

DOI: <https://doi.org/10.34069/AI/2022.53.05.18>

How to Cite:

Ryndiuk, V., Gaydulyn, O., Kuzmenko, O., Chorna, V., & Sharkova, I. (2022). Legal institute of lobbying: the problem of legislative regulation in Ukraine. *Amazonia Investiga*, 11(53), 186-193. <https://doi.org/10.34069/AI/2022.53.05.18>

Legal institute of lobbying: the problem of legislative regulation in Ukraine

Правовий інститут лобіювання: проблема законодавчого врегулювання в Україні

Received: March 15, 2022

Accepted: May 24, 2022

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Abstract

The article examines the problem of legislative regulation of the socio-political institution of lobbying in Ukraine on the basis of borrowing similar experience from developed democracies using the dialectical method. It is noted that lobbying should be considered as one of the democratic institutions of influence of the public and business structures on decision-making by public authorities (representation of interests), namely as a professional mediation activity between society and government. Legislative regulation of the institution of lobbying in Ukraine may not restrict other rights of citizens regarding their influence on the authorities, which are guaranteed by the Constitution of Ukraine and defined by national legislation (for example, the right to appeal to the authorities, the right to participate in the management of public affairs through advisory bodies, parliamentary hearings, public discussions, etc.). It is concluded that the most pressing aspects of the problem of legal institutionalization of lobbying in Ukraine, which need to be addressed, are the following: development of theoretical-methodological

Анотація

В статті досліджується проблема законодавчого врегулювання суспільно-політичного інституту лобіювання в Україні на основі запозичення аналогічного досвіду розвинених демократичних держав з використанням діалектичного методу. Зазначається, що лобізм слід розглядати як один із демократичних інститутів впливу громадськості та бізнесових структур на прийняття рішень органами публічної влади (представництва інтересів), а саме як професійну посередницьку діяльність між суспільством та владою. Законодавче врегулювання інституту лобізму в Україні не може обмежувати інші права громадян щодо їх впливу на органи влади, які гарантовані Конституцією України та визначені національним законодавством (наприклад, право на звернення до органів влади, право брати участь в управлінні державними справами через консультативно-дорадчі органи, парламентські слухання, громадські обговорення тощо). Зроблено висновок, що найбільш актуальними аспектами проблеми

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foundations of lobbying in national political-legal realities, taking into account similar foreign experience; a comprehensive approach to the legislative regulation of lobbying activities at all levels of public authority, and on the basis of clear harmonization of lobbying rules with legislation in related areas; legislative definition of the concept and all components of lobbying activities, the legal status of lobbyists; particular attention should be paid to the development of ethical rules for the lobbying profession, which should be based on the principles of legality, transparency, openness and integrity.

Keywords: democracy, integrity, lobbying, rule-making activity, citizens' rights, public authority.

Introduction

In Ukraine, the issue of legislative regulation of lobbying in the activities of public authorities has been actively discussed for over 20 years, in particular, referring to the similar experience of other countries. During this time, a number of draft laws were registered in the Parliament of Ukraine, the subject of which is the legal institute of lobbying: "On lobbying in Ukraine" (1999), "On the legal status of groups united by common interests (lobby groups) in the Verkhovna Rada of Ukraine" (1999), "On the activities of lobbyists in the Verkhovna Rada of Ukraine" (2005), "On the regulation of lobbying in Ukraine" (2010), "On lobbying" (2016), "On public advocacy" (2017), "On ensuring transparency and legality of communication with subjects of power" (2017), "On state registration of lobbying entities and lobbying activities in Ukraine" (2020 and revised - 2021), "On lobbying" (2020) (Stavniichuk, 2020). However, none of the proposed draft laws has been adopted.

At the same time, lobbying, as a mechanism for representing the interests of various groups before the government, is an integral part of the political life of any democratic state, a specific model of communication between society and government. The objective necessity of lobbying is explained by the fact that the state itself can not sufficiently take into account the interests of different social strata, groups that make up society (Godny, 2019). The absence of civilized legislative regulation of lobbying leads to the functioning of this phenomenon in Ukraine as an

правової інституціоналізації лобізму в Україні, які потребують свого вирішення, є наступні: розробка теоретико-методологічних засад лобювання в національних політико-правових реаліях з врахуванням аналогічного зарубіжного досвіду; комплексний підхід до законодавчого врегулювання лобістської діяльності як на всіх рівнях публічної влади, так і на основі чіткого узгодження норм про лобювання з законодавством у суміжних сферах; законодавче визначення поняття та всіх складових лобістської діяльності, правового статусу лобістів; окрему увагу слід приділити розробці етичних правил професії лобіста, які мають виходити з принципів законності, прозорості, відкритості та доброчесності.

