Constitutional Framework of Activities of Nonprofit Organizations Producing Public Goods

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ABSTRACT

The basic human needs include the needs for public goods, their satisfaction stipulated by the Constitution of the Russian Federation. The State cannot be the sole producer of such goods, as the state monopoly in the public sector has a negative impact on the quality of public goods. Their production should be based on the competitive activities of nonprofit organizations (NPO). The participation of the state and local governments in the public sector should be primarily limited to financing the citizens' expenditure for the consumption of public goods, as well as to the regulation and control of the activities of NPO.

The constitutional framework for the creation of membership-based NPO is the right to association guaranteed by Art. 30 of the Constitution of the Russian Federation. Creating conditions for the exercise of the citizens' right to association requires a system of guarantees including socio-economic, political, legislative and other guarantees. A special role among the guarantees of the citizens' right to association is played by its judicial protection against the misconduct of the state and local self-government. Such protection should be aimed at the application of liability measures to public entities, their bodies and officers in the event of violation of the rights and legitimate interests of nonprofit organizations or their members.

Keywords: *social state, public sector of economy, public goods, citizens' right to association, nonprofit organizations*

1. Introduction

The twenty five years that have passed since the adoption of the current Constitution of the Russian Federation is a relatively short period by historical standards. However, over this short period Russia has undergone profound transformations of social life which would have taken many decades in other conditions. The prerequisite for such rapid transformations was the consolidation of the foundations of the constitutional system alongside with development of the model of relations between the state and the individual which is fundamentally new for our country.

Its ideological foundation was the concept of an individual formulated in the Constitution of the Russian Federation and designed to ensure the person's individual freedom and autonomy in the natural and social world as a system of sovereign rights inherent in each individual. The central place in this system is occupied by the need for personal space, as well as the closely related needs for freedom, spiritual creativity and other intangible values. It seems by no means accidental that a person, his free will and fundamental, inalienable rights enshrined in the country's fundamental law, are recognized as the highest value (Article 2 of the Constitution of the RF)[1].

Among other things, the Constitution of the Russian Federation guarantees the inalienable human rights to access to public goods, such as life, health, education, security, and cultural values. The rights and freedoms that are significant in a socially oriented market economy include the right to work in the conditions meeting the safety and hygiene requirements[2], the right to health protection, to education and other rights listed in Art. 37-43 of the Constitution of the Russian Federation. Of great importance is the exercise of cultural rights and freedoms enshrined in Art. 44 of the Constitution, namely the freedom of literary, artistic, scientific, technical and other types of creativity, teaching, as well as the right to participate in cultural life, to use cultural institutions and to access cultural values[3].

This circumstance was reflected in the ruling of the Constitutional Court of the Russian Federation dated November 16, 2004 No. 16-P where cultural rights and freedoms, including the rights in the field of communi-

[1] Constitution of the Russian Federation (adopted by a nationwide vote on 12.12.1993). As amended by the laws of the RF on amendments to the Constitution of the RF dated 30.12.2008 No. 6-FCZ, dated 30.12.2008 No. 7-FCZ, dated 05.02.2014 No. 2-FCZ, dated 21.07.2014 No. 11-FCZ // CL of the RF. 2014. No. 31. Art. 4398.

[2] For more details see: *Fabricius F.* Hum Human Rights and European Politics: Political and Legal Situation of Workers in the European Union. M.: Ed. Moscow State University, 1996.

[3] See: *Ivakina D. S.* The Concept and System of Human and Civil Cultural Rights and Freedoms in Russia // Constitutional and Municipal Law. 2018. No. 9. P. 146.

cation, are defined as necessary elements of the constitutional status of an individual[4]. Constitutional scholars also consider the provision of cultural rights and the production of the relevant goods to be a condition for the dynamic development of the present-day Russian society. In their opinion, the task of a democratic social state at the present stage of development is to create conditions for comprehensive creative self-fulfillment of the person since cultural creativity is an important aspect of individual and social freedom[5].

2. Constitutional doctrine of the social state: pro and contra

The listed constitutional rights are the individual's claims to public goods necessary for the full and comprehensive fulfillment of human freedom in social life that have been established and legally guaranteed by the basic law. The world's experience shows that the production and provision of such goods cannot be put on a purely market basis. The nature of public goods and their characteristic features (such as, in particular, indivisibility, non-competitiveness in consumption, impossibility of excluding the so-called "free riders" from the consumers) make their production knowingly loss-making and irrelevant for profit-making organizations and individual entrepreneurs whose activities are focused on profit-making.

