

# AUTOCRACY VIA TECHNOCRACY: ADMINISTRATIVE RULEMAKING, DEMOCRATIC BACKSLIDING, AND THE “MYTH” OF BUREAUCRATIC RESISTANCE\*

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## ABSTRACT

Democracies are under threat everywhere, with autocratic leaders leading the charge to erode cherished freedoms, undermine faith in elections, and diminish institutions meant to counter unchecked power. Among those institutions are our administrative agencies—our technocratic governing apparatus where public interest meets public reason—believed to be a “benevolent constraining force” that can counter an autocrat by resisting illiberal policies. This Note explores this characteristic of agencies, specifically in the context of their rulemaking power. We look at both historical experiences and the administrative law landscape in the Philippines to link agency action with democratic backsliding. It then draws from existing scholarship to develop a legal analysis model that integrates both the bureaucracy’s authority and incentive to exhibit resistance towards an autocrat. The analysis culminates in a typology of agencies that provides an explanation for bureaucratic behavior. Ultimately, the discussion builds on the legal discourse surrounding administrative agencies and their important role in the protection of our democracy.

**KEYWORDS:** administrative rulemaking, democratic backsliding, bureaucratic resistance, authority-incentive model

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## I. INTRODUCTION

On March 3, 2006, the National Telecommunications Commission (NTC) issued Memorandum Circular (“MC”) No. 01-03-2006, with the subject “Program Standards for Radio and TV Broadcast and Cable TV Stations,” which imposed strict guidelines on radio and television broadcasts. The MC prohibited “the broadcast of materials which tend to propose/incite treason, rebellion, sedition, or pose a clear and present danger to the State” by radio and television stations, coupled with threats of disciplinary sanctions against violators.<sup>1</sup> The issuance was made following the declaration of a state of emergency through Proclamation No. 1017 by then President Gloria Macapagal-Arroyo, just one week prior, on February 24, 2006.

This NTC rule was widely condemned at the time of its issuance. The Committee to Protect Journalists characterized it as part of the Arroyo administration’s “series of repressive actions against the press.”<sup>2</sup> Domestically, it prompted a plea before the United Nations High Commissioner on Human Rights by then Senator Jamby Madrigal, who said that the country was placed by President Arroyo in “a state of martial law where the rule of law of [sic] no longer exists.”<sup>3</sup>

Meanwhile, Freedom House, a global non-profit that “systematically track[s] the most pressing threats to democracy”<sup>4</sup> worldwide, lowered its rating of the Philippines from “free” in 2002 to 2005, to “partly free” in 2006 and 2007 with a corresponding lowering of score in their “political rights” criterion,<sup>5</sup> indicating a worrying trend of backsliding from democracy in the middle of Arroyo’s second term. Freedom House’s 2007 report cites the NTC issuance in its assessment.<sup>6</sup>

MC No. 01-03-2006 was also the subject of a petition for certiorari and prohibition filed with the Court of Appeals (CA) by the Philippine Press

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<sup>1</sup> Nat’l Telecomm. Comm’n (NTC) Mem. Circ. No. 01-03-2006 (2006). Program Standards for Radio and TV Broadcast and Cable TV Stations.

<sup>2</sup> *Attacks on the Press 2006: Philippines*, COMM. TO PROTECT JOURNALISTS WEBSITE, Feb. 5, 2007, at <https://cpj.org/2007/02/attacks-on-the-press-2006-philippines/>.

<sup>3</sup> Julie Javellana-Santos, *Senator Files Rights Abuse Complaint Against Arroyo At UN*, ARAB NEWS, Mar. 6, 2006, at <https://www.arabnews.com/node/281363>.

<sup>4</sup> *About Us*, FREEDOM HOUSE, at <https://freedomhouse.org/about-us> (last accessed May 21, 2025).

<sup>5</sup> Miguel Paolo P. Reyes, *Rating Philippine Democratization: A Review of Democratization Metrics*, 1 ASIAN DEM. REV. 182, 183 (2012).

<sup>6</sup> FREEDOM HOUSE, FREEDOM IN THE WORLD 2007: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND LIBERTIES 637 (2008).

Institute, the Center for Media Freedom and Responsibility, the Philippine Center for Investigative Journalism, and several broadcasting stalwarts, including Arnold Clavio, Maria Ressa, Ed Lingao, and Henry Omaga-Diaz. The CA denied the petition on procedural grounds, holding that certiorari and prohibition were improper remedies and that the petitioners should have brought their case before the Regional Trial Court in an action for nullification. The Supreme Court, in a minute resolution, dismissed in 2015 an appeal of this decision, ruling that the dismissal was proper.<sup>7</sup> Neither of the courts considered the substance of the petition, in that the issuance constituted an unlawful prior restraint and an affront to the constitutional freedom of the press.

This instance aptly demonstrates the potency of administrative agencies and their rulemaking power to cause a certain degree of regression from democracy. Although agencies are highly specialized and generally technocratic, they can and have been used to facilitate, or even advance, the goals and interests of an autocratic leader, harming democracy.

When administrative agencies such as the NTC are given a policy directive by an autocratic president, they have two possible courses of action: they may adopt the rule, or they may resist. Literature in fields of public administration and organizational behavior accepts “bureaucratic resistance”—the idea that our agencies and the bureaucrats who govern them are a “benevolent, apolitical constraining force on what might otherwise be an imperial autocrat.”<sup>8</sup> Still, our experiences, including what the NTC did here, tell the opposite story.

Dwelling on this disconnect, this Note attempts to devise a model to assess bureaucratic behavior in the context of democratic regression and the role of agency rulemaking therein. I first describe the intuitive link between democracy and bureaucracy, and drawing from the Philippine experience, discuss the historical complicity of administrative agencies during bouts of backsliding experienced by our democracy. I attempt to explain the legal conditions behind such complicity in the latter portions of Part III. I then revisit the concept of bureaucratic resistance and develop a legal analysis model that captures both the agencies’ authority and incentive to resist autocratization. The model is applied to a select number of Philippine administrative agencies, which are then classified into a typology

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<sup>7</sup> Phil. Press Inst. v. Ermita, G.R. No. 180303, slip op. (Feb. 24, 2015).

<sup>8</sup> Rebecca Ingber, *Bureaucratic Resistance and the National Security*, 104 IOWA L. REV. 139, 142 (2018).

based on the level of resistive behavior they can exhibit. The Note reflects on this model under Part VI, while Part VII concludes.

## II. THE DEMOCRACY-BUREAUCRACY NEXUS

### A. The Administrative State and the Democratic State

The view that administrative agencies are democratic is hardly expressed legally. The traditional legal precept, though, is that their creation and functions are intertwined with public interest. This was held as doctrine in *Pangasinan Transportation Co., Inc. v. The Public Service Commission*,<sup>9</sup> a 1940 case questioning an agency's authority to regulate public utilities:

The business of a common carrier holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation. When private property is "affected with a public interest it ceased to be *juris privati* only." When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discounting the use, but so long as he maintains the use he must submit to control. Indeed, this right of regulation is so far beyond question that it is well settled that the power of the state to exercise legislative control over public utilities may be exercised through boards of commissioners. This right of the state to regulate public utilities is founded upon the police power, and statutes for the control and regulation of utilities are a legitimate exercise thereof, for the protection of the public as well as of the utilities themselves.<sup>10</sup>

Thus, the democratic essence of administrative agencies is found not just in the legislative—and thus, popular—imprimatur driving their regulatory functions; these functions themselves are meant to protect and advance the interests of the polity.

As the understanding of democracy became more complex and shifted from the simplistic discourse surrounding *state legitimacy* to *institutional* and even *electoral legitimacy*, later scholarship had to contend with the special

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<sup>9</sup> [Hereinafter "*Pangasinan Transp. Co.*"], 70 Phil. 221 (1940).

<sup>10</sup> *Id.* at 233. (Citations omitted.)

relationship between administrative agencies and democracy in the context of three-branch liberal governments. For example, some literature in both law and political science has drawn such a link as one attributed to the agencies' inherent "pluralization" of the executive branch. Because administrative functions are diffused across many institutions, agencies effectively share amongst themselves the blame for errors and malfeasance in governance.<sup>11</sup> Meanwhile, as they are aligned structurally with the president, who is "envisioned both to control agencies and to be electorally accountable for agency actions,"<sup>12</sup> agencies may also feel the impact of their maladministration if voters punish the president in the polls. This creates an important cycle of democratic legitimacy and electoral accountability.

An important presumption here is presidential domination over the agencies. This framing, which was well-criticized by advocates of a concentrated administrative power and its ability to generate a more informed public opinion,<sup>13</sup> places presidential control as a function of democracy because of the president's electorally legitimate character. Eventual experiences of backsliding, though, would demonstrate that this is not in itself a flawless argument.

Another level of intersection between administration and democracy is found in the process through which agency actions, including administrative rules, are performed. This is a view most notably espoused by American scholars who place a great value on inquiring about the electoral legitimacy of governmental action. Susan Rose-Ackerman, for instance, asserts that agencies perform the important function of "fill[ing] the constitutional and statutory gaps" that constitutional framers and the legislature had left out.<sup>14</sup> In order to stay within that "chain of legitimacy," agencies "ought to engage in public consultation" in promulgating their rules<sup>15</sup> and subject their actions to multiple layers of accountability that are not necessarily electoral, but may be about agency performance, protection of individual rights, and the robustness of their policymaking procedures.<sup>16</sup>

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<sup>11</sup> See John M. De Figueiredo & Edward H. Stiglitz, *Democratic Rulemaking*, in 3 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PUBLIC LAW AND LEGAL INSTITUTIONS 40 (Francesco Parisi ed., 2017).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* By placing administrative authority in the hands of a single individual, i.e., the President, the public will readily understand the author of any "pernicious measure," and then may use elections to punish him for these actions.

<sup>14</sup> SUSAN ROSE-ACKERMAN, *DEMOCRACY AND EXECUTIVE POWER* 16 (2021).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 17–19.

These effectively resolve the “democratic deficit” created by having unelected bodies write policies to implement the laws enacted by elected legislators.

Others, including John de Figueiredo and Edward Stiglitz, see the process of administrative rulemaking as the best embodiment of the concept of *deliberative democracy*, where agencies “structure[] decisions to ensure at least some minimum level of engagement and rational discussion between the government and the public”—a value that is not necessarily present in the legislative process.<sup>17</sup>

Administrative law scholar Jerry Mashaw builds on deliberative democracy theories by asserting that the democratic value of administrative agencies is not just within their inclusive processes, but in how agency actions are constrained to integrate reason (as in non-arbitrariness) and reason-giving (as in laying out a sufficient evidenced-based justification for agency action).<sup>18</sup> This demand of “contemporary reasonableness” creates a system of administration that is “highly participatory, complexly interconnected with political and legal monitors, and insulated against [...] the seizure of public power for private or partisan advantage.”<sup>19</sup>

The views espoused in these later works appear to be heavily influenced by the American system that is largely governed by the provisions of their Administrative Procedure Act.<sup>20</sup> As we will see later, peculiarities in Philippine administrative law can lead to different outcomes. They, however, communicate a unified point: that administrative agencies and their actions considerably intersect with democracy. Agencies are not just a democratic necessity borne out of the “complexity of modern life,”<sup>21</sup> but an arena within which to advance democratic values and align state action with public reason. An exercise of control over these agencies can thus mean exercise of control over the democratic order, and any leader who wishes to reverse democratic advances may thus very well utilize their control over agencies.

