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Articles

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Evolution and Current State of the American Model of Administrative Procedure: Towards Reform and Conceptual Understanding

Ewolucja i stan obecny amerykańskiego modelu postępowania administracyjnego. W kierunku reformy i ujęcia koncepcyjnego

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ABSTRACT

Administrative procedure in the United States of America is an integral part of administrative law. It is universal in its nature as it plays the role of an effective tool to regulate the conduct and activities of officials of state authorities, to combat corruption, and to protect the rights and legitimate interests of citizens. The relevant agencies issue rules and regulations that have the force of law. Currently, progressive governance largely depends on decisions of the state policy made in the course of government rule-making, and therefore certain aspects of the modern model of administrative procedure in the US should be revised with a view to further reform. The objective of the article is to conduct independent research on the formation and current condition of the American model of administrative procedure. A set of general scientific and special methods was used to achieve this objective. The leading method in the process of research was the dialectical method of cognition of phenomena and processes, which made it possible to determine the condition, areas and prospects for the development of scientific research and legislative developments in legal regulation and approbation of the American model of administrative procedure. The conclusion drawn by the authors made it possible to form a conceptual understanding of the American model of administrative procedure.

Keywords: government rule-making; administrative procedure; progressive governance; model of administrative procedure; United States of America

INTRODUCTION

Administrative law is based on the following principle: a citizen has the right to demand that his rights are granted; the public administration must cope with this task by fulfilling its direct responsibilities. Administrative law defines how the "organic" statute, which establishes an appropriate substantive law framework, actually distributes powers among public officials and imposes obligations at the local level.[1] The complexity of the main commands of most modern regulatory schemes requires the creation of an intermediate system to complete the regulatory cycle from state governance to private compliance. This intermediate function is performed by officials, who sometimes respond formally and sometimes informally.[2] The way in which administrative law influences the conduct of officials has important consequences for the observance of democratic principles and for good governance in society.[3] The organizational structure and working procedures of state authorities are shaped by provisions arising from both general procedural laws and legislative acts relating to energy, education, taxation or social benefits. This set of

[1] S.W. Yackee, *The "Science" of Policy Development during Administrative Rulemaking*, "Policy Studies Journal" 2021, vol. 49(1), pp. 146–163.

[2] R.A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for "De Novo" Review*, "Journal of Legal Analysis" 2015, vol. 8(1), pp. 47–93.

[3] C. Coglianese, *Administrative Law: The U.S. and Beyond*, 2016, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2657&context=faculty_scholarship (access: 15.9.2023).

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legal sources means that administrative rules and procedures can vary greatly in various agencies and even within the same agency, depending on individual issues of the policy or types of action.[4]

Administrative procedure relates to methods and processes in administrative bodies, as opposed to judicial procedure, and can be defined as a sequence of actions issued or carried out by an administrative body on its own initiative or upon request in order to take a decision on the rights, interests and obligations of the parties to the procedure, or to take a decision based on public interest in accordance with applicable laws and other regulations.[5] The American model of administrative procedure differs from the European analogues by its peculiar structure, legal status of administrative agencies, variety of types and functional purposes. Each year, agencies of the US issue many thousands of regulations governing important policy issues such as air quality, financial markets, highways, foreign aid, production of energy, toxic chemicals, and the scope of federal rule-making is very impressive.[6] Critics of the administrative state argue that "the bureaucrats, an irresponsible and headless fourth branch of government, have come to rule the American politics".[7] Nevertheless, despite these concerns, the legislative delegation of regulatory authority to agencies still continues today, as a result of which modern governance greatly depends on decisions of the state policy made in the course of government rule-making.[8] In this regard, law scholars come to the conclusion that the model of administrative procedure of the US needs to be reformed. It is necessary to stop getting stuck on the rule-making activities of agencies.[9]

The objective of the article is to conduct independent research on the formation and current condition of the American model of administrative procedure. To achieve this objective, it is necessary to (1) analyse the legal status and specifics of administrative agencies, (2) study the concepts of the doctrine of the development of the American model and litigation practice, and (3) explore the main options to improve the American model of administrative procedure.

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[4] Z. Kisil, *On the Issue of Integration of Civil Society Institutions in Preventing Corruption in Ukraine: Administrative and Legal Dimension*, "Social and Legal Studios" 2022, vol. 5(2), pp. 31–37.

[5] S. Yesimov, V. Borovikova, *Administrative and Legal Implementation of the Rights of Business Entities*, "Social and Legal Studios" 2022, vol. 5(3), pp. 16–22.

[6] D.H. Rosenbloom, *Administrative Law for Public Managers*, London 2018.

[7] C.R. Berry, J.E. Gersen, *Agency Design and Political Control*, "Yale Law Journal" 2017, vol. 126(4), pp. 1002–1049.