The obligation to produce public goods can be forcibly imposed on these market agents by the law. However, this path only leads to a significant decrease in the quality of the goods produced and the services provided to the consumer. This circumstance was noted by a number of economists (in particular, J. St. Mill, J. Ledyard, M. Blaug, L. I. Jacobson, etc.) who suggested recognizing the natural monopoly of the state[6] in the production of public goods to overcome the "market failures". This resulted to emergence of the doctrine of the "welfare state" emerged which dominated the economic policy of Western countries in the second half of the last century.

This idea was most fully translated in the principle of the social state, as enshrined in paragraph 1 of Art. 7 of the Constitution of the RF which proclaimed the Russian Federation a social state, its policy aimed at creation of the conditions ensuring a decent life and free development of the person. According to the basic law, the main activities of the social state include protection of labor and health of people, establishment of a guaranteed minimum wage, state support for the family, motherhood, fatherhood and childhood, the disabled and the elderly, development of a system of social services, establishment of state pensions, benefits and other measures of social protection of the population[7].

These areas naturally require an appropriate economic base which is the so-called public sector of the economy. It is no coincidence that many theorists considered the public sector an almost monopoly sphere of economic activities of the social state. Based on this, it was generally accepted that the property component of the public sector is public (state and municipal) property recognized and protected on an equal basis with the private property of citizens and legal entities, as well as state and municipal finances, primarily budget funds.

Over time, however, there were revealed systemic shortcomings and contradictions of the "welfare state" experiencing as many failures as the free market[8]. In the process of production and provision of public goods the state appeared to be facing an acute shortage of information being, due to its asymmetry[9], an irreplaceable resource in the conditions of centralization inherent in state structures. As a

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[4] Resolution of the Constitutional Court of the Russian Federation dd. November 16, 2004 No. 16-P on the case of verification of the constitutionality of the provisions of paragraph 2 of Art. 10 of the Law of the Republic of Tatarstan "On Languages of the Peoples of the Republic of Tatarstan", part 2 of Art. 9 of the Law of the Republic of Tatarstan "On State Languages of the Republic of Tatarstan and Other Languages in the Republic of Tatarstan", paragraph 2 of Art. 6 of the Law of the Republic of Tatarstan "On Education" and paragraph 6 of Art. 3 of the Law of the Russian Federation "On Languages of the Peoples of the Russian Federation" in connection with the complaint of citizen S. I. Khapugin and the inquiries of the State Council of the Republic of Tatarstan and the Supreme Court of the Republic of Tatarstan // CL of the RF. 2004. No. 47. Art. 4691.

[5] See: *Chetvernin V. A.* Democratic Constitutional State: Introduction to Theory. M.: Ed. The Institute of State and Law of The Russian Academy of Sciences [IGP RAN], 1993. Pp. 3–11.

[6] See: *Blaug M.* Blaug M. Economic Thought in Retrospect. M.: Delo, 1996. P. 196; *Jacobson L. I.* The Public Sector of the Economy: Economic Theory and Politics. M.: State University Higher School of Economics [GU VShE], 2000. Pp. 17–18; *Ledyard J.* Failures of the Market. M.: Infra-M, 2004. Pp. 501–508.

[7] See: *Umnova-Konyukhova I. A.* The 1993 Constitution of The Russian Federation: The Constitutional Ideal Evaluation and its Implementation in Light of International Experience // Lex russica. 2018. No. 11. P. 27.

[8] See: *Yakovleva E. E.* Economics of the Public Sector in Russia and in the World // Izvestiya TRTU. 2006. No. 17 (72). P. 118.

[9] See: *Arrow K. J.* Uncertainty and the Welfare Economics of Medical Care // The American Economic Review. 1963. Vol. 53. No. 5. Pp. 941–973.

consequence, the low quality of the public goods provided by the state becomes a problem. In addition, the idea that it is the state that is the main, if not the only, producer of public goods gives rise to paternalistic ideas about its role and place in public life which are almost the main disadvantage of the social market economy negating the advantages of this concept.

Stimulating the state paternalism, as well as the welfare mentality of the general public, the doctrine of the social market economy ideologically substantiates the unlimited expansion of the state and the suppression of private initiative under the plausible pretexts of ensuring "social justice", support of the poor and vulnerable members of society, etc. In its turn, the government intervention in the economic life has a far-reaching negative impact on the private sector, creating a threat of stagnation and inefficiency in solving the problems faced by it. An alternative to such a situation is the widest possible introduction of *quasi-market* structures into the public sector, these structures being created by attracting private property and private producers into this sphere.

