Parliament. Providing for substantive parliamentary pre-determination might particularly appease the critics objecting to the use of '*Henry VIII*-clauses'.

[71] Compare eg Sunkin, 'Grounds for Judicial Review: Illegality in the Strict Sense' in Feldman (ed) *English Public Law* (2004) 745 ff.

[72] Compare Himsworth, 'The delegated powers scrutiny committee' (1995) P L 34 ff.

[73] See McAuslan and McEldowney, *Law, Legitimacy and the Constitution* (1995) 23.

[74] Compare for similar arguments in the US Wright (n 57) 575 ff; Jaffe (n 57) 1183 ff; McGowan (n 57) 1128 ff; Freedman (n 57) 78 ff; Ely (n 41) 131 ff; Aranson, Gellhorn and Robinson (n 44) 67; Bardach and Kagan, Going by the Book (1982) 46 ff; Dill, 'Scope of Review of Rulemaking after Chadha—A Case for the Delegation Doctrine?', 33 (1984) Emory L. J., 953 ff; Garland, 'Deregulation and Judicial Review' (1985) 98 Harv L Rev, 507, 568 ff; Mayton (n 57) 965; Gellhorn (n 57) 352–3; Dripps (n 66) 662 ff. Stewart, 'Beyond Delegation Doctrine' (1987) 36 Am U L Rev, 323, 324, asserts, however, that there are no 'judicially manageable and defensible criteria to distinguish permissible from impermissible delegations'. Similarly Pierce, 'Delegation of Powers to Administrative Agencies—Political Accountability and Delegated Power' 36 (1987) Am U L Rev, 391, 403 ff.

[75] Compare Anschütz *Die Verfassung des Deutschen Reiches* (14th edn 1933) Art 48; März, *Die Diktaturgewalt des Reichspräsidenten* (1997); Lindseth (n 22) 1361 ff.

[76] *Reichsgesetz zur Behebung der Not von Volk und Reich*, 24.3.1933, RGBl. I, 141. Compare Mössle (n 37) 28 ff; Lindseth (n 22) 1370 f.

[77] See Lindseth (n 2) 1387 ff; Ossenbühl 'Gesetz und Verordnung im gegenwärtigen Staatsrecht' (1997) ZG, 305, 307 ff.

[78] Compare Schmitt Glaeser, 'Partizipation an Verwaltungsentscheidungen' (1973) 31 VVDStRL, 179, 199.

[79] Schoenbrod, 'Separation of Powers and the Powers that Be—The Constitutional Purposes of the Delegation Doctrine' (1987) 36 Am U L Rev 355, 386.

2. Limits to substantive predetermination in the enabling legislation

However, the proper legislature in Germany is also subject to the 'dilemma'[80] of in certain cases being unable to itself solve complex regulatory problems and to predetermine the content of executive norms by means of taking essential normative decisions. Anything else would be parliamentary 'calumny' or self deception.[81] The impossibility of more precise statutory regulation is often an argument in the German jurisdiction for relaxing the restrictions on the empowering legislation in Art 80 Basic Law.[82] Comparison with the American and British systems underlines the sense of such an argument.[83] In this way in all countries the question arises of whether and by what means democratic legitimation can be supplemented.

III. DEMOCRATIC LEGITIMATION BY PARLIAMENTARY PARTICIPATION IN THE EXECUTIVE RULEMAKING PROCESS

In Germany as in Britain, a common tool to compensate for the lack of substantive predetermination of executives rules by the parliament is the technique that parliament in some ways participates in the executive rule-making procedure.

A. The German Approach: Bundestag Participating in the Process of Making Rechtsverordnungen

It is the main feature of German law governing administrative legislation that it provides for rather intense parliamentary participation.[84] Following the German tradition, which can be traced back to the reign of the Prussian kings and German emperors in the 19th century,[85] the *Bundestag* as a whole can participate in the process of making '*Rechtsverordnungen*' in three distinct ways. The most important tools to ensure parliamentary influence are so called '*Zustimmungsverordnungen*' which need the consent of parliament before they are promulgated. However, some subordinate legislation has only to be explained by the administration to the *Bundestag*. Parliament then has the chance to voice its opinion ('*Kenntnisverordnungen*'). This method has for example been used to inform the parliament concerning the implementation of

[80] The term 'dilemma' is used to describe the problem in German and American scholarship. See eg Ossenbühl (n 77) 314; and Schoenbrod (n 57) 1227.

[81] Eichenberger, 'Gesetzgebung im Rechtsstaat' (1982) 40 VVDStRL 7, 29–30.

[82] Compare BVerfGE 8, 274, 326; 11, 234, 237; 21, 1, 4; 28, 175, 183; 58, 257, 278; and v Danwitz, *Die Gestaltungsfreiheit des Verordnungsgebers* (1989) 128–129.

[83] See eg Mashaw, 'Prodelegation: Why Administrators Should Make Political Decisions' (1985) 1 J L Econ & Org. 1 ff; Pierce (n 74) 391 ff.

[84] cp Pünder (n 1) 150 ff.

[85] See, for the time before 1919 G. Jellinek (n 51) 99 ff, 366 ff; Reich-Erkelenz, *Das Verordnungsrecht des Monarchen im deutschen konstitutionellen Staat* (1966); and, for the Weimar republic, Huber, *Deutsche Verfassungsgeschichte seit 1789*, vol. VI (1981) 440.