[8] S.W. Yackee, *The Politics of Rulemaking in the United States*, "Annual Review of Political Science" 2019, vol. 22(1), pp. 37–55.

[9] R.G. Noll, M.D. McCubbins, B.R. Weingas, *Administrative Procedures as Instruments of Political Control*, "Journal of Law Economics and Organization" 1987, vol. 3(2), pp. 243–277.

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MATERIALS AND METHODS

The theoretical and methodological basis of the study is formed by the scientific provisions of the general economic theory, the theory of regional economic development, administration and management, planning and forecasting. A set of general scientific and special methods was used to perform the tasks set in the research. The leading method in the process of research was the dialectical method of cognition of phenomena and processes, which made it possible to determine the condition, areas and prospects for the development of scientific research and legislative developments in legal regulation and approbation of the American model of administrative procedure. The comparative law method, which was used in the process of comparative analysis of the existing norms on the territory of various US states, also takes a special place. Also, a comparative analysis of scientific research on this issue was carried out in order to identify positive trends in the development of the American model of administrative procedure.

The method of theoretical generalization was used to identify special features of the theoretical foundations of the operation of the administrative procedure in the US, as well as to give a comprehensive characteristic of the transformation processes of state bodies and the discretion of their powers. The abstract logical method was used to substantiate the principles of the system of legal regulation of state services, as well as to analyse conceptual and methodological approaches to reforming the administrative procedure. Statistical, graphical analysis and grouping methods were used to assess the current condition and results of the implementation of new approaches to the administrative procedure in state services, to assess the characteristics of the innovative development of the dichotomy of administrative procedure. Analysis, synthesis, deduction and induction were used to substantiate conceptual provisions and improve the mechanism of implementation of the administrative procedure, participation of the public in decision-making. Economic and statistical methods were used to statistically analyse the development of discretion of powers of agencies in the US and their effectiveness. Expert assessment methods were used to assess the degree of achievement of a balanced development of administrative procedures and public interests in the context of modern transformations.

Structural and logical analysis was used to substantiate methodological approaches in respect of the transformation at the age of digitalization of the American model of administrative procedure and the current realities of the society. Systemic economic analysis was used to substantiate and determine the areas of transformation of governance systems and related state services. The historical method was used in the study of the genesis of the development of the legislation regulating the foundations of the development of the American model of administrative procedure in the US; the formal-logical method made it possible to identify gaps in the current legislation in the area under research. The dogmatic method

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was used to formulate conclusions in accordance with the purpose of the research. The normative-semantic method, logical methods of cognition and the method of legal modelling were used to formulate legislative proposals. The choice of the methodology is substantiated by the purpose of the article and the tasks set, which, in turn, allowed us to maximally research the issues mentioned in the article, and to propose our own solution to the problems arising in the law enforcement practice in modern realities.

The basis for scientific research was formed by the works of such scientists as A.M. Bertelli and M. Busuioc, D.G. Duncan and B.R. Levey, O. Markova, D.H. Rosenbloom, C.J. Walker, V. Huth,[10] and others. Particular attention was paid to the work by S.W. Yackee titled *The Politics of Rulemaking in the United States*.[11] This work made it possible for the author to form his position on the genesis of legal regulation of the special features of implementation of the administrative procedure on the territory of the state under research. Also, a detailed study of the findings of S.C. Ahn, set out in *Legitimacy, Flexibility and Administrative Law*, helped to substantiate a critical position regarding the prospects for transforming the administrative procedure in the US in the context of the present-day realities.[12] To draw conclusions, the results of the research by R.A. Epstein on the role of instructions and guidelines in modern administrative procedure were used.[13] At the same time, a number of theoretical and applied problems related to the definition of the essence of the processes of development of the American model of administrative procedure remain unresolved. Therefore, the relevance of the stated problem and its theoretical and practical importance determined the choice of the subject matter of the research and the definition of its objectives and tasks.

[10] A.M. Bertelli, M. Busuioc, *Reputation-Sourced Authority and the Prospect of Unchecked Bureaucratic Power*, "Public Administration Review" 2021, vol. 81(1), pp. 38–48; D.G. Duncan, B.R. Levey, *DOJ Issues "Rich Menu of Options" for Congress to Revise the Administrative Procedure Act*, 18.8.2020, https://www.natlawreview.com/article/doj-issues-rich-menu-options-congress-to-revise-administrative-procedure-act (access: 11.9.2023); O. Markova, *Comparative Legal Analysis Types of Administrative Procedure*, "Legal Bulletin" 2020, vol. 3(1), pp. 29–37; D.H. Rosenbloom, *op. cit.*; C.J. Walker, *A Reform Agenda for Administrative Adjudication*, 2021, https://www.cato.org/regulation/spring-2021/reform-agenda-administrative-adjudication (access: 11.9.2023);V. Huth, *Celebrating the 75th Anniversary of the Administrative Procedure Act*, 11.6.2021, https://www.gsa.gov/blog/2021/06/11/celebrating-the-75th-anniversary-of-the-administrative-procedure-act (access: 10.2.2024).