Ключові слова: демократія, доброчесність, лобювання, нормотворча діяльність, права громадян, публічна влада.

informal institute (Yarovi, 2017). Ukrainian society has formed a negative attitude towards such a social phenomenon as lobbying, the latter is associated with the illegal influence of business, oligarchs on public authorities and their officials in favor of making a specific decision, corresponds to various manifestations of corruption and bribery. All this determines the relevance of the chosen research topic.

The purpose of this article is to analyze attempts to regulate lobbying activities in Ukraine and identify a number of key issues that need to be addressed in the process of adopting a special law on lobbying in Ukraine.

Theoretical Framework or Literature Review

The objective need to lobby, as one of the democratic institutions of society's influence on the government, has led to interest in various aspects of this issue from both political scientists and legal scientists from various foreign countries. For example, Weil (2017) provides a comprehensive overview of different kinds of lobbying strategies and techniques. Hall & Deardorff (2006) model lobbying not as exchange (vote buying) or persuasion (informative signaling) but as a form of legislative subsidy—a matching grant of policy information, political intelligence, and legislative labor to the enterprises of strategically selected legislators. Nicoll (2007) suggests a theoretical and empirical framework and attempts to explain

variations in interest group behavior at the policy level.

Intensive political development of Ukrainian society and its further democratization has led to a number of theoretical-legal studies of the phenomenon of lobbying and domestic scientists. This study analyzed the work of Ukrainian legal scholars who have dealt with this problem.

Thus, in his dissertation research Godny (2019) substantiates the understanding of lobbying as a political and cultural phenomenon of society, the specificity of which is determined by the existing features of the relevant state traditions, constitutional system, differences in economic systems, historical features, cultural traditions of society and suggests the use of the concept of "civilized lobbying". The issues of development and formation of lobbying in Ukraine, in particular in the context of the use of foreign experience, its legislative regulation have been studied by a number of domestic scientists, whose works were analyzed in this article.

Also, the information and analytical base of the study consists of draft laws on lobbying, which were developed and submitted to the Parliament of Ukraine, explanatory notes of the subjects of the right of legislative initiative to them and conclusions of the Main Scientific and Expert Department of the Verkhovna Rada of Ukraine on these draft laws, other official documents.

Methodology

The basis of the study is the dialectical method, which provides for the need for a comprehensive study of such a social political-legal phenomenon as lobbying, the specific content of which is determined by the influence of historical, social, economic, cultural components of a society, state. Based on this, lobbying can be positive, be one of the democratic legal institutions of interaction between civil society and government, and negative, be synonymous with corruption.

The formal-logical method, based on the laws of formal logic, was used to clarify the concept of lobbying as one of the activities, the content of which is the influence of stakeholders in civil society, business on the decision-making process of public authorities. The concept of lobbying should be defined through a more general generic concept of influence (pressure, representation of interests) with the definition of significant (essential) specific species characteristics of this activity.

Activity approach, which assumes that the methodology of the study is based on the category of human activity as a subject of political-legal relationships, used in determining all the necessary elements of the structure of lobbying activities, namely its subject, object, result, methods and purpose.

Results and Discussion

The history of the origin of the term "lobby" (lobbying) is associated with lobbies, hotel corridors, the corridors of the parliaments of Great Britain and the United States, which became a meeting place for various stakeholders and government officials who listened to requests and promised, often not selflessly, but for money, to fulfill them (Kartashov, Horodok & Herasymchuk, 2016). In the allegorical sense of political terminology, this word is interpreted as "corridors of power" (Marenichenko, Sychova & Garkavyi, 2018). Vocabulary definition of the word "lobbying" (or "lobby") is a group of people who exert influence, exert pressure when considering issues in public bodies in the interests of certain groups, individuals in favor of one or another decision (Busel, 2005). So, lobbying is usually seen as a set of ways of targeted influence of individual citizens and their associations, business structures to public authorities in the process of their rule-making activities; a special mechanism of dialogue between the public, representatives of different social interest groups and public authorities.

