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THE RULEMAKING PROCEDURE – DEFINITION, CONCEPTS AND PUBLIC PARTICIPATION

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Abstract

The importance of delegated legislation is growing in both the quantitative and qualitative sense. Under the American system, the so-called division of rulemaking authority between the legislative and executive branch was resolved at a very early juncture and in a highly pragmatic manner by applying the fundamental principles of the legislative procedure to the level of the rulemaking procedure, which primarily implies the transparency and openness of the latter. Conversely, Continental Europe did not develop a general theory of public participation which could provide a basis for the search for solutions to the situation. The purpose of this paper is to present different concepts of the rulemaking procedure and discuss the question of public participation. We conclude that, as the quantity and complexity of societal relationships grow, it is fruitful to use the so-called problem-solving model of the rulemaking procedure as a starting point for its procedural arrangement. This allows us to focus on the role that civil society, interest groups and the general public play in the contemporary governance process.

Keywords

Delegated Legislation, Public Participation, Problem Solving, Rulemaking Procedure, Administrative Procedure, Comparative Law

I. Introduction

The importance of delegated legislation[3] is growing in both the quantitative and qualitative sense. Quantitative growth is the result of multiple factors, e.g. the increasing number of

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[3] The term "delegated legislation" (Slovene: *podzakonski predpisi*; German: *exekutive Rechtsnormen*) is used to facilitate international comparisons. We understand this term to mean legal acts which are issued by the executive and through which legal relations are regulated in an abstract and general manner. Comparative legal literature places German (legislative) regulations issued by the government (*Verordnung or Rechtsverordnung*) and US legislative rules issued by the president and federal administrative bodies in this group of legal acts (see Pünder,

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areas regulated by the state and the fact that the law is the most frequently used regulatory instrument. The growth of the qualitative importance of delegated legislation is the result of both external and internal factors. The nature of certain matters is such that the law cannot provide adequately precise substantial guidelines for the executive to follow in rulemaking. In systems in which, due to negative historical experiences (e.g. Germany), the executive is tightly bound to the law, this is a problem as, objectively speaking, the volume of matters of such nature is growing. An even larger problem appears when this external factor is joined by an internal one – the conscious delegation of regulation from the legislator to the executive. In parliamentary systems, where this occurs due to close political bonds between the executive and the legislator, this is problematic because this principle shift in the sphere of political decision making and in responsibility for regulating sensitive political questions does not lead to the creation of new legal-theoretical models and, consequently, legal arrangement. Under the American system, this considerable dilemma of constitutional law – the so-called division of rulemaking authority between the legislative and executive branch – was resolved at a very early juncture and in a highly pragmatic manner by applying the fundamental principles of the legislative procedure to the level of the rulemaking procedure, which primarily implies the transparency and openness of the latter. Conversely, Continental Europe did not develop a general theory of public participation which could provide a basis for the search for solutions to the situation.

In Europe, delegated legislation is generally treated as a deviation from the ideal of the principle of the separation of powers and, as such, is handled carefully. Such an understanding fails to take into account the complexity of contemporary governance. Delegated legislation must not be an exception within a complex administrative system; it must be viewed as a typical form of the functioning of the executive that, at the same time, represents a constitutionally foreseen and limited division of work between the legislator and the executive in the field of regulating societal relations.[4] The enormous importance of delegated legislation therefore logically brings up the question of the procedure for its creation.

The purpose of this paper is to present different concepts of the rulemaking procedure and discuss the question of public participation. The paper is structured accordingly: first, a general presentation of the rulemaking procedure is given; this is followed by a discussion of the rulemaking procedure as a solution to the problem. Lastly, the role of public participation is discussed in this context. The subject is also discussed from a comparative law perspective.

2009, pp. 29–36, Vagt, 2006, pp. 41–43 and Rose-Ackerman et al., 2015, p. 191). In the Slovenian legal order, this group of legal acts contains decrees issued by the government as well as rules, decrees and instructions issued by ministers (see Article 21 of the Government of the Republic of Slovenia Act and Article 74 of the State Administration Act).

[4] See Hoffmann-Riem et al. (eds.) (2008, pp. 977–978) and von Bogdany (2000, p. 304).

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II. The rulemaking procedure in general

Along with competence and form, procedure represents an element of formal legality. As such, procedure is a prerequisite of the legality of delegated legislation.

