

Historical aspects and the meaning of lobbying from a legal perspective

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There is no doubt that the term “lobbying” has become an integral part of the modern political rhetoric. It is hard to imagine that the decisions taken domestically or internationally are free from influence of political and economic relations participants: large business entities, national or regional elite, certain high-ranking officials. Due to the increasing role and continuous presence of lobbying in the political relations the question of its legal regulation is becoming more and more essential.

It is reasonable to start the analysis of the nature of lobbying from a look-back study. The history of the term “lobbying” derived from the term “lobby” – the place of a walk in a monastery. In the XVII century the term “lobby” was used to define the premises for a walk in the House of Commons in England. Starting from 1640 it was used to define the premises nearby the council chamber of the House of Commons used for meetings of the Parliament’s members with citizens¹. In the United States the term “lobby” and its derivatives

can be found in the statements of James Madison, the fourth US President. In 1808, these terms were used during debates in the US Congress. By the middle of the XIX century, the term “lobby” was used to define the interest groups in the US Congress and the respective groups in legislative assemblies of the states. In 1862, the term “lobbyist” came into use in connection with corruption².

When Ulysses S. Grant was in office, the term “lobby” was used to define the place for meetings of political officials (senators, ministers) with citizens in the entrance hall (lobby) of Willard Hotel. In the hotel’s lobby the political issues were discussed and, as a result, the most rational proposals of citizens won support and state representatives promised to realize them.

Therefore, the term “lobbying” derived from the place where the meetings of Ulysses S. Grant with Americans took place. Despite of initially democratic nature of such meetings, further cooperation with

officials in the United States was of corruptive nature³.

There is another position according to which lobbying runs back to the start of the Congress operations and relates to so called "boarding house groups". Boarding house group were the groups of congressmen-representatives of different states who dwelled and ate together. These groups were very united in the Congress and appeared to be a good access point to the legislative procedure for the interested organizations⁴.

In 1770s-1780s groups named "caucuses" (groups of congressmen united for political purposes; for example, Congressional Black Caucus, Congressional Steel Caucus) stepped up. In the beginning of the XIX century committees as organizational units of the Congress were formed, which boosted lobbying activities. According to Thomas Woodrow Wilson, the 28th US President: «There can be no doubt that the power of the lobbyist consists in great part, if not altogether, in the facility afforded him by the Committee system»⁵.

Samuel Culter Ward (1814-1884) is considered to be a lobbying revolutionary who withdrew from standard corruptive approach in lobbying and created new type of lobbying – social lobbying. He arranged dinners for political leaders, made friends with senators, ministers, giving arguments to defend his viewpoint. Therefore, lobbying in the US stopped to be associated with undignified behavior and was deemed as a respected and well paid professional occupation⁶.

The development of lobbying activity in states is worth noting separately. According to the Constitution of Georgia dated 1877 lobbying was declared a crime. The punishment for carrying out lobbying practices was imprisonment for the term of one to

five years. Massachusetts represented another approach to lobbying and introduced a system for lobbyists' registration in 1890⁷.

At the federal level the history of lobbying begins with admission of the fact of government relations. In connection with this two Resolutions of the US Congress in which the term "lobbyist" was officially used should be mentioned. The Resolution of 1852 passed by the House of Representatives prohibited a newspaperman «who shall be employed as an agent to prosecute any claim pending before Congress» from being on the floor of the House⁸. The Resolution of 1876 contained a direct requirement for the agent to inform orally whose interests they were presenting⁹.

Foreign Agents Registration Act (FARA, 1938) is considered to be the first act regulating lobbying activities, despite of a narrow scope of its implementation. The Act requires persons acting as agents of foreign principals in political capacity to go through registration procedure and to provide reports regarding their activities.

It is worth mentioning that the first instances of foreign interests lobbying in the US took place much earlier than the date of FARA adoption. For instance, due to successful lobbying practices the transaction between the Russian Empire and the US in 1867 regarding the sale of Alaska became possible. The Russian Government paid the amount of USD 30,000 to the former US senator¹⁰.

At the present time the provisions of FARA apply to relations a party of which is a representative of a foreign state, foreign political party or any other foreign principal. To be subject to FARA, a foreign principal is to be engaged in lobbying or represent a foreign client who does not pursue

noncommercial purposes directly (for example, officers of international organizations, diplomatic missions etc.). FARA sets out that foreign agents are obliged to (a) provide the Attorney General with the application on registration, information regarding finance and business; (b) allow access of state inspection services to their documents; and (c) indicate types of political propaganda carried out by them.

