INTERACTION OF ENFORCEMENT AUTHORITIES OF THE USA WITH PUBLIC IN LAWMAKING

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Аннотация

В статье рассмотрен неформальный нормотворческий процесс в Соединенных Штатах Америки и участие в нем американских граждан. Сделано предложение о необходимости внедрения подобного опыта в Украине.

Ключевые слова: формальный нормотворческий процесс, неформальный нормотворческий процесс, правовой акт, период предоставления объявлений и объяснений.

Summary

Informal rulemaking in the United States of America and participation of Americans in it are considered in the article. Proposals about necessity of implementing of this experience in Ukraine are made.

Key words: formal rulemaking, informal rulemaking, rule, notice and comment period.

One of the hallmarks of a democratic society is citizens' ability to influence public authorities, which is usually achieved through: participation in elections, referendums and other forms of implementation of direct democracy mechanisms; organizational initiative (participation in associations, non-governmental organizations, political parties, etc.); participation in conventional and unconventional (unauthorized) protests [1].

Recently, the indicated problem found its reflection in works of O. Babinov, V. Bakumenko, N. Drahomyretska, A. Kolodii, O. Lytvynenko, P. Manzhola and others, but none of these scholars focused attention on the study of the nature and features of the interaction of the executive authorities and public within rulemaking process. In passing, we note that to date, the need to develop such cooperation is recognized at official level. For example, the Law of Ukraine "On Grounds of Corruption Prevention and Counteraction" envisages public anticorruption expertise of draft legal acts [2].

In view of the above, the named problems must be comprehensively analyzed in scientific literature, which, in turn, requires an examination of the organization and execution of such work in foreign countries, including the United States of America. Familiarization with international experience, as rightly noted in the literature, enhances our understanding of legal phenomena under study; helps to look at a particular issue from a different angle; compares our achievements with achievements of foreign counterparts; allows not to waste time on solving problems that have already been resolved within covers of foreign publications [3]. Indeed, extraordinary scientific relevance and usefulness of any comparative legal studies are undeniable.

Thus, the main goal of this paper is to study the US experience in cooperation between executive authorities and public in rulemaking and to develop proposals for the implementation of national legislation and law-enforcement practice. The main focus of the article is given to the analysis of rules by the US executive authorities.

According to the Administrative Procedure Act, rulemaking activity is an agency process for formulating, amending, or repealing a rule. A rule in turn is an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy [4].

During the rulemaking process, the executive authority is entitled with various responsibilities, including those associated with public participation in it. In this case we are talking about the need:

– to inform the public on the intention to adopt appropriate rule, giving it a possibility to make the necessary suggestions to the proposed regulations and provide authorities with the necessary information;

– to provide public access to the rulemaking record, enabling citizens to supply executive authorities with additional information and analyze data not included in the proposed legal act;

– to analyze and respond public's comments [5].

The foregoing suggests that the public plays an important role in the adoption of rules by the executive authority and affects the process of their adoption.

In turn, rulemaking implemented by the US executive branch is divided into formal and informal rulemaking. The formal process is set forth in law, mandating the agency action, and lies in the fact that all of the data received at the agency hearing later is reflected in the protocol [4]. In all other cases, the legislative process is informal. Given the fact that in the United States a formal process is currently applied only in rare cases, it is suggested to elaborate the informal rulemaking process and the participation of the general public in it.

Informal rulemaking process is called notice and comment period. During this process executive authority must publish a draft of the future rule and create conditions for its public discussion. For example, if the competent authority of the executive branch intends to establish incentive payment terms for lease of freight cars, the notification of the proposed rule would look like this: "We intend to establish incentive payment terms for lease of freight cars". However, there are exceptions in the requirements for notice and comment period. Sometimes this process is missing, and sometimes it is missing "on reasonable grounds" (when it is unnecessary or impossible, for example, in case of emergency) [6, p. 281].

Information about the draft rule must contain the preamble; the presence of the text itself is optional. The notice shall also contain information on the terms and procedure for submitting comments on the draft legal act, the contacts of persons responsible for their processing, etc. [7].