Continental law is characterized by the way in which it focuses mainly on the legislative procedure and the administrative procedure in the narrow sense.[5] The two main reasons for this are 1) a focus on the law as the main legal act which can determine (alongside the constitution) rights and obligations, and 2) the legal position of the individual when deciding on his or her rights and obligations *in concreto*. From a purely legal perspective, that is, from the perspective of rights and obligations and the legal position of the individual, the substance of delegated legislation is mainly regarded as relatively uninteresting. This is because, in the view of legal theory, 1) rights and obligations cannot be determined or revoked by delegated legislation on the one hand, and 2) in the case when they are and this is in accordance with the rule of law, they pertain to an indeterminate circle of subjects, which is why no one is directly and concretely affected. Accordingly, Continental law, especially German legal science,[6] has for a long time demonstrated no special interest in the rulemaking procedure, which is why the latter is as a rule regulated either in a systemically weak (fragmented) or a sector-specific manner (e.g. environment, spatial planning).[7] In either case, the rulemaker has a fairly free hand in shaping the procedure.

The importance that delegated legislation takes on in practice calls these views into question. Substantial legality is of course important, but it does have its limits, which is why the question of a suitable balance between the substantial and procedural legality of delegated legislation that would still be in line with the principle of the separation of powers justifiably arises.[8] The procedure is therefore important. A key question is whether those features of the rulemaking procedure which, according to Barnes' division,[9] belong to the second generation of administrative procedures still match up with the features of contemporary governance and, if in fact they do not, which elements of third-generation administrative procedures would they need to take up, or even which of their own elements would need to be transformed into third-generation procedures.[10] An answer to this question can be sought in the framework of a definition of the rulemaking procedure.

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[5] Administrative procedure in the narrow sense is the procedure of issuing concrete individual administrative legal acts (German: *Verwaltungsakt*; English: administrative decision; Slovene: *posamični upravnopravni akt*).

[6] See Erichsen & Ehlers (2006, p. 559).

[7] For Germany, see Rose-Ackerman et al. (2015, pp. 192 and 195–200).

[8] See Pirnat (2003, pp. 64–65).

[9] See Barnes (2008).

[10] Barnes (2009, p. 4) finds that, outside the US and EU, this procedure is not given special attention; regarding the system itself, he feels that laws under the Continental system of law would need to include participatory rights to a greater degree (in the field of municipal planning, for example) and foresee multiple types of procedures, not just one (the American Administrative Procedure Act, for example, recognizes different types of procedures).

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III. Definition and concepts

The rulemaking procedure can be defined as a sequence of actions that leads to the determination of the substance of legal rules. This definition directs attention towards substantial legality, as the substance of the legal rule is at the forefront: the rule must be in accordance with the law. Taking this focus as a starting point, the rulemaking procedure must then be conceptualized as a combined tool for implementing the law and the decision-making procedure or, in other words, as the formation of a final decision based on the law.[11]

Such a definition prevents us from taking a step forward in the search for procedural solutions to the substantial distinction between the law and delegated legislation. A definition that copies the main elements of definitions of the procedure as such onto the field of delegated legislation therefore appears to be more useful in defining the rulemaking procedure: the rulemaking procedure can be defined as a sequence of actions for shaping the substance of legislation which represents the solution to a problem. Such a definition conceptualizes the rulemaking procedure as a system for communications between the public and the state in which not all solutions arise from the legal framework (the law), but are instead formed, for the most part, through the procedure. The rulemaking procedure therefore displays a degree of convergence with the legislative procedure in certain elements, particularly in its demand for transparency and openness.[12]

Three points of emphasis are essential for this definition of the rulemaking procedure: the sequence of actions, the openness of the goal and solving the problem.

The rulemaking procedure as a sequence of actions

The rulemaking procedure is an orderly activity. It is therefore important from a legal standpoint to know which elements in the sequence are to be legally regulated and through which legal acts this is to be accomplished. Within this dimension of the procedure, this is a matter of formalizing the procedure and selecting legal resources for its regulation.

These two tasks are partially connected, as the degree of formalization influences the types of legal acts that regulate the procedure. Namely, if the procedure is to be strongly formalized, the framework guidelines of constitutional law will not suffice, and the procedure will also need to be regulated legally – and vice versa.

At this point the question of achieving a uniform legal order or, in other words, looking for common points among all rulemaking procedures arises. This question touches upon the substantial and institutional heterogeneity of delegated legislation and the functions assigned to it by the legislator.

[11] See Barnes (2008).