The basic document regulating lobbying activities is the Federal Regulation of Lobbying Act adopted in the United States in 1946. According to this Act persons engaged in lobbying activities in the US Congress were to pass the registration procedure and present reports about their activities quarterly. It should be noted that the Act was limited in scope due to the following reasons: (a) it applied only to lobbying in the US Congress; (b) reports of lobbyists were provided on a voluntary basis; (c) the Act applied only to relations between the lobbyists and the Congressmen and did not regulate cooperation of lobbyists with other Congress officers. The last argument is based on the court practice, in particular, the court comes to this conclusion in case *United States v. Harriss*, 347 U.S. 612 (1954).

The Act of 1946 directly distinguished lobbying and corruption, stating that its provisions did not apply to the facts set out in the Bribery Act and could not be construed as abolishing the provisions of the Bribery Act.

The Act of 1946 set out the following requirements for the persons receiving money for influencing on the Congress' decisions:

1. they shall be registered with the clerk of the House of Representatives or the secretary of the Senate;

2. they shall provide personal information and report on their purposes of activities;

3. they shall deliver financial accounts in relation to receipt of all funds for their activities; and

4. they shall provide reports to registering clerk.

The Act was in force until the Lobbying Disclosure Act was enacted in 1995, which is currently in force as amended by the Honest Leadership and Open Government Act (2007). At the Lobbying Disclosure Act signing ceremony Bill Clinton said that it was a harsh but positive law that pierced the corporate veil from the world of Washington lobbying and was designed to reestablish credibility of Americans to their Government¹¹. The Act of 1995 was the result of the struggle between representatives of two different approaches to lobbying regulation: supporters of heavy and detailed regulation, on one hand, and supporters of more restrained, framework regulation, on the other hand. Distinctive feature of the Act of 1995 is that it regulates not only lobbying in the US Congress, but also lobbying in executive authority, primarily represented by the President and the Vice-President of the United States.

Having reviewed the process of establishment of lobbying regulation in its native land, the United States, it is worth analyzing the historic aspects of representation of private persons' interests in relations with the state authority in Russia. According to some researchers, formation of the interest groups and lobbying organizations in Russia took place in the XVIII century under Catherine the Great rule when the Letters Patent on Rights, Liberties and Privileges of Nobility was granted in 1785¹².

However this did not mean formation of professional lobbying which cannot arise only out of the fact of interest and organized nature of the group. The first society qualified as lobbying was the Free Economic Society. It was organized in order to increase prosperity of the nation and spread useful and necessary knowledge. The society had access to the supreme state authority and was respectively one of the first social interest groups which used legal means of cooperation with the authorities for achieving its goals¹³.

There were also trading forums that were aimed at representing interests of intermediary in general and its sectors before representative and social institutions¹⁴.

In 1867, the Society for Facilitating Russian Industry and Trade Sectors was formed. This Society was engaged in making recommendations for improvement of labor, craft industry, finance, tax and shipping industry legislation. The Imperial Russian Technical Society (1866) was also engaged in lobbying, this Society existed until 1929. In 1917, the Society for Russian Economic Renovation was established. Moreover, All-Russian Convention of Trade and Industry was convened in Moscow. It consisted of around 500 entrepreneurial associations from all over the country. The Convention was engaged in political propaganda rather than lobbying of corporate interests, however it could have been engaged in professional lobbying activities in due course¹⁵. Stock exchange societies also had substantial authority in lobbying.

Therefore, institutional basis for lobbying in Russia was established by the XX century. However, due to the lack of political will of the Russian government, civilized forms of conversation between the soci-

ety and the government did not develop, moreover, unlawful means of influence on the state decisions (embezzlement of public funds and bribery) dominated¹⁶.

In the soviet science it was traditionally believed that lobbying was merely a foreign concept undoubtedly related with corruption. The Great Soviet Encyclopedia (the third addition, vol. 14, 1973) defines lobbying as the system of firms and agencies of major monopolies affiliated with US legislative authorities. These firms and agencies were deemed to have direct influence on congressmen and state officials, using, among others, means of corruption, for the benefit of monopolies they represented. In the Soviet Union, during the period of the developed socialism, the representatives of different organizations and industry sectors in the state bodies, so called "pushers", wheedled out funds and comfortable working standards by means of their connections and capacities. It may be considered that they were carrying out lobbying activities¹⁷. The new perspectives for private sector interests lobbying were opened during "perestroika" in the end of the 80s. The following documents should be mentioned: the Law of the USSR "On cooperation in the USSR" of 1988 and the Law of the USSR "On property in the USSR" of 1990.