3. Nonprofit organizations as the major producer of public goods

There are reasons to assert that production of public goods is to be the primary focus of the activities of nonprofit organizations (NPOs) which do not consider profit-making to be their main purpose and do not distribute the profit received among the participants (paragraph 1 of article 50 of the Civil Code of the RF)[10]. At the same time, since the constituent documents of all NPOs, in one way or another, presuppose the implementation of the activities aimed at profit-making, they can be participants both of the market and various quasi-markets formed in the public sector of the economy. In its turn, the participation of the state and local self-government bodies in the public sector should be mainly limited to financing of the expenses of public goods consumers choosing their private producers independently and on a competitive basis[11].

It is important to emphasize that the expenditures from the state and municipal budgets are not the only source of financing of public goods consumption. A considerable share of the finances accumulated by the public sector are private funds, including the funds of the consumers themselves, which allows increasing the interest of the latter in the quality of the provided goods. Such a system focused on the competition of private producers of public goods seems to be more efficient than their production directly by the state or state financing of a limited number of oligopolistic producers[12]. As noted by researchers, "private property in a competitive environment stimulates more efficient use of resources and meets the needs of consumers better than the state property"[13].

Widely known is the British experience of formation of quasi-market structures in the public sector of the economy. A distinguishing feature of the British model of organizing the public sector is the use of vouchers, that is, a special type of securities giving their holders the right to demand the provision of an appropriate share of public goods. The vouchers were designed to promote solution of the problems arising from the very nature of public goods, thereby ensuring their targeted provision to consumers[14]. The result was the formation of quasi-markets that worked well in practice for the widest range of public goods and services, primarily in the field of education, health care, utilities, etc. in Great Britain in the 1980s-1990s.

By comparison, in our country, quasi-market mechanisms in the public sector of the economy are being formed more slowly, the rates varying in its various segments. One of the actively developing quasi-markets is the housing and utility sector where more than 50% of the housing stock were already serviced by management companies by the beginning of the current decade, and in some constituent entities of the Russian Federation (for example, in Moscow region) this figure was 80%[15]. At the same time, the functioning of management companies of the housing and utility sector is fraught with a number of systemic difficulties, the ways to overcome them not being fully outlined.

This experience which was successfully applied both in the UK and in other countries enabled some theorists to come up with the suggestion to go even further, extending the market or quasi-market

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[10] Civil Code of the Russian Federation. Part 1. Approved by Federal Law dated 30.11.1994 No. 51-FZ // CL of the RF. 1994. No. 32. Art. 3301; 2018. No. 1. Part 1. Art. 43.

[11] See: *Le Grand J., Bartlett P.* Quasi-markets and Social Policy. London : Macmillan Press, 1993.

[12] See: *Burchardt T., Hills J., Propper C.* Private Welfare and Public Police. New York : J. Rowntree Foundation, 1999. P. 14.

[13] *Andrushchak G. V.* Quasi-markets in the Economy of the Public Sector // Economics of Education. 2008. No. 3. P. 214.

[14] See: *Klein R.* Privatization and the Welfare State // Lloyd Bank Review. 1984. Jan. P. 12–29.

[15] See: *Kitsay J. A.* Role of Management Companies in Housing and Communal Services: Foreign and Domestic Experience // Theory and Practice of Social Development. 2012. No. 1. P. 162.

principles to the production of any public goods, including those that were traditionally included in the sphere of responsibility of the state, its bodies and executives (for example, law enforcement, justice, crime prevention, etc.). Such recommendations certainly look quite utopian and hardly feasible in practice. Their main shortcoming seems to be the naive confidence in the possibility of solving the problems requiring comprehensive solutions by economic means only. In particular, it seems obvious that police lawlessness and violence are not overcome by the privatization of the police, but by the formation of the mechanisms of democracy, also including civil control over the activities of law enforcement agencies, that is, over the quality of the public goods produced by them.

At the same time, this concept contains a rational kernel. Namely, it is fundamentally wrong to see the state as the main producer and supplier of public goods, with the exception of those that, like justice or crime prevention, cannot be provided privately (although the participation of private individuals in this cannot be completely excluded). A different approach to the public sector of the economy seems to be more correct as it sees a sophisticated interweaving of market and quasi-market mechanisms in it. According to this approach, the provision of many public goods (for example, reimbursable educational or medical services) can be commercialized in order to improve their quality.