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<sup>17</sup> De Figueiredo & Stiglitz, *supra* note 11, at 46–47.

<sup>18</sup> See JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 43–48 (2018). Mashaw looks at different sources of reason-giving requirements such as the Constitution and statutes where each source provides constraints against federal administrative agencies in the United States.

<sup>19</sup> *Id.* at 164.

<sup>20</sup> 5 U.S.C. §§ 551–559.

<sup>21</sup> *Pangasinan Transp. Co.*, 70 Phil. at 229.

## B. The Converse: The Deep State Narrative

Still, even Mashaw acknowledges that the democratic outcomes created by reasoned administration do not necessarily overcome the unelected nature of agencies.<sup>22</sup> As he points out, “‘bureaucrat’ is not a congratulatory label,” and it remains too loaded a term because of its negative implications.<sup>23</sup>

These are most famously advanced by US President Donald Trump, who has been a major proponent of the deep state conspiracy theory. “Deep state” refers to “an alleged shadowy group of powerful bureaucrats and officials who, according to many, wield undue influence over government policies, regardless of the elected administration.”<sup>24</sup> The deep state narrative takes advantage, at the same time, of America’s social inclination towards electoral legitimacy by populist and partisan invocation, emphasizing the unelected nature of agencies. Ultimately, administrative agencies are presented as “the main force that prevented [Trump] from accomplishing everything that he wanted to [do],”<sup>25</sup> a characterization that resonates with his electoral base determined to push back against roadblocks to Trump’s agenda. The narrative has resulted in the demonization of nonpolitical civil servants. But more strikingly, undermining the legitimacy of agencies has allowed Trump to roll back administrative regulation and implement austerity measures through substantial cuts in spending in the name of government efficiency.<sup>26</sup>

This Note does not adopt or attempt to rationalize this view. While the deep state narrative admits to antidemocratic outcomes caused by administrative agencies, our analysis concerns an entirely different segment within the gamut of president-agency dynamics. The difference is that while the deep state framing sees agencies to be acting *contrary to* a popular executive, making them illegitimate, our analysis will concern agency rules undertaken *in compliance with* a dominating president, or its corresponding inaction as a form of resistive behavior. Thus, the systemic demonization of

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<sup>22</sup> MASHAW, *supra* note 18, at 164.

<sup>23</sup> *Id.*

<sup>24</sup> Rebecca Jacobs, *Trump has said he wants to destroy the “deep state” 56 times on Truth Social*, CITIZENS FOR ETHICS, Aug. 1, 2024, at <https://www.citizensforethics.org/reports-investigations/crew-investigations/trump-has-said-he-wants-to-destroy-the-deep-state-56-times-on-truth-social/>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

the “deep state” can only be understood here as a prelude to or means of consolidating presidential control over agencies.

It is ultimately this control and the legal factors surrounding it that are the subject of our discussion. How they can be linked to democratic regression is probed further in the next chapter.

### III. DEMOCRATIC BACKSLIDING AS AN ADMINISTRATIVE PHENOMENON

#### A. How Democracies “Backslide”

The concept of democratic backsliding is well-covered in social science literature, although legal analysis of the concept is scant. It is generally understood as an “incremental erosion of democratic institutions, rules, and norms”<sup>27</sup> by governments. These are brought about by “a purposeful effort of autocrats,” whose rise to power are generally through electoral victories, to undermine the constitutive elements of the democracy.<sup>28</sup>

This definition has significant implications. First, democratic backsliding is a process, as contrasted with abrupt regime changes such as those done through *coup d'états* or illiberal revolutions.<sup>29</sup> Another consequence is that the phenomenon is a deterioration or a U-turn, implying that the backsliding polity was already in the process of democratization but reversed course along the way. This renders irrelevant in our analysis the question of whether autocratization has been completed, as democratic backsliding concerns itself with the mere reversion or erosion, and not total transformation to authoritarian rule, although the degree to which that reversion or erosion occurs varies greatly across different contexts.

A related conclusion here is that backsliding polities *are* already democracies, to whatever extent. It is the very same democratic institutional design that thus allowed for backsliding to occur. Haggard and Kaufman describe this as “[d]emocracy [...] consuming itself,” where the autocratic threats come from within the constitutional process of the democracy.<sup>30</sup>

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<sup>27</sup> STEPHEN HAGGARD & ROBERT KAUFMAN, BACKSLIDING: DEMOCRATIC REGRESS IN THE CONTEMPORARY WORLD 1 (2021).

<sup>28</sup> *Id.* at 4.

<sup>29</sup> *Id.* at 1.

<sup>30</sup> *Id.*

Haggard and Kaufman’s extensive review reveals that this modern process of backsliding is “set in train by polarization, the rise of illiberal candidates[,] and legislative acquiescence in the collapse in the separation of powers.”<sup>31</sup> Backsliding thus begins in democracies with strong polarization around economic, racial, or ethnic divisions. The worsening of the “us against them” divide across key social issues only results in “sharper” differences between these polarized groups. Ultimately, this raises the appeal of anti-system executive leaders who advocate for one side or the other. These leaders make derogation from democracy and its procedural constraints more acceptable,<sup>32</sup> as not only will their actions result in the advancement of their preferred policies, but also in a “triumph” over the other side of the social cleavage.

This autocratization will go nowhere if not furthered by a reduction or erosion in horizontal or interbranch checks on executive discretion, specifically by a capture of the other branches of government.<sup>33</sup> Once an illiberal leader rises, they commit either a “frontal assault” on these checking institutions (through threats of abolition or some degree of constitutional change) or systemic delegitimization.<sup>34</sup> Eventually, restrictions on civil liberties, including freedom of speech, freedom of assembly, and freedom of association, soon follow, as well as an undermining of the electoral process, as means to curtail opposition and consolidate power.<sup>35</sup>

Trends of autocratization are quantitatively assessed through democratization metrics developed by social scientists. Although the strength of their respective methodologies remains a subject of scholarly debate, these metrics generally measure the main constitutive elements of democracy that Haggard and Kaufman examined: (1) the protection of civil liberties, primarily freedom of speech and of the press, as well as freedom of expression and of association; (2) the holding of free and fair elections; and (3) the strength of institutions and mechanisms through which government power can be checked.

Established metrics capture a worryingly global trend of autocratization. For example, the Democracy Report 2025 of the Varieties

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<sup>31</sup> *Id.* at 56.

<sup>32</sup> *Id.* at 14–17.

<sup>33</sup> *Id.* at 39–40.

<sup>34</sup> *See id.* at 41–49. The text details how populist presidents in Venezuela (Chávez), Ecuador (Correa), and Bolivia (Morales) used the creation of Constitutional Assemblies—a fundamental form of constitutional change—to bypass and dismantle legislative checks.

<sup>35</sup> *Id.* at 4.

of Democracy (V-Dem) Project<sup>36</sup> of the University of Gothenburg indicates that liberal democracies have now become the least common regime type globally, with at 38% of the world's population residing in autocratizing countries in 2024.<sup>37</sup> According to their analysis, freedom of expression is the “worst affected aspect of democracy,”<sup>38</sup> with deliberation and clean elections not far behind.<sup>39</sup>

A similar trend is captured in Democracy Index 2024<sup>40</sup> of The Economist, which notes that indicators under the functioning of government, the electoral process, and pluralism being those impacted the worst by the actions of autocrats. Finally, Freedom House's Freedom in the World 2024<sup>41</sup> notes that at least 52 countries are declining in their metrics that examine democratic freedoms, a fact which they attribute to various armed conflicts and the undermining of elections.

## B. Backsliding in the Philippines

The Philippines, being a relatively young and immature republican democracy, is not immune to autocratization. Currently, the country is tagged in Democracy Index 2024 as a “flawed democracy,” ranking 51st globally, with notably lower scores in their “political culture” and “functioning of government” indicators.<sup>42</sup> The Economist's analysis points to the high level of concentration of power among prominent political dynasties as the main factor that drives these weaknesses.

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<sup>36</sup> V-DEM INSTITUTE, DEMOCRACY REPORT 2025: 25 YEARS OF AUTOCRATIZATION – *DEMOCRACY TRUMPED?* [hereinafter “V-DEM 2025”], at [https://www.v-dem.net/documents/61/v-dem-dr\\_2025\\_lowres\\_v2.pdf](https://www.v-dem.net/documents/61/v-dem-dr_2025_lowres_v2.pdf) (last accessed May 20, 2025). V-Dem compiles comprehensive historical data on the different facets of democracy. Its indicators are grouped into deliberative democracy; egalitarian democracy; electoral democracy; liberal democracy; and participatory democracy.

<sup>37</sup> *Id.* at 6–10.

<sup>38</sup> *Id.* at 17.

<sup>39</sup> *Id.*

<sup>40</sup> THE ECONOMIST, DEMOCRACY INDEX 2024 [hereinafter, “DEMOCRACY INDEX 2024”] (2025), at <https://www.eiu.com/n/campaigns/democracy-index-2024/> (last accessed May 20, 2025). Democracy Index assesses countries in a 0 to 10 scale across sixty indicators, grouped into five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture.

<sup>41</sup> FREEDOM HOUSE, FREEDOM IN THE WORLD 2024: THE MOUNTING DAMAGE OF FLAWED ELECTIONS AND ARMED CONFLICT [hereinafter “FREEDOM IN THE WORLD 2024”] (2024), at [https://freedomhouse.org/sites/default/files/2024-02/FIW\\_2024\\_DigitalBooklet.pdf](https://freedomhouse.org/sites/default/files/2024-02/FIW_2024_DigitalBooklet.pdf) (last accessed May 20, 2025). Freedom House puts a special focus on civil liberties that come with democracy.

<sup>42</sup> DEMOCRACY INDEX 2024, *supra* note 40, at 67.

V-Dem's dataset recognizes the same trend, raising issues about the quality of democratic deliberation within Philippine institutions.<sup>43</sup> In their 2024 metrics, the country ranks 99th in the liberal democracy index<sup>44</sup> and 98th in the electoral democracy index,<sup>45</sup> with poor to average performance in other component indices: the country is 93rd in the liberal component index,<sup>46</sup> 155th in the egalitarian component index,<sup>47</sup> 63rd in the participatory component index,<sup>48</sup> and 111th in the deliberative component index.<sup>49</sup>

Historically, the most prominent democratic regression occurred during the presidency of Ferdinand Marcos, Sr. (1965-1986) who declared martial law in 1972, persecuted the political opposition, and caused the curtailment of civil liberties. After Marcos, Sr. was deposed in 1986 and a new constitutional order was installed the following year, V-Dem's quantitative metrics on Philippine democracy sharply recovered. A period of post-martial law democratic consolidation followed in the era of the current Fifth Philippine Republic. During this period, there are two notable regressions in democratization metrics: during the middle of the presidency of Gloria Macapagal-Arroyo (2001-2010), and then at the onset of the presidency of Rodrigo Duterte (2016-2022).

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<sup>43</sup> V-DEM 2025, *supra* note 36, at 18.

<sup>44</sup> V-Dem's liberal democracy index "captures both electoral and liberal aspects of democracy and goes from the lowest (0) to the highest (1) levels of democracy." *See id.* at 9 n.2.

