2008

Policy and Methods: Choices for Legislatures

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James R. Maxeiner*

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Introduction

The Politics of Law and Legal Policy Special Workshop is charged with considering “which political, organizational and normative solutions allow forceful realization of social and political goals without breaking principles of democracy and the rule of law.” Several areas of law, e.g., information technology, biogenetic technology, energy and ecology, require state attention, yet the legislature is not yet in position, and may never be, to provide a complete set of legal rules governing them.

Today I would like to identify choices of legal methods that legislatures have in adopting and subsequently implementing of policy legislation. I base my remarks principally on my experiences with and study of antitrust law in the United States and Germany. Twenty-five years ago – fresh from several years as attorney with the Antitrust Division of the United States Department of Justice – at the Max Planck Institute in Munich I investigated possible reasons why antitrust law then was subject to so much more criticism in the United States than in Germany. I presented the results of my study as a doctoral dissertation at the University of Munich under Professor Dr. Wolfgang Fikentscher1; I published them in English as Policy and Methods

* This essay is a revised version of remarks presented at the Politics of Law and Legal Policy Special Workshop, XXIII World Congress of Philosophy of Law and Social Philosophy, 4 August 2007, Kraków. It retains the discussion format. The time available for revision did not permit more exhaustive analysis or footnoting.

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in German and American Antitrust Law: A Comparative Study². The general conclusion that I reached, based on my study of antitrust law, was that the choice of methods by which a law is applied, particularly when a purpose of the law is to advance public policy, can have significant impact on how that law is accepted and on how well it functions in implementing policy. The two decades that have passed since then seem to validate my conclusion. In that time U.S. antitrust law has receded in importance, while German antitrust law has been embraced by the European Union, and through the European Union, now has force right here in Kraków. Two decades ago no one would have foreseen such a possibility.

While my conclusion that legal methods affect law implementation seems obvious, surprisingly few jurists recognize and act on it. Lawyers go about their business with the legal methods that they know and do not think about alternative methods. Yet comparison of legal methods amply demonstrates that legislatures have a choice of approaches. While I identify choices, and sometimes suggest which I think are preferable in fulfilling the Special Workshop’s charge³, I do not suggest that any particular choice is itself essential. Whichever choices are made, however, they will affect how forceful and successful policy implementation is.

The Policy Problem

Balancing policy, democracy and the rule of law is a daunting task. The rule of law, in particular the legal certainty aspect of the rule of law, demands a certain rigidity in law so that people can plan their lives with confidence that their actions are lawful and that they will be left in peace by government.⁴ Yet policy requires a certain flexibility in decision-making to deal with the unforeseen. I cannot improve on Gustav Radbruch’s formulation of the problem: “Legal certainty demands positivity, yet positive law claims to be valid without regard to its justice or expediency [i.e., public policy]”⁵. Radbruch

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³ I assume here that these choices are essentially available within the existing legal system.
saw an inescapable tension – “antimony” – among justice, legal certainty and policy.

The tension between legal certainty and policy is perhaps more severe than is the tension between legal certainty and justice. The policy tension is the focus of my remarks today; the tension with justice I treat only incidentally. Why might the tension between legal certainty and policy be greater than the tension between legal certainty and justice? Because legal certainty is a bulwark against the state. Policy – a claim of the society as a whole – can be and is used to trump individual claims against the state. Here in Poland you have witnessed this repeatedly in the recent past. Nazi occupiers said “Everything useful to the [German] people is right; everything that injures them is wrong;” Home-grown Communists called for “socialist legality.” Under both regimes, law became politics. That sometimes happens even under more benign regimes.

The policy problem is not only that policy threatens the rule of law; it has another side. Maladroit attention to justice and legal certainty themselves threaten policy. Many an American antitrust policy decision has been impeded by an unnecessary conjunction with a decision of individual culpability.

My prior work did not focus on democracy and I have no particular knowledge in balancing democratic legitimacy with policy. Yet the Special Workshop’s charge does incorporate democracy. I do have some thoughts on that theme which I will provide.