[12] In scientific or technical fields characterized by uncertainty, rapid change and innovation, the conceptualization of the decision-making procedure would be similar to scientific research methods. In certain areas, for example determining allowable amounts of emissions, food safety and drug approval, the substance of the delegated legislation would therefore be determined on the basis of research, transparent debates and a search for consensus among experts in the field of risk management. Such a procedure would be based on the broad participation of expert groups and the broader public and on the publication of all known facts and research (Barnes, 2009, p. 23).

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The degree of formalization of a rulemaking procedure depends on an assessment of the legal importance of the procedure and on the legal tradition. In legal systems where informal instruments and established practice are valid ways of steering the functioning of the executive, legally relevant questions will be regulated in this way, and not through formalized rules which could result in rigidity and pure formalism. In legal systems characterized by the opposite situation, formalized rules will receive greater emphasis.
Assessments of the legal importance of the rulemaking procedure depend for the most part on the relation between the law and delegated legislation and on an understanding of the governance process. The rulemaking procedure will be less important if and where delegated legislation is viewed as the (legal and value-based) regulation of unimportant details; the political process will be completed in the parliament by the adoption of a law. On the other hand, the procedure will be deemed more important if delegated legislation is understood as a constitutionally foreseen and limited division of work between the legislator and the executive and consequently as a continuation or at least a part of the political decision-making process, and if the legislation will have important (legal) consequences for the (legal) situation of individuals.
Regardless of the different understandings of the role of delegated legislation, the following may be highlighted as a classic set of questions to be asked at the outset of the rulemaking procedure: the start of the procedure, who is participating in the procedure and in what way, and what rules govern the decision-making process and the publication of the delegated legislation. Adherence to these rules is a condition for the formal legality of the delegated legislation. As explained above, the actions that make up the procedure are united by a common goal: the (as yet) substantially open decision we are working towards.[13] Although formal legality is a value in and of itself, it is not an end in and of itself, but serves substantial legality, that is, the legal and broader correctness of the end decision.[14] In terms of constitutional law, the procedural demands that arise from the fundamental constitutional principles and from basic human rights and freedoms are important. They pertain on the one hand to the operationalization of these principles and, on the other, to the relationship between these principles and fundamental human rights and freedoms. The matter can be formulated as two questions: Is it possible to derive concrete procedural rules for rulemaking from the fundamental constitutional principles?; and, is it possible to derive procedural rules of this kind directly from basic human rights and freedoms?[15]

The rulemaking procedure as a »formative« activity

In no case is the substance of delegated legislation defined in the law with such a degree of precision that it could be considered merely the result of deductive reasoning.[16] The

[13] See Trips (2006, pp. 102–103).
[14] At this point, the question of the consequences of formal errors in the rulemaking procedure comes up, specifically whether or not only those errors that impact or could potentially impact the substance should be sanctioned.
[15] In Slovenia, for example, the question of the relationship between the principle of democracy and the right to participate in the administration of public affairs is relevant (Article 44 of the Constitution of the Republic of Slovenia).
[16] For example, Hill, in: Hoffmann-Riem et al. (eds.) (2008, p. 960); Schmidt-Assmann (2006, p. 326); Gösswein

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rulemaking procedure is therefore actually a process of "formation" (*Gestaltungsverfahren*) whereby "formation" can be understood as creating something new – something not defined in the law in advance with such a degree of clarity that it would be possible to say that the formation of delegated legislation is merely the imprimatur of a form determined in advance.[17] The "new" here is the result of a reduction of the complexity of actual social relations within a legally defined framework; it implies the processing of information, interests and legal norms of a higher level on a middle level of concretization and the formation of new legal rules as a new model for a normative representation of reality.[18]
The openness of the goal further means that value judgements are also present in every rulemaking procedure, as each decision is based on three types of premises – value-based, factological and methodological.[19] The more open the goal, the greater the value basis, and consequently the greater the political aspect of the functioning of the executive.

The rulemaking procedure as a solution to a problem

At first glance it would seem that the solution to a given problem is only one possible kind of substance of delegated legislation. A typical example of this would be solutions to environmental and spatial problems,[20] where the substantial guidance of the law is at its weakest.
We feel that the search for a solution to a problem can also be understood more broadly, and apply it to all kinds of delegated legislation.[21] Namely, we define the problem as the search for a solution within legally prescribed frameworks. The legal norm is the result of the process of choosing between multiple options. Because the legal framework is always such that it enables value judgements and consequently a choice from among multiple possibilities, and because the essence of the procedure lies in at least partial uncertainty regarding the goal, the rulemaking procedure can in every case be defined as problem solving. Such emphasis on the rulemaking procedure is closely linked to the previous

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(2001, p. 66).