[11] S.W. Yackee, *The Politics of Rulemaking…*, pp. 37–55.

[12] S.C. Ahn, *Legitimacy, Flexibility and Administrative Law*, 2021, https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1093&context=etd (access: 10.2.2024).

[13] R.A. Epstein, *op. cit*.

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RESULTS

According to Article 1 Sections 1 and 8 of the 1787 Constitution of the United States,[14] the US Congress has the power to pass laws, but cannot control their observance, and therefore the powers to supervise and control the observance of the laws are delegated to special administrative agencies. When establishing administrative agencies, Congress determines their structure, name and competence to issue legislative provisions. Thus, a block of delegated law has evolved in the legal system, which resulted in the emergence of delegated and non-delegated legal doctrines. The first doctrine suggests that Congress delegates a number of legislative, executive and judicial powers to administrative agencies, while the second doctrine suggests that the US Supreme Court imposes restrictions and procedural requirements on the delegation of such powers. The legislative branch establishes agencies and delegates them certain powers through the adoption of an appropriate law that vests the administrative agency with the legislative power (the power to issue rules and regulations), the executive power (the power to investigate and enforce its rules) and the judiciary power (the power to hold hearings and determine whether its decrees have been violated).[15] The legislative bodies (Congress and state legislatures) establish agencies to achieve and solve specific tasks (e.g. to clean the environment or improve worker safety) or in response to an event that has occurred in the society. Most of the administrative agencies are assigned to executive bodies that are part of the executive branch of the government.

The model of administrative procedure is objectified, enshrined in the 1946 Administrative Procedure Act,[16] was made part of the 2019 United States Code,[17] and was a model of administrative procedure also for European countries.[18] The National Conference of Commissioners on Uniform State Laws developed the 2009 Model State Administrative Procedure Act[19] to uniformly apply the provisions of the 1946 Administrative Procedure Act across all states. The specific activities of administrative agencies include rule-making, law enforcement and rendering of judicial decisions. "Rule-making" means the agency process of the development, changing or cancellation of rules – statements of the general or specific nature intended for the implementation and interpretation of a law or policy, and

[14] https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm (access: 10.2.2024).

[15] J.D. DeLeo, *Administrative Law*, Boston 2008.

[16] https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf (access: 10.2.2024).

[17] https://www.govinfo.gov/app/collection/uscode/2019 (access: 10.2.2024).

[18] C. della Giacinto, *Administrative Procedure in Europe*, 31.10.2022, https://www.theregreview.org/2022/10/31/della-cananea-administrative-procedure-in-europe (access: 7.9.2023).

[19] https://www.cga.ct.gov/2009/rpt/2009-r-0209.htm (access: 10.2.2024).

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for the description of the agency's organizational and procedural requirements.[20] Rules adopted in accordance with certain legal requirements by bodies within the competence of the authorities have the force of law. For example, the US Environmental Protection Agency issues regulations (legislative powers) to implement the environmental protection objective set by Congress, enforces the rules it adopts (enforcement powers) and holds hearings (judicial powers) in the event of violations of these rules by the business. Thus, three brunches of power can be simultaneously concentrated in a single administrative agency. Agencies are considered to have quasi-executive, quasi-legislative and quasi-judicial powers.[21]

At the legislative level, § 551 of Title 5 ("Government Organization and Employees") of the 2019 United States Code defines an administrative agency as any representative office of the US Government, whether or not another agency is subordinate to it, with the exception of anything related to Congress, the courts, the governments of the territories or possessions of the United States, the government of the District of Columbia, agencies made up of representatives of the parties or representatives of organizations of the parties in disputes they have identified. Section 102 (1) of the 1975 New York State Administrative Procedure Act[22] states that agencies are "departments, bureaus, commissions, divisions, offices, boards, councils, committees, and officers or other government bodies whose chiefs are appointed by the Governor". The emergence of a model of administrative procedure was explained by positivist researchers only by the process of delegation of authority by Congress to an agency, which created the "principal-agent" problem.[23] By creating rules, agencies could implement their political preferences rather than legislative ones. Thus, scientists have identified two types of problems that have arisen as a result of delegation of authority: "coalition drift" and "bureaucratic drift".[24]

The bureaucratic drift occurs when agency officials do not act in accordance with the terms of a coalition agreement between stakeholder groups and politicians. The coalition drift occurs when officials deviate from the future course of Congress, pursuing their own policies. R.G. Noll, M.D. McCubbins and B.R. Weingas presented an innovative approach to delegation of a wide range of powers by Congress to an administrative agency.[25] They proposed to consider the administrative procedure as a tool of political control over administrative agencies that Congress could use to enshrine it in a law. In this way, Congress can increase the likelihood through an administrative process that rule-making agencies will represent the

[20] O. Markova, *op. cit*.
[21] J.M. Beermann, *Administrative Law*, Alphen aan den Rijn 2010.
[22] https://www.nysenate.gov/legislation/laws/SAP/102 (access: 10.2.2024).
[23] A.M. Bertelli, M. Busuioc, *op. cit*.
[24] *Ibidem*, p. 42.
[25] R.G. Noll, M.D. McCubbins, B.R. Weingas, *op. cit*.