The goods that cannot be provided to the consumer solely on a market basis due to their non-property nature should be produced by quasi-market structures, their main participants being NPOs based on private property, which will minimize the participation of the state in the public sector. Therefore, the issue is the decentralization of decision-making processes and the transfer of the primary responsibility for the production of public goods to NPOs. Being independent subjects based on private property, NPOs are not built into the system of hierarchical ties, and therefore are free to choose the optimal strategies for public goods production. That is, conditions arise both for improving the quality of the public goods provided, and for developing optimal principles of interaction between the state and private producers of these goods in the public sector of the economy.

4. Citizens' right to association and its legal guarantees

In the light of the above, there is an important practical task of ensuring and protecting the citizens' right to association stipulated by Art. 30 of the Constitution of the Russian Federation. The right to association is the constitutional basis for the creation and operation of NPOs based on the participation of citizens and organizations in it (such as non-governmental organizations, associations, consumer cooperatives, real estate owners 'associations, including homeowners' associations, etc.)[16]. Comprehensive implementation of this right by individuals and legal entities is likely to become an important incentive for the development of civil society structures in our country and will also allow stimulating public goods production by private entities.

As already noted, ensuring the citizens' right to association requires an integrated approach aimed at creating a system of guarantees, including socio-economic, political, legislative and other guarantees[17]. However, it is to be admitted that this system has not fully taken shape in the Russian Federation, which hinders the NPOs' activities of providing public goods and at the same time hinders the development of the public sector of the economy based on civil initiative. Among the various reasons, one should highlight the limited sources of funding of the activities of non-profit organizations, the presence of legislative contradictions and gaps, and the insufficient effectiveness of judicial guarantees.

No less important is the lack of a clear understanding of the legal nature of NPOs, as well as of the goals and objectives of their activities. Thus, one cannot agree with the widespread statements (based on the literal interpretation of paragraph 2 of article 2 of the Federal Law "On Non-profit organizations")[18], according to which the latter are to be completely deprived of the right to carry out other activities, apart from those aimed at achieving social, charitable, cultural, educational, scientific and managerial purposes, in order to protect the health of citizens, to develop physical culture and sports, to meet the spiritual and other intangible needs of the citizens, to protect the rights, legitimate interests of citizens and organizations, to resolve disputes and conflicts, to provide legal assistance, as well as other purposes related to the production of public goods. Thus, this is the question of an almost complete ban on the performance of income-generating activities by NPOs under the pretext

[16] See: *Lysenko V. V.* Law on Union into the Public Associations and Noncommercial Organizations // State and Law. 2011. No. 6. Pp. 92–95.

[17] For more detail see: *Agishev R. A.* Constitutional Base and Guarantees of Human and Citizen Rights to Association in the Russian Federation // Leningrad Law Journal. 2014. No. 3 (37). Pp. 41–42.

[18] On Non-Profit Organizations: Federal Law dated 12.01.1996 No. 7-FZ. As revised by federal law dated 29.07.2018 No. 260-FZ // CL of the RF. 1996. No. 3. Art. 145; 2018. No. 31. Art. 4849.

that the contents of such activities "remained legally uncertain, which is certain to create possibilities for various kinds of abuse"[19].

Meanwhile, it should be understood that performance of income-generating (profit-making) activities is not an end in itself for NPOs, but contributes to the achievement of the main goals of their activities. Being deprived of an important source of income, NPOs will lose their financial and economic independence, which will lead to their increased dependence on the state which is already considerable. That is why it is difficult to agree with the lawyers who, striving for the dogmatic purity of concepts, believe that income generation cannot be among the activities of NPOs due to the non-commercial nature of the latter. Actually, it is not the contents of the activities, but only the gradation of its main goals, that makes it possible, in our opinion, to distinguish between profit-making and non-profit organizations, including at the level of legislative regulation.

The aforesaid also determines one more direction of improving the legal status of NPOs which has to be dwelt on only briefly. This is about endowing non-profit organizations engaged in the production and provision of public goods with general legal capacity. In accordance with paragraph 1 of Art. 49 of the Civil Code of the RF, the legal capacity of an NPO is known to be special. They can only have the subjective rights and obligations that correspond to the main objectives of the activities stipulated by the constituent documents. This is the difference between NPOs and profit-making organizations having general legal capacity and any rights and obligations not prohibited by the law.

