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OPPORTUNITIES OF CIVIL SOCIETY INSTITUTIONS IN THE PROCESS OF ADOPTION AND IMPLEMENTATION OF LEGAL ACTS OF STATE AUTHORITIES

Summary

The paper studies the opportunities of civil society institutions, envisaged by the Ukrainian legislation, in the process of adoption and implementation of legal acts of state authorities. The author demonstrates that there are various ways, in which civil society can participate in administration of state affairs. A quite important way of such participation is influence on the law-making process of the parliament, the Head of State, and government. Such an influence of civil society institutions is based on the provisions of the Constitution of Ukraine, which guarantees that Ukraine is a democratic, social, law-based state; the people are the sole source of power in Ukraine and they exercise power directly or through the state authorities and local self-government bodies. The research studies the issue of participation of civil society institutions in development of law-making proposals (initiatives), in public discussions of draft acts, and in conducting examinations of such draft acts. The author established that civil society institutions have a number of opportunities in Ukraine to affect the activities of state bodies in order to facilitate the implementation of their authority, granted to them through elections, as well as to conduct control over the effectiveness and legality of such activities. One of the most important ways for civil society institutions to carry out their functions is their participation in the law-making process (process of developing, adopting, and implementing acts of state authorities).

Introduction

There are various ways, in which civil society can participate in administration of state affairs. A quite important way of such participation is influence on the law-making process of administrative subjects, i.e. parliament, the Head of State, and government. Such an influence is based on the provisions of the Constitution of Ukraine, which guarantees that Ukraine is a democratic, social, law-based state; the people are the sole

source of power in Ukraine and they exercise power directly or through the state authorities and local self-government bodies.

Undoubtedly, the best way for the people to exercise power or, in other words, to declare their will is through elections or referendum. These forms of direct democracy are characterized by certain peculiarities, such as periodicity (for elections), high cost and complexity of implementation (for referendum). Thus, the people of Ukraine and their organized associations, i.e. civil society institutions, constantly take part in alternative forms of participation in state administration, including through active involvement in the law-making process.

Apart from participation in the process of development of state authorities' draft acts, participation of civil society institutions through public control is necessary on the stage of acts being in force. Furthermore, the Strategy of National Security of Ukraine specifies that the main measures to increase efficiency of legal acts' implementation should include, in particular, improvement of the mechanism of public officials' responsibility for promptness, completeness, and accuracy of provided information and proper response to applications of citizens and public organizations, as well as appearances in the media [1].

Such researchers as O. I. Voronov [2], M. O. Kravets [3], Y. V. Chystokoliani [4] recently partially studied the issue of civil society's participation in the decision-making process of state authorities. They researched new aspects of interaction with state authorities, represented by government and other executive bodies. Judicial branch demonstrates substantial progress in relations with civil society. Particularly, on July 21, 2017, a regular session of the Judicial System Communication Committee, attended by, among others, Head of Supreme Judicial Council Mr. I. Benedysiuk and Head of Supreme Qualification Commission of Judges of Ukraine Mr. S. Koziakov, approved the Concept of Direct Contacts of Judges with the Public, developed according to the Conclusion of the Consultative Council of European Judges (CCJE) № 6 (2004) on fair trial within sensible time and the role of judge in judicial proceedings considering alternative means of dispute resolution and the Conclusion of CCJE № 7 (2005) «Justice and Society» [5].

1. Participation of civil society institutions in development of law-making proposals (initiatives) and public discussions of legal acts

It is widely accepted that law-making process of developing draft acts is a complex and manifold juridical procedural activity of law-makers, involving

consecutive stages (procedures), which taken together are aimed at adoption of legal acts. Properly designed law-making process directly affects the quality and promptness of development of the law-makers' draft acts, as well as the efficiency of their further implementation.

Normally, the main stages of draft act development are preparation of law-making proposal (initiative), organizing public discussion of draft act, and its examination.