EC directives by subordinate legislation.[86] Finally, there are '*Aufhebungsverordnungen*' which can be vetoed by the *Bundestag* after their promulgation. The participation of the parliament as a whole is considered as constitutional. The *Bundesverfassungsgericht* asserts no violation of the separation of powers.[87] The Court only requires a 'legitimate interest of the legislature' ('*legitimes Interesse der Legislative*') to maintain influence on the sub-legislative law-making. However, no legislative delegation on the federal level requires participation of committees of the *Bundestag* in the process of developing administrative rules. The reasoning behind not using this legislative tool on the federal level can be traced back to a decision of the *Bundesverfassungsgericht* in 1950, which asserted that committees of the legislature lack the authority to participate in the legislative process independently.[88] No constitutional problem is seen when parliamentary committees are only heard and merely give advice during the process of creating *Rechtsverordnungen*. At the state level, however, there are many examples of enabling statutes which require the consent of a parliamentary committee in the process of issuing a *Rechtsverordnung*.

B. The British Approach: Scrutiny on the Floor of the House and in Committees

The British parliamentary participation resembles the German situation.[89] There are three principal methods ensuring parliamentary scrutiny of delegated legislation.[90] The first mechanism simply offers information to the Westminster Parliament. Comparable to the German '*Kenntnisverordnungen*' the empowering legislation only requires the subordinate legislation to be laid before the House. Questions may be asked, but no direct form of attack upon such legislation is possible. The second tool gives Parliament more control: similar to the German '*Zustimmungsverordnungen*' the empowering legislation requires the subordinate legislation to be subject to an affirmative resolution of each House or the House of Commons alone. The third way is the negative resolution procedure. In this case a private member must secure time to attack the subordinate legislation. The instrument is open to a 'prayer of annulment' within 40 days. This way of ensuring parliamentary scrutiny

[86] See § 2 II of the '*Gesetz betreffend Rechtsverordnungen der Bundesregierung zur Durchführung von EG-Richtlinien*'. Compare with British Law eg Craig (n 4) 379–380.

[87] See BVerfGE 8, 271, 319 ff; 8, 274, 321; 59, 48, 49 ff. Some federal and state constitutional norms even provide explicitly for the participation. Compare Art. 109 paragraph 4 Basic Law, Art. 9 paragraph 2 Bavarian Constitution, Art. 47 paragraph 1 Constitution of Berlin.

[88] BVerfGE 4, 193, 203.

[89] See also for a comparative perspective Kersell (n 16); Lindseth (n 22) 1352.

[90] See Craig (n 4) 374 ff. Compare also Hood Phillips, Jackson and Leopold (n 9) 672 ff; Wade and Forsyth (n 52) 898 ff; Allen, *Law and Order* (3rd edn, 1965) 122 ff; Campbell 'Statutory Instruments—Laying and Legislation by Reference' (1987) P L 328 ff; Hayhurst and Wallington (n 52) 547 ff.

resembles the German '*Aufhebungsverordnungen*'. The affirmative resolution procedure adds the strongest legitimation to the subordinate legislation. However, relatively few statutory instruments are subject to the procedure. In contrast to German state practice the negative procedure is most often chosen.[91] But it is difficult for an MP to secure sufficient support to move a prayer for annulment. In practice a very large portion of prayers on negative instruments are not debated at all, and the procedures do not provide for an adequate parliamentary consideration of the general run of statutory instruments.[92] Nevertheless, it is important to note that control on the floor of Parliament is supplemented by scrutiny in committees.[93] Committees, however, do not have the right of a final decision, and in this respect British Law resembles the German Law on the Federal level.

C. The American Approach: Legislative Veto is Unconstitutional

In view of the far-reaching delegated powers and the independence of public bodies promulgating rules, one could be led to think that the American Congress could at least—as do the *Bundestag* in Germany and the British Parliament—determine that rules created by the executive should require its prior approval.[94] Indeed, American law did once provide for such a legislative veto and Congress used to exercise it[95] until—to the disappointment of many commentators—the Supreme Court in the notorious *Chadha* case (1983) pronounced the legislative veto to be unconstitutional on the grounds that it infringed the principle of the separation of powers.[96] Delegated legislation was considered to be the task solely of the executive. The legislature could only regain the power to create norms through a formal legislative procedure in which both chambers ('bicameralism') and the President ('veto or

[91] Turpin (n 24) 414; Loveland (n 9) 134. Kersell (n 16) 82, notes that the affirmative procedure is, of course, less popular with Governments as it requires parliamentary time in every case and provides the Opposition with more chances to be obstructive if that is its inclination.

[92] See Turpin (n 24) 496; Craig (n 4) 376. Compare also Beatson, 'Legislative Control of Administrative Rulemaking: Lessons from the British Experience' (1979) 12 Corn I L J 199, 213–215. Compare for suggestions of improvement Rippon Commission (n 52) 91–93, 149.

[93] It is the duty of the 'Joint Committee on Statutory Instruments' which was formed 1973 from the committees of the Commons and Lords to examine every subordinate legislation laid before Parliament in order to determine whether the attention of the House should be drawn to an instrument. See for details Craig (n 4) 377 ff, 395–396; Hayhurst and Wallington (n 52) 547 ff; Hood Phillips, Jackson and Leopold (n 9) 676 ff; Wade and Forsyth (n 52) 901 ff. For a comparative perspective on the UK, Australia, New Zealand and Canada see Kersell (n 16) 43 ff.

[94] See, for a comparative study of Anglo-American law, Schwartz and Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (1972) 90.

[95] An inventory of these statutes as of 1983 appears as an appendix to the dissenting opinion of Justice White in *Immigration and Naturalization Service v Chadha* (1983) 462 US 919, 1003.