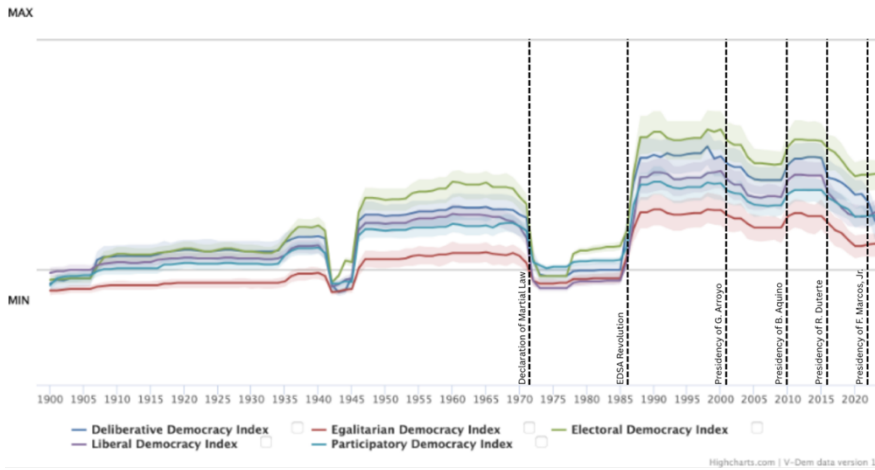
<sup>45</sup> V-Dem's electoral democracy index measures "the quality of elections, individual rights, as well as freedoms of expression, the media, and association." *See id.*

<sup>46</sup> V-Dem's liberal component index "captures checks and balances on the executive, respect for civil liberties, the rule of law, and the independence of the legislature and the judiciary." *See id.*

<sup>47</sup> V-Dem's egalitarian component index "measures to what extent all social groups enjoy equal capabilities to participate in the political arena." *See id.* at 58.

<sup>48</sup> V-Dem's participatory component index considers "civil society organizations, mechanisms of direct democracy, and participation and representation through local and regional governments." *See id.* at 59.

<sup>49</sup> V-Dem's deliberative component index "assesses the process by which decisions are reached in a polity," and whether it is "one in which public reasoning, focused on the common good, motivates political decisions." *See id.*



**Figure 1.** V-Dem’s historical data on Philippine democracy from 1900 to the present, shows similar trends across all major and component indices.

The demarcations that identify presidencies are superimposed to supplement the data, noting the president’s central role in the process of autocratization.<sup>50</sup>

Parallels can be drawn in both the Arroyo and Duterte regimes. Arroyo, who rose to the presidency after the ouster of Joseph Estrada in 2001, was credibly alleged to have orchestrated widespread electoral fraud in the 2004 elections to ensure her own win, in what came to be known as the “Hello Garci” scandal.<sup>51</sup> The ensuing social unrest was met by her administration’s attacks on the press and civil society during the emergency declaration crisis in 2006.<sup>52</sup> On the other hand, the ascent of the popular Rodrigo Duterte was driven by his resounding rhetoric against criminality and illegal drugs. His presidency was marked by a multitude of “assaults” on civil society. Duterte’s war on drugs and other policies shrank democratic space, with leftist and other progressive groups tagged as terrorists. He also led the charge to revoke the congressional franchise of the country’s largest television broadcast company in 2020.<sup>53</sup>

<sup>50</sup> See Haggard & Kaufman, *supra* note 27, at 14–17.

<sup>51</sup> Freedom House, *Freedom in the World 2006: The Annual Survey of Political Rights and Liberties* 569 (2007).

<sup>52</sup> Freedom House, *supra* note 6.

<sup>53</sup> See Aries Arugay & Justin Baquisal, *Bowed, Bent & Broken, Duterte’s Assaults on Civil Society in the Philippines*, 42 *J. Current Se. Asian Aff.* 328, 339 (2023).

### C. Backsliding via Administrative Rules

The actions of an illiberal leader are hardly ever linear or predictable, however. Scholars of public administration have noted three possible permutations of an autocrat's relationship with administrative agencies: the autocrat may sideline the agencies, ignore the agencies, or use the agencies to advance their agenda, each with their own reasons and consequences.<sup>54</sup> Our concern here is the last possibility. After all, even the most ruthless autocrat would need to perform some degree of governance, which can only be done through the available bureaucratic apparatus. This highlights an important political incentive for autocrats to cultivate some degree of control over the agencies.

The role of administrative agencies in bouts of democratic regress is thus apparent if not intuitive. The constitutive elements of democracy, which are eroded systematically by autocrats, are controlled or influenced to some degree by administrative agencies. Freedom of speech, of expression, and of the press can all be constrained in some level by administrative regulation. Elections are normally administered by an agency. Deliberative and participatory mechanisms are, theoretically, integrated within an administrative agency's processes in issuing rules and performing its regulatory functions. To illustrate, we draw here from the identified historical experiences of backsliding and lay out specific instances of administrative rulemaking being used to effect such democratic regress.

#### 1. 2006: *Arroyo vs. the Press*

Democracy watchdog Freedom House partly attributed the phenomenon of backsliding under the Arroyo administration to the February 2006 emergency declaration, which "significantly infringed on press freedom."<sup>55</sup> The administration's response to social unrest was a series of actions that included surveillance and an eventual raid on *The Daily Tribune*, a local newspaper that published articles critical of the Arroyo administration, and as earlier mentioned, the issuance of NTC MC No. 01-03-2006. This administrative rule, issued a week after the emergency declaration by Arroyo, did two things.

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<sup>54</sup> MICHAEL BAUER, B. GUY PETERS, JON PIERRE, KUTSAL YESILKAGIT, & STEFAN BECKER, DEMOCRATIC BACKSLIDING AND PUBLIC ADMINISTRATION: HOW POPULISTS IN GOVERNMENT TRANSFORM STATE BUREAUCRACIES 8–12 (2021).

<sup>55</sup> FREEDOM HOUSE, *supra* note 6, at 637.

First, it reissued existing “program standards” promulgated by the NTC in two of its older issuances: (1) the martial law-era MC No. 11-12-85, a standard and long-existing rule which required radio and television stations to “cut off” the broadcast of any content which tends to incite treason, rebellion, or sedition; and (2) MC No. 22-89, which adds to the cutting-off practice by directly prohibiting “the airing of rebellious/terrorist propaganda, comments, interviews, information and other similar and/or related materials.”

This first point is interesting. It should be noted that the direct prohibition of “rebellious/terrorist propaganda, comments, interviews, information, and other similar and/or related materials” by MC No. 22-89 was made following a state of national emergency declared by then President Corazon Aquino<sup>56</sup> and eventually, Congress,<sup>57</sup> due to a *coup d'état* in December 1989. This is why MC No. 22-89 was specifically made “in view of the current on-going state of rebellion/terrorism” and prohibited the broadcast of “government strategic information” and “description of government weapons, military units, vehicles and such other government tactical operations.”<sup>58</sup> In fact, following the repeal of the state of emergency, MC No. 22-89 was promptly lifted through a subsequent issuance by the NTC that same month.<sup>59</sup> Thus, in MC No. 01-03-2006, the NTC relied on an old and already-repealed rule intended for different circumstances, perhaps with the thinking that it was meant as a catch-all prohibition on the broadcast of anti-government material.

Secondly, MC No. 01-03-2006 adopted another set of guidelines internally promulgated by the Kapisanan ng mga Brodkaster ng Pilipinas (KBP),<sup>60</sup> KBP Circular No. 06-016, and imposes administrative sanctions against its violators through an agreement with the KBP. This allowed then NTC Chair Ronald Solis to package the NTC rule as “not a form of censorship but of self-regulation.”<sup>61</sup> The irony here, however, is that the KBP guidelines under KBP Circular No. 06-016 were issued only several

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<sup>56</sup> Proc. No. 503 (1989). Declaring a State of National Emergency Throughout the Philippines.

<sup>57</sup> See Rep. Act No. 6826 (1989). Declaring a State of National Emergency.

<sup>58</sup> NTC Mem. Circ. No. 22 (1989). Revision of Memorandum Circular No. 11-12-85 Re: Program Standards.

<sup>59</sup> NTC Mem. Circ. No. 25 (1989). Lifting of Memorandum Circular No. 22-89.

<sup>60</sup> The KBP is the organization of broadcast media in the Philippines that acts as a platform for self-regulation.

<sup>61</sup> Javellana-Santos, *supra* note 3.

days before MC 01-03-2006, and were made pursuant to the instructions of the NTC to the KBP to define what would constitute “rebellious” news.<sup>62</sup>

It appears that the real intention behind NTC’s issuance of MC No. 01-03-2006 was to censor content that could be perceived as anti-government, in a way that skirts the constitutional proscription against abridging the freedom of the press. Although the rule was merely part of a series of actions by the Arroyo administration, it represented the most direct and formal assault on press freedom that characterized the country’s democratic regression during this period.

As we earlier noted, Freedom House lowered its rating of the Philippines from “free” in 2002 to 2005, to “partly free” in 2006 and 2007, with a corresponding lowering of score in their “political rights” criterion.<sup>63</sup> Meanwhile, drops in all V-Dem indices are seen during this period, primarily in their liberal democracy index (from 0.41 in 2001, when Arroyo came to power, to 0.35 in 2006) and electoral democracy index (from 0.55 in 2001 to 0.47 in 2006).<sup>64</sup> Although these significant drops are not attributable *only* to the administrative rule in question, the overall policy of the administration that reflected that democratic regress was greatly advanced by such a rule. This is also true for what occurred 12 years later.

## 2. 2018: Duterte vs. the Civil Society

The backsliding experienced during the presidency of Rodrigo Duterte was less sudden and more systematic, although its documentation had improved due to the advent of technology and social media. Even early in his term, scholars already noted Duterte’s brand of “penal populism,” which, while playing into the anxieties and hopes of Filipinos, had the potential of “creat[ing] a legacy of exclusion and divisiveness.”<sup>65</sup> True enough, upon his assumption to power in 2016, he instituted “decidedly militaristic” law and order policies, including the war on drugs.<sup>66</sup> Duterte

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<sup>62</sup> KBP meet to determine ‘rebellious’ news, GMA NEWS, Mar. 1, 2006, at <https://www.gmanetwork.com/news/topstories/nation/1202/kbp-meet-to-determine-rebellious-news/story/>.

<sup>63</sup> Reyes, *supra* note 5.

<sup>64</sup> *V-Dem Country Graph: Philippines* [hereinafter “V-Dem Country Graph”], V-DEM WEBSITE, at [https://www.v-dem.net/data\\_analysis/CountryGraph/](https://www.v-dem.net/data_analysis/CountryGraph/) (last accessed May 21, 2025).

<sup>65</sup> Nicole Curato, *Politics of Anxiety, Politics of Hope: Penal Populism and Duterte’s Rise to Power*, 35 J. CURRENT SE. ASIAN AFF. 91, 106 (2016).

<sup>66</sup> Arugay & Baquisal, *supra* note 53, at 334.

rebuffed any pushback from civil society and human rights groups, and even the Catholic Church.<sup>67</sup>

Most relevant to our discussion is Duterte's policy toward civil society participation. Although there are mechanisms for consultations that are instituted under law,<sup>68</sup> certain actions of the Duterte administration eroded participative democracy and shrank the available space for any outside check on government power. These actions ranged from rhetorical to formal, with the latter being done through administrative rules.