According to O. Tomkina, the stage of draft act development allows to achieve high degree of organization in solving strategic tasks regarding economic growth, social and cultural development of the people, formation of civil society, as well as to mobilize activity of public organizations [6, p. 92]. Y. Pererva's stance also is reasonable, according to whom law-making process is characterized by involving unspecialized organizations and civil society institutions (scientific and educational institutions, parliamentarism facilitation foundations, various public organizations, etc.) into preparation of draft acts [7, p. 82].

I. Lozynska believes that the crucial law-making standard in a lawful state has to be the requirement of extended participation of civil society institutions in law-making process in different forms: submittal of legal initiatives (from groups of voters, public organizations, or indirectly through official subjects of legal initiatives); national discussion of draft acts, and delivery of expert conclusions [8, p. 11].

V. Kovalskyi and I. Kozintsev justifiably claim that there is a connection between law-making stages and law-making principles; they believe that «compliance with the principle of democratism and humanism is ensured by the stage of public discussion, whereas the principle of the supremacy of law and lawfulness is ensured by the stage of act's examination» [9, p. 16]. According to S. Slynko, the principle of democratism (public characteristic of law-making process) envisages active participation of representatives of various social strata in law-making activities, while the principle of humanism involves direction of legal acts towards protection of rights and liberties of citizens and highest possible satisfaction of their material and psychological needs [10, p. 80]. Furthermore, M. Voronov separately researched such a principle of law-making process as consideration of public opinion [11, p. 7].

Law-making proposal (initiative) is an initiation of the process of adopting legal acts and, accordingly, the first stage of act development. There is a debatable stance of certain authors that law-making process begins only with adoption of official decision on draft act preparation

[12, p. 193; 13, p. 95] and not development of law-making proposal (initiative).

Currently, Ukrainian legislation contains no clear regulation of such a category as law-making proposal (initiative). Meanwhile, corresponding right of citizens and civil society institutions is based on the provisions of the Constitution of Ukraine, which are regulations of direct action according to Article 8 of the Basic Law. Particularly, the right of citizens to request the authorities to develop and adopt acts is based on Article 38 of the Constitution of Ukraine, which specifies that all citizens are entitled to take part in administration of state affairs, as well as provisions of Article 40 of the Basic Law, which guarantee every citizen's right to submit individual and collective written applications or personally address state authorities, local self-government bodies, and civil servants and officials of these bodies, as well as they obligate the said officials to consider such applications and provide substantiated responses in a period, specified by law.

Requirements to applications, including to those containing proposals regarding development and adoption of acts, as well as regulations of the period of their consideration, are given in the Law of Ukraine «On applications of citizens», according to which an application is a written or spoken proposal that contains opinion as to regulation of social relations, improvement of legal foundation of governmental and civil life, social, cultural and other fields of activity of the state and society, as well as regarding improvement of the authorities' performance [14].

Other countries have positive experience of solving this problem. For instance, the Law of the Republic of Belarus «On Regulatory Legal Acts of the Republic of Belarus» specifies that law-making initiative is an official submittal by natural person or legal entity to state body or to public official containing draft act or substantiated proposal to adopt (issue) amendments, additions, adopt (issue), interpret, terminate, acknowledge as invalid, or cancel legal acts or their parts [15].

Whereas in Ukraine, there is a suggestion to legally establish the notions «law-making proposal» and «law-making initiative.» Particularly, law-making proposal is defined as substantiated application, submitted by authorized entity, regarding the necessity to adopt (issue) a regulatory legal act, introduce amendments into it, or acknowledge it as invalid, whereas law-making initiative is defined as official submittal of draft regulatory legal acts under established procedure by subjects of law-making initiatives [16].

Normally, law-making proposal has to be written (meanwhile, Ukrainian legislation does not prohibit submittal of proposals verbally or via e-mail)

and contain justification of such necessity and basis for development and adoption of corresponding act, as well as indicate the provisions of the Constitution of Ukraine that attribute the act in question within the competence of the law-making subject. Furthermore, such a proposal would ideally indicate how adoption of the act concerns the Pre-election campaign of the President of Ukraine, his annual or extraordinary address to the Verkhovna Rada of Ukraine about domestic and foreign affairs of Ukraine, as well as other strategic (program) documents, e.g. coalition agreement, programs of government activity, etc.

