

Realization of the constitutional right to public associations: theoretical and legal aspects

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Abstract. The article is devoted to conducting a general theoretical and legal study of the modern dimension of the right to public associations.

It is indicated that general theoretical legal science does not have a single, generally accepted understanding of the concept of civil society. It is proved that from the point of view of general theoretical jurisprudence, the right to public association is a form of implementation of representative democracy. It includes institutionalized forms of interaction between the state and civil society. Collective realization of rights through the creation of public organizations by citizens is the best way to exercise rights and freedoms, as well as to satisfy various interests. Public associations are the main subjects of civil society in view of their goals, tasks and legal status.

It was established that the right to public associations is enshrined at the level of international, including "soft" law, as well as constitutional and legislative, which indicates that it is adequately guaranteed by regulations.

A significant actualization of this right has been proven in connection with pandemic threats and in the context of the reform of decentralization of public power in Ukraine. It is motivated that the COVID-19 pandemic revealed and exacerbated a huge number of shortcomings in the functioning and decisions made by public authorities and, as a result, posed a threat to civil and political rights that modern states have accumulated. It is also indicated that the pandemic has demonstrated that the public has very few means and methods with limited mechanisms by the state to limit public activity for the purpose of protecting public health. Civil society organizations are one of the few that have the potential to control and challenge the executive, especially in times of crisis. It is argued that human rights NGOs have the potential to supplant more radical demands for economic justice and thus serve reactionary rather than revolutionary purposes.

Keywords: public associations, right to association, legal institutions, pandemic crisis, decentralization.

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Реалізація конституційного права на громадські об'єднання: теоретико-правові аспекти

Анотація. Стаття присвячена проведенню загальнотеоретичного дослідження сучасного виміру права на громадські об'єднання.

Вказано, що загальнотеоретичній юридичній науці немає єдиного, загальноприйнятого розуміння поняття громадянського суспільства. Доведено, що з погляду загальнотеоретичної юриспруденції, право на громадське об'єднання виступає формою реалізації представницької демократії. Вона включає інституціоналізовані форми взаємодії держави і громадянського суспільства. Колективна реалізація прав через створення громадянами громадських організацій є найкращим способом здійснювати права і свободи, а також задовольняти різноманітні інтереси. Громадські об'єднання є основними суб'єктами громадянського суспільства з огляду на їх цілі, завдання та правовий статус.

Констатовано, що право на громадські об'єднання закріплені на рівні міжнародного, у тому числі «м'якого» права, а також на конституційному та законодавчому, що вказує на належну його нормативну гарантованість.

Доведено значну актуалізацію цього права у зв'язку з пандемічними загрозами та в контексті реформи децентралізації публічної влади в Україні. Мотивовано, що пандемія COVID-19 виявила та посилила величезну кількість недоліків функціонування та прийняття рішень органами публічної влади, і як наслідок, несла загрозу громадянським і політичним правам, яку накопичили сучасні держави. Також вказано, що пандемія продемонструвала, що дуже мало засобів та методів залишається у громадськості при лімітованих механізмах з боку держави обмежувати публічну діяльність з метою охорони громадського здоров'я. Громадські організації одні з небагатьох суб'єктів котрі мали потенціал контролювати та кидати виклик виконавчій владі, особливо під час криз. Вмотивовано, що правозахисні неурядові організації мають потенціал витіснити більш радикальні вимоги економічної справедливості і таким чином служити реакційним, а не революційним цілям.

Ключові слова: громадські об'єднання, право на асоціації, правові інституції, пандемічна криза, децентралізація.

Introduction

Modern law should be transformed. Human rights as unconditional legal values are perceived as an indisputable axiological attribute. However, these rights are also subject to change, especially in terms of transforming the understanding of equality, the security of rights, and the legitimacy of their restriction. Recently, many variable determinants in the legal dimension of general principles have emerged, often in the form of "legitimate restrictions". For subjects of law with an average level of legal awareness, they are positioned with a classic form of inequality and discrimination.

This general conclusion should be considered in the context of individual human rights. Political rights are the basis of democratization of society and the rule of law, so their realization is very important for state and legal interests. Using the example of the political right to public associations, we should consider the current change in the ideological dimension of this right.

The purpose of this article is to conduct a general theoretical and constitutional study of the modern dimension of the right to public associations.