**Legal Methods**

Before turning to the choices of legal methods available, let me specify what I mean by legal methods. Broadly speaking, legal methods are devices used to apply abstract legal rules to factual situations in order to decide concrete cases. Legal methods as the means to decide concrete cases include, in a broad sense, creating as well as implementing legal rules. I consider legal methods under three rubrics: *law making, law finding,* and *law applying.* Legal methods are the principal means by which law content is made clear and by which law application is made predictable.

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1993); 8th ed. 1975 (Erik Wolf, ed.). Here I translate what Radbruch called Zweckmäßigkeit as policy, although the literal translation might be expediency.

Lawmaking is legislative. The legislature adopts a statute, or an administrative authority adopts a regulation pursuant to a statute. The statute or regulation applies not just to one case, but to a generality of cases. Law-finding is a determination by a decision-maker of the applicable rule of law for a particular case and any necessary interpretation of the rule. It may include creating new rules of general applicability where none already exists. Law-applying is application of found rules to decide particular cases. Most commonly this process presupposes a process for fact-finding as well as law-finding. The facts found are then related to applicable law. Law applying may require that the decision maker value a particular case, for example, by determining that an actor was "negligent" or that the effect on competition is "unreasonable."

Legal methods help make decisions. I distinguish among three different kinds of decisions: legal, equitable and policy. Purely legal decisions require no valuing by decision makers. They are acts of recognition. Rules (i.e., norms) give the answers: the rules require no interpretation to understand their requirements, the rules require no valuing by decision makers for their application, and the rules grant decision makers no discretion in the consequences of their application. Purely legal decisions correspond to Montesquieu's vision of judges as the "mouthpiece of the statute." Statutes decide all issues of equity and policy. Montesquieu's ideal proved unachievable. We now acknowledge that statutes cannot decide all issues. Sometimes statutes are necessarily indefinite and require concretization in regulation or legal decision. Sometimes statutes direct decision makers to value conduct in addition to determining what that conduct was. Sometimes statutes authorize decision makers to choose among a range of measures to order.

Valuing decisions provide less legal certainty than do strictly legal decisions. Strictly legal decisions rest on factual determinations and should be largely independent of decision makers. Valuing decisions depend on how individual decision makers assess particular cases. As noted, I divide these valuing decisions into two classes: equity decisions and policy decisions. Where strictly legal decisions are relaxed for the sake of justice in individual cases, I see equity decisions. Where they are loosened to permit adjustment of decisions for the sake of general welfare, I see policy decisions. Equity decisions are decisions made, not according to rules, but for the sake of the best possible result as between the parties present before the decision maker. Policy decisions, in the widest sense, are choices that take into account and even may prefer interests that are not before the decision maker. They are decisions for society at large – the general welfare.
This distinction between equity and policy is apparent in a distinction that American jurists make between antitrust law, on the one hand, and unfair competition law, on the other. The principal focus of antitrust law is said to be the protection of the free market, that is, the protection of competition as such, and not the protection of individual competitors or individual consumers. The principal focus of unfair competition laws (such as trademark law), on the other hand, is the protection of individual competitors and individual consumers.

Now I would like to identify choices that legislatures have in policy legislation by posing a series of questions. I do not provide answers to these questions. Today I have limited goals: raising awareness that legal methods do matter for policy legislation and demonstrating that many choices are available.

Methods Choices for Policy Legislation

1. What should be the place of political parties and partisan politics in policy?

Because policy concerns society at large, policy should be affected by politics. But party politics are by their nature partisan. Partisan politics (within limits) are generally considered appropriate at the time of adoption of policy by the legislature: after all, partisan debates are what political systems are about. There is reason, on the other hand, to avoid politically-motivated decisions in the implementation of policy. Politically-motivated decisions may be inconsistent with each other. They may give rise to the suspicion of favoritism and the belief that decisions are made for partisan interest and not for the public good. When partisan politics decides individual cases, the rule of law, democratic legitimacy and good policy are all threatened.