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interests of their voters without further intervention of Congress, addressing the issue of bureaucratic drift. In addition, Congress can change agency policy as the preferences of its members change, addressing the issue of coalition drift. Legal scientists have considered the administrative procedure in the context of different models of administrative law in different historical periods.[26] R. Stewart's drive-belt is a model activating administrative law through an administrative procedure, in which agencies were considered as executors of legislative directives.[27]

The administrative procedure was an integral part of this model. By limiting the activities of administrative agencies to legislative directives, the administrative procedure was aimed at ensuring the fairness and rational rule-making process.[28] The "drive-belt" model with its vision of administrative procedures could not work given the significant amount of the legislation on delegation of powers adopted by Congress.[29] The "experience" model is based on the assumption that agencies rely on knowledge gained from specialized experience.[30] This professionalism has enough disciplined the conduct of the agency and made it possible to use science and economics to formulate sound policies.

The "stakeholder representation" model of 1970 is characterized by the fact that Congress adopted decrees aimed not only at economic but also at safety and environmental issues.[31] The agencies implemented the provisions of these laws using an informal process of notification and comments, during which rules were adopted. According to this model, the administrative procedure is open to all subjects affected by the adopted norm, and also increases the legitimacy of actions of the agency based on the same principle as legislative rule-making. Thus, the purpose of this model was to allow all stakeholders to participate in the development of a rule that meets their interests. Administrative law reflected the stakeholder representation model, creating a requirement for informed rule-making known as the "hard-look doctrine",[32] which articulated the factual and analytical basis for agency's decisions and ensured broad public participation in informal rule-mak-

[26] *Ibidem*.

[27] C. Coglianese, *op. cit*.

[28] O. Serneda, A. Tsummer, *Prerequisites for the 1994 Budapest Memorandum in the Context of Ukrainian-American Relations*, "Foreign Affairs" 2022, vol. 32(5), pp. 24–31.

[29] Course Hero, *The New Social Regulation and the Transformation of Administrative Law*, 4.2.2008, https://www.coursehero.com/file/p3p83aa/Transmission-Belt-Theory-of-Administrative-Containment-The-regulatory-agency-is (access: 18.9.2023).

[30] J. Ziekow, *Administrative Procedures and Processes*, [in:] *Public Administration in Germany: Governance and Public Management*, eds. S. Kuhlmann, I. Proeller, D. Schimanke, J. Ziekow, Cham 2021.

[31] C. DeMuth, *Can the Administrative State Be Tamed?*, "Journal of Legal Analysis" 2016, vol. 8(1), pp. 121–190.

[32] J. Kessler, C. Sabel, *The Uncertain Future of Administrative Law*, "Daedalus" 2021, vol. 150(3), pp. 188–207.

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ing. The parties gained wider access to judicial supervision (control) over the agency's actions as the doctrines of legal liberalization emerged and developed. The courts transformed rule-making based on the procedure of notification and comment into a hybrid process combining elements of informal rule-making and formal rendering of judicial decisions. The stakeholder representation model was criticized for its support and focus on procedures.

In 1980, the presidential control model emerged. This model demonstrates a disregard for administrative procedures like the "experience" model but for a different reason. The model has its own procedures, which were created by the President and enshrined in decrees rather than in laws. Together with other instruments, these procedures allowed the White House to control and influence the agency's actions. As the sole actor, the President coordinated and directed the executive branch of government through tools such as centralized cost-benefit analysis of agency's proposals.[33] Despite the strength of the presidential control model, the judiciary system turned its attention to traditional administrative procedures. Administrative bodies in quasi-judicial procedures observe judicial standards thanks to the general legal heritage of administrative law, where a quasi-judicial body is a non-judicial body that can interpret the law.[34] This model of administrative procedure applies substantive law and legislation and makes new decisions in situations that have not previously arisen or are not provided for in the legislation and regulations (e.g. urban planning procedures). In this case, the quasi-judicial model serves as a coercive tool. The result of quasi-judicial model procedures is a decision regarding individual rights in the form of an order. According to § 551 of Title 5 of the 2019 United States Code, any action not provided for by law is a judicial decision, an order means the full or partial final decision of the agency on matters other than rule-making, but including licensing.