Research status. Political issues of human rights institutionalization have always been relevant for jurisprudence. Such scholars as S. Bostan, Y. Bysaha, D. Bedov, N. Bortnyk, I.

Zharovska, V. Kovalchuk, and others have dealt with the problems of general theoretical and legal understanding of human rights of a political nature.

The problems of political human rights in the context of the right to association have been the subject of consideration by such scholars as P. Alston, E. Seyhan, J. Yu, H.H Jia, D. Lin and others.

However, political and globalization changes are making their own adjustments, so the announced subject of research requires additional comprehensive study.

Results

Representatives of the Austrian school of law (P. Alston) generally note that the human rights system faces an existential threat. They explain that countries that once defended human rights now openly doubt their legitimacy. Inequality and estrangement are at least partly to blame. People who feel "badly affected by... economic changes brought about by globalization" have feelings of "fear and resentment" that are being effectively exploited by "populist" leaders. Most people feel that they "do not have the opportunity to participate in a human rights organization" that exists to protect "'asylum seekers,' 'criminals,' [and] 'terrorists'", in part because NGOs focus on the rights of marginalized minorities and do not address violations of economic and social rights [1].

In general theoretical science, there is no single common understanding of the concept of civil society. One group of scholars interprets it as a set of interactions between individuals that have developed in the course of activities in defense of human rights and freedoms. In contrast, the second group includes institutionalized forms of such interaction in civil society, primarily public associations established and registered in accordance with the current legislation. At the same time, they are united by the fact that the creation of civil society organizations by citizens is the best way to exercise rights and freedoms and satisfy various interests. Public associations are the main subjects of civil society in terms of their goals, objectives and legal status.

The importance of public associations is recognized at the international and national levels and is enshrined in a number of international, European and national legal acts. The right to freedom of association is confirmed by major international human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The Council of Europe and the Organization for Security and Cooperation in Europe (OSCE) have developed a comprehensive set of standards and political commitments relating to the right to freedom of association. This right is enshrined in both the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) adopted by the Council of Europe and the Copenhagen Document of 1990 [2, p.16].

The right to freedom of association has been repeatedly confirmed by judicial practice at the international and national levels. In addition, over the past few decades, a number of international governmental and non-governmental organizations have developed and adopted many documents proclaiming the right to freedom of association. These documents include recommendations, resolutions, interpretative decisions of contracting authorities and reports of UN special rapporteurs. They have laid the foundation for "soft" international law.

The praxeological dimension is also very significant in this aspect. The ECtHR recognizes that the state has a positive obligation to ensure the realization of the right to freedom of association. In particular, the Court has ruled that "genuine and real respect for the right to freedom of association cannot be reduced purely to the state's duty not to interfere [...]. At the same time, the public authorities are obliged to guarantee the proper functioning of an association or political party, even if they annoy or offend persons opposed to the legitimate ideas that these associations seek to support" [3].

An important constitutional principle of freedom of association should be its real separation from public authorities. By the right to public associations, the interests of civil society, not the state, are realized. Let's look at the example of China. The Chinese government adopted a model of "total control" to manage social organizations in the totalitarian era before the Opening Up and Reforms, without leaving any space for social organizations to survive as the CCP considered social organizations to be "revolutionary" and "deconstructive." The Chinese have adopted a gradual control system to manage social organizations in the post-Opening and Reform era of authoritarianism, treating social organizations differently according to their threats to the ruling order and their benefits to economic development, as the CCP views social organizations as a "complex" but "complementary" force[4]. But the party has a significant influence on civil organizations. Therefore, despite the easing, we cannot say that there is a real right to association in this country in the context of liberal values.

At the international level, there is a strong legal framework that regulates the right to freedom of association and lays the foundation for national legislation recognizing the right to associate as an integral part of civil society. The Constitution of Ukraine and a number of laws are important for understanding the legal framework for the activities of public associations, which, among other things, constitute the prerequisites for influencing the legal culture as the basis for the development of civil society in Ukraine.

Article 36 of the Constitution of Ukraine states that "citizens of Ukraine have the right to freedom of association in political parties and public organizations for the exercise and protection of their rights and freedoms and satisfaction of political, economic, social, cultural and other interests, with the exception of restrictions established by law in the interests of national security and public order, public health or protection of the rights and freedoms of others" [5].