[17] In terms of the possibility for originality, German theory distinguishes between two types of "formative" procedures: original (*originär*) and comprehensive (*nachvollziehend*). In the first case, the executive itself executes an authority granted to it, and in the second it co-creates substance on the basis of a second body that was created in advance. It places rulemaking procedures in the former and planning procedures in the latter (see Schneider in Hoffmann-Riem et al. (eds.) (2008, pp. 620–621)). As noted in the first section, on the one hand it is true that the degree of openness of the goal is not the same in all cases, which is why it is difficult to speak of the executive as having some sort of firmly set degree of independence in shaping societal relations in the modern state (the case law of the German Constitutional Court has shown that this court is flexible in deciding on essential matters which must be regulated by the legislator; the situation in the US is different, as there the focus soon shifted from the breadth of authorities to the way in which they are implemented); on the other hand, it is also true that the space for openness is constantly expanding to include more fields of administrative law and that for this reason the question of referential fields of administrative law and their impact on general administrative and (even) constitutional law is again being posed.

[18] Gösswein (2001, p. 54).

[19] Virant (1998, p. 17).

[20] For rulemaking regarding so-called fracking (hydraulic fracturing), see Rinfret et al. (2014).

[21] Even, for example, in the case of so-called organizational-technical delegated legislation. This means that the substance of a decree on the internal organization and systemization of work posts is a solution to a problem – the concrete search for rules for optimal internal organization and work processes.

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one and opens the gates for administrative science, which approaches the matter from the standpoint of decision making.[22]

The rulemaking procedure is a decision-making process that as such must be delineated from decision making in the administrative process in the narrow sense, although in both cases the decision is taken unilaterally by the state. In the administrative process in the narrow sense, decision making is only one phase of the process, whereas in the case of delegated legislation, the entire procedure "formatting" the legislation can be understood as a decision-making process, in the sense of providing solutions to individual levels of problems, from the more general to the more concrete. The substance of delegated legislation is therefore the result of a decision-making process, and this implies reducing uncertainty about the ultimate substance over multiple sequential – and also parallel – phases.

Decision making is closely linked to communication, information and interests.[23] Namely, the quality of the decision depends on the quality of the relations between participants in the process and on the quality of their ability to communicate; here, communication means inputting information and interests linked with the object of the decision making or problem solving.[24]

To tie this in with the discussion of the types of decision-making processes,[25] delegated legislation represents legally programmed decisions in both the substantial and the procedural sense. Because the notion of the executive as an all-encompassing substantially programmed decision-making system is a fiction, the question of the relationship between substance and procedure arises, particularly with regard to the use of procedural guidance to make up for a lack of substantial guidance.

Once the characteristics of authoritative decisions are also factored in, it follows from the above that, in the case of delegated legislation, the executive cannot simply fall back on the authority of the law. This means that the rulemaking procedure must be regulated in such a way that it transmits the so-called authority of the body: provisions must be made for a decision-making process which would hypothetically enable all viewpoints important for the decision to be expressed and decided on in an impartial, *fair* procedure. It would therefore be possible to place certain demands on the formation of the procedure, demands which surpass classic demands (efficiency, for example): professionalism, impartiality, equal "weapons", etc.

Taking all this into consideration, a part of German theory conceptualizes the modern model of the rulemaking procedure as a model for conflict resolution that plays out in phases and on the basis of a division of work between the legislator and the executive.[26] In

[22] See, for example, Schuppert (2000, p. 740).

[23] In contrast to traditional principal-agent theories, Lee (2013) suggests the administrative broker model, in which politically influential agencies can block information leakage to legislators and enhance their own discretion. Through mediating conflicts of interest and minimizing unnecessary contingencies, agencies can persuade their stakeholders not to provide information to legislators and, therefore, indirectly affect legislators' decisions on delegation and oversight.

[24] For a detailed explanation, see Schuppert (2000, p. 740).

[25] See Schuppert (2000, pp. 775–776).