In a quasi-judicial model of administrative procedure, the agency acts as a judge exercising quasi-judicial powers in the form of formal and informal rendering of decisions. In cases where the provisions of §§ 554, 556 and 557 of Title 5 of the 2019 United States Code provide for mandatory requirements for the conduct of proceedings in the minutes, this model of administrative procedure is called a formal judgment and the cases are heard in the same way as legal proceedings. According to administrative law, this model of procedure is similar to a judicial process in the sense that the authorities must adhere to the basic principles: publicity, *ex officio* investigation, the obligation to make a reasoned decision and the opportunity for the parties concerned to exercise their rights: the right to a defence, the right to be heard. As a rule, only judges can decide cases related to private rights, but

[33] *Ibidem*.

[34] I. Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, "American Journal of International Law" 2008, vol. 102(2), pp. 275–308.

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administrative bodies are the exception to this rule, they are established by the legislative body and are responsible for monitoring and regulating a specific area of concern to the government. An informal hearing is usually a simple meeting and discussion between an agency official and a person affected by its actions. Generally, the length of the hearing depends on the case. However, there are other forms of a court decision under the 1946 Administrative Procedure Act (which are not similar to court cases). Since they are not formal court decisions and therefore do not have to comply with the Administrative Procedure Act, they are commonly called informal judicial decisions made by informal actions of the agency under a simplified procedure.

It is also necessary to draw attention to another important point regarding the combined functions of the agency, which combine the functions of the body determining the form of an order or rule, and the body considering it in case of objections from the party against which such decision was made. The initial decision is made after a competitive hearing by an official of the administrative agency. The official works for the appointed agency but is not directly engaged in the investigation of the case on which he or she makes a decision (the so-called "separation of duties"). The stage of revision of the decision made by the agency takes place at a higher level of the same agency that made the preliminary decision, which is an administrative procedure. In the event of a judicial review of a decision of the agency, the courts of general jurisdiction ensure that the decision is judicially reviewed in terms of its legality and reasonableness. Formal, informal and exclusive rule-making differ in the degree to which individual persons participate in the agency's rule-making process. Most federal agencies develop rules through informal rule-making. The informal procedure is also called the procedure of notification and comments, which is regulated by § 553 of Title 5 of the 2019 United States Code, according to which the agency must ensure public participation in the informal rule-making process.

The process of development of the rules of notification and comments begins with making the proposed rule available to the public – a "general notice of proposed rule-making" to notify members of the public of prospective regulations and offer their views, usually through publication in the Federal Register, thus providing an opportunity to comment on the content of the proposed rule for a certain period. For the agency, public feedback is a prerequisite to make an effective decision, on the one hand, and to comply with the rules, on the other hand.[35] Despite the fact that the 1946 Administrative Procedure Act establishes the minimum degree of public participation in the rule-making procedure, it becomes possible to exercise the right to participate in the informal procedure. The possibility to comment allows ordinary citizens and organized groups to play a real influential role in the rule-making of

[35] D.J. Kochan, *The Commenting Power: Agency Accountability through Public Participation*, "Oklahoma Law Review" 2018, vol. 70(3), pp. 601–622.

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notifications and comments, as well as in the formulation of regulatory policy.[36] Paragraph 553 (c) of Title 5 of the 2019 United States Code requires that the publication of the final rule not only includes the publication of its text in the Federal Register, but also that this publication be accompanied by a "brief general statement of the basis and purpose of the rule".

The rule-making of the administrative procedure is called to be "quasi-legislative" because the administrative body exercises the power of the legislator in the rule-making process as the agency process of formulation, changing or cancellation of a rule. Through regulations, the agency not only implements laws adopted by the legislative body, but also fills in gaps in the law, indicating the way the citizens should act to comply with the law.[37] The source of the delegated powers is a permissive act, which establishes the agency and grants it with rule-making rights. The rules adopted by the agency serve as a guide for the public on how to act and how to behave. They have full force of law and can change and affect the legal rights of citizens. Quasi-legislative activities can be appealed in the court, unless it is prohibited by law or judicial precedent. As a general rule, the person appealing quasi-legislative acts must wait for the completion of the rule-making procedure and adoption of the rule before appealing it, having reviewed it first in the administrative and then in the judicial procedure. To understand how the quasi-legislative model of administrative procedure works, it is necessary to consider the distinctive features between rule-making by agencies and rule-making by Congress. The first significant difference lies in the procedural requirements for rule-making by agencies. Paragraph 553 of Title 5 of the 2019 United States Code sets procedural requirements for agencies making rules, as opposed to similar procedural rules of Congress that ensure the observance of the same by the courts.