One such rule is MC No. 15 by the Securities and Exchange Commission (SEC) issued on November 7, 2018. MC No. 15 empowered the agency "unchecked discretion to identify [civil society organizations] considered to be at-risk [of terrorist financing and money laundering] based on information provided by government agencies such as the Philippine National Police."<sup>69</sup> It required non-stock and non-profit organizations, including civil society organizations formed for political or advocacy purposes, to disclose to the SEC, among others, their objectives and intended activities; the names of individuals who "own, control or direct their activities[;]" the location of their "operations" and "activities[;]" as well as geographic and individual sources and beneficiaries of their funding.<sup>70</sup> These are massive departures from the usual rules of disclosure in the incorporation process, which only required, among others, the names of the incorporators and stockholders and a business address.

MC No. 15 further provided that the SEC will cooperate with both national and international enforcement agencies to share the information gathered in these disclosure mechanisms.<sup>71</sup> The SEC also empowered itself to investigate any violation of such rules on disclosure, and for that purpose, the SEC "may enlist the aid and support and/or deputize any and all enforcement agencies of the Government of the Republic of the Philippines."<sup>72</sup> This is a sweeping power to investigate, especially as non-

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<sup>67</sup> *Id.*; see also Reuters, *Corrected: Philippine president renews attack on Catholic church*, REUTERS, Jan. 12, 2019, at <https://www.reuters.com/article/world/corrected-philippine-president-renews-attack-on-catholic-church-idUSKCN1P41JA/>.

<sup>68</sup> See, e.g., LOCAL GOV'T CODE, § 2(c).

<sup>69</sup> Arugay & Baquisal, *supra* note 53, at 337.

<sup>70</sup> Securities and Exch. Comm'n. (SEC) Mem. Circ. No. 15 (2018), § 4.2. Guidelines for the Protection of SEC Registered Non-Profit Organizations from Money Laundering and Terrorist Financing Abuse.

<sup>71</sup> §§ 9.1–9.3.

<sup>72</sup> § 10.2.

disclosure would only ordinarily entail some administrative correction, and that the investigation could have been limited to more expert agencies such as the National Bureau of Investigation or the Anti-Money Laundering Council.

This administrative rule was ostensibly presented as part of a harmless and routine executive policy. It aligns with and served as a prelude to Duterte's Executive Order ("EO") No. 68, issued five days after MC No. 15, which adopted a National Anti-Money Laundering and Countering the Financing of Terrorism ("AML/CFT") Strategy. Duterte said that this Order would "facilitate inter-agency coordination focused on the development of national policies on AML/CFT consi[s]tent with relevant AML/CFT laws and international standards."<sup>73</sup> The set of guidelines was developed through the technical assistance provided by the Asian Development Bank.<sup>74</sup>

What is left unsaid, however, is that MC No. 15 and EO No. 68 came at a time when Duterte was intensifying his political and military offensive against communist rebels, including their allies and sympathizers in civil society. The rules came less than two years after Duterte ordered the lifting of his ceasefire with the New People's Army.<sup>75</sup> Less than a month after the SEC rule, Duterte floated the idea of forming "armed death squads" to fight the rebels.<sup>76</sup> That December, he issued EO No. 70, which created the National Task Force to End Local Communist Armed Conflict (NTF-ELCAC), a body notorious for red-tagging leftist groups and other people's organizations. It thus appeared that MC No. 15 was issued as part of this policy, in order to surveil organizations and corporations that may have any hint of association with the communists, even when these groups were created for legitimate civic purposes. True enough, the Duterte administration eventually claimed that six nongovernment organizations, including some involved in human rights work such as the Philippine Alliance of Human Rights Advocates ("PAHRA") and the Alliance for the

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<sup>73</sup> Nestor Corrales, *Duterte signs EO to adopt strategy vs money laundering, financing terrorism*, INQUIRER.NET, Nov. 21, 2018, at <https://newsinfo.inquirer.net/1055651/duterte-signs-EO-to-adopt-strategy-vs-money-laundering-financing-terrorism>.

<sup>74</sup> See ASIAN DEV. BANK, DEVELOPING ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM (AML/CFT) APPROACHES (2018), at <https://www.adb.org/projects/documents/reg-48359-001-tcr>.

<sup>75</sup> See *Duterte orders lifting of ceasefire with CPP-NPA*, PRES. COMMC'N OFF. (PCO) WEBSITE, Feb. 4, 2017, at [https://pco.gov.ph/news\\_releases/duterte-orders-lifting-of-ceasefire-with-cpp-npa/](https://pco.gov.ph/news_releases/duterte-orders-lifting-of-ceasefire-with-cpp-npa/).

<sup>76</sup> See *Duterte plans anti-communist 'death squad'*, DW.COM, Nov. 28, 2018, at <https://www.dw.com/en/duterte-plans-anti-communist-death-squad-in-philippines/a-46484215>.

Advancement of People's Rights ("KARAPATAN"), were financing communist terrorism, resulting in the revocation of their respective SEC registrations.<sup>77</sup>

It goes without saying that the country's democratization metrics reflected the regression caused by these policies of the Duterte administration. The country's rank in the Democracy Index had been in free fall during Duterte's first few years in office (from 51st in 2017 to 55th by 2020).<sup>78</sup> There was also a substantial decrease in the value of the country's V-Dem participatory democracy index (from 0.38 in 2014 during the Benigno Aquino III administration to 0.32 in 2018 and 0.31 in 2019), as well as all other indices.<sup>79</sup>

#### D. Why Rulemaking, Specifically?

To recall, the theories advanced by Rose-Ackerman<sup>80</sup> and Mashaw<sup>81</sup> saw the democratic value in administrative actions, respectively, in the process through which such actions are produced and in the reason why such actions are justified. But if that is so, why did administrative rulemaking play such a central role in notable bouts of backsliding in the Philippines? And why rulemaking specifically?

Unlike what these theories hold to be given, there are characteristics of administrative rulemaking, whether general or peculiar to the Philippine administrative law landscape, that make such power especially vulnerable to a "hijacking" by autocratic tendencies. At the outset, the most obvious reason is that administrative rulemaking is general in scope and application. Our Administrative Code says as much when it defines "rule" as "any agency statement of general applicability that implements or interprets a law, fixes and describes the procedures in, or practice requirements of, an agency, including its regulations."<sup>82</sup> Thus, unlike decisions of administrative bodies

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<sup>77</sup> See WORLD ORG. AGAINST TORTURE, CRACKDOWN ON HUMAN RIGHTS DEFENDERS LIKELY TO INTENSIFY AFTER PRESIDENT RODRIGO DUTERTE'S CANDIDATES SWEEP SENATE ELECTIONS (2019), at <https://www.omct.org/en/resources/urgent-interventions/crackdown-on-human-rights-defenders-likely-to-intensify-after-president-rodrigo-dutertes-candidates-sweep-senate-elections>.

<sup>78</sup> Janvic Mateo, *Democracy index: Philippines' ranking goes down again*, PHIL. STAR, Feb. 17, 2024, at <https://www.philstar.com/headlines/2024/02/17/2334031/democracy-index-philippines-ranking-goes-down-again>.

<sup>79</sup> *V-Dem Country Graph*, *supra* note 64.

<sup>80</sup> ROSE-ACKERMAN, *supra* note 14.

<sup>81</sup> MASHAW, *supra* note 18.

<sup>82</sup> ADM. CODE, bk. VII, § 2(2).

in quasi-judicial cases, which bind only the parties concerned, administrative rules are matters not just of law but of overall governmental policy. The alignment of and compliance by everyone concerned is thus expected following an administrative rule.

This character is furthered by three factors: (1) that administrative rules constitute an exercise of legislative discretion by the executive; (2) that procedural recourse for those aggrieved by administrative rules under Philippine law is limited and unclear; (3) and that the requirements of due process are fewer and less burdensome on rulemaking agencies. Collectively, not only do these factors make agency rules a strong ingredient of democratic regression, but they also make them less susceptible to judicial review.

### *1. Rulemaking as Legislative Discretion*

Administrative rulemaking has long been characterized as a conferment of discretion by Congress. In *Lokin v. COMELEC*,<sup>83</sup> the Supreme Court said:

The legislative power of the Government is vested exclusively in the Legislature in accordance with the doctrine of separation of powers. As a general rule, the Legislature cannot surrender or abdicate its legislative power, for doing so will be unconstitutional. Although the power to make laws cannot be delegated by the Legislature to any other authority, a power that is not legislative in character may be delegated.

Under certain circumstances, the Legislature can delegate to executive officers and administrative boards the authority to adopt and promulgate [implementing rules and regulations]. [...] For as long as the policy is laid down and a proper standard is established by statute, there can be no unconstitutional delegation of legislative power when the Legislature leaves to selected instrumentalities the duty of making subordinate rules within the prescribed limits, although there is conferred upon the executive officer or administrative board a large measure of discretion. There is a distinction between the delegation of power to make a law and the conferment of an authority or a discretion to be exercised under and in pursuance of the law, for the power to make laws necessarily involves a discretion as to what it shall be.<sup>84</sup>

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<sup>83</sup> 635 Phil. 372 (2010).

<sup>84</sup> *Id.* at 391–92.

This, which follows a long line of cases beginning with *Compania General de Tabacos de Filipinas v. The Board of Public Utility Commissioners*,<sup>85</sup> is an interesting point for two reasons. First, even when the Court stops short of characterizing administrative rules as an exercise of delegated legislative power, it does not concede that the “discretion” granted to agencies is beyond the ambit of Congress’ legislative power. Since “[t]he legislative body possesses plenary power for all purposes of civil government” and “legislative power embraces all subjects and extends to all matters of general concern or common interest,”<sup>86</sup> Congress is never bereft of discretion in determining how a law shall be carried out. Indeed, unlike many constitutional law cases concerning separation of powers—which review legislative action to ensure Congress acted *just enough* to fall within the scope of its powers—cases concerning non-delegation review whether Congress acted *largely enough* and left as reasonably little room as possible to the executive.

Hence, a grant of rulemaking authority to an administrative agency is effectively a relinquishment of a certain portion of Congress’ own discretion. By laying down a complete policy and a sufficient standard that would govern administrative rulemaking, Congress is making two deliberate choices at the same time: positively, as in actively leaving certain details to the executive, and negatively, as in refraining from exercising a power it already had.

Secondly, and on a related note, both the executive and legislature are political branches of government, in that their respective provinces are inherently characterized by an exercise of discretion.<sup>87</sup> A concession of discretion from one branch—deemed to be the direct representatives of the people—to another brings about broad democratic implications. Therefore, the extent and scope of rulemaking discretion granted to or exercised by the executive can be a badge of legislative support behind a president, or an assertion of control by a president against a hostile legislature in cases where there might be some level of interbranch conflict. In either instance, administrative rules become an important tool for a president because, as earlier noted, an illiberal leader’s relationship with the legislature—the latter

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<sup>85</sup> 34 Phil. 136 (1916).

<sup>86</sup> *Macalintal v. COMELEC*, 943 Phil. 212, 21 (2023), *citing* *Kida v. Senate*, 675 Phil. 316, 361 (2011).

<sup>87</sup> A brief contrast may be made as against the judiciary as well as quasi-judicial agencies, which are bound to merely apply the law as written.

being the main horizontal check to executive power—is a factor in the success of autocratization.<sup>88</sup>

## 2. *Limited Procedural Recourse*

Another key characteristic of administrative rules is that procedural recourse for those aggrieved by them is limited. Persons aggrieved by decisions of quasi-judicial agencies, on the other hand, have a uniform mode of recourse as these are generally appealable to courts via Rule 43 of the Rules of Court, subject only to *lex specialis* in cases where a different mode of appeal is spelled out in the governing statute.<sup>89</sup> Recourse for administrative rules, though, is less clear; they may either be nullified by the courts under their power of judicial review,<sup>90</sup> or raised in a petition for declaratory relief via Rule 63 of the Rules of Court.