The preamble states the need to adopt a rule, its scope, the name of the law under which it was adopted, as well as brief content of the act. This way the authority seeks to explain in understandable to the public language the reasons for adoption of a rule based on the results of the previous study or obtained by reliable data. In addition, the executive authority may form in the preamble the list of issues which, in his opinion, have to be processed by the public. However, this does not mean that the public can comment only these issues. Public opinion may be expressed with respect to any aspect of the future rule [7].

Executive authority puts the notice of a draft rule in the Federal Register, which is a "legal newspaper" of federal government. If notification is not published in the Federal Register, the executive authority must personally notify the persons who will apply this rule, giving them a copy. The above procedure is applied only in the case where the range of stakeholders is known to the executive authority or such persons can be easily identified [8].

Typically, executive agencies give the public 60 days to provide relevant proposals. Sometimes, this period may be reduced or increased depending on the circumstances developed around the adoption of a particular rule. At the same time, it should be emphasized that the specified time is not final, and therefore the executive authorities may consider public proposals after the deadline as well. However, the public should try to submit proposals within the prescribed period, after the deadline such suggestions can be left unattended by the authority. In most cases, the executive authorities inform the authors whether they consider proposals received after the expiry of the period [7]. Thus, it can be concluded that the authorities try to get as many suggestions from the public as possible and consider them in the process of further review and adoption of the final version of the act, which, of course, would contribute to the improvement of its quality, and enhance public confidence in the government.

In addition, notice on the development of a rule is placed in the public docket, which is a database of draft rules, their final texts, oral and written proposals provided by the public, researches which are the bases for authority in adopting rules, including studies not covered in the draft rule and other relevant information that confirms the need to adopt specific rule. Public docket is available on the Federal Internet site Regulations.gov. Search on the site is performed by the ID number of the document, which can be found at the beginning of the notice on the proposed draft rule. [9] It allows US citizens to be fully aware of the content and direction of rulemaking activity of government bodies.

The authorities always welcome public suggestions on the draft legal act, because some proposals are very helpful and affect the final text of the act. Sometimes submitted proposals are focused on significant details that have not been taken into account by the authorities in preparing the draft legal act. Thus, it allows the authorities to revise their vision of a solution to the problem and adopt a legal act that will meet the needs of the public. It should be noted that the draft rule may be amended on the basis of submitted public proposals only if such changes are logical and do not alter the essence of the act. If the essence is changed, the executive agency shall reappoint the procedure for public hearing. In this case, the public should give suggestions about changes made to the draft legal act [7].

At the same time, some suggestions can be confusing and unreasoned, based only on assumptions. These suggestions are not taken into account when approving the final text of the rule, as, according to the provisions of the Administrative Procedure Act, the executive authorities should adopt only those rules, which achieve a specific objective, set forth in the text of the law. [4] Consequently, the public is, in fact, obliged to provide only quality offers that will later be used by the executive authorities.

After the notice and comment period expires, the authority shall consider all submissions received and analyze them. If they do not change the essence of the draft legal act, the authority shall adopt a rule. The final legal act should contain a preamble and the text of the rule. The preamble provides a response to the most significant issues raised in public hearings, and formulates regulations on the main principles and purpose of the rule. Executive authority must respond or comment all proposals submitted to it on the draft legal act. These responses can be given to each proposal individually as well as in aggregate, in case, for example, when the authority received many offers of the same or similar content. Minor suggestions or proposals of editorial nature are usually not discussed in the preamble [8].

Thus, we can conclude that the public in the United States has rather strong impact on the legislative process of the executive power. If a legal act is adopted without its participation, it is declared invalid, which means it loses validity.

In our view, such a practice would be very useful for our country because it makes government transparent and the public informed on important matters of state activity. At the same time, it should be emphasized that public involvement in the legislative process is not a right of the executive authorities but their responsibility arising from the provisions of the Constitution of Ukraine, where, in particular, it is stressed that the bearer of sovereignty and the only source of power in Ukraine is the people who exercise power directly and through government agencies and local authorities [10]. The above provision should be interpreted in such a way that exactly people (citizens, civil society) should determine the direction and content of the governmental activity, and if so, the state must establish clear and thorough procedures for public involvement in the rulemaking process.