First of all, it is necessary to say about the often quite broad understanding of the concept of "lobbying" and it is identified with the concept of public or social "influence", "pressure", "representation of interests" in domestic legal science. In particular, the title of one of the draft laws "On lobbying" in the process of its consideration was changed to the following: "On the influence of the public on the adoption of normative legal acts" (Nesterovych, 2010a). In this connection, attention should be drawn to the position of the Parliamentary Assembly of the Council of Europe, expressed in the report "Lobbying in a democratic society" of 5 June 2009. According to its, the regulation of lobbying should be based on the principle of clear delineation of lobbying as a professional paid activity and the activities of civil society organizations (Bazilevych, Nesterovych & Fedorenko, 2015).

The influence of civil society (interested groups and individuals) on the rule-making activities of public authorities can be exercised through a

number of democratic legal institutions. Nesterovych (2014) writes that there are two models of public influence in the law-making process: 1) Anglo-Saxon (traditional, classical) model (USA, Canada, Great Britain, Australia, etc.) - public influence on the adoption of normative-legal acts is based on the implementation of the constitutional right of citizens to petition the authorities and has a clearly defined legal form; 2) continental (European) model (Germany, France, Austria, the Netherlands, etc.) - the influence of the public on the adoption of normative-legal acts is carried out through specially created advisory bodies to public authorities.

Lubinets (2020) points to the main difference between the American (Anglo-Saxon, classical) and continental (European) models by regulating lobbying in the law-making process. The American model assumes the existence of legislation on lobbying, which establishes the procedure for registration and reporting of lobbyists. The continental model does not impose strict requirements on lobbyists, but the legal framework of these states imposes legal restrictions mostly on officials in relations with members of the public. This model provides for the establishment of special advisory institutes, in which representatives of different interest groups have the opportunity to influence policy decisions.

Accordingly, approaches to the legislative regulation of lobbying in different countries are different. Some countries have chosen the American model by adopting a separate special legislative act in this area (USA, Canada, Australia, Great Britain, Austria, Ireland, France, Lithuania, Poland, etc.), and other continental - has no special legislative acts on lobbying, provisions governing certain aspects of lobbying are included in various legislative acts (Germany, Netherlands, Italy, Spain, Finland, Czech Republic, Croatia, Romania, Latvia, etc.). At the same time, for example, the legislation on lobbying in Hungary, adopted in 2006, was repealed in 2011 due to its ineffectiveness (Lubinets, 2020). The Law on Lobbying was adopted in the Republic of Lithuania in 2000, but in the first year of its operation only 6 people registered as lobbyists (European Information and Research Center, 2016). Thus, for various subjective and objective reasons, attempts at legislative regulation the institution of lobbying in different countries are not always effective.

The country of "classical lobbying" is the United States, where the legislative regulation of this

activity has deep roots, and did not arise as a result of a one-time political decision. In 1946, the world's first special law regulating lobbying was passed, aimed at separating lobbying from corruption. Yarovoi (2019) points to the positive experience of the United States in the field of special regulation of lobbying activities, and notes that the problem of corruption related to the influence of various groups in society on decision-making by officials, until it is fully resolved, even in the United States.

Both models of representing the interests of citizens (their groups) before the government are to some extent implemented in the legislation of Ukraine. Thus, the first model of public influence on the rule-making of public authorities is based on the implementation of the constitutional right to appeal to public authorities, local self-government bodies and officials of these bodies, who are obliged to consider the appeal and give a reasoned response within the time limit established by law in Article 40 (Constitution of Ukraine, 1996). According to the Law of Ukraine No. 393/96-VR (1996), citizens can address public authorities with proposals (comments) which provide advice, recommendations on the activities of these bodies and their officials, as well as to express opinions on the regulation of social relationships and living conditions of citizens, improving the legal framework of state and public life, socio-cultural and other spheres of state and society. An electronic petition is a special form of collective appeal of citizens to the President of Ukraine, the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, and the local self-government body.

The second model of public influence on the rule-making of public authorities is based on the realization of the constitutional right of citizens to participate in the management of state affairs in Article 38 (Constitution of Ukraine, 1996). For example, at the level of the Parliament of Ukraine, the influence of the professional scientific community on legislative activity is realized through the creation of the Scientific Advisory Board under the Chairman of the Verkhovna Rada of Ukraine - consultative-advisory body that operates to attract highly qualified specialists in the field of law to work on draft laws and provides its scientific support (Order No. 502, 2021). At the level of executive power, this model is implemented through the legal institution of public councils. Thus, the Resolution of the Cabinet of Ministers (Resolution No. 996, 2010) provides for the establishment of public councils at ministries, other central executive bodies and local state

administrations as temporary consultative-advisory bodies that promote public participation in the formation and implementation of state and regional policy. The main tasks of the public council, in particular, are promoting the consideration of public opinion by the executive body, involvement of representatives of interested parties in decision-making.