[96] *Immigration and Naturalization Service v Chadha* (n 95) 919 ff with a dissenting opinion of Justice *White* (967 ff). See also *Process Gas Consumers Group v Consumer Energy Council of America* (1983) 463 US 1216 ff. Compare generally Strauss, 'Was there a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision' (1983) Duke L J 789 ff.

approval') participate. While some types of Congressional review of administrative rules are constitutional such as 'report-and-wait'-provisions[97], the legislative veto in its classic sense is generally no longer an option for Congressional control over rulemaking.

D. Comparative Assessment of the Different Approaches

Even if in the United States the legislative veto could not prevail, from the comparative law point of view, the former American practice of legitimating delegated legislation through participatory rights of representatives of the people, should in the German and British discussion be an argument for rather, than against, the compensatory effect of parliamentary participation.

1. Compensation for a lack of definition in the delegating statute by parliamentary participation in the creation of executive norms

The judgments in which the Supreme Court declared the parliamentary right of participation to be unconstitutional are criticised in the US for their overly formal rationalisation. It is regretted that 'the most effective means of legislative control over rule-making' was knocked out of the hands of Congress.[98] German law is governed by the (albeit controversial[99]) idea that in all cases in which, despite all efforts, it is in effect not possible to give an adequately defined statutory regulation, a lack of substance in the empowering legislation may be compensated by retrospective parliamentary participation in the creation of the executive rule.[100] Similar reasoning is voiced in Switzerland[101] (and governs to a certain extent the 'comitology' procedures in EU law[102]). The legislature thus assumes political responsibility for the executive rule beyond the original empowerment by means of subsequent approval, so that in cases of '*Zustimmungsverordnungen*' a noteworthy additional level of democratic legitimation is effected. This approach could also be considered in the UK where only relatively few statutory instruments are subject to the affirmative procedure. The German model suggests that the most important types of delegated legislation should be subject to the affirmative resolution procedure.

[97] See eg *Alexandria v US* (1984) 737 F 2d 1002 (Fed. Cir.). Generally Aman and Mayton (n 40) 626 ff; Pierce and Shapiro and Verkuil (n 42) 67 f.

[98] See Schwartz (n 3) 217 (with further references).

[99] Compare for objections Staupe (n 65) 317 ff; v Danwitz (n 82) 112 ff; *Sommermann*, 'Verordnungsrechtmächtigung und Demokratieprinzip' JZ 1997, 434, 438 ff.

[100] Compare Brohm, 'Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung' (1972) 30 VVDStRL 245, 269–270; Klein, 'Die Kompetenz- und Rechtskompensation' (1981) DVBl, 661, 662; Novak, 'Gesetzgebung im Rechtsstaat' (1982) 40 VVDStRL, 40, 52.

[101] See eg Bäumlin 'Die Kontrolle des Parlaments über Regierung und Verwaltung' (1966) ZSR 165, 241 ff.

[102] Compare Craig and de Búrca (n 10) 118 ff; Smismans (n 10) 601 ff.

Such claims have already been voiced in British scholarship.[103] Likewise, the Joint Committee on Delegated Legislation has recommended that the affirmative procedure should be used for rules which substantially affect the provisions of primary legislation, impose or increase taxation, or otherwise involve special considerations.[104] These considerations would also take into account that it is—as we have seen—difficult for an MP to secure sufficient support to move a prayer for annulment in the negative resolution procedure. Above all, the German approach might be particularly fruitful to mitigate the objections against '*Henry VIII* clauses'.[105]

2. Limits to compensation

However, the limits to compensation must also be borne in mind. While it is true that delegated legislation gains in democratic legitimation through the participation of the directly elected parliament, the German *Bundesverfassungsgericht* stresses that parliamentary participation nevertheless fails to reach the level of legitimation of formal statutes because of the difference—also emphasised by the US Supreme Court—between the approval procedures and legislative procedures.[106] In addition, this democratic coupling has its drawbacks in that the parliamentary task of formulating policy etiolates.[107] Furthermore, parliamentary control of delegated legislation is severely restricted as executive norms can normally only be approved or disapproved in their entirety and without amendment.[108] Under German constitutional law parliamentary reservations to change an executive rule are even considered unconstitutional.[109] A realistic view of German and British state practice finally reveals that the effectiveness of parliamentary control of subordinate legislation is constrained by the shortage of information and time for debate.[110] Some British scholars even state that it is a constitutional fiction to say

[103] See Craig (n 4) 376. Compare also in a comparative perspective Kersell (n 16) 81.

[104] *Second Report of the Joint Committee on Delegated Legislation* (1972–1973) H L 204; (1972–1973) H.C. 408. Compare also Rippon Commission (n 52) 31.

[105] Compare Himsworth (n 72) 41. See for the 'super-affirmative procedure' pursuant to the Regulatory Reform Act 2001 Craig (n 4) 378–379; Hood Phillips, Jackson and Leopold (n 9) 678 ff; Turpin (n 24) 408 ff; Miers, 'The Deregulation Procedure: An Expanding Role' (1999) P L 477 ff.

[106] See BVerfGE 2, 237 ff; 8, 274 (319, 323). A different opinion is voiced by Ossenbühl (n 77) 315.

[107] See v Danwitz (n 82) 130. Compare concerning the American law eg Scalia, 'The Legislative Veto—A False Remedy for System Overload' (1979) 3 Regulation, 19, 22; Elliott, 'INS v Chadha—The Administrative Constitution, the Constitution and the Legislative Veto' (1983) Sup. Ct. Rev, 125, 150–151.

[108] See Turpin (n 24) 496; Wade and Forsyth (n 52) 990.

[109] Compare Sommermann (n 99) 438 ff.