On the whole, we would agree with Y. Slovska, who believes that, in Ukraine, subjects of law-making initiative can theoretically be any natural persons or legal entities, although, in reality only influential political figures, scientists, and public organizations are able to exercise this right, as thanks to their practical experience they possess skills to generalize information regarding gaps of legislative regulations and possibility of personal cooperation with subjects of law-making initiative [17, p. 66].

Additionally, submittal of law-making proposal can contain in its annex a draft of the corresponding act and necessary accompanying documents, or only general description of the issue that requires resolution by adopting an act of the Verkhovna Rada of Ukraine, President of Ukraine, Cabinet of Ministers of Ukraine, or other law-making subject.

Research of O. Shcherbaniuk, based on the analysis of constitutions of such countries as Austria, Albania, Brazil, Georgia, Italy, Spain, Latvia, Lithuania, Poland, Romania, Slovenia, and Switzerland, justifies necessity to establish the public law-making initiative through introduction of corresponding amendments into the Constitution of Ukraine [18, p. 100].

Meanwhile, V. Skrypniuk offers to consider the public law-making initiative as one of the instruments for exercising the people's power or as a right granted by law to a certain number of citizens to request the parliament to adopt, cancel, or introduce amendments into a legal act (the right to make adjustments or changes of the current legislation at any time, when such a public need is articulated); the corresponding initiative may be formulated (proposal, formulated clause-by-clause and submitted under the established procedure) or unformulated (general proposal regarding the principles of the draft, which should be developed by the state authority) [19, p. 86].

Researching similar issues, V. Fedorenko points out that in some cantons of Switzerland, citizens are entitled to a national veto on laws passed by parliament (in the event of the collection of a necessary number of

signatures in favor of the cancellation of an already existing parliamentary law, such a law becomes invalid) [20, p. 62].

Such a stage of draft development as public discussions is quite important in the law-making process, including for civil society institutions. This stage involves a public discussion of the relevant act in order to further take into account the expressed proposals and comments thereon.

The stance of the Ministry of Justice of Ukraine is that the participation of civil society institutions in the rule-making process of the state through the discussion of draft acts is aimed at engaging citizens into the administration of state affairs, providing them with free access to information about the activities of the authorities, ensuring publicity, openness, and transparency in the work of these bodies, promoting the establishment of a systematic dialogue between the authorities and the public, improving the quality of development and adoption of decisions, creating conditions for citizens to participate in the drafting of such decisions [21].

It should be noted that in accordance with the Resolution of the Cabinet of Ministers of Ukraine «On ensuring the participation of the public in the formation and implementation of state policy», public consultations are mandatory in the form of public discussion on: draft regulatory legal acts of high social importance that concern constitutional rights, liberties, interests, and responsibilities of citizens, as well as acts that envisage granting privileges or placing restrictions on economic entities and civil society institutions, local governments' exercise of the authority, delegated to executive bodies by relevant councils; draft regulatory acts; drafts of state and regional programs of economic, social, and cultural development, as well as decisions on the status of their implementation [22].

O. Sinchuk expresses substantiated conclusion that «when citizens feel to be part of the rule-making process, there is an increased probability that they will be in favor of the product obtained as a result of this process» [23, p. 77].

I. Ibrahimova has a similar opinion, according to which the necessity of interaction and information exchange between the public and the authorities is due, primarily, to the need to ensure the legitimacy of the authorities and to confirm that the people hold the power [24, p. 106].

O. Tarnopolska also believes that the process of draft act development should include a scientific analysis, identification of the actual need for future legal regulation, highest possible consideration of the public opinion and suggestions and observations of public organizations, political parties, experts, and scientists, formulated in the scientific literature, public speeches, corresponding letters, and applications of citizens [25, p. 11].

In accordance with the Regulations on the procedure for development and submittal of draft acts of the President of Ukraine, draft acts of the Head of state, which envisage resolution of significant issues of national importance or related to the exercise of human and civil rights and liberties, may, according to the decision of the President of Ukraine, be brought forward for discussion by the public [26]. As the President of Ukraine pointed out during the presentation of the «Strategy of Reforms – 2020», a package of draft acts for the launch of priority reforms should be prepared through constant communication with experts and civil society [27].