Accordingly, lobbying can be considered only as one of the public political-legal institutions of public influence (stakeholders and individuals) on the rule-making activities of public authorities and their officials, carried out by special entities (lobbyists) on a professional basis. The formation of the legal institution of lobbying in Ukraine can take place only taking into account the existing in Ukraine legal democratic institutions of public influence on government, without limiting the latter, and in parallel with them. Thus, speaking about the legal regulation of lobbying in Ukraine, lobbying should be seen as a professional activity of lobbyists (intermediaries between stakeholders and public authorities), which consists in defending the interests of certain groups and exercising legitimate targeted influence on public authorities and their officials in favor of making of one or another decision. Legislative consolidation of the legal institution of lobbying should not replace or limit other existing and existing legal institutions of public influence on the decisions of public authorities, and should provide for the formation of a professional group of mediators between society and government (lobbyists), who must have a certain amount of rights and responsibilities to carry out their mediation activities.

In particular, the Concept of the Draft Law of Ukraine "On Public Influence on the Adoption of Legal Acts" defines lobbying as a legitimate influence of duly registered and accredited persons (lobbyists and lobbying associations) on public authorities, their officials in the interests of customers, during the adoption (participation in the adoption) of their normative-legal acts (Order No. 448-p, 2009). The draft law No. 3059 "On State Registration of Lobbying and Lobbying in Ukraine" of 11 February 2020 defines lobbying as the activity of a natural or legal person, who from the moment of state registration and for monetary remuneration, in accordance with the terms of the agreement on lobbying, aimed at fulfilling the terms of such agreement, as well as preparation, planning, coordination, research, other ancillary work, which at the time of their implementation are aimed at fulfilling the terms of the contract for the provision of lobbying services. Thus,

lobbying is a "mediating" public political and legal phenomenon, one of the mechanisms of communication between society and business with the government (Marenichenko, Sychova & Garkavyi, 2018).

The subjects of lobbying are lobbyists (legal entities and individuals) who are engaged in mediation activities between society and government, provide organized representation of the interests of various stakeholders, and are registered in accordance with the legislation on lobbying. For example, in the United States there are lobbyists, lobbying firms, law firms, companies specializing in government relations, public affairs. In Germany, lobbying is exclusively for legal entities with the status of associations, unions and organizations. In France, these are individuals and legal entities, which are mainly formed by professional, age and other characteristics. In the United Kingdom, there are lobbyists who are united in lobbying firms, and most lobbyists are members of the Association of Professional Political Consultants (European Information and Research Center, 2016). Accordingly, the objects of lobbying activities are public authorities and their officers. The result of lobbying is the adoption (non-adoption) of a decision (normative-legal act) by these bodies or their officials in the interests of relevant groups or individuals. The purpose of lobbying is to organize and exert pressure (legitimate influence) on the process of decision-making by the authorities of certain decisions (normative-legal acts) to secure the interests of interested groups or individuals (Nesterovych, 2010b). These interests may be different, but even in countries with rich democratic traditions, lobbying pursues predominantly socio-economic interests (Odintcova, 2008).

The goal of lobbying can be achieved in different methods. Their choice depends on the political-legal situation in a particular country, potential opportunities of subjects and features of objects of lobbying activity (Kravchenko & Kucheriavyi, 2019). In the experience of different countries of legal regulation of lobbying, the main organizational and legal forms of interaction of lobbyists with public authorities in the process of adopting normative-legal acts are: sending petitions to the authorities; organization and holding of public hearings; participation of lobbyists in the work of parliamentary committees, consultative and advisory institutions established under public authorities; initiating the adoption of necessary normative-legal acts (European Information and Research Center, 2016). For example, in the

European Union, the mechanism for cooperation between civil society and the legislature is the official "European Commission Transparency Register", where any European organization can submit its data in order to receive notification of the opening of a particular issue of future EU legislation or, by filling in the relevant documents, thus communicate its position to the EU structures (Krut, 2020). In the Ukrainian reality, in the absence of legal regulation of lobbying activities and its shadowy nature, illegal methods of dialogue are usually used: providing illegal benefits, undeclared funding of politicians and civil servants, shadow ties, backstage conspiracies (Main Scientific and Expert Department of the Verkhovna Rada of Ukraine, 2020).