The agency is obliged to publish notifications of the rules in the Federal Register and to allow the public to discuss the draft rule for 30 days or sometimes even for a longer period. This gives the public the right to vote in the quasi-legislative process. In practice, this rule-making process supplemented by the procedure of judicial review of agency's decision, subject to the procedural and substantive aspects of the final decision, compensates for the lack of political checks and balances that are of paramount importance to the legislative process.[38] Another difference concerns communication in the standard setting process. Congress uses the so-called one-way communication. In a legal context, *ex parte* communica-

[36] *Ibidem*.

[37] W. Lu, *Comparative Analysis of the Establishment of Chinese and American Think Tanks*, "Foreign Affairs" 2021, vol. 31(5), pp. 44–51.

[38] N. Chudyk, O. Vivchar, *Strategy of Strengthening the Economic Security of Enterprises of Network Structures: Pragmatics and Key Vectors of Development*, "Law, Policy and Security" 2023, vol. 1(1), pp. 55–67.

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tion is communication between a party to a court hearing and the presiding judge without the knowledge or consent of the other party to the case. The context of informal rule-making procedures governed by § 553 of Title 5 of the 2019 United States Code does not impose any restrictions on *ex parte* communication. Open and transparent communication between an official of the agency and the public is maintained during informal rule-making process to promote public engagement and encouragement. However, in the formal rule-making procedures governed by §§ 556 and 557 of Title 5 of the 2019 United States Code, such communication is prohibited at the stage hearing, which is carried out in accordance with rules similar to those applied in the court. An *ex parte* communication means an oral or written communication that is not public and does not require notification to all parties.

In informal rule-making, the minutes are not like the minutes of a court session; it consists of the case file (dossiers), communication materials and comments submitted to the public about the rule, and everything else that the agency referred to or was guided by when adopting of the final rule. Neither Congress nor the President is subject to such restrictions in the legislative process. By granting rule-making powers to an agency, Congress may order the agency to follow certain procedural requirements in addition to those required by the informal rule-making procedures under the 1946 Administrative Procedure Act. Hybrid legislative acts on rule-making usually impose additional procedural requirements for rule-making for agencies that can be found in the judicial context, but do not require the agency to participate in the formal rule-making process.[39] These statutes usually create a rule-making process with more flexibility than formal rule-making procedures under §§ 556 and 557 of Title 5 of the 2019 United States Code and more public participation than informal rule-making procedures under § 553 of Title 5 of the 2019 United States Code. A hybrid law on rule-making can require an agency to hold hearings, allow the parties concerned to give oral evidence and provide participants with the opportunity for cross-examination or interrogation.

If a group of citizens concerned exercising their right to petition to the government submits a written proposal to Congress to amend a law, which the citizens consider harsh or unreasonable, they may receive a response with a promise to consider this matter. If the same group of citizens files an appeal with the federal agency with jurisdiction over the matter requesting to adopt a new rule or amend existing rule and receives the same refusal in response, the citizens can apply to the court and the court can no longer reject the application without consideration and making a decision. Paragraph 553 (e) of Title 5 of the 2019 United States Code requires agencies to grant the parties concerned with "the right to petition to adopt, amend or cancel a rule". In addition, § 706 (1) of Title 5 of the 2019 United States Code requires courts that hear claims under the 1946 Administrative Procedure

[39] Administrative Procedure Act, 1946.

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Act to "require the agency to take actions if it unlawfully refrains from doing so". As a result, the courts recognize that they can require agencies to make the final decision within the rule-making process. The final requirement for agencies is to act consistently. They are not prohibited from changing their minds, but if they do, they must explain why they are acting differently in similar matters. This provision is enshrined in the 1946 Administrative Procedure Act in order to minimize the interference of the public and courts in the activities of the agency.

Thus, the American model of administrative procedure has a dual nature, since it combines elements of two models of administrative procedure, namely quasi-judicial and quasi-legislative. In its essence and content, it is a hybrid model. The specific nature of the administrative procedure model is visible through the prism of the powers of administrative bodies, which are implemented in various types of administrative procedures (formal, informal, hybrid, agreed rule-making, formal and informal court decisions). The name of the procedure depends on the type of decision the agency takes on the case.

DISCUSSION

Administrative procedure is the foundation of administrative law, and hence the interest in its codification and stability over time. National systems of administrative procedures, which are traditionally different and generally considered incompatible with the convergence process, are becoming more and more convergent under the pressure of international and regional shared values and principles or under the influence of judicial decisions. Thus, the vision of having converged administrative procedures on a global scale is no longer an illusion. The approach of the American legislator to the consolidation of types of administrative procedures is structured since the types are presented in a single act, which simplifies both research and analysis (both at theoretical and at practical levels) in terms of application.[40] Independent regulatory agencies are as such in the sense that their officials cannot be dismissed without proper justification and, therefore, cannot be changed depending on the political conditions, and this ensures the continuity of their work regardless of any given presidential administration.[41] The drive-belt model and the experience-based model of powers and discretion of an agency were used when agencies were sometimes allowed to expand their authority to address the current problems, and when agencies were given a red light if their expansion was too extensive or contrary to the relevant statute.