In Ukraine, the right under study is protected at the constitutional level and there is a specialized legislative act - the Law of Ukraine "On Public Associations"[6]. It defines the legal and organizational framework for the realization of the right to freedom of association, the procedure for the formation, registration, operation and termination of public associations. The constitutional doctrine defines many principles of the functioning of associations, and it is acceptable that the legislative provisions have implemented positive legal standards, in particular, Article 3 of the Law defines the principles of formation and operation of public associations: 1) voluntariness; 2) self-governance; 3) free choice of the territory of activity; 4) equality before the law; 5) absence of property interest of their members (participants); 6) transparency, openness and publicity.

Today, public institutions cannot function without supervisory control by representatives of civil society. All-powerfulness can lead to inadequate decisions and those that violate the rights and legitimate interests of the public. One of the ways to make the government more democratic is to strengthen the functioning of public participation channels. The modernized world has to change the meaning of democracy constantly because of the needs of people in collective life. With the growth of urbanization, forms of representative democracy have become effective methods of public participation in the life of any country. Participatory democracy has gradually evolved into "representative" democracy, which is explained by the increasing number of participants, as well as the growing complexity and diversity of decisions. Consequently, the need for an institution that would be the voice of the people and that could exert pressure on the administration has increased.

Today, depending on the new approach to governance, the act of voting has lost its primary features, elections are no longer the only tool for participation in representative democracy and the understanding of democracy that allows citizens to actively participate in

political and social life is changing, such methods prevail. For this reason, civil society organizations are gaining in importance in liberal democracies.

In recent years, the importance of public associations has increased significantly. The pandemic threat has become the catalyst that has shaped the actualization of the law under study in new dimensions.

The recent situation is as follows. On January 30, 2020, the World Health Organization (WHO) declared the COVID-19 outbreak a "public health emergency of international concern". Since then, at least 89 countries have declared states of emergency. Using their newly acquired executive powers, governments have imposed mandatory quarantines, lockdowns and curfews, expanded surveillance and closed borders. The right to liberty, the right to privacy, freedom of movement and freedom of assembly, association and expression are just a few of the many rights that have been restricted under the slogan "stay home, save lives." The concern, as always with exceptional regimes, is that after the pandemic is over, governments will continue to retain emergency powers [7, p.269].

In particular, first, the COVID-19 pandemic has revealed and exacerbated a huge number of shortcomings in the functioning and decision-making of public authorities and, as a result, posed a threat to civil and political rights that modern states have accumulated.

Secondly, the pandemic has demonstrated that the public has very few means and methods left with limited mechanisms on the part of the state to restrict public activities for the purpose of protecting public health. Civil society organizations were among the few that had the potential to control and challenge the executive branch, especially during crises.

Third, human rights NGOs have the potential to crowd out more radical demands for economic justice and thus serve reactionary rather than revolutionary goals.

In addition to the pandemic threat, the decentralization reform has become a significant factor in actualizing the human right to association. Local authorities have gained more powers, the territorial community has become the center of the residents' lives, so the organizations created are now a powerful public mechanism for assisting local governments.

A representative of the Turkish constitutional doctrine points out that in the modern world, the culture of good neighborliness has diminished and individuals have stayed away from decision-making mechanisms, ignoring problems related to the neighborhoods in which they live, which weakens neighborhood relations and has had a negative impact on the organization and participation in neighborhoods. Due to community-based organizations, the weakened culture has begun to strengthen again, and residents are taking steps to address problems instead of ignoring them. Thanks to the activities and projects of local-level CSOs, the number of their members is growing, which has a positive impact on local democracy by solving problems and issues of local importance [8, p.43].

Conclusion

From the point of view of general theoretical jurisprudence, the right to public association is a form of realization of representative democracy. It includes institutionalized forms of interaction between the state and civil society. Collective realization of rights through the creation of public organizations by citizens is the best way to exercise rights and freedoms, as well as to satisfy various interests. Public associations are the main subjects of civil society in terms of their goals, objectives and legal status.

The right to public associations is enshrined in international law, including "soft" law, as well as in constitutional and legislative law, which indicates that it is properly guaranteed by law.

The significant actualization of this right in connection with the pandemic threats and in the context of the decentralization reform of public authorities in Ukraine has been proved.

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