The first mode is, of course, subject to the stringent requisites of judicial review: (a) the existence of an actual case or controversy; (b) *locus standi* of the petitioners; (c) that the question of constitutionality has been raised at the earliest opportunity; and (d) that constitutionality is the *lis mota* of the case.<sup>91</sup> These requirements must mean that the challenge alleges the rule's violation of the Constitution or a statute (as in it was issued *ultra vires* or abridges a constitutional right), and that the violation affected the petitioner specifically.

Still, even if the facts of a case merit the judicial review of an administrative rule, it will not preclude the Court from refusing to exercise jurisdiction and requiring that resort be first made before the rulemaking agency and its superior agencies. In *BOCEA v. Biazon*,<sup>92</sup> for example, the petitioners challenged an administrative rule by the Bureau of Customs (BOC) for being violative of the Constitution. The Supreme Court held that although the petitioners properly invoked its expanded certiorari powers under the Constitution, they should have still complied with the doctrines of hierarchy of courts and exhaustion of administrative remedies. In fact, the Court essentially outlined the lengthy process that the petitioners should have followed before resorting to it:

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<sup>88</sup> See HAGGARD & KAUFMAN, *supra* note 27.

<sup>89</sup> See, e.g., LOCAL GOV'T CODE, § 61(b).

<sup>90</sup> CONST. art. VIII, § 1.

<sup>91</sup> See *Ifurung v. Carpio-Morales*, 831 Phil. 135, 152 (2018).

<sup>92</sup> [Hereinafter “*BOCEA*”], 925 Phil. 623 (2022).

In this case, the exhaustion of administrative remedies should have started by seeking reconsideration or review of the assailed administrative issuances from the Commissioner of Customs, followed by an appeal to the Secretary of Finance. In case of an adverse decision, the petitioners could have elevated the same to the Office of the President, which is the ultimate source of executive authority over the Bureau of Customs (BOC). Resort to the courts begins only after this exhaustion of administrative remedies, by raising the same to the Court of Appeals *via* an appeal under Rule 43, and, eventually, to the Supreme Court *via* a petition for review on *certiorari* under Rule 45.<sup>93</sup>

Not only was this portion erroneous (as Rule 43 only governs appeal from quasi-judicial bodies,<sup>94</sup> not administrative decisions or appeals as to rules), but it also reads as self-contradictory, as the Court had already said that invoking its expanded certiorari powers was in order. The petitioners cannot be reasonably expected to submit to an additional four steps of recourse before resorting to the courts when grave abuse of discretion correctible by judicial review was already shown. Additionally, the Court cannot simply compel the petitioners to first avail of administrative remedies, especially since the agency rules in question were promulgated in compliance with orders of then President Benigno Aquino III.<sup>95</sup> Because administrative rules like the one in question in *BOCEA* are issued normally by reason of executive policy, any appeal to the executive is unlikely to bear fruit.

The other recourse, declaratory relief under Rule 63, is of a different character. It does not provide an affirmative relief but only a judicial interpretation or a judicial declaration of one's rights concerning an administrative rule. In *Commissioner of Customs v. Hypermix*,<sup>96</sup> the Court held that declaratory relief is a proper remedy by a party adversely affected in the implementation of an administrative rule, subject to the requisites of absence of breach of the rule, justiciability, interest and standing of the petitioner, and ripeness for judicial determination of the issues raised.

However, in earlier cases, the Court had likewise required that petitioners for declaratory relief must not have any other adequate relief "available through other means or other forms of action or proceeding."<sup>97</sup>

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<sup>93</sup> *Id.* at 630–31.

<sup>94</sup> RULES OF COURT, Rule 43, § 1.

<sup>95</sup> *BOCEA*, 925 Phil. at 631.

<sup>96</sup> [Hereinafter "*Hypermix*"], 680 Phil. 681 (2012).

<sup>97</sup> *Ferrer v. Roco*, 637 Phil. 310, 318 (2010).

In *Ferrer v. Roco*, what the Court referred to as “relief through other means or other forms” is an administrative appeal against the agencies concerned. The Court explained, in affirming the dismissal of a petition for declaratory relief:

Under the doctrine of primary administrative jurisdiction, courts cannot or will not determine a controversy where the issues for resolution demand the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact. In other words, if a case is such that its determination requires the expertise, specialized training and knowledge of an administrative body, relief must first be obtained in an administrative proceeding before resort to the courts is had even if the matter may well be within their proper jurisdiction.<sup>98</sup>

This rationale was nowhere applied in *Hypermix*, where the rule in question by the BOC could have been appealed before the Department of Finance, and even when none of the known exceptions to the doctrine of exhaustion of administrative remedies was alleged.

Another issue with a Rule 63 action against administrative rules is the discretionary nature of the relief, as “[c]ourts may refuse to declare rights or to construe instruments if it will not terminate the controversy or if it is unnecessary and improper under the circumstances.”<sup>99</sup> This certainly relegates declaratory relief as a less viable remedy for any person aggrieved by an administrative rule.

Because of these, judicial appeals of agency rules have a lower likelihood of procedural success. The Court’s understanding of the available remedies is not as clear-cut as in an appeal of a quasi-judicial decision, with the requirement of exhaustion of administrative reliefs (which a court may or may not impose) being a significant roadblock.

### 3. Fewer and Less Burdensome Due Process Requirements

Finally, the due process requirements imposed on administrative rules are fewer and less burdensome on the issuing agencies than those imposed on quasi-judicial agencies.<sup>100</sup> The Administrative Code, under Book VII, prescribes some semblance of a notice-and-comment procedure:

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<sup>98</sup> *Id.*

<sup>99</sup> *Zomer v. Ct. of Appeals*, 868 Phil. 93, 105 (2020).

<sup>100</sup> *See Ang Tibay v. Ct. of Indus. Rel.*, 69 Phil. 635 (1940).

agencies will publish or circulate notices of proposed rules, and then afford interested parties the opportunity to submit their respective views thereon.<sup>101</sup> The same provision, however, also says that notice-and-comment is required only “as far as practicable,” giving agencies a built-in excuse for when an agency deems circumstances to be exigent or such process to be impractical. The requirement also does not apply to rules that are merely interpretive or internal in nature, except when the interpretive rule “increases the burden of those governed.”<sup>102</sup>

Generally, the Court imposes no requirement on agencies regarding the form of the procedure, as well as who to consult in public participations.<sup>103</sup> Notice also that the Administrative Code provision does not require the agencies to actively seek comments from interested parties or even consider and adopt these comments; it suffices that an *opportunity* to comment is afforded to them. For all intents and purposes, a 15-day window to submit comments to a proposed rule would already satisfy this due process requirement.

Publication and filing are the other due process requirements imposed by the Administrative Code. The publication requirement has been in place since *Tañada v. Tuvera*<sup>104</sup> and has been held to be a “necessary component of procedural due process.”<sup>105</sup> Filing, meanwhile, requires agencies to file copies of their rules with the University of the Philippines Office of the National Administrative Register (ONAR); otherwise, it ceases to be a “basis of any sanction against any party or persons.”<sup>106</sup>

Neither non-publication nor non-filing is fatal to an agency rule. In *Philippine Ass’n of Service Exporters v. Torres*,<sup>107</sup> the non-publication of certain department orders by the Department of Labor and Employment meant that they “may not be enforced and implemented.”<sup>108</sup> Similarly, in *GMA Network v. MTRCB*,<sup>109</sup> non-filing with the ONAR meant that an agency rule is unenforceable and could not be a basis for the suspension of the petitioner’s

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<sup>101</sup> ADM. CODE, bk. VII, § 9(1).

<sup>102</sup> *Phil. Stock Exch. v. Sec’y of Fin.*, 924 Phil. 615 (2022).

<sup>103</sup> *But see* *All. for the Fam. Found. v. Garin*, 809 Phil. 897 (2017). Here, the Court struck down a rule by the Food and Drug Administration for violating guidelines that the Court previously set in *Imbong v. Ochoa*, 732 Phil. 1 (2014).

<sup>104</sup> 230 Phil. 528 (1986).

<sup>105</sup> *Arroyo v. Dept. of Just.*, 695 Phil. 302, 353–54 (2012).

<sup>106</sup> ADM. CODE, bk. VII, ch. 2, § 3.

<sup>107</sup> 287 Phil. 322 (1992).

<sup>108</sup> *Id.* at 331.

<sup>109</sup> 543 Phil. 178 (2007).

right to broadcast a television program. Neither of these cases resulted in the voiding of the administrative rule, nor did they preclude eventual compliance and vindication of the rule by the concerned agency.

Our laws provide great leeway to agencies when compared to their American counterparts. Administrative rulemaking under US law is governed by 5 US Code § 553, which provides for a very strict procedure that, among others, covers the form and manner of notices of the proposed rule, requires consideration of submitted comments, and specifically spells out the terms of publication.<sup>110</sup> This is perhaps why administrative actions are more readily linked to democratic legitimacy by American scholars: their governing statute provides greater procedural constraint to executive discretion.

In sum, while the due process requirements under our Administrative Code are indubitably important, they are not beyond the scope of the usual routine undertaken by administrative agencies when promulgating rules. Unlike administrative decisions on contested cases, which have substantive and procedural due process requirements under both the Administrative Code and *Ang Tibay v. CIR*, rulemaking due process concerns only formalities. There is no requirement that the rule be based on evidence on record or that it must state the facts and the laws on which it is based.<sup>111</sup> Independent consideration by the agency head is also not required. Our system is hence widely open to the possibility of agency rules being issued arbitrarily, as due process appears to be easily fulfilled by the agency anyway. It also removes another angle with which to oppose and challenge these rules before the courts. When these conditions are paired with an illiberal leader intending to “use” the bureaucracy<sup>112</sup> to autocratize, what appears to be left as a potential check is any resistance presented by the agencies themselves.

#### IV. THE “MYTH” OF BUREAUCRATIC RESISTANCE

Having discussed the potency of administrative agencies and their rulemaking powers in facilitating autocratic tendencies and causing a certain degree of regression from democracy, we are then able to zero in on the behavior of these agencies (and the people who lead them: technocratic civil

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<sup>110</sup> 5 U.S.C. § 553.

<sup>111</sup> Compare with MASHAW, *supra* note 18.

<sup>112</sup> See BAUER et al., *supra* note 54.

servants) in the face of these tendencies. Truly, if the legal and political landscape surrounding administrative rulemaking make it such an enticing tool for an autocrat, then the other significant part of the analysis is whether the administrative agency *will* submit to the autocrat.

When administrative agencies are given an autocratic directive from an autocratic executive, they have two possible courses of action: they may adopt the autocratic rule, or they may resist. The latter course of action, commonly termed “bureaucratic resistance,” has been an extensive focus of studies in the fields of political science, public administration, and organizational behavior. It presupposes that the bureaucrats who comprise administrative agencies can exhibit resistive behavior, and, in some cases, substitute their own wisdom over a superior.