In the beginning of the 1990s, when the key players changed from the state authorities to the business entities, the business began to take precedence over the state in ambitions and available resources, provided necessary funds for adopting the policy advantageous for major enterprises. In 1992, about five hundred acts on providing exemptions and preferences to certain industry sectors and enterprises were issued. In 1993, financial industrial groups

appeared, they defined the political life agenda, nominated their representatives to political offices. As a result, the relations between the authorities and the business were becoming more and more secret and person-centered¹⁸.

Boris Yeltsin during his pre-election campaign in 1996 actively received support from financial industrial groups promising to promote their interests in return. Since 2000 relations between the state and the business have changed: financial industrial groups distanced from politics, the state required corporate responsibility of business entities for supporting their interests.

The following position appears to be true. Provided that representation of interest groups is not now based on regulated and transparent procedure, vector of the state development is determined not by its real needs but by the proximity of various groups to public policy decision-making centers. For that very reason the necessity of legal regulation of forms and methods of interest groups' representation is so vital. This could procure progressive and effective development of Russian society and learning the conceptual difference between corruption and civilized lobbying. Bribery is a crime but lobbying in accordance with the law will lead to increasing well-being of the nation¹⁹.

Turning now to analyzing the substance of lobbying concept, it is required to define the legal purpose of lobbying – it is taking a decision by the state authorities for the benefit of individuals or legal entities. Such decision requires one of the following actions: (a) approval or disapproval of a draft statutory act (a bill or a regulation); (b) amending a statutory acts in force; (c) provision of budgetary allocations; (d) imposition

of preferential tax treatment; (e) decriminalization of criminal acts; (f) imposition or cancellation of administrative penalty; (g) approval or disapproval of nominees to legislative, executive, judicial offices; (h) declaring a person who is putting pressure to be subject to favorable statutory act and not subject to unfavorable statutory act; (i) entry into international treaties; and even (j) military non-interference²⁰.

As to the types of lobbying, its forms and methods it is vital to make a reservation that they are determined by the most important factors of political legal development of the society and the state: the level of law and order development, democratic freedoms, legal awareness, legal and political culture, political system and state mechanism efficiency and traditions.

Thus, to begin with, there is explicit and implicit lobbying. The former is aimed directly at a person under pressure. However, this does not mean that the cooperation itself needs to be direct. The methods of explicit lobbying are (a) persuasion in the course of face-to-face contact; (b) preparation of draft bills; (c) consulting regarding the matters of interest, including by conducting expert analysis of draft statutory acts; (d) making a speech during panel sessions of a legislative body and its panels; and (e) taking part in research and practice conferences and workshops²¹. Implicit lobbying aims at shaping of public opinion regarding matters of interest by means of (a) the mass media; and (b) holding mass demonstrations. Implicit lobbying is characterized with psychological pressure on people.

When explicit lobbying is carried out it is essential to determine the state body and the political leader with whom the cooperation will be built for lobbying purposes. In

the United States until the mid XX century the government officials with whom the cooperation was usually built for lobbying purposes were the chairmen of the Congress' panels. It was caused by the fact that the main part of work under draft bills were carried out in the panels of the Congress' houses and the decisions taken complied with seniority system under which the panel took decisions proposed by its chairman, and the house always supported the panel's position.

There are corporate and embedded lobbyists. The former are entities hired by other companies and individuals to carry out lobbying activities and that put not less than twenty per cent of their working time to interactions with government officials. Embedded lobbyists are employees of corporate PR and GR services, whose job responsibilities include liaison with government officials²².

Lobbyists are divided into domestic and foreign. Through lobbying of interests of national companies the United States have become leaders in terms of their impact on the global markets. Since the XIX century, the United States have been using emissaries in order to defend the interests of the capitalists in South America, Africa and China. According to the Lobbying Disclosure Act of 1995 the list of foreign lobbyists has been narrowed in order to increase the number of officially registered domestic lobbyists. As a result, an ethnic lobbying, which is implemented by groups established on a national basis, has arisen in the United States. All the necessary conditions were in place to support the existence of this form of lobbying in the United States. First of all, the US democracy is characterized with such a feature that every politician

is seeking for the support of all groups and minorities, among which national communities occupy an important place. Secondly, given that according to the Federal Regulation of Lobbying Act of 1946, authorities of foreign states were prohibited to influence on the United States, this clause has become to be evaded by hiring lobbyists who were registered as foreign agents and carried out their activities in compliance with law. Thirdly, diaspora plays a very important role in the formation of ethnic lobbying, especially global diaspora presented in virtually all states (Armenian, Hebrew, Chinese, Arabic and others). They recognize themselves as a part of the people who is in another country, while naturally building cooperation with authorities of both the country of their residence and their historical homeland²³.