[110] See Craig (n 4) 376. Compare also Beith, 'Prayers Unanswered: A Jaundiced View of the Parliamentary Scrutiny of Statutory Instruments' (1981) 34 Parliamentary Affairs 165, 170; Hayhurst and Wallington (n 52) 547 ff.

the Parliament exercises any real safeguards over delegated legislation.[111] Beatson concludes:[112]

> The British system of legislative veto has proved less than satisfactory in rendering administrators accountable to their political superiors and protecting those affected by administrative rules. This limited success stems from many factors. These include *de facto* executive control of the legislature, the unavailability of information about the substance of a rule in the time available for control, the limited time available for debate, and the apparent unwillingness of Members of Parliament to take an interest in scrutiny, especially for technical infirmities.

Thus under German law a parliamentary reservation can never fully replace the substantive requirements of Art. 80 Basic Law. The approval of the *Bundestag* could only function as a merely supplementary democratic legitimation.[113]

IV. DEMOCRATIC LEGITIMATION BY PUBLIC PARTICIPATION IN THE EXECUTIVE RULE-MAKING PROCESS

In view of the uncompromising jurisprudence of the Supreme Court on the legislative veto and the flexible approach to substantive requirements made upon the empowering legislation, American law is left with only the possibility of securing democratic legitimation of delegated legislation by means of the involvement of the public in executive legislative procedures. This concept should be taken into consideration in Germany and the UK.

A. The American Approach: The Model of Participatory Democracy

The American Administrative Procedure Act (APA) provides for participation by all interested persons as a necessary step in all cases of delegated legislation (§ 553 APA).[114] The public authority has to publish a proposed rule and to give notification of which empowering legislation the delegated legislation is based on, what the factual substantive basis for the decision-making is and how interested persons may participate in the legislative procedure ('notice of proposed rulemaking').[115] In addition, the public authority has to give an opportunity to 'anyone who makes the effort to write a letter'[116] to participate in the process of legislation ('right to comment').[117] The agency has to take account

[111] Compare Allen (n 90) 136. See also Beatson (n 92) 213–215.
[112] Beatson (n 92) 222.
[113] Compare BVerfGE 8, 274, 323.
[114] Compare for a British perspective eg Craig (n 4) 384–387; Garner, 'Consultation in Subordinate Legislation' (1964) P.L. 105, 122 ff; Wade and Forsyth (n 52) 897.
[115] See for details § 553 (b) APA. Compare for the notice and the 'pre-notice part' of rulemaking Aman and Mayton (n 40) 44 ff.
[116] Fox, *Understanding Administrative Law* (1986) 128.
[117] § 553 (c) sentence 1 APA.

of the 'significant comments' either in writing or by means of a hearing.[118] Finally the agency also has to compile and make publicly available a 'rule-making record' with a thoroughly reasoned 'statement of basis and purpose'.[119] The participatory rights can be enforced in Court. Judicial review is much easier to achieve in the USA than in Germany.[120] Claims by individuals, interest groups and associations are increasingly given *locus standi* (so-called 'liberal standing').[121] A claimant can appear widely as 'private attorney general representing the public interest'.[122] Also he need not await the enforcement of the rule ('pre-enforcement review of rules').[123] American courts scrutinise the observance of procedural requirements especially strictly (the so-called 'hard look' doctrine). As the procedural control under the 'arbitrary or capricious test' also covers the objective correctness of the basis for the decision,[124] judicial control of executive rule-making in the US is in general tighter than in Germany.[125]

Following the US Supreme Court's reasoning public participation serves as compensation for the lack of substantive definition of the empowering norm.[126] According to the (albeit controversial) American legal approach, an effective and 'fair'[127] public influence on the rule-making authority in turn secures a democratically legitimated legislative decision.[128] One basis for this, among others,[129] the so-called 'interest representation

[118] To secure public participation American courts force the rulemaking authorities to explicitly consider the 'significant comments'. See Aman and Mayton (n 40) 55 ff (with references to the judicature).

[119] § 553 (c) sentence 2 APA. See for example *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co.* (1983) 463 US, 29 ff.

[120] Cp Ehlers, 'Die Klagebefugnis nach deutschem, europäischem Gemeinschafts- und US-amerikanischem Recht' (1993) VerwArch 139 ff; Brickman, Jasanoff and Ilgen, *Controlling Chemicals: Politics of Regulation in Europe and the United States* (1985) 108 ff.

[121] See above all *Association of Data Processing Service Organizations, Inc. v Camp* (1970) 197 US, 150 ff; *US v Student Challenging Regulatory Agency Procedures* (1973) 412 US, 669 ff. Generally Aman and Mayton (n 40) 379 ff.

[122] Brickman, Jasanoff and Ilgen (n 120) 108.

[123] See above all *Abbot Laboratories v Gardner* (1967) 387 US, 136, 148–149; *Lujan v National Wildlife Federation* (1990) 110 S.Ct., 3177, 3190–3191. Generally Aman and Mayton (n 40) 414 ff. For the UK compare the concerns voiced by Craig (n 4) 386.

[124] See Mintz and Miller, *A Guide to Federal Agency Rulemaking* (2nd edn, 1991) 323 (with reference to the judicature and legal scholarship).

[125] Similarly Brickman, Jasanoff and Ilgen (n 120) 116 ff; Scharpf, *Die politischen Kosten des Rechtsstaates* (1970) 24.

[126] See above all *Schechter Poultry Co v US* (n 38) 495 ff.

[127] Dworkin, *Law's Empire* (1986) 177 ff, compares the political decision-making to roulette: 'Fairness in politics . . . is now generally understood . . . to mean procedures that give all citizens more or less equal influence in the decisions that govern them.' Pierce, Shapiro and Verkuil (n 42) 454, explain: 'Obligations of fairness are seen as alternatives and supplements to political accountability as a method of bureaucratic control.'