There are many reasons why bureaucrats would resist a policy directive, which can also reveal the degree to which such resistance would be exercised. Resistance may be brought about by mere “neutral friction,” where resistive action is not motivated by any discernible agenda against the chief executive, but only a product of bureaucrats continuing on a predetermined path until “countervailing actors directly force a change.”<sup>113</sup> It may also be done because of legal constraints or a normative attitude to reject abuse.<sup>114</sup> A more commonly seen form of resistance is borne out of a simple disagreement over policy or the value of evidence supporting it between the bureaucrat and the principal.<sup>115</sup> Regardless of the motivation behind the resistance or the mechanism through which it is performed, its situation in our discussion means it will lead to a predictable outcome: it will frustrate autocratization by sabotaging autocratic policies. Therefore, exploring the conditions that permit or constrain resistive behavior by agencies and their bureaucrats will provide a substantial explanation for why, for instance, the NTC and the SEC agreed to issue their antidemocratic rules, as discussed earlier. It will reveal what type of agencies can or cannot exhibit resistance, especially in the face of strong executives and the legal and political realities that facilitate their autocratic tendencies.

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<sup>113</sup> Ingber, *supra* note 8, at 165–66.

<sup>114</sup> *Id.* at 167–70.

<sup>115</sup> *Id.* at 170–73.

## A. Understanding Bureaucratic Resistance

Sociologically, resistance is understood to have two core dimensions: action and opposition.<sup>116</sup> Hence, resistance entails some form of active behavior, taken in disagreement with something else. This brings about a host of questions, though, concerning the recognition of and the intent behind the resistance performed. The differing “lines of disagreement”<sup>117</sup> as to these elements necessitate a classification of resistive behavior. For our purposes, we understand bureaucratic resistance within the sociological typology as either *overt* or *covert* resistance. We presume that when the bureaucracy resists autocratic leaders, they do so actively and intentionally, even though it may or may not be recognized by the autocrat as resistance. We deem intent to be present and disregard recognition.

Resistance by the bureaucracy is an organizational behavior concept derived from the so-called principal-agency problem, which concerns how “one person gets another person to do what he wants”;<sup>118</sup> that is, questions on the ability of a principal to get an agent to act in the former’s interests. Proponents of the more economic principal-agent models tended to argue that compliance is a function of “devising a feasible incentive scheme to induce [it].”<sup>119</sup> Because, naturally, managers are never reliably able to ascertain the values and qualifications of their subordinates<sup>120</sup> or constantly supervise the latter’s actions,<sup>121</sup> the economist’s response to the principal-agency dilemma is to incentivize compliance by designing contract schemes that would induce alignment of interests.<sup>122</sup> Consequently, this is the reason why they believed the principal-agency problem is much more pronounced in the public sector: great restrictions exist on the incentive structure available to public managers, which do not necessarily exist in private firms.<sup>123</sup>

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<sup>116</sup> Jocelyn Hollander & Rachel Einwohner, *Conceptualizing Resistance*, 19 SOC. F. 533, 538 (2004).

<sup>117</sup> *Id.* at 539.

<sup>118</sup> JOSEPH STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 202 (3rd ed. 2000).

<sup>119</sup> JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC* 25–26 (1999).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See JAMES WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 161 (2000). This discusses the “China Lake experiment,” a real-world example of incentive design, an economist’s solution to the principal-agency dilemma in the context of bureaucracy.

<sup>123</sup> STIGLITZ, *supra* note 118, at 204.

Later scholars of organizational studies, such as Brehm and Gates, moved away from this simplistic framing and presented an “enhanced” principal-agency model as a response. Their model yielded a two-pronged outcome: compliance is induced when there is an absence of resource and rule-based constraints on supervision, and the subordinate is likewise predisposed in favor of the policy.<sup>124</sup> They presented three alternative courses of action by a public sector subordinate: working to produce the policy output positively; shirking (which is further sub-classified into “leisure-shirking” or simply doing nothing, and “dissent-shirking” or doing nothing as a means to oppose a particular policy output); and sabotage or the production of a negative policy output.<sup>125</sup>

Drawing from these theories to focus on bureaucratic resistance specifically, Rebecca Ingber posited that resistance emanates primarily from two variables: the bureaucrat’s formal authority to resist, consisting of power allocations granted either by the legislative, executive, or the judiciary;<sup>126</sup> and the bureaucrat’s functional power to resist, which refers to their discretion that may be exercised in the absence of constraints from superiors, other agencies, and external entities.<sup>127</sup>

It appears from these that the understanding of bureaucratic resistance evolved from being principal-centric, which understood it as a function of the circumstances of the supervisor, to being agent-centric, which viewed resistance as a function of the circumstances of the agency. Value can be found in both approaches, and it is possible to develop a synthesis applicable to the legal analysis with which they are concerned.

First, we acknowledge that mutual flaws exist in the principal-agency models of bureaucratic resistance we discussed. We reiterate that central to resistance are action and opposition. Economic models that focus on incentive schemes underestimate the predisposition of agencies to act, say, in furtherance of their grave opposition on matters concerning lofty democratic values. Thus, incentive schemes should not be seen as the prime mover of resistance by a docile agent, but as a set of conditions that would make resistive action possible.

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<sup>124</sup> BREHM & GATES, *supra* note 119, at 42–46.

<sup>125</sup> *Id.*

<sup>126</sup> Ingber, *supra* note 8, at 175–87.

<sup>127</sup> *Id.* at 189–97.

On the other hand, emerging political science models depart too greatly to the point of overestimating the value of agency authority. Ingber, for example, presumes that the power and discretion granted to agencies drive their resistance, with important factors such as possible repercussions to resistance subsumed as minor “constraints” to such power. This view would understate possible permutations of agency design, such as when there exists presidential authority to revoke agency power or to abolish agencies entirely at will, both of which are responses to resistance that can be reasonably expected of an autocrat. The proper framework of analysis here should move away from “mythologizing” resistance—untethered from the folly of viewing agencies as the mighty protectors of democracy, while also seeing how conditions that are conducive to resistance can be possible. This should synthesize both the agency of the bureaucracy and the limitations inherent in the agency’s placement within the overall framework of government.

We are then able to obtain the best of these scholarly approaches and arrive at two variables that bring about resistance: whether an agency has the authority to act on a predisposition to resist, as propounded by Inger, on one hand, and the incentivizing or disincentivizing conditions that govern resistive behavior, on the other. For recall purposes, we will term this the “Authority-Incentive” model.

## **B. Authority to Resist**

It is important at this stage to consider that agencies are created by law, giving us, in the form of statutory text, readily available blueprints of agency design from which our analysis may be sourced. Beyond that, the authority granted to agencies by Congress in their respective charters is an implicit foretelling of resistance. Our Constitution grants the president control over executive departments, bureaus, and offices,<sup>128</sup> and it is common for newly created agencies outside the department framework to be attached to the Office of the President.<sup>129</sup> Thus, the level of presidential control over the agencies (and the concomitant authority to resist) that is relevant to our analysis can be approximated by an analysis of agency design.

Certainly, bureaucrats have “behind-the-scenes discretion to effectuate [their] preferred course of action, even to challenge the duly-

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<sup>128</sup> CONST. art. VII, § 17.

<sup>129</sup> *See, e.g.*, Rep. Act No. 9485 (2007), § 17, *amended by* Rep. Act No. 11032 (2017); Rep. Act No. 10667 (2014), § 5; Rep. Act No. 11363 (2018), § 9.

elected President.”<sup>130</sup> The first element of our model examines this discretion and the degree to which it can be exercised.

### *1. Source of Rulemaking Authority*

We first look at the source from which the rulemaking authority of an agency emanates. Ingber noted congressionally sourced, judicially sourced, and executive sourced authorities to resist.<sup>131</sup> In the context of Philippine administrative law, however, the latter two may not be present. Presidential “allocation,” as Ingber called it, of rulemaking authority does not exist, because administrative rulemaking is sourced only from Congress’ legislative power.<sup>132</sup> Judicial “allocation” likewise does not exist here, as judicial deference to agency expertise falls short of an active grant of authority, and more a passive non-exercise of jurisdiction. The source of rulemaking authority may thus only be constitutional or statutory, with the former being a greater facilitator of resistance given its perpetual insulation from an autocrat’s potential control over the legislature.

### *2. Extent of Rulemaking Discretion*

Another important consideration is the extent of rulemaking discretion granted by law to the agency. Broad statutory or constitutional language permits a large room for the agency to align itself with presidential discretion, govern a broad aspect of the behavior of the governed, and thereby ultimately cause democratic regress. Meanwhile, provisions that confine the agency’s rulemaking power to a strictly programmatic or technical subject may be indicative of the agency’s authority to exhibit resistance, as the law itself conveniently provides for the legal constraint that can facilitate it. This technical, non-discretionary character of rulemaking authority gives the agency refuge from autocratic directives.

Note that this does not concern the technical nature *of* the agency, but only of its rulemaking power. Even very technical agencies such as sector regulators may be given broad rulemaking powers, and vice versa.<sup>133</sup> A proper analysis of the empowering law must be conducted to examine whether the rulemaking authority given to the agency concerns a broad topic

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<sup>130</sup> Ingber, *supra* note 8, at 173.

<sup>131</sup> *See id.* at 175–89.

<sup>132</sup> *See* Lokin v. COMELEC, 635 Phil. 372 (2010).

<sup>133</sup> *See, e.g.*, INS. CODE, § 437(a), (c), (d); *compare with, e.g.*, Rep. Act No. 10844 (2015), § 6(a), limiting the rulemaking power of an agency with a broad general mandate, by aligning it with a defined legislative policy.

within a specific sector, or a narrow, delimited matter even within a wide general mandate.

### *3. Administrative Alignment with the President*

The administrative relationship between the agency and the chief executive determines the level of control the latter may exercise over agency actions. Agencies under direct presidential control has less authority to resist, and those placed underneath layers of bureaucratic organization become “immune to the pressures and larger policy goals of executive departments that threaten administrative agencies.”<sup>134</sup> Agencies that are independent by law are thus given the highest primacy in this equation. Those within the department framework may be further analyzed: those classified as departments may be considered less resistive given the political proximity of their heads, as cabinet members, to the president, while those subsumed under a department may have stronger insulation. Those directly attached to the Office of the President have the weakest authority to resist. Even if attachment as an administrative relationship is done only “for purposes of policy and program coordination,”<sup>135</sup> the reality is that attached agencies are still scrutinized more directly by the president and those directly working under them, making any resistive behavior by these agencies less acceptable.

## **C. Incentive or Disincentive to Resisting**

The other half of our model looks at the economic factors that can drive agencies and bureaucrats to resist an autocrat. This finds relation with the more “traditional” schools of thought surrounding the principal-agency problem, which placed greater value on whether the principal’s circumstances have created the necessary set of conditions that allow the agent to perform differently from what was intended. While these factors can pertain to some degree of control over or independence by the agency, they do not necessarily concern resistance directly or point to the immediate legal consequences of that resistance. What they do is create the extrinsic conditions that can render resistive behavior a rational option for the bureaucrat, which, for these purposes, we limit to the head of the agency.

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<sup>134</sup> DAVID LEWIS, *PRESIDENTS AND POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997* 46 (2022).

<sup>135</sup> HECTOR DE LEON & HECTOR DE LEON, JR., *ADMINISTRATIVE LAW: TEXT AND CASES* 44 (2016).

### 1. *Removability of the Bureaucrat*

The issue of removability strikes at the heart of agency independence.<sup>136</sup> This indicator will look at whether an agency head can be removed by the chief executive, and whether such removal may be done at will, as in an extension of the president's power to appoint, or only by cause. Another possible permutation is irremovability in cases where the bureaucrat in question is an impeachable official, or for some other reason is shielded from removal by the president under law.