This limitation of the freedom of NPOs' activity gained momentum in judicial practice. The ruling of the Constitutional Court of the RF dd. February 19, 1996, No. 5-O established that the limits of the NPOs' activities were set both by the constituent documents and the duty to comply with the laws[20] formulated in paragraph 2 of Art. 15 of the Constitution of the RF. Thus, a "rubber situation" was established, since the obligation to comply with the Constitution of the RF and Russian laws is universal extending both to citizens and organizations and to the state, as well as other public legal entities. Therefore, in our opinion, emphasizing this obligation in relation to NPOs can only contribute to the introduction of a regime of mandatory regulation of their activities in law enforcement and judicial practice. In order to avoid such a situation, it seems expedient to legislate the norm according to which NPOs primarily involved in the activities related to the production and consumption of public goods, including consumer cooperatives, associations (unions), charitable and other foundations, autonomous non-profit organizations, etc., may have any rights and obligations not prohibited by the applicable law, including, of course, the obligation stipulated by paragraph 2 of Art. 15 of the Constitution of the RF.

A special role in the system of guarantees of citizens' right to association seems to be played by its judicial protection at all levels. It is obvious that the violations of this right requiring judicial intervention are diverse. Such violations include both unlawful actions of individuals and legal entities (for example, chicanery prohibited by Article 10 of the Civil Code of the Russian Federation: the exercise of civil rights solely with the intention of causing harm to another person, actions bypassing the law with a knowingly illegal purpose, as well as other knowingly dishonest exercise of civil rights), and above all, the arbitrariness of public authorities.

It is no secret that the actions of the state, its bodies and officials aimed at preventing citizens from exercising their right to association are extremely common at present. In particular, this is about the unjustified denials of state registration of NPOs which become possible in a situation when the procedure itself at the legislative level is unnecessarily complicated compared to the state registration of profit-making organizations. This creates the preconditions for the arbitrary discretion of the competent authorities in the issue of denying registration for an NPO. In this regard, the proposals of a number of lawyers to simplify the procedure of state registration of NPOs by extending general regulations on state registration of profit-making organizations to the latter (with account of the specifics of their activities, of course) seem quite reasonable and justified.

Nevertheless, the creation of legislative guarantees of the right to association, as well as the conditions stimulating the public goods production activities of NPOs is a necessary, but far from sufficient requirement. It is important already now to strive for the formation of a stable judicial practice preventing unjustified denials of state registration for NPOs, as well as denials of registration on the grounds not applicable to profit-making organizations. In other words, the judicial authorities should contribute

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[19] *Lysenko V. V.* Op. cit. P. 93.

[20] Determination of the Constitutional Court of the RF dated February 19, 1996 No. 5-O on the refusal to accept for consideration the complaint of Ural independent territorial trade union of workers of various forms of ownership as not meeting the requirements of the federal constitutional law "On the Constitutional Court of the Russian Federation" // Legal reference system (SPS) "Consultant Plus".

to the development of a unified procedure of state registration for all organizations, both profit-making and non-profit. Moreover, a guarantee of the right to association implemented in the activities of the judicial power would be the establishment of the most favorable treatment for state registration of the NPOs primarily involved in production and provision of public goods.

In addition, in accordance with the provisions of Art. 11 and 12 of the Civil Code of the RF, judicial protection is the main means of ensuring the property independence of NPOs. It is the courts that play the leading role in protecting the property rights of this category of entities, including in cases of its forced termination on the grounds stipulated by the law. Such grounds include, for example, execution upon property for the obligations of the owner (Art. 237 of the Civil Code), termination of the person's ownership of the property that cannot be owned by the person (Art. 238 of the Civil Code), alienation of immovable property due to seizure of the site on which it is located (Art. 239 of the Civil Code), alienation of real estate in connection with the seizure of the land plot for state or municipal needs (Art. 239.2 of the Civil Code), etc.

In all these cases, arbitrary actions on the part of the state, its bodies and officials are certain both to undermine the stability of property relations and to have an extremely negative effect on the exercise of the right to association, contributing to a decrease in the quality of the public goods produced by NPOs. Creation of effective means of judicial protection is supposed to help overcome the negative trends emerging in this area. In the long term, the goal to be achieved by the legislation, judicial practice, as well as by the efforts of the scientific legal community and other representatives of the civil society is the formation of the mechanism of responsibility of the state and other public legal entities to individuals, including non-profit organizations.

Thus, the judicial protection of NPOs from unlawful or other unfair actions on the part of the state and local self-government bodies, like no other, will contribute to ensuring the implementation of the constitutional right to association and, as a result, the development of civil society institutions, as well as improving the structures of the public sector of the economy.

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