[128] See Pierce, Shapiro and Verkuil (n 42) 224; Bonfield (n 18) 151 ff.

[129] Compare for different approaches Sunstein, 'Beyond the Republican Revival' (1988) 97 Yale L J, 1539 ff ('republicanism'); Colburn '"Democratic Experimentalism": A Separation of Powers For Our Times?' (2004) 37 Suffolk U L Rev 287 ff.

model'[130] (somewhat supported by the 'public choice theory'[131]). The executive legislation process should be so structured that it is similar to the parliamentary equivalent.[132] American scholars explain: 'An attitude about delegation is not to worry about how broadly Congress delegates power to agencies, and to instead pay attention to how the agency uses the power.'[133] According to the American legal view, delegated legislation then has democratic legitimation similar to a statute if the public exercises influence over the rule creating authority in a way similar to that exerted on parliamentarians ('corridoring' rather than 'lobbying'[134]).[135] The tightly structured and judicially controlled[136] public participation in executive dedicated legislation is seen as a 'substitute' for the classical democratic process of decision-making, where the parliamentary decision-makers are elected and are politically answerable to the voters.[137]

B. The German Approach: No General Requirement of Public Participation in the Process of Making Rechtsverordnungen

Compared to the American rule-making procedure, German executive rule-making institutions are relatively free from external requirements.[138] As a general rule German law does not require public participation in the procedure of making sub-legislative law. It is normally at the discretion of the authority to what extent the public are involved in the creation of delegated norms. Furthermore, there is no general requirement that reasons must be given.[139] Some modern statutes, however, provide for some public participation in the form of hearings of affected interests ('*Anhörung beteiligter Kreise*').[140] But the *Bundesverfassungsgericht* has stated that there is no constitutional requirement of public input into the rulemaking process.[141] The Court asserted

[130] See Bonfield (n 18) 15–16; Stewart (n 56) 1669 ff; Garland (n 74) 510 ff, 576 ff, 581 ff; Breyer and Stewart, *Administrative Law and Regulatory Policy* (1979) 34–35; Diver, 'Policy-making Paradigms in Administrative Law' (1981) 95 Harv L Rev, 393, 423–424.

[131] See Black, *The Theory of Committees and Elections* (1958); Buchanan and Tullock, *The Calculus of Consent* (1962); Tullock, 'The Problems of Majority Voting' (1959) 67 J of Pol Ec 571 ff; Parsons, *Sociological Theory and Modern Society* (1967) 223 ff. Compare also Pierce, Shapiro and Verkuil (n 42) 18 ff.

[132] Bonfield (n 18) 15.

[133] Aman and Mayton (n 40) 36. See also Davis, 'A New Approach to Delegation' (1969) 36 U Chi L Rev 713 ff; Stewart (n 74) 323–324; Sunstein, 'Interest Groups in American Public Law' (1985) 38 Stan L Rev 29, 60–62.

[134] Lowi (n 66) 297.

[135] See Lowi (n 57) 51; Bonfield (n 18) 146; Scalia, 'Two Wrongs Make a Right—The Judicalization of Standardless Rulemaking' (1977) 1 Regulation, 38 ff; Aman and Mayton (n 40) 41; Davis, *Discretionary Justice* (1969) 219; Fuchs, 'Development and Diversification in Administrative Rule Making' (1977) 71 Nw U LRev, 83, 105; Pierce, Shapiro and Verkuil (n 42) 24 ff (with further references).

[136] On the importance of courts in the 'interest representation model' Garland (n 74) 510–511.

[137] See also *Batterton v Marshall* (1980) 648 F 2d, 694 ff (DC Cir); Starr, dissenting opinion in *Community Nutrition Institute v Young* (1987) 818 F 2d, 943, 951 (DC Cir); Stewart (n 56) 1683.

[138] Compare Pünder (n 1) 140 ff.

[139] Compare Ramsauer (n 35) 74b.

[140] See generally for examples Schneider, *Gesetzgebung* (1982) 150.

[141] BVerfGE 42, 191 (205).

that the legislature is free to decide whether it requires hearings in the process of making *Rechtsverordnungen* and who might participate in these hearings. The situation is different for individualised administrative orders ('*Verwaltungsakte*'). To the extent those decisions infringe on the rights of the citizens, participation is constitutionally required in the form of a hearing ('*rechtliches Gehör*'). Participation before issuing a *Verwaltungsakt*, however, is interpreted as not having its roots in the principle of democracy[142], but rather in the 'rule of law' ('*Rechtsstaatsprinzip*') and in the fundamental rights and liberties under due process ('*Grundrechtsverwirklichung durch Verfahren*').[143]

The major purpose of statutory provisions requiring public participation in administrative rule-making is to incorporate the experience and information in the administrative legislation process and thus enhance its rationality.[144] Furthermore, those requirements will foster the resource efficiency of the government as the participation may ease the later application of the administrative rules. Democratic legitimacy, however, is not the goal of those requirements.[145] German courts and scholarship even view public input sceptically in that the persons involved represent their interests and not the common good.[146] To ensure democratic legitimation they argue that the decision-making power must remain solely with the executive delegate. Representative democracy is considered as the 'the proper form of democracy'.[147] As we will argue later this reasoning is not without doubt as public participation may at least add democratic legitimation to the subordinate legislation. On an informal level, however, consultations between executive officials and representatives of the regulated industry occur often. The German process of administrative legislation is thus rather informal.