### 2. *Term of the Bureaucrat*

The bureaucrat's term of office, while related to removability, is an entirely separate factor. Fixed-term bureaucrats can have greater incentive to resist, not because their continuity in office is guaranteed, but because their status as a civil servant transcends presidential terms. They can have great belief that policy direction will change during their term in office once a new president assumes.<sup>137</sup> As their terms transcend presidential terms, policy direction appears to be mutable and temporary. On the other hand, coterminous bureaucrats are generally tethered to conditions of the president and are thereby disincentivized to perform any resistive behavior.<sup>138</sup>

### 3. *Appointment Restrictions*

Similarly, restrictions on appointments as to field of expertise, years in service, and other such factors can bring a great deal of incentive to the bureaucrat.<sup>139</sup> What we are concerned about here is some form of specific and positive legal restriction on who is qualified to be appointed. The logic here is not that these bureaucrats cannot be simply removed or replaced. Of course, even if the statute requires an appointed bureaucrat to be a lawyer, the president can still easily replace a resisting appointee with another, more subservient lawyer. The incentive here lies in the value that comes with the specificity of their skills, as well as the external value that can be ascribed to such specificity, especially in the case of highly technical agencies.

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<sup>136</sup> Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1163 (2013).

<sup>137</sup> LEWIS, *supra* note 134, at 47.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 47–48.

#### 4. *Budgetary Independence of the Agency*

Finally, we look at the budgetary independence of the agency. Agencies dependent on the executive's expenditure programming mechanisms (i.e., through the National Expenditure Program or "NEP") have a reduced incentive to resist, as reprisal by the president through a reduction in budget or the agency's programs becomes a real possibility. Meanwhile, protection through legal provisions that grant fiscal autonomy results in the exact opposite: a great incentive to resist exists because the administrative agency's institutional and fiscal survival is assured.

### V. UNLOCKING THE "MYTH": THE AUTHORITY-INCENTIVE PARADIGM

#### A. Agencies to Analyze

After developing an entirely new model to understand resistive bureaucratic behavior, we can then proceed with selecting the agencies to which such a model can be applied. We tie this analysis back with our earlier discussion on democratic backsliding and specifically look at agencies concerned with the constitutive elements of democracy: (1) the protection of civil liberties, primarily freedom of speech and of the press, as well as freedom of expression and of association; (2) the holding of free and fair elections; (3) the strength of institutions and mechanisms through which government power can be checked.<sup>140</sup> This is because it is their rulemaking functions that will ultimately result in a regression in democracy.

<b>Democratic Element</b>	<b>Sample of Concerned Agencies</b>
Protection of civil liberties, primarily freedom of speech, the press, expression, and association	NTC, SEC, Movie and Television Review and Classification Board (MTRCB), Department of Information and Communications Technology (DICT), National Privacy Commission (NPC), Philippine Competition Commission (PCC)
Free and fair elections	Commission on Elections (COMELEC)
Strength of government institutions, check on government power,	Department of the Interior and Local Government (DILG), Commission on Audit (COA), Office of the

<sup>140</sup> See *supra* Part III.A.

participatory and deliberative mechanisms in government	Ombudsman (OMB), Civil Service Commission (CSC), Department of Social Welfare and Development (DSWD)
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**Table 1.** Select agencies to which the Authority-Incentive Model will be applied.

The selection of these agencies is based on whether their mandates relate to the democratic elements with which our analysis is concerned, although the rationale for some may be less clear. For example, the DSWD is included as it has the mandate to accredit civil society organizations that will be permitted to engage with the government. Likewise, the PCC's mandate to restrict commercial transactions like mergers and acquisitions can abridge the constitutional freedom of association.

### B. Assigning Values to the Model

The indicators we identified in our analysis in Part IV are given assigned values between “0” and “1”, which will allow us to approximate the strength of both sides of the model. Middle-ground possibilities are likewise considered.

To determine the bureaucrat's authority to resist an autocrat, these values are:

Indicators of the Bureaucrat's <i>Authority to Resist an Autocrat</i>	Value Assignments			
	Source of rulemaking authority	Constitutional 1		Statutory 0
Extent of rulemaking discretion	Limited or technical 1		Broad 0	
Administrative alignment with the president	Independent 1	Subsumed to a department 0.5	Department 0.25	Directly attached 0

**Table 2.** Value assignments for the indicators of authority to resist.

For the bureaucrat's incentive to resist an autocrat, these are:

<b>Indicators of the Bureaucrat's Incentive to Resist an Autocrat</b>	<b>Value Assignments</b>		
Removability of the bureaucrat	Not removable by the president 1	Removable but only for cause 0.5	Removable by the president at will 0
Term of the bureaucrat	Fixed term 1		Coterminous 0
Appointment restrictions	Restricted by law 1		No restrictions 0
Budgetary independence of the agency	Fiscal independence 1	Assured appropriations 0.5	No provision for either 0

**Table 3.** Value assignments for the indicators of incentive to resist.

The idea here is to come up with an average value for both sides of the model for each of the agencies we selected and then classify these agencies into a typology that integrates all factors and indicators.

### C. Analyzing the Agencies

In this step of the analysis, we conduct an extensive legal survey primarily covering the respective charters or empowering statutes for the selected agencies. We then determine based on the provisions of these laws whether the indicators exist, accordingly assign values, and compute the average to approximate a value for the whole side of the model.

Our analysis for the authority to resist yields the following table of values:

Agency	Source of rulemaking authority	Extent of rulemaking discretion	Administrative alignment with the president	Average value
NTC <sup>141</sup>	0	0	0.5	0.16667
SEC <sup>142</sup>	0	0	0.5	0.16667
MTRCB <sup>143</sup>	0	0	0	0
DICT <sup>144</sup>	0	1	0.25	0.41667
NPC <sup>145</sup>	0	0	0.5	0.16667
PCC <sup>146</sup>	0	0	0	0
COMELEC <sup>147</sup>	1	0	1	0.66667
DILG <sup>148</sup>	0	0	0.25	0.08333
COA <sup>149</sup>	1	0	1	0.66667
OMB <sup>150</sup>	1	1	1	1
CSC <sup>151</sup>	1	0	1	0.66667

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<sup>141</sup> Exec. Order No. 546 (1979), § 15(e), (g) (Source of rulemaking authority; extent of rulemaking discretion); Rep. Act No. 10844 (2015), § 15(b)(1) (Administrative alignment with the President).

<sup>142</sup> Rep. Act No. 8799 (2000), § 5(g); REV. CORP. CODE, § 179(o) (Source of rulemaking authority; extent of rulemaking discretion); *About: Clusters and Agencies*, DOE WEBSITE, at <https://www.dof.gov.ph/about/clusters-agencies> (Administrative alignment with the President).

<sup>143</sup> Pres. Dec. No. 1986 (1985), § 3(a) (Source of rulemaking authority; extent of rulemaking discretion); § 1 (Administrative alignment with the president).

<sup>144</sup> Rep. Act No. 10844 (2015), §§ 6(d), 8(j) (Source of rulemaking authority); § 6(a) (Extent of rulemaking discretion); Rep. Act No. 10173 (2012), § 7(j), (l), (m) (Administrative alignment with the president).

<sup>145</sup> Rep. Act No. 10173 (2012), § 7(j), (l), (m) & § 18 (Source of rulemaking authority); § 39 (Extent of rulemaking discretion); Rep. Act No. 10844 (2015), § 15(b)(2) (Administrative alignment with the president).

<sup>146</sup> Rep. Act No. 10667 (2014), § 12(d), (f), (h) (Source of rulemaking authority); § 50 (Extent of rulemaking discretion); § 5 (Administrative alignment with the president).

<sup>147</sup> CONST. art. IX-C, § 2(1) (Source of rulemaking authority); art. IX-C, § 2 (Extent of rulemaking discretion); art. IX-A, § 1 (Administrative alignment with the president).

<sup>148</sup> ADM. CODE, bk. IV, ch. 1, § 3(2) (Source of rulemaking authority; extent of rulemaking discretion; administrative alignment with the president).

<sup>149</sup> CONST. art. IX-D, § 2(2) (Source of rulemaking authority; extent of rulemaking discretion); art. IX-A, § 1 (Administrative alignment with the president).

<sup>150</sup> Art. XI, § 13(8) (Source of rulemaking authority; extent of rulemaking discretion); art. XI, § 5 (Administrative alignment with the president).

<sup>151</sup> Art. IX-B, § 3 (Source of rulemaking authority, extent of rulemaking discretion); art. IX-A, § 1 (Administrative alignment with the president).

DSWD <sup>152</sup>	0	1	0.25	0.41667
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**Table 4.** Application of the model to each selected agency, for the authority to resist.

We do the same process for indicators under incentive to resist and come up with the following:

Agency	Removability of the bureaucrat	Term	Appointment restrictions	Budgetary independence of the agency	Average value
NTC <sup>153</sup>	0	0	1	0	0.25
SEC <sup>154</sup>	0	1	1	0.5	0.625
MTRCB <sup>155</sup>	0.5	1	1	0	0.625
DICT <sup>156</sup>	0	0	1	0.5	0.375
NPC <sup>157</sup>	0	0	1	0.5	0.375
PCC <sup>158</sup>	0.5	1	1	0.5	0.75
COMELEC <sup>159</sup>	1	1	1	1	1
DILG <sup>160</sup>	0	0	0	0.5	0.125

<sup>152</sup> ADM. CODE, bk. IV tit. XVI, ch. 1, § 3(1) (Source of rulemaking authority; extent of rulemaking discretion).

<sup>153</sup> Pres. Dec. No. 807 (1975), § 6(3) (Removability of the bureaucrat; term); Exec. Order No. 546 (1979), § 16 (Budgetary independence of the agency).

<sup>154</sup> Pres. Dec. No. 807 (1975), § 6(3) (Removability of the bureaucrat); Rep. Act No. 8799 (2000), § 4.1 (Term); § 4.2 (Appointment restrictions); § 75 (Budgetary independence of the agency).

<sup>155</sup> Pres. Dec. No. 1986 (1985), § 2 (Removability of the bureaucrat; term; Appointment restrictions).

<sup>156</sup> CONST. art. VII, § 16. (Removability of the bureaucrat); Pres. Dec. No. 807 (1975), § 6(2) (Term); Rep. Act No. 8799 (2000), § 4.2. (Appointment restrictions); § 75 (Budgetary independence of the agency).

<sup>157</sup> CONST. art. VII, § 16. (Removability of the bureaucrat); Pres. Dec. No. 807 (1975), § 6(3) (Term); Rep. Act No. 10173 (2012), § 9 (Appointment restrictions); § 41 (Budgetary independence of the agency).

<sup>158</sup> Rep. Act No. 10667 (2014), § 7 (Removability of the bureaucrat, term); § 6 (Appointment restrictions); § 51 (Budgetary independence of the agency).

<sup>159</sup> CONST. art. XI, § 2 (Removability of the bureaucrat); art. IX-C, § 1(2) (Term); art. IX-C, § 1(1) (Appointment restrictions); art. IX-A, § 5 (Budgetary independence of the agency).

<sup>160</sup> Art. VII, § 16 (Removability of the bureaucrat); Pres. Dec. No. 807 (1975), § 6(2) (Term); Rep. Act No. 6975 (1990), § 92 (Budgetary independence of the agency).