[40] O. Markova, *op. cit*.

[41] D.T. Karamanukyan, *The Legal Nature of Administrative Agencies of the USA*, "Bulletin of the Omsk Law Academy" 2016, no. 1, pp. 85–90.

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In this context, agency deregulation and the resulting cases are striking examples that teach both the possibilities and the limitations of administrative law. The main reason is that agency deregulation is not necessarily a matter of gradual changes in the process of administrative law. In some cases, it can be such a transformative phenomenon that the relevant law is actually cancelled.[42] As to the positive side, the guidance can reduce uncertainty and offer parties subject to the regulation regime (the general public, private firms, state and local governments) a safe haven for compliance. Also, it can create administrative inconsistencies that may arise in any agency managing individual field offices located throughout the country. As to the negative side, however, the guidance can be a means using which aggressive government officials, with little consultation with the industry, go beyond the law, the requirement of a statute or even regulations thereunder. It is difficult for any private party to oppose compliance with the rules, even if they go beyond the formulation or purpose of the law, or both.[43]

Current rules on legal capacity and final judgment too often require people to stick to a system that is not developed anywhere in the 1946 Administrative Procedure Act, and too often they serve as a means for an agency to set burdensome legal regimes that have tremendous coercive effects on government and private institutions that do not have an effective way to appeal these decisions, given the rigid rules regarding status, maturity and finality. The law scholar emphasizes that no government official should be allowed to expand his or her authority through non-obligatory actions, the actual impact of which can be as serious as the final action of the agency, be it regulation or enforcement measures. New management and regulation methods should be taken into account in order to create a revised conceptual framework for administrative law and, as a consequence, for administrative procedure. Accordingly, each procedural component needs adjustment. If consultations are intended to maintain an effective dialogue between stakeholders and agencies (i.e. consultations are not a one-off event but a dynamic process), the procedures should be established to ensure contact with stakeholders throughout the process, as well as the possibilities to provide feedback. The growing desire for processualisation in an unstable world causes a further increase in the role of the administrative procedure in which rules, actions and decisions must be invented.[44]

According to the 2002 E-Government Act,[45] state services were transferred to Internet platforms, which increased their accessibility to the public, the Federal

[42] S.C. Ahn, *op. cit*.

[43] R.A. Epstein, *op. cit*.

[44] J. Barnes, *Towards a Third Generation of Administrative Procedures*, 29–30.4.2016, https://law.yale.edu/sites/default/files/area/conference/compadmin/compadmin16_barnes_towards.pdf (access: 10.2.2024).

[45] https://www.congress.gov/107/plaws/publ347/PLAW-107publ347.pdf (access: 10.2.2024).

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Register became available on the Internet, the widespread use of e-mail facilitated public participation, and the eRulemaking and Rules.gov programmes were established to support the creation of rules with email notifications and comments. Mass comments are usually sent by organizations on behalf of their voters, such as advocacy organizations, special interest groups or marketing associations.[46] Mass misattributed and computer-generated comments, at least for the time being, do not significantly disrupt the process of notification and comments, but such comments raise issues that are important enough that steps can and should be taken to mitigate the difficulties associated with them, and technology also provides opportunities to enhance public participation in rule-making.[47] Scientists recommend that agencies and appropriate coordinating bodies share best practices and relevant innovations to address the challenges and opportunities associated with mass misattributed and computer-generated comments, as well as technologies associated with the additional public participation processes.[48]

Agencies and relevant coordinating bodies should consider the possibility of the provision of materials that explain to potential commentators what information is useful to the agency in public comments; and when publishing the final rule, agencies should indicate whether they have removed any misattributed or computer-generated comments from the list. Agencies should consider the full range of stakeholders who may have information, views or data related to the rule-making process and the ways of their interaction. The engagement of the public to specific rules should be planned at the earliest possible stage of the rule-making process, while agencies should consider the possibility of using a wide range of ways and methods to get the views and ideas of different individuals and groups.[49]

Since Congress adopted the 1946 Administrative Procedure Act, the size and scope of activities of the federal regulator has grown dramatically, which sometimes results in ineffective rule-making process and lack of accountability. To eliminate these shortcomings, the US Department of Justice held a summit on modernizing the 1946 Administrative Procedure Act in December 2019, and published the Justice Department Report on Modernizing the Administrative Procedure Act,[50] which offered constructive recommendations for modernization and improvement of this

[46] V. Huth, *op. cit*.