Additionally, Ukrainian legislation establishes the procedure for engaging the public into the discussion of draft acts during the law-making activity of the parliament and government. In accordance with the Law of Ukraine «On the Regulations of the Verkhovna Rada of Ukraine», in order to hold preliminary consideration of the draft act or a draft of another act, representatives of public associations, experts, professionals, and other persons, who can express their opinion on expediency of their adoption, are invited to a meeting of the main committee [28].

According to the Regulations of the Cabinet of Ministers of Ukraine, the main developer has to organize a public discussion of draft acts that have public significance and relate to the rights and obligations of citizens, as well as drafts that provide benefits or privileges to individual economic entities; the government has to inform the public of its activities and decisions through press releases, press conferences, and briefings by government members, and to publish relevant materials in the print and electronic media, as well as to involve citizens in the decision-making process on issues of public interest or concerning the development and implementation of state social and economic policy, regulation of labor, social, and economic relations, national trade unions, their associations, and national associations of employers [29].

Foreign legislations contains the practice of public discussion of draft acts as well. For instance, Articles 22 and 23 of the Law of the Kyrgyz Republic «On Regulatory Legal Acts of the Kyrgyz Republic» stipulate that public discussion shall be carried out in relation to draft acts that affect the interests of citizens and legal entities, as well as draft acts regulating entrepreneurial activity [30].

The draft law of Ukraine «On Regulatory Legal Acts» also proposes to establish that a draft act concerning the rights, liberties, and legitimate interests of citizens, issues of socio-economic development of the state, shall be submitted to the public for discussion by means of its placement on the

official web pages of the state authorities or publication in printed media or otherwise communicated to the public [16].

For example, in the United States, in order to develop a qualitative draft act, several types of public discussion of draft acts are applied: written request of the opinion of interested parties, to which the relevant draft is sent; conducting consultations and conferences; establishing advisory committees, which can operate as one-time, temporary, or permanent; holding hearings, which are divided into informal and formal (competitive) [31, p. 63].

At the stage of public discussion of draft acts of the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, and other law-making subjects, the international practice of white books and green books can be applied. According to Ukrainian scientists, the task of the green book is to help the government to draw the attention of citizens to the problem in the field of public administration, as well as to find out the attitude of citizens towards possible solutions, and the white book is aimed at recording the results of consultations and consideration of proposals and recommendations formulated by citizens [32, p. 38].

Therefore, the main purpose of the stage of public discussion is to ensure that the draft act developer considers as much as possible the proposals and comments that may be provided by any entity. This, in turn, makes it possible to substantially simplify the subsequent implementation of the act, in view of its public recognition, and the elimination of deficiencies that the developers could not foresee on their own for objective reasons.

2. Draft examination and control over implementation of current legal acts as a guarantee of participation of civil society institutions in the law-making process of state authorities

Draft act examination and the involvement of civil society institutions in it are of great significance in the law-making process.

In this respect, V. Kovalskyi and I. Kozintsev have a well-justified opinion that compliance with requirements for draft act design is ensured, primarily, by a legal (juridical) examination, which is commonly viewed as the expert assessment of the draft act on its compliance with the legislation of Ukraine, international treaties of Ukraine, as well as the main provisions of the legislation of the European Union, the competence of the law-making body; ensurance of its implementation by organizational measures, sanctions, incentives; adherence by the developer to the rules of legal engineering [9, p. 86].

Some scholars separate the public examination [24, p. 106] and gender examination [33, p. 130] of draft acts.

Moreover, it is necessary to draw attention to the fact that the Cabinet of Ministers of Ukraine approved a special Procedure for Public Examinations [34]. According to the said Procedure, public examination is an integral part of the mechanism of democratic governance of the state, which involves civil society institutions assessing the activities of executive bodies, the effectiveness of the adoption and implementation of decisions of such bodies, development of proposals for solving socially significant problems for their consideration by executive bodies; the proposals prepared by the civil society institutions based on the results of the public examination are taken into account by the executive body during the preparation of socio-economic development programs, state designated and regional programs, the formation of budgets of the respective level, and the solution of issues of current affairs.