C. The British Approach: No General Duty to Consult in Subordinate Legislation

The British law on consultation resembles the German law. It all depends on the enabling legislation. What is absent from English law is any general duty

[142] Critical of this assessment Pünder 'Verwaltungsverfahren', in Erichsen and Ehlers (eds) Allgemeines Verwaltungsrecht (13th edn, 2006) § 12, n 14.

[143] Compare Staupe (n 65) 204 ff (with further references).

[144] Ossenbühl, 'Rechtsverordnung' in Isensee and Kirchhof (eds) *Handbuch des Staatsrechts* (1988) 414.

[145] Compare Kopp, 'Verfahrensregelungen zur Gewährleistung eines angemessenen Umweltschutzes' (1980) BayVBl., 97, 101 ff.

[146] Compare BVerfGE 66, 82 ff; Ossenbühl (n 144) 414–415; Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (vol. II 1980) 667 ff.

[147] See Böckenförde, 'Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie' in G. Müller et al (eds) *FS Eichenberger* (1982) 301 ff. Compare also Hartisch, *Verfassungsrechtliches Leistungsprinzip und Partizipationsverbot im Verwaltungsverfahren* (1975) 90 ff (with further references).

to consult, imposed either by statute or by common law.[148] Such a lack of a general statutory duty to consult is contrary to American law.[149] Furthermore there is no general duty to give a hearing in common law ('natural justice') where the decision under attack is of a legislative nature.[150] Likewise the right to reasoned decisions does not apply to legislative orders.[151] It has to be noted, however, that case law has recognised consultative rights in certain instances.[152] It finds its grounds in the doctrine of 'legitimate expectations' and the 'duty to act fairly'. When consultation is specified by a particular enabling statute, failure to comply with the duty will generally result in the order subsequently made being held to be void ('procedural *ultra vires*').[153] British courts demand (in a remarkable resemblance to American law): 'First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit intelligent consideration and response. Third, that adequate time must be given for consideration and response and finally, fourth, that the product of the consultation must be conscientiously taken into account in finalising statutory proposals.'[154] After all, it seems that British law takes public participation in executive legislation somewhat more seriously than German law. At least, there is a discussion about the advantages of prior consultation and the difficulties attendant upon such a regime.[155] In November 2000 the Cabinet Office has issued a 'Code of Practice on Written Consultations' which was—without formal legal force—to provide 'a clear framework of standard and advice' for departments, so as to further 'responsive, open administration'.[156] In contrast to the American law, however, there is no general duty to ensure public participation in administrative legislation. As in Germany, the most widespread and influential procedure is the informal consultation with

[148] See Craig (n 4) 381; Garner (n 114) 105 ff; Jergesen, 'The Legal Requirements of Consultation' (1978) P.L. 290 ff; *Turpin* (n 24) 408 ff.

[149] Note that a limited legal duty to consider objections was imposed by the provisions of the Rules Publication Act 1893 that the rule-making authority must consider any written representations made within the forty-day period of preliminary publicity. Wade and Forsyth (n 52) 896, assert that this produced so little benefit that it was repealed by the Act of 1946.

[150] Compare *Bates v Lord Hailsham* (1972) 1 W.L.R. 1373, 1378. See also *R v Devon County Council, ex p Baker* (1993) COD 138; *R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators' Association* (1972) 2 QB 299, C.A.

[151] The right to reasoned decisions under the Tribunals and Inquiries Act 1992 is expressly excluded in the case of rules, order or schemes 'of a legislative and not an executive character.' See s 10 (5) (b).

[152] See for details Craig (n 4) 381–383; Jergesen (n 148) 290 ff.

[153] See for cases Craig (n 4) 380–381. Compare also Wade and Forsyth (n 52) 884–885; Jergesen (n 148) 310 ff.

[154] See *R. v Brent London Borough Council, ex p. Gunning* (1985) 84 LGR 168, as cited by Craig (n 4) 381 with further examples. Compare also Jergesen (n 148) 302 ff.

[155] See eg Craig (n 4) 383–388. Compare also Galligan, *Due Process and Fair Procedures* (1996) Ch 4; Rippon Commission (n 52).

[156] www.cabinet-office/servicefirst/index/consultation.htm See Craig (n 4) 388; Turpin (n 24) 411. Compare also Select Committee on Public Administration, *First Report, Public Participation, Issues and Innovations* (2001) HC 373-I.

interests in the making of subordinate legislation. Consultation with interests and organisations likely to be affected by rules and regulations is a firmly established convention.[157]

D. Comparative Assessment of the Different Approaches

In Germany as in the UK, the evaluation of the American understanding of democracy, according to which the political and legal process does not end with empowering legislation but rather in many respects only then begins, may offer ideas for consideration—particularly in cases in which the legislator is neither able to precisely determine the content of the subordinate norms nor to substantively scrutinise the delegated legislation.

1. Supplementation of the often insufficient democratic legitimation of delegated legislation by public participation

The American model could be used above all in such regulatory areas where legislation is highly controversial politically and where parliamentary legitimation alone fails to secure sufficient acceptance.[158] The rule creating authority would thereby itself become an 'actor in the public political process'[159] and—like American agencies—would have to endeavour to gain the necessary support for proposed regulations directly from the people and above all from the affected groups. In this way publicity would supplement the often insufficient parliamentary democratic legitimation of delegated legislation and the circumstance would be recognised that there is no legitimation by expertise alone without political appraisal.[160] Such a model of delegated legislation structured in terms of participatory democracy would in addition counteract certain disadvantages of representative democracy. Participatory rights give individuals additional opportunities for influence beyond their participation in general elections. This would mitigate the frustrating circumstance that precisely the informed and interested voter has to register his differentiated reaction to a range of political alternatives in a single vote[161]—a problem which has above all been addressed by the so-called 'public choice theory'.[162] It would dissipate feelings of powerlessness of those subject to

[157] See Wade and Forsyth (n 52) 897; Garner (n 114) 105 ff; Jergesen (n 148) 290 ff; Griffith (n 9) 279, 288 ff.