As we shall see below, to a substantial extent the legislatures can control the role of partisan politics in policy through choices they make in setting rules and designating institutions and procedures for implementing those rules.

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Sometimes an overtly political decision is desirable. Then the legislature can circumscribe that political decision in ways that enhance both legal certainty and democratic legitimacy. It can, inter alia, explicitly and unambiguously state who shall decide, what the criteria for that decision are to be and what the decision’s consequences are.

Adoption of Policy: The Who

2. Should the legislature have a monopoly on policy adoption or should it, in part, delegate that function to others?

When the legislature determines in a statute what public policy will be, and sets forth legal rules for the policy’s implementation, it honors both democracy and the rule of law. The Special Workshop’s charge presupposes that it is not possible to make all of those decisions beforehand. The legislature, nevertheless, has choices in how it adopts and implements policy. In adopting policy the legislature can delegate rule-making authority to other governmental or to non-governmental bodies. In implementing policy, it can use indefinite legal concepts, provide for discretion and otherwise allow for policy decisions in the course of law application. To the extent that the legislature is able to make these decisions beforehand – assuming that the policy so made is equally effective – the legislature better promotes legal certainty when it does so. Delegation of policy adoption seems a second best solution.

3. If the legislature delegates policy adoption, to what extent, to whom, and subject to what procedures should it do so?

The more the legislature delegates policy adoption, the greater the challenge to democratic legitimacy is. For that reason, it ordinarily is preferable to minimize such delegation. To the extent possible, the legislature should set the general policy and delegate only, if at all, the filling in of details. In any case, the rule of law demands that the legislature delegate such policy adoption with as much specificity as reasonably possible.

The institution chosen for this delegation of policy adoption needs not be a government institution. It might be, for example, a non-governmental
trade association. In the latter case, even more than in the former, the legislature should be careful in defining the scope of delegation.

The legislature may determine the procedures by which the delegated institution adopts policy. The legislature may require that the delegated institution be legislature-like in composition (i.e., representatives of the regulated), that it proceed legislature-like to hear interested parties, and that it create law-like regulations. In this fashion the legislature may honor both the interests of democracy and of the rule of law.

**Adoption of Policy: The What**

4. **To what extent should the legislature or its delegate determine all policy questions before policy is implemented?**

When the legislature determines in a statute what policy will be, and leaves no policy decisions for implementation, it honors both democracy and the rule of law. To the extent that it is able, the legislature should make policy that does not require policy decisions in implementation. Of course, the charge of this Special Workshop assumes that it is not always possible.

5. **If the legislature cannot provide for legal decisions exclusively in implementation of policy, should it separate legal decisions from policy decisions and, if so, how?**

A central assertion of my book, *Policy and Methods in German and American Antitrust Law*, was that a major advantage of German antitrust law over American antitrust law was the former's clear separation of policy decisions from legal and equity decisions. German antitrust law distinguished policy decisions from the other two forms by providing for different types of norms for each and by implementing those different types of norms through different types of decision makers, acting pursuant to different types of procedures, and ordering different kinds of measures.

Fundamental to my assertion of the importance of separation of policy decisions is the observation that not all decisions involved in implementing policy require valuing decisions. Some decisions implementing policy legislation can be entirely legal; policy questions need not be addressed. The
legislature can provide one set of norms to govern those instances that do not require policy determinations and another set of norms that do require such determinations. The former legal norms can eschew all hallmarks of policy flexibility, such as indefinite legal concepts and discretion. They can provide for individual culpability of persons subject to sanction. They can allow for sanctions with retrospective effect. The can provide that all decisions be legal and be made by judges or other persons who are local to the parties concerned and organizationally are distant from political responsibility.