Ethnic lobbying could not be appraised unambiguously. According to some researchers, ethnic lobbying in the United States poses a serious threat to its sovereignty as it is aimed at performing the certain order of the foreign states. According to other researchers, ethnic lobbying is nothing but a kind of check-and-balance system.

Certain lobbyists from Russia and a few other CIS countries are registered as the lobbyists in the European Union. Russian companies primarily represent energy industry sector. There are also certain companies that are not Russian residents but have representative offices in Russia. For example, Bellona, a Norwegian company engaged in environmental protection, is also registered as a lobbyist. Some companies (for example, PAO Gazprom) not directly registered as lobbyists in the European Parliament or the European Com-

mission, promote their interests through special agencies, for example, G+Europe²⁴.

As to the forms of lobbying, it should be noted that there are no legislatively established lobbying forms even in the countries where lobbying is officially recognized. In the countries where there is no legal regulation of lobbying, lobbying is carried out through other constitutional institutes. For instance, Constitution of France dated 1958 establishes Social and Economic Council – an information and advisory board which is designed (a) to consult the government and participate in formation of economic and social policy, (b) to engage social and professional associations in state policy shaping and (c) to facilitate interaction between social and professional groups. Taking into account the nature of the Social and Economic Council, it is presumed that various pressure groups representing interests of market participants are presented within it.

Various research and practice conferences, workshops, symposia, round tables held locally or internationally are rather widespread and effective forms of lobbying. These lobbying forms are particularly significant due to the fact that persons representing state authority and taking part in the abovementioned conferences and workshops are at ease and do not expect explicit lobbying from the managers or participants. Explicit lobbying indeed is not carried out, however each such large-scale educational and scientific event is aimed at achieving certain results in a form of specific decisions taken at the state level. And for achieving this it is required that honored guests of such events – state bodies' representatives – come to "correct conclusions"²⁵.

Constitutional basis for lobbying in Russia are (a) the provisions of Article 32

of the Russian Constitution dated 1993 setting out the right of citizens to participate in administration of state affairs individually or through their representatives; and also (b) the provisions of Article 33 granting a right to each citizen to apply personally and to send individual and collective requests to the state and local authorities. Interest groups activities are based on Article 30 of the Constitution which guarantees the right to form unions and the freedom of unions. Article 45 of the Constitution should also be mentioned. This article establishes that each person is entitled to protect its rights and freedoms by all means that are not declared unlawful, which enables to consider that lobbying methods are allowed for protection of rights and freedoms of citizens and their unions²⁶.

The following methods of rights and freedoms protection are not prohibited by law and comply with lobbying methods: (a) expert analysis of draft bills, draft decisions of the state and local authorities, (b) participation of lobbyists in day-to-day work of the Federal Assembly of the Russian Federation (committees and panels of the State Duma and the Federation Council), and (c) giving comments in the mass media regarding matters discussed. The most efficient method of lobbying is appointment of state officers to positions in financial industrial groups, major corporations with further return to the big-league politics and nomination of insiders to offices in executive and judicial authorities.

As to implicit lobbying, the most efficient methods contemplate engaging trade unions whose main purpose is to represent the consensual will of the employees of a certain industry sector and to defend their interests, including by the way

of lawful strikes. Employers also resort to such strikes: major industrial companies may take steps to close the enterprises, to transfer the enterprise to another region or country, which may entail significant staff reduction and unemployment increase. Announcements regarding such measures inevitably provoke protests. All these measures are taken in order to make the state provide tax exemptions, credits at preferential rates etc.

The entities engaged in lobbying activities are individuals (for example, lobbyist-consultant in Canada), as well as legal entities. Large corporate institutions, trade unions, entrepreneurial associations and public associations represent the latter – they all have special departments in their structure, staff number of which vary from several dozens to hundreds of employees.

Lobbyists represent various professional communities, have different experience but most of them have extensive background in offices of state and local authorities, which ensure their efficiency as persons promoting business and public associations interests in regard of taking state decisions.

It is essential to make a few remarks regarding image of lobbyist. As some researchers vividly describe, lobbyist is not a cynic