[26] See Hoffmann-Riem et al. (eds.) (2008, pp. 977–978). Cf. Horvat (2004, p. 280), who draws a distinction

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line with this model, the executive is charged with that part of the problem-solving process which it can manage better than the legislator, and this also influences the relationship between the law and delegated legislation. The essence of the division of work therefore lies in the way that the regulated field is divided up among the different levels of the rulemaking procedure so as to ensure that the possibilities these levels offer for "shaping" are exercised to the greatest possible extent. Legal guidance is therefore not only of a substantial nature, but can also be of a procedural-organizational nature.[27]
To summarize the idea behind problem-solving model for the rulemaking procedure, as complex societal relations continue to grow and gain prevalence, their regulation demands cooperation and a division of work between, and the graduated resolution of problems (conflicts) by the legislator and the executive. This model for the rulemaking procedure would therefore have to be in accordance with an updated understanding of the principle of the separation of powers and would also have bring in its wake a new understanding of the substantial relationships between the law and delegated legislation. Such a model is a model of accessoriness that would place emphasis on the importance of the procedure.[28]

IV. Public participation in the rulemaking procedure

Once the rulemaking procedure is defined as problem solving, the substance of the delegated legislation in relation to the law will always represent something new, something that has yet to be defined with such a degree of accuracy within the law. Here, delegated legislation appears as the result a reduction of the complexity of actual societal relations within a legally defined framework and implies the processing of information, interests and legal norms of a higher level on a middle level of concretization.[29] In a rulemaking procedure thus defined, the subject whom the legislation will impact will have an important role. The rulemaking procedure therefore takes on new features: ongoing communication, participation, creating network structures and a basis in the complementarity, and not the mutual exclusivity, of the functions of bodies of state.[30]
The debate on public participation in rulemaking is essentially a debate on a normative system of the state that would be suited to the current times and the current environment and to constitutional principles.[31] The possibilities for public participation in the rulemaking procedure must echo the importance of delegated legislation and a modern

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between the terms collision and conflict of interest. In his opinion, delegated legislation represents a way to resolve collisions of interests, whereby he understands collision to mean the simultaneous existence of multiple interests which compete with and/or exclude one another. The executive resolves collisions of interest both through piecemeal legal acts and delegated legislation, while conflicts of interest are in the competency of the judiciary.

[27] Similarly Hill (2008, p. 977–978).

[28] See Hill (2008, p. 978); see also von Bogdany (2000, p. 304).

[29] Gösswein (2001, p. 54).

[30] Barnes (2009).

[31] See Farber & O'Connell (2014) for discussion on the reality of the modern administrative state that, in their opinion, diverges considerably from the series of assumptions underlying the APA and classic judicial decisions that followed the APA reviewing agency actions.

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understanding of democracy.[32] On an empirical level, public participation is not hard to justify.[33] Difficulties occur on the normative level. The majority stance of theory is that public participation in rulemaking is not a general demand of constitutional law, but only a possibility available to the legislator in those fields where the democratic deficit is not of a principled, but of a specific nature (e.g. environmental issues). Regardless, the principles of democracy and rule of law and the principle of efficiency derived from the principle of separation of powers can provide constitutional law with points of departure for public participation in rulemaking.

A number of functions have been attributed to public participation in rulemaking,[34] and many differences exist between legal systems. Positing the legal orders of the US and Germany as typical legal systems, it is possible to conclude that in both systems the public participates in rulemaking; differences appear in the volume of participation and in how participation is legally regulated, and can be explained through different understandings of the role of delegated legislation and different points of departure for understanding democracy (monistic vs. pluralistic).[35] Namely, the legal regulation of public participation in rulemaking is the result of the views of theory and the needs of practice, and is therefore a typical example of tension between the normative and the actual.

V. Conclusion

Existence of delegated legislation is a fact. Contemporary issues in public governance speak in favour of its extensive use, whether theorists like it or not. It is therefore important to address this form of legal regulation not only in a substantive but also in a procedural way. Procedure does matter, especially as the complexity and quantity of complex societal relationships grow. Having this in mind, we find the so-called problem solving model of rulemaking procedure a suitable starting point for its procedural arrangement – the legal norm is namely the result of the process of choosing between options. This allows us to focus on the role that civil society, interest groups and the general public today play in the governance process and on the findings of administrative science. However, simplifications in the form of merely copying American rulemaking procedure in a European continental law tradition are to be avoided. Despite convergence in terms of common public administration principles, one must be aware of different legal, administrative and cultural traditions. Nevertheless, rulemaking procedure in Europe is becoming more open and transparent and consequently raising questions in relation to basic constitutional principles, especially principles of democracy, rule of law and separation of powers.

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[32] Arkush (2013) proposes so-called "direct republicanism", which attempts to combine elements of representative and direct approaches. In a direct republican system, large panels of randomly selected citizens decide policy questions presented to them by government officials.

[33] Nevertheless, the relationship between public participation and administrative performance remains controversial (see Lee, 2014).

[34] See Seidenfeld (2013) for the role of politics in a deliberative model of the administrative state.

[35] See Ziamou (2001) and Vagt (2006).

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