Through sophisticated drafting, statutes can, in effect, have it both ways. They can provide for an interplay of legal and policy decisions that subjects to legal regulation those questions for which there is general consensus and imposes policy controls on those issues where flexibility is required. Many techniques can support this endeavor. Among these are:

a. For the sake of legal certainty, prohibit all forms of a particular conduct, but authorize exceptions to be made on policy grounds with future effect.

b. For the sake of legal certainty, permit all forms of a particular conduct, but authorize prohibitions to be made on policy grounds limited to future effect.

c. For the sake of policy flexibility, use general clauses to authorize challenges to conduct, but for the sake of legal certainty, circumscribe the consequences of those decisions and limit them to future effect.

d. For the sake of policy flexibility, grant discretion to decision makers to choose among different measures, but for the sake of legal certainty, unambiguously identify the circumstances under which that discretion may be exercised, circumscribe the range of choices it allows, and limit the effect of those choices to the future.

Implementation of Policy: The Who

6. Whom should the legislature authorize to invoke and implement policy?

One of the most important choices that the legislature has in the policy field is the determination of whom to authorize to implement the policy that it sets. Care in assigning policy decisions can both promote good policy while it enhances democratic legitimacy and the rule of law. By clearly
identifying policy decision makers beforehand, the legislature supports a higher level of practical legal certainty. While the law may not always determine what the decision makers decide, when who shall decide is clear, how they will decide may become clear through practice of the decision makers. Consideration of whom to designate as decision makers leads to a series of further choices.

7. Should policy decision makers be politically responsible?

Since we have already suggested that it is desirable not to mix partisan politics with policy implementation, it is counter-intuitive to ask now, whether policy decision makers should be politically responsible. Yet for policy reasons we now discuss, some measure of political accountability seems desirable.

Policy decisions direct society. They decide issues for everyone; they are neither mere applications of existing rules to objectively determined facts, nor are they determination of the equities of disputes among individuals. As such they have wider effect than either legal or equity decisions.

Matters of public policy are not susceptible to purely objective measures. To decide, for examples, what is the right level of competition or which human rights are fundamental, are judgments that can be justified and explained, but that cannot be proven. They are necessarily made based on imperfect knowledge of the present and of the future. They are legitimate not because they are right, but because they are reached within an accepted political system.

Policy decision makers ordinarily are and, at least to some extent, should be politically responsible for their decisions. We should want them to decide within the law, but we purposely give them authority to make their own assessments of what is in the general welfare. We should want them to be able to look to us, the public, for approval. We should not want them to ignore the popular will. One simple way to enhance political accountability without injecting partisan politics into decision making is to make highly visible those persons and institutions charged with making policy decisions.
8. Should policy decision makers have subject matter expertise?

Purely legal decisions do not usually require special subject matter expertise. Because the legislature has already determined the criteria for decision, legal decision makers need only to find facts and apply law to those facts. While this is considerably more difficult than is generally acknowledged, it still largely does not involve decision makers in the active shaping of society’s future. It is placing one case within an existing system, rather than constructing a new system. Policy decisions, on the other hand, to some extent do demand that decision makers participate in developing the present system and shaping the future. They are called upon to make judgments for the community at large. Normally, their ability to do so is enhanced by expert knowledge.

9. Should policy decision makers be coordinated?

One way or another, policy decisions – if not policy decision makers – should be coordinated. Policy decisions are decisions for society at large and thus should be transparent to society at large and consistent for all its members. Of course, we generally seek to coordinate legal decisions. Consistency of legal decisions is important, too, for fulfillment of the promise of equal treatment. We generally coordinate legal decisions through two means: uniform statutes and appellate review of their application.

This usual form of coordination of legal decisions is not easily applied to policy decisions. Policy decisions rest on judgments of society; they are not set out ready-made in statutes. If statutes and appellate review cannot coordinate policy decisions, another approach is necessary. One way to coordinate policy decisions is to centralize them all in a single-decision maker. If only one decision maker decides, there is no need for coordination with others. But if that single decision maker is itself an institution composed of different people, the question is still not fully answered. How will those different decision makers coordinate their decisions? Should there be a hierarchal relationship among them?