In passing, it should be noted that today in our country some measures in the mentioned direction are already being taken. For example, Ukrainian citizens have impact on the regulations in the field of environmental protection. Such a possibility is provided by the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ratified by the Verkhovna Rada of Ukraine. Art. 6 of the Convention establishes that public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of: the proposed activity and the application on which a decision will be taken; the nature of possible decisions or the draft decision; the public authority responsible for making the decision; the

envisaged procedure, including, as and when this information can be provided (the commencement of the procedure; the opportunities for the public to participate; the time and venue of any envisaged public hearing; an indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public; an indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and an indication of what environmental information relevant to the proposed activity is available); and the fact that the activity is subject to a national or transboundary environmental impact assessment procedure [11].

The procedure described above is very similar to the US, but it exists only in the field of environmental protection. In all other areas of public administration there is no legal regulation of public influence on adoption of legal acts.

Thus, we consider it necessary to adopt the Law of Ukraine "On Public Influence on the Adoption of Administrative Acts". In the law it is suggested to identify a group of administrative acts, which would be covered by the law. In our opinion, it should be normative administrative acts because they establish general rules of conduct, are continuously and repeatedly applied in order to regulate social relations of the same type and have personified (specific) subject [12, p. 282].

Central provision in the mentioned law shall belong to procedure of public influence on the adoption of the final text of an administrative act. To achieve this objective the law shall provide a number of duties of public administration, including: posting notice of intent to adopt an administrative act on its website. The notice should also contain a summary of the administrative act, its purpose and text; establish deadlines for submission of proposals to the draft administrative act; reporting about the entity, responsible for synthesis of proposals, and place of the hearing. In addition, in the law it should be clearly stressed that the final decision on publication of an administrative act should be made only after the authority reviews all submitted proposals and provides the respond to the public.

Hopefully, such a law will be adopted in the near future, as its absence hinders the process of democratization of Ukrainian society.

List of reference links:

1. Манжола П.Г. Форми участі громадськості у діяльності органів влади та прийнятті політичних рішень / П.Г. Манжола // Стратегічні пріоритети. – 2007. – № 4 (5) – С. 13–18.

2. Про засади запобігання і протидії корупції : Закон України від 07.04.2011 року № 3206-VI // Відомості Верховної Ради України. – 2011. – № 40. – Ст. 404.

3. Мельник Р.С. Адміністративно-господарське право як структурний елемент системи адміністративного права: зарубіжний досвід та національні особливості / Р.С. Мельник // Право і безпека. – 2010. – № 2. – С. 55–59.

4. Administrative Procedure Act (5 U.S.C. Subchapter II) [Електронний ресурс]. – Режим доступу : http://www.archives.gov/federal-register/laws/administrative-procedure.

5. Formal Rulemaking [Електронний ресурс]. – Режим доступу : http://administrativelaw.uslegal.com/administrative-agency-rulemaking/formal-rulemaking%20.

6. Gary Lawson Federal Administrative Law : American Casebook series / Lawson Gary. – West, 2009. – 1060 p.

7. The Informal Rulemaking Process [Електронний ресурс]. – Режим доступу: http://regs.dot.gov/informalruleprocess.htm.

8. A Brief Overview of Rulemaking and Judicial Review [Електронний ресурс]. – Режим доступу : http://www.wise-ntern.org/orientation/documents/CRSrulemakingCB.pdf.

9. Participate Today [Електронний ресурс]. – Режим доступу : http://www.regulations.gov/#!faqs;qid=2-1.

10. Конституція України від 28 червня 1996 року // Відомості Верховної Ради України. – 1996 р. – № 30. – Ст. 141.

11. Конвенція про доступ до інформації, участь громадськості в процесі прийняття рішень та доступ до правосуддя з питань, що стосуються довкілля [Електронний ресурс]. – Режим доступу : http://zakon2.rada.gov.ua/laws/show/994_015/page.

12. Адміністративне право України. Академічний курс : [підручник] : у 2-х т. / ред. колегія: В. Б. Авер'янов (голова). – К. : Юрид. думка, 2005.– . – Т. 1 : Загальна частина. – 2005. – 624 с.