Additionally, we should point out the provisions of the Law of Ukraine «On the Framework of Prevention and Counteraction of Corruption», according to which, the Ministry of Justice of Ukraine conducts anti-corruption examination in order to identify provisions in draft regulatory legal acts, which may contribute to corruption offenses. The results of the examination are subject to mandatory consideration during making a decision on the publication (adoption) of the relevant act [35].

According to the Regulations of the Cabinet of Ministers of Ukraine, in the case of a public anti-corruption expert examination, the developer is obliged to provide citizens or associations of citizens, at their request, with the draft act and necessary materials, as well as to take into account the proposals received as a result of public anti-corruption examination, during the draft elaboration [29]. Meanwhile, public anti-discrimination examination is carried out by public organizations, natural persons, and legal entities in accordance with the Procedure for conducting public consultations on the issues of development and implementation of state policy [36].

Thus, legal examination is a crucial stage in the draft act development, which enables establishing the facts of the act's disconformity to the requirements of acts of the same or higher legal force, to prepare proposals on the necessity to amend other legal acts, to render impossible or minimize the future appeal against the act in the Administrative or Constitutional Court, to protect the law-making subject from possible criticism regarding the imperfection of their acts.

After clarifying the peculiarities of engaging civil society institutions into the stages of development of law-making proposals (initiatives), conducting public discussions and examinations of draft acts, we should consider the issue of public control.

Public control over the law-making process is directly related to such types of control as parliamentary, governmental, and judicial. Meanwhile, the control activities carried out by civil society institutions are quite new for the Ukrainian constitutional law and least studied. There is a reasonable opinion that unlike governmental control, which is clearly defined institutionally and legally, public control seems to be rather amorphous [37, p. 273].

The definition of the term «public control» can be found only in the draft Law of Ukraine «On Public Control», which proposes to define this term as implementation of legal, organizational, and information measures to ensure the strict observance of the provisions of the Constitution, laws of Ukraine, other regulatory legal acts so as to promote their effective operation and conducting the functions, entrusted to them, of protecting the rights, liberties, and interests of citizens [38].

The issues of control are closely linked to the activities of civil society institutions regarding monitoring the results of the law-making process. According to M. Afanasieva, it is necessary to consolidate the activities of various monitoring subjects in order to overcome the unsystematic nature of this area and increase the effectiveness of the law-making process and its results. Formation of a permanent organizational mechanism for monitoring the legislation will ensure the prompt, targeted collection of reliable information on the implementation of legislation, the adoption of appropriate law-making decisions, and achievement of goals set in the legal acts [39, p. 41].

In his research, A. Shkolyk asserts that public's control over public administration bodies does not possess coercive tools that could be applied during the exercise of state control, however, its role in democratic and legal states should not be underestimated [40, p. 167].

In the law-making process, public control is especially effective at the stage of act implementation. As Y. Tikhomirov notes, implementation is the final stage of legal regulation, its result, as well as the process of implementation of legal provisions through the exercise of subjective rights and obligations; the inherent attribute of implementation is the assessment of the effectiveness of such regulation, since the designated function of law is measured by its actual implementation, which is determined through the

«feedback» from society to law on the basis of assessing its utility in general [41, p. 33, 316].

It should be emphasized that public control over the law-making process of administrative subjects is based, primarily, on the provisions of Articles 55 and 124 of the Constitution of Ukraine, according to which every citizen is guaranteed the right to appeal against decisions of state authorities in courts, whose jurisdiction extends to all legal relations that arise in the state.

We would agree with the opinion contained in the collective work of Ukrainian scholars regarding the fact that the system of ensuring legality in the field of state administration plays an important role in the control by public organizations, which is an indicator of the development of a democratic society [42, p. 357]. It is believed that, in every country, the concept of control over the activities of state-authorized entities has its own peculiarities, however, the general understanding is that its main feature is the activities of citizens and their organizations, aimed at monitoring and analysing information about administrative processes; revealing inconsistencies, violations, and deviations from social and, more importantly, legal norms; putting forward demands and proposals for the elimination of deficiencies or adjustments of the corresponding acts [43, p. 577].