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8 One caveat to a preference for expert knowledge, however, might be that in ideologically-charged policy fields, expert knowledge may be tantamount to adoption of a particular program. While that might enhance legal certainty, whether it would promote better policy is questionable.
10. Should policy decisions be made through legal procedures?

One approach to de-politicizing policy decisions is to make policy decisions pursuant to legal procedures. The legislature could require that the ordinary courts themselves decide pursuant to civil procedure, as is done in American antitrust law, or it could direct that administrative authorities decide using legal-like procedures, as is done in both American and German antitrust law. Use of legal procedures is seen to enhance rule of law protections.

On the other hand, full assimilation of policy decision making procedure to civil procedure is not desirable. Civil procedures give parties control over proceedings, which is not desirable for policy decisions. Parties can direct whether courts decide, for civil courts must decide cases presented to them. The parties can largely determine the scope of the controversy. In the American system they can likewise largely determine what evidence the court hears; in other systems, they can at least substantially affect what the court hears. Parties naturally focus the court’s attention on the parties themselves. In civil procedures the decision maker has limited ability to consider what parties do not present.

Policy decisions demand different kinds of proceedings. By definition policy decisions are concerned with effects on those not present in the hearing hall. In policy proceedings, the focus should be on the public interest; decision makers should actively seek the information necessary for the best possible policy decisions.

11. Should ordinary courts be charged with policy decisions?

It is sometimes suggested that courts should make policy decisions. Indeed, in the United States, they often do. Yet the ordinary courts are ill-suited for policy decisions.

Judges are not politically responsible; we do not want them to be. We guarantee them independence. We want them to decide according to the law and not according to preference. We accept their independence, because they are bound by law, and because the effects of their decisions are ordinarily limited to the parties before them.
Judges are generalists. While in some systems they develop particular subject matter competencies, they are not expected to shape society’s future. They are not chosen for subject matter competency.

Judges are concerned with the parties before the court. Judges naturally focus on the effect of their decision on the parties before the court. They are better-positioned to consider culpability of parties than impact on society.

The judicial branch is usually decentralized. Local decision makers provide convenience to parties and knowledge of local conditions. Decentralization results in a certain level of inconsistency of decision. This inconsistency is tolerable largely because it is concerned more with past conduct than with future acts, because it affects only the parties immediately before the court, and because appellate courts keep the level of inconsistency within bounds. Such inconsistency is not tolerable for policy decisions having future and national effect.

Policy decisions, by their nature, have a larger constituency. They require judgments about the social value of particular practices or conditions. How much competition is sufficient to maintain a free market? Which rights are essential to a system of ordered liberty? On these issues, there is no inherent limit on how much evidence to take. We should not expect parties participating in proceedings to speak for others not present. What the parties see as important may be peripheral to sound decisions of the policy questions before the decision maker.

Judges generally have little ability to supervise and direct the orders that they issue. Offices charged with executing judgments typically have limited resources and capabilities. Their authority is often geographically circumscribed. They ordinarily do not have authority to act on their own initiative. Accordingly, they cannot well implement policy widely. Policy decision makers need greater enforcement capability. They should have geographically broad authority.

Conclusion

The legal methods through which one adopts and implements policy decisions profoundly affect the compatibility of policy implementation with democratic legitimacy and legal certainty of the rule of law. Indeed, the choice of legal methods can be as important as the formulation of the policy
itself. While a good choice of methods will not heal a bad policy, it can help assure that a less-than-perfect choice of policy can be more forcefully realized than otherwise, it can also help improve the policy choices made and help protect democratic legitimacy and the rule of law.

While deficiencies in legislation or in the political system may require resort sometimes to policy decisions in the course of law application, legislatures should minimize mixing policy decisions with law application. One of the simplest ways of promoting policy while safeguarding the rule of law is to restrict the effect of policy decisions to the future. In any case, policy decisions can ordinarily be expected to be better made when they are recognized as such, are made by institutions created to make policy decisions, and are reached by decision makers who can appeal to political responsibility as a basis for their decisions.