Professional lobbyists have a certain legal status, which determines the scope of their rights and responsibilities, and therefore have real legal mechanisms in order to provide public authorities with information on certain topical (socially significant) issues that need to be addressed, and to exert legitimate pressure on a decision. Accordingly, organizational and legal forms of participation of lobbyists in the activities of public authorities, methods of control of lobbying activities and legal responsibility of lobbyists also require a clear legislative definition. Rosenko (2010) writes that lobbying is sometimes compared to advocacy. Only an advocate protects the already violated right of the client, and the lobbyist seeks to ensure his right by adopting appropriate normative-legal acts.

When trying of legislative regulation the institution of lobbying in Ukraine, special attention should be paid to the ethical side of the issue, which determines the positive or negative nature of lobbying in general. In particular, it is a question of creation of an image of the highly professional, honest and incorruptible lobbyist, formation of image of independent, successful and respectable profession. For example, in the United States, these functions are assigned to the American League of Lobbyists, a non-governmental organization established in 1979 (Main Scientific and Expert Department of the Verkhovna Rada of Ukraine, 2020). Ethical rules of conduct for lobbyists should be based on the principles of legality, transparency, openness and integrity as the basic principles of the lobbying profession. Legality provides for lobbying exclusively in the legal field. Transparency and openness are associated with the availability to the public of complete, objective and reliable information about lobbying. Integrity

characterizes the lobbyist's personality, is key to his reputation as a professional, should become the standard of the profession, find expression in corporate moral and ethical standards that lobbyists must follow when lobbying, and is ensured by the existence of lobbying ethics. In particular, the draft Law on Lobbying (Law No. 5144, 2016) proposed the following interpretation of integrity as a principle of lobbying. Integrity is the activity of lobbyists aimed at conscientious protection of the interests of clients of lobbying services, prohibition of lobbyists to simultaneously represent the interests of two or more competing customers of lobbying services, if this may lead to a conflict of interest as defined in the relevant lobbying agreements.

It should also be noted that the legislative regulation of lobbying in Ukraine should be comprehensive and systematic, in particular, taking into account that lobbying takes place in the rule-making process at all levels of public authority from parliament to local governments. The norms of the special law on lobbying should be harmonized with the legislation regulating the functioning of other legal institutions of influence of certain groups of society and citizens on the government, as well as with the legislation determining the legal status of public authorities, anti-corruption legislation and other legislation in related areas.

Conclusions

In the current political-legal realities of Ukraine, lobbying is an integral part of the life of the state and society, but operates outside the legal field, has a mostly shadowy, corrupt nature. The experience and effectiveness of legislative regulation of lobbying in different countries are different: both the existence of special laws on lobbying, and the inclusion of rules on certain aspects of lobbying in other laws. Technical copying of foreign models of legal regulation of lobbying without taking into account the historical, cultural and state traditions of Ukrainian society, domestic political-legal reality is unpromising. The formation of the legal institution of lobbying in Ukraine cannot restrict other rights of citizens regarding their influence on the authorities, which are guaranteed by the Constitution of Ukraine and defined by national legislation. Lobbying should be considered as one of the democratic institutions of influence of the public and business structures on decision-making by public authorities (representation of interests), namely as a professional mediation activity between society and government.

Lobbying needs to be clearly distinguished from other activities related to the influence of civil society on decision-making by public authorities.

The main issues that need to be resolved in the process of adopting a special law on lobbying in Ukraine are the following: 1) development of theoretical-methodological foundations of lobbying in national political-legal realities, taking into account similar foreign experience; 2) a comprehensive approach to the legislative regulation of lobbying activities at all levels of public authority; 3) clear coordination of lobbying norms with legislation in related areas; 4) legislative definition of subjects, objects, purpose, result, methods of lobbying activity, legal status of lobbyists, their rights, duties and legal responsibility, the order of their state registration; 5) development of corporate moral-ethical standards, which should guide professional lobbyists, based on the principles of legality, transparency, openness and integrity as the basic principles of the lobbying profession. Only in this case, lobbying can become one of the effective, efficient and legitimate democratic political and legal institutions of public influence on the content of decisions of public authorities.

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