[158] Compare for the UK Craig (n 4) 383–387; for Germany Dienel, 'Partizipation an Planungsprozessen' (1971) 4 Verwaltung, 151, 152 ff; Hufen, *Fehler im Verwaltungsverfahren* (1986) 198; Lübbe-Wolff, 'Verfassungsrechtliche Fragen der Normsetzung im Umweltrecht' (1991) ZG, 218, 227 ff; Denninger, *Verfassungsrechtliche Anforderungen an die Normsetzung* (1990) 60 ff.

[159] Scharpf (n 125) 62.

[160] See Lübbe-Wolff (n 158) 235 ff.

[161] Scharpf (n 125) 65. Compare also Choper (n 56) 13.

[162] Compare Black (n 131) 61 ff, 156 ff, 178 ff; Tullock (n 131) 571; Parsons (n 131) 231 ff; Hovenkamp, 'Legislation, Well-Being, and Public Choice' (1990) 57 U Chi L Rev, 63 ff;

the law and their resultant apathy and distrust of the political process ('*Politikverdrossenheit*').[163] This is a challenge in the first place to the legislator.[164] Empowering statutes should not only address the question of how legislative tasks are to be allocated appropriately, but also the question of the way these tasks are to be performed.

However, Wade and Forsyth object:[165] 'In Britain the practice counts for more than the law . . . It may be that consultation which is not subject to statutory procedure is more effective than formal hearing, which may produce legalism and artificiality.' This statement is not unproblematic since legal requirements facilitate judicial control. This is necessary for the legitimising effect of public participation and to prevent 'agency capture' by strong interest groups.[166] Decisive for effective democratic legitimation are the transparency of the executive decision-making and the equality of opportunities to exert influence.[167] A fair procedure in the American sense—that is a transparent procedure which offers all interested parties equal opportunities of influence and is in view of the danger of 'agency capture' controlled judicially (particularly by allowing a pre-enforcement review)—could strengthen confidence in delegated legislation so that it would be seen and accepted through the direct coupling to the people as 'worthy of deference and respect'[168] and thus democratically legitimated.[169] The legislator could prescribe in a statute of general application[170] that the rule creating authority has to publish a proposal, give all interested parties—or at least their representatives[171]—an opportunity to make representations, to record 'significant comments' and make them available to the other participants, and finally give a reasoned decision for their legislative decisions with reference to the representations

Hovenkamp, 'Arrow's Theorem: Ordination and Republican Government' (1990) 75 Iowa L Rev 949 ff Critical Mashaw, 'The Economics of Politics and the Understanding of Public Law' (1989) 65 Chi-Kent L Rev, 123 ff; Sunstein (n 133) 29; Posner, *Economic Analysis of Law* (3rd edn, 1986) 496 ff; and Pierce (n 74) 408 ff.

[163] In Germany, '*Politikverdrossenheit*' was 1992 the 'word of the year'. Compare for the UK Dunley and Weir, 'Public Response and Constitutional Significance' (1995) 48 Parliamentary Affairs, 602, 615; Trevor Smith, 'Citizenship, Community and Constitutionalism' (1996) 49 Parliamentary Affairs, 262 ff.

[164] See also Schmitt Glaeser (n 78) 236; Lübbe-Wolff (n 158) 246–247.

[165] (n 54) 897.

[166] Compare Sunstein (n 133) 61 ff, from the German perspective Hoffmann-Riem, 'Selbstbindungen der Verwaltung' (1982) 40 VVDStRL, 187, 204 ff. For scepticism about the agency capture thesis compare *Posner*, 'Theories of Economic Regulation' (1974) 5 Bell Jnl. of Econ. and Mgmt. Sci., 335, 342; for an empirical analysis, see Page (n 9) 129 ff.

[167] See *Small Refiner Lead Phase-Down Task Force v Environmental Protection Agency* (1983) 705 F 2d, 506 f (D C Cir); Harter (n 57) 17 ff; Stewart (n 56) 1684–5.

[168] Bonfield (n 18) 151.

[169] Compare Luhmann, *Legitimation durch Verfahren* (1969) 210 ff.

[170] Compare for Germany Pünder (n 1) 293 f; for the UK eg Garner (114) 105 ff.

[171] Compare on the problem of apathy Schmitt Glaeser (n 78) 239–240, on the role of organised interest groups Leach in Mullard (ed) *Policy-making in Britain* (1995) 34–5; for Germany Dagtoglou, 'Partizipation an Verwaltungsentscheidungen' (1972) DVBl, 712, 714 ff.

received.[172] Such participation of the public in the delegated legislation process would not only facilitate the creation of substantively correct executive rules,[173] ease their implementation.[174] and realise the constitutional principles of control of power, legal security and legal protection,[175] but would also legitimise the executive rule-making decision. This is particularly applicable because in Germany the division between legislative and adjudicative decisions ('*Verwaltungsakt*'), despite all efforts, has become increasingly more random and less transparent, which is why attention must be paid to the administrative legislation and its procedural requirements.[176] Similarly Paul Craig states for the UK:[177] 'It is not immediately self-evident why a hearing should be thought natural when there is some form of individualised adjudication but not where rules are being made.'