S. Kosinov has a substantiated stance, according to which in the conditions of democracy public control solves a dual task: protects the rights and liberties of human and citizen, and also ensures (preserves) the legitimacy of the authorities [44, p. 322].

In accordance with the Law of Ukraine «On Public Associations», for the purpose of accomplishing its purpose, a public association has the right to submit proposals (remarks), applications, and complaints to the state authorities; to participate in drafting legal acts issued by state authorities and concerning the issues of governmental and public life; take part in the work of consulting, advisory, and other auxiliary bodies created by state authorities [45]. The Laws of Ukraine «On Access to Public Information» [46] and «On Trade Unions, Their Rights, and Guarantees of Their Operation» [47] provide additional guarantees for the control of public organizations over the law-making process of the authorities.

Undoubtedly, public control can significantly affect the activity of law-making subjects, who are forced to increase their effectiveness in the presence of constant monitoring by citizens and their associations. Meanwhile, according to American scholar C. Howarth, public control over state authorities, even if it is carried out under the law, can only be conducted if the public is aware of government operation and its

peculiarities. Therefore, information is the key to the implementation of effective state policy and trust in government institutions. In accordance with the US legislation, each state agency periodically publishes in the Federal Register the descriptions and addresses of its central and local bodies, the rules for carrying out procedures, the description of available blanks, and an indication of where these blanks can be obtained; it provides materials on its activity for the public's information and copying, which allows anyone to obtain data from any kind of federal agency on any matter [48, p. 51].

Currently, scholars of constitutionalism raise the question of establishing in Ukraine the institution of constitutional complaint in 2016 as a new tool of public control. V. Radziievska points out doubtless expediency of direct access of any citizen to constitutional jurisdiction body using the constitutional complaint as a form of protection of violated rights and liberties [49, p. 56].

In his research, M. Hatsko proposes to differentiate between several functions of the cassation complaint: right-exercising (exercising one of the forms of participation of citizens in the administration of state affairs), right-restoring (one of the ways of restoring violated right), informational (one of the sources of information for state authorities), preventive (one of the ways to eliminate violations of law and prevent offenses) [50, p. 207].

Conclusions

Civil society institutions have a number of opportunities in Ukraine to affect the activities of state bodies in order to facilitate the implementation of their authority, granted to them through elections, as well as to conduct control over the effectiveness and legality of such activities. One of the most important ways of carrying out their functions by civil society institutions is their participation in the law-making process (process of developing, adopting, and implementing acts of state authorities, primarily, the parliament, Head of state, and government) through active involvement in the preparation of law-making initiatives (proposal), organizing public discussions of draft acts, and conducting their examination.

The law-making initiative (proposal) as an official submittal to the state authorities regarding the feasibility of developing and/or adopting an already developed draft act is the energy of civil society, which stimulates the law-making process. Involvement of civil society institutions is absolutely vital, as it is difficult for law-makers to understand the needs of citizens; here,

particular obstacle may lie in the bureaucratic procedures used by the authorities.

The purpose of the public discussion is to prevent the cessation of the law-making process initiated by the law-making initiative (proposal), to ensure that this initiative has not been distorted in the process of preparation and revision of the act, and also it allows to significantly simplify the subsequent implementation of the act, because of its public recognition, and to eliminate the flaws that the developer could not foresee on an objective basis for objective reasons. In addition, the discussion allows to balance the interests of the developers of the law-making initiative, other citizens (public associations), market players, which may be affected by the initiated law-making process, and the state, since law-making initiatives, as a rule, relate to certain responsibilities of the state or the tools for their implementation and additional human, material, and financial (budget) resources.

Examination of draft acts of state authorities is directly connected with the process of public discussion and is conditioned, in particular, by the fact that resources are limited in any country; quite often the interests of an interested party are narrow-profile; by nature, everyone resists anything new, which involves spending extra time and/or energy. Examination, conducted by or involving independent entities-representatives of civil society institutions, enables solution of these problems of general and special nature.

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