[47] S. Balla, R. Bull, B. Dooling, E. Hammond, M. Herz, M. Livermore, S.B. Noveck, *Mass, Computer-Generated, and Fraudulent Comments*, 1.6.2021, https://cutt.ly/IERZqU0 (access: 14.9.2023).

[48] *Ibidem*.

[49] M. Sant'Ambrogio, G. Staszewski, *Public Engagement with Agency Rulemaking*, 19.11.2018, https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf (access: 10.2.2024).

[50] Office of Public Affairs, *Justice Department Releases Report on Modernizing the Administrative Procedure Act*, 11.8.2020, https://www.justice.gov/opa/pr/justice-department-releases-report-modernizing-administrative-procedure-act (access: 10.2.2024).

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Act, which offered a "rich menu of options" for revision by Congress: extend judicial control to cover non-obligatory orders of the agency that are, for all intents and purposes, *de facto* mandatory for regulated parties; order to develop a more flexible rule process, so that the length of the period of notifications and comment, careful check of the rules is appropriate for the importance of the rules. This concept already exists for cost-benefit analysis of certain main rules.[51]

C.J. Walker identifies four areas that are the most important for reform: (1) an attempt should be made to reconcile the constitutional contradictions in the administrative judicial decision between the independence of the judicial body in making decisions and the political control over rendering a judicial decision by the agency; (2) the new world of court decisions of agencies must be reformed, which is not governed by the formal provisions of the 1946 Administrative Procedure Act on court decisions in order to protect the people who use these judicial systems; (3) court decisions of mass agencies should be modernized using measures aimed at assurance quality, including improved appeal controls of agencies and effective use of artificial intelligence; (4) there is also a need to explore ways to eliminate the refugee roulette in considering immigration decisions by ensuring greater consistency and fairness in the system.[52] Thus, the discussion leads to the conclusion that agencies should plan for public participation, which should be as open and inclusive as possible, so that different strata of the population, including those not normally engaged, have the opportunity to share their views, values and concerns. The size and scope of the federal regulatory body have increased dramatically, as a result of which law scholars have proposed constructive recommendations for modernization and improvement of the Administrative Procedure Act.[53]

CONCLUSIONS

The American model of administrative procedure was influenced by the concept of delegated law established by Congress. This area of law consists of decision-making procedures of administrative bodies, including rules on transparency and public participation, which also includes the practice of supervision by legislative bodies, courts and elected executive bodies, thus constituting a hybrid of judicial and legislative procedure, since administrative bodies perform functions and exercise quasi-judicial and quasi-legislative powers within the administrative procedure. Analysing the American model of administrative procedure, four types

[51] D.G. Duncan, B.R. Levey, *op. cit*.
[52] C.J. Walker, *op. cit*.
[53] D.G. Duncan, B.R. Levey, *op. cit*.

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of activities of agencies were distinguished, which are based on two dichotomies: (1) rule-making and court decisions and (2) formal and informal rule-making.

In the US, the form of objectification of results depends on the type of rule-making. The agencies adopt rules within the framework of informal rule-making, an order in the form of a court decision within the framework of formal rule-making. The rights to participate in rule-making procedures often follow the same values and principles as judicial procedures: the right to be heard, the presence of the due law procedure and legal provisions. In addition, participation is considered as the right of defence rather than as a dialogue between a citizen and the agency.

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ABSTRAKT

Procedura administracyjna w USA jest integralną częścią prawa administracyjnego. Ma ona charakter uniwersalny, pełni bowiem funkcję skutecznych narzędzi regulacji postępowania i działalności funkcjonariuszy władz państwowych, zwalczania korupcji oraz ochrony praw i uzasadnionych interesów obywateli. Właściwe agencje wydają przepisy mające moc prawną. Obecnie perspektywiczne rządzenie w dużej mierze zależy od decyzji polityki państwowej podejmowanych w toku stanowienia prawa państwowego, dlatego niektóre aspekty współczesnego modelu postępowania administracyjnego w USA powinny zostać zrewidowane w celu dalszych reform. Celem artykułu jest przeprowadzenie samodzielnych badań nad kształtowaniem się i aktualnym stanem amerykańskiego modelu postępowania administracyjnego. Aby osiągnąć ten cel, zastosowano zestaw ogólnych metod naukowych i specjalnych. Wiodącą metodą w procesie badawczym była dialektyczna metoda poznania zjawisk i procesów, która pozwoliła na określenie stanu, obszarów i perspektyw rozwoju badań naukowych oraz rozwiązań legislacyjnych w zakresie regulacji prawnych i aprobaty amerykańskiego modelu postępowania administracyjnego. Wyciągnięty przez autorów wniosek pozwolił na sformułowanie rozumienia koncepcji amerykańskiego modelu postępowania administracyjnego.

Słowa kluczowe: stanowienie prawa państwowego; postępowanie administracyjne; perspektywiczne rządzenie; model postępowania administracyjnego; USA