2. Limits to compensation and the problems of time, cost and delay

Nevertheless, there are limits to compensation. The US system of delegated legislation is not ideal. In view of the criticism voiced against the 'democratic process ideal'[178] in the USA[179] legitimation through procedure according to the German view of democracy and on the basis of the Basic Law can only supplant but not replace parliamentary democratic legitimation of the executive norm.[180] Criticism has also been voiced in British scholarship.[181] In Germany, adopting the American approach to democratic legitimation would also contradict legal tradition, which seeks justice not in procedural fairness and a balance of conflicting interests, but above all in the substantively correct decision.[182] In the USA in recent years, there has also been a reaction against substantive law. The euphoria of the 1970s of the 'rule-making era'[183]—in which rule-making was seen as 'one of the greatest inventions of modern government'[184] — has given way to a more sober view. There is—as we have seen—a crisis of legitimation. Above all, however, in the US delegated legislation has become so formalised that the costs—even taking account of the costs saved through public involvement in information gathering

[172] The US Supreme Court stresses in *Bowen v American Hospital Association* (1986) 476 US, 610 ff: 'Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its judgment.'

[173] Cp Craig (n 4) 384.

[174] Cp Schmitt Glaeser (n 78) 189.

[175] See Pünder (n 1) 202 ff, 219 ff, 233 ff, 271.

[176] Cp eg Pietzcker, 'Verwaltungsverfahren zwischen Verwaltungseffizienz und Rechtsschutzauftrag' (1983) 41 VVDStRL, 193, 218 f; Hufen (n 158) 295 ff.

[177] Craig (n 4) 384.

[178] Cp Stewart (n 56) 1760 ff.

[179] See above all Sargentich (n 56) 433 ff (with further references).

[180] Similarly Brohm (n 105) 270; Schmitt Glaeser (n 78) 240 ff.

[181] Cp Craig (n 4) 384 ff.

[182] Scharpf (n 125) 38.

[183] Scalia, 'Back to the Basics: Making Law Without Making Rules' (1981) Regulation, 25 ff.

[184] Davis, quoted by McGarity, 'Some Thoughts on "Deossifying" the Rulemaking Process' (1992) 1 Duke L J, 1385.

('information costs'[185])—have risen dramatically. An example may serve as an illustration. The Federal Drug Administration was required to lay down rules for the peanut content of peanut butter. This process of executive norm creation took nine years![186] Anything like this has to be avoided elsewhere.[187] Beyond doubt, there is the practical problem of time, cost, and delay. In Germany and in Britain the common informal consultation with interests in the making of subordinate legislation causes no high decision costs in the short term. There is little delay. Making administrative decisions after consulting a wide range of affected interests will slow down the decision-making and will cause increased costs for the administration. In certain circumstances, however, such costs are worth bearing. As Paul Craig puts it[188]: 'If an autocrat made all decisions, they would doubtless be made more speedily. A cost of democracy is precisely the cost of involving more people.' Furthermore, the American scholar Arthur Bonfield points out that 'the immediately more expensive procedural requirements . . . might be likely to reduce societal costs in the long run. They might result in better rules. Better rules would reduce the need for subsequent agency proceedings to cure earlier mistakes.'[189] Finally, public participation enhances the acceptance of the regulation. This reduces the costs of enforcement.

V. CONCLUSION

Delegated legislation is regulated in fundamentally different ways in the US, the United Kingdom and in Germany. While some differences—such as the American distrust of political government and reliance on administrative expert managers—are merely of legal cultural interest, other divergences provide food for thought. On the one hand, those in the US and Britain should note that the proper legislature in Germany under the Damocles sword of unconstitutionality is in many cases well able to prescribe a substantive programme of delegated legislation for the executive. Parliament is elected by the people and should not without cause be relieved of its responsibility for substantive legislation. As we have seen, comparable considerations have been voiced in the American and British debate. Furthermore German and British state practice show that an inevitable lack of substantive predetermination of the executive rule in the empowering legislation can to a certain extent be compensated by retrospective parliamentary participation in the decision-making process. The comparison thus supports critics in the US who object to the Supreme Court judicature on the unconstitutionality of the legislative veto. By means of subsequent approval the legislator assumes political

[185] Cp DeLong, 'Informal Rulemaking and the Integration of Law and Policy' (1979) 65 Virginia Law Review, 257, 319 ff (with further references).
[186] See Aman and Mayton (n 40) 61.
[187] See for a detailed solution to this problem Pünder (n 1) 228 ff.
[188] Craig (n 4) 386.
[189] Bonfield (n 18) 448.

responsibility for subordinate legislation beyond the original empowerment. Particularly the German model suggests that the most important types of delegated legislation should be subject to the affirmative resolution procedure. The comparison underpins such claims in British scholarship. On the other hand Germany and Britain have to accept that there are limits to the substantive parliamentary predetermination of the delegated legislation and to the retrospective legitimation by parliament. In this respect the American model of participatory democracy is of value. The comparison suggests understanding public participation as compensation for the lack of influence of the elected representatives of the people. It makes clear that the democratic legitimation of secondary legislation can also be secured where the public are comprehensively involved in the delegated legislation procedure. The tendency in German and British law-making to provide statutorily for public participation finds comparative support. American law shows that the characteristic elements of the proper legislative procedure—publicity of decision making, orientation towards balance of interests and involvement of political minorities—can also enrich the exercise of delegated powers and must do so in case the due legislative process cannot exert sufficient influence on rule creation. In defiance of the indisputable increase of decision-costs, it is in these cases not sufficient to refer the citizen seeking participation to the public interest sought by representatives in the parliamentary process and to leave the determination of the circle of those involved and the mode of their involvement to the discretion of the rule-making authority.