COA <sup>161</sup>	1	1	1	1	1
OMB <sup>162</sup>	1	1	1	1	1
CSC <sup>163</sup>	1	1	1	1	1
DSWD <sup>164</sup>	0	0	0	0	0

**Table 5.** Application of the model to each selected agency, for the incentive to resist.

Finally, we consolidate the average values for both sides of the model, which will allow us to arrive at a proper typology to complete our analysis.

Agency	Average value for Authority to Resist	Average value for Incentive to Resist
NTC	0.16667	0.25
SEC	0.16667	0.625
MTRCB	0	0.625
DICT	0.41667	0.375
NPC	0.16667	0.375
PCC	0	0.75
COMELEC	0.66667	1
DILG	0.08333	0.125
COA	0.66667	1
OMB	1	1
CSC	0.66667	1
DSWD	0.41667	0

**Table 6.** Average values for authority and incentive to resist.

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<sup>161</sup> CONST. art. XI, § 2 (Removability of the bureaucrat); art. IX-D, § 1(2) (Term); art. IX-D, § 1(1) (Appointment restrictions); art. IX-A, § 5 (Budgetary independence of the agency).

<sup>162</sup> Art. XI, § 2 (Removability of the bureaucrat) art. XI, § 11 (Term); art. XI, § 8 (Appointment restrictions); Rep. Act No. 6770 (1989), § 38 (Budgetary independence of the agency).

<sup>163</sup> CONST. art. XI, § 2 (Removability of the bureaucrat); art. IX-B, § 1(2) (Term); art. IX-B, § 1(1) (Appointment restrictions); art. IX-A, § 5 (Budgetary independence of the agency).

<sup>164</sup> Art. VII, § 16 (Removability of the bureaucrat); Pres. Dec. No. 807 (1975), § 6(2) (Term).

#### D. A Typology of Agencies Based on the Authority-Incentive Model

Based on the values arrived at, we are able to come up with a typology of the agencies based on the entire Authority-Incentive model. We determine the median of both sets of values, which will give us a picture of the relative relationship between the average figures. Based on their closeness to the medians, we classify the agencies as follows:

- *Resistive agencies* are bureaucratic agencies that exhibit both a high level of authority to resist and a high level of incentive to resist. These are primarily more independent and can thus be expected to serve as guardians against autocratic behavior by strong executives.
- *Restrained agencies* are agencies that have a limited authority to resist but have a high level of incentive to resist. These are agencies that can be, to some degree, more susceptible to autocratic directives, although their action (or inaction) can be justified by institutional limitations, whether real or perceived.
- *Unwilling agencies* are agencies that may have some or a high level of authority to resist but are disincentivized from exhibiting such resistive behavior. These are agencies that are vulnerable to being avenues for autocratization but leave a room for engagement and persuasion.
- *Docile agencies* are agencies that have both a limited authority and an incentive to resist. They are highly susceptible to making rules that serve the interests and goals of an autocrat.

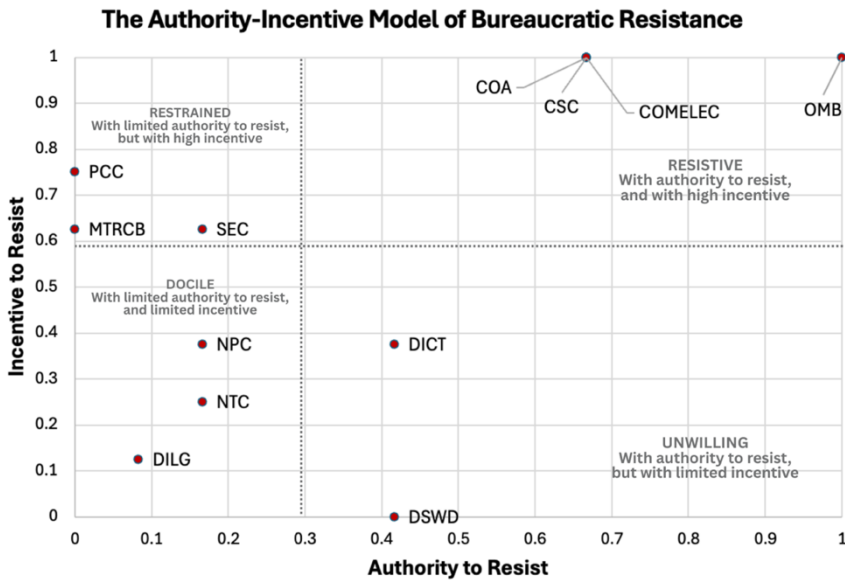
Based on these qualifications, and using the computed median of 0.29 for authority and 0.62 for incentive, we arrive at the following typology:

Agency	Average value for Authority to Resist	Average value for Incentive to Resist	Classification
NTC	0.16667	0.25	Docile
SEC	0.16667	0.625	Restrained
MTRCB	0	0.625	Restrained
DICT	0.41667	0.375	Unwilling

NPC	0.16667	0.375	Docile
PCC	0	0.75	Restrained
COMELEC	0.66667	1	Resistive
DILG	0.08333	0.125	Docile
COA	0.66667	1	Resistive
OMB	1	1	Resistive
CSC	0.66667	1	Resistive
DSWD	0.41667	0	Unwilling

**Table 7.** Classification of the agencies based on the average values.

This data can be represented in a scatter plot graph to arrive at the final visualization of the Authority-Incentive model.



**Figure 2.** Scatter plot visualization of the model and its resulting typology of agencies.

## VI. ANALYSES AND REFLECTIONS

### A. Beyond Agency Independence

The application of the model reveals a stratified view of bureaucratic resistance. Through an amalgamation of various indicators, we get a more

nuanced understanding of agency behavior that can likewise predict and explain future phenomena.

Resistive agencies such as the COMELEC, the COA, the CSC, and the Ombudsman all have in common their constitutional anchor. An easier way would be to say that this fact alone grants them total independence, but our analysis reveals that it is not that simple. The broadness of the rulemaking authority of the constitutional commissions gives them great room to facilitate autocratization, which is not apparent for the Ombudsman, who only makes rules as to procedures. The COMELEC's rulemaking authority, for example, is so broad that any hypothetical directive from an autocrat that erodes electoral integrity can be facilitated. Agency independence under the Constitution forms part of that equation, but it does not explain resistance entirely.

Unwilling agencies, meanwhile, appear to be more common among department-level agencies: the DSWD and the DICT, among our select group. The disincentives are easy to discern: their heads can be removed at will by the president, and there are closer political ties between their mandates and the policy of the executive. Even when they can resist, they might not be willing to do so; the antidote does appear to be attacking that limited level of incentive.

The PCC, the MTRCB, and the SEC, who are restrained agencies in our typology, all do appear to be highly technocratic agencies. This technocratic nature, in some way, contributes to their willingness to protect their specific mandates from autocratic tendencies. Nonetheless, their close administrative relationship with the president or their sweepingly broad mandates provides an easily perceived restriction to resistance. They may, therefore, feel more compelled that a presidential directive must be translated into an agency rule by them.

Finally, the DILG, the NTC, and the NPC are all seen to be docile agencies that are perfect candidates to facilitate the whims of an illiberal leader. We have seen this in the NTC rule in 2006, which we have discussed quite extensively. They have limited authorities and limited incentives to resist, signaling that their rules must be a subject of public scrutiny, especially when it relates, to some degree, to the enjoyment of democratic liberties.

Our model appears to have great democratic value. In an era of worrying democratic backsliding as captured by various democratization metrics, citizens are called to be on guard about their rights and the

functionality of their government institutions, specifically those mandated to serve as checks to a powerful executive. A sound classification of agencies based on their authority and incentive to resist allows those invested in democracy to engage with these agencies to influence their behavior, identify the terms of such engagement, and determine a better approach to exact accountability from the bureaucrats that govern them.

It can likewise inform lawmakers who partake in agency design. By adopting the learnings here, our legislators can be more conscious of the democratic value of agencies, their power-checking role, and the importance of their rulemaking authorities, in crafting the provisions of agency charters and similar empowering statutes. This way, any concession of discretion<sup>165</sup> from our representatives to the chief executive becomes more guided and calculated based on its potential impact on our democratic structure. Democracy-conscious legislators will find it more especially useful.

Ultimately, our analysis builds on the scholarship on agency independence under administrative law, which conventionally limits itself to the institutional indicators of insulation from executive control. As a start, it forwards a certain level of nuance that elevates discussions surrounding agency independence, integrating other elements from the rationality of the bureaucrat to implications on democracy.

## **B. Suggestions for Further Studies**

The model is not without limitations, however, and this is something other scholars can build on and improve. Most noticeable perhaps is the unclear relationship between the indicators and the democratic elements that initiated our analysis. To achieve this, a closer integration between democratization metrics and the assigned values can be done, which can ensure that the indicators are truly aligned with the implications of autocratic rulemaking on democracy. Rulemaking discretion, for example, can be further nuanced and related to democracy by looking at the exact power of agencies that can curtail civil liberties, rather than the broadness of the power as a whole.

Values assigned in the indicators can also be reexamined further. Heavier weight can be given on specific circumstances that are demonstrably better linked with the democratic analysis, in lieu of simply averaging the values as if they are equal. Another factor that can be looked at as an indicator

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<sup>165</sup> See *supra* Part III.D.1.

is the reviewability of agency rules, and the existence of precedent in case law that would require a review by the president or their office of agency rules. Although this is an inexact circumstance,<sup>166</sup> making it difficult to objectively establish, it is nonetheless an important factor as it examines a ready mechanism through which the resistance of a bureaucrat can be overturned.

Finally, it might be desired to better integrate political realities and similar considerations into the equation. Alignment of political interests between the president and the technocrat, rent-seeking behavior, patron-client dynamics, and other such factors are all too real to be left out. Although these are products of an entirely different set of political and sociological phenomena, they help explain why an agency head would abandon resistance and permit their agency to be used in autocratizing.

## VII. CONCLUSION

Bureaucratic resistance is not a myth. Administrative agencies do play an important role in checking the power of chief executives who can, conventionally, substitute their judgment for that of any technocrat in the civil service. This is inseparable from the inherent democratic value of the “administrative state”—not just in the agencies’ advancement of the public interest, but in how their actions must be grounded in public reason.

In the advent of global democratic regress, though, that role is under threat. The rise of populist autocrats compels us to rethink the viability of our existing institutional arrangements. Administrative agencies are not lost in that equation, and there are historical experiences and legal explanations as to why agencies and their power to regulate through rules have been a ready tool for an autocrat to abridge liberties and shrink democratic spaces. It is in this context that we say resistance by our bureaucrats has been reduced to fiction. Indeed, it was easy to be resigned to the grim fact that the best and the brightest our country has to offer—placed in positions of consequence to serve the governed—have been reduced to mere vehicles to accommodate, if not accelerate, the backsliding of our democracy.

Our analysis here of a carefully selected set of administrative agencies reveals that the explanation might not be as straightforward as we would think. It also leaves room for some degree of optimism that our

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<sup>166</sup> See *supra* Part III.D.2.

bureaucratic apparatus can serve as a robust guardrail to a rogue autocrat. We see that resistance is performed at different levels, facilitated by different dimensions of law, so we ultimately understand that some agencies serve that power-checking function better than others. Any action our society takes to exact some degree of democratic accountability from our agencies can be better informed by this fact.

Admittedly, this does not reverse any trend of democratic backsliding. But it might just give us better information in using one of our strongest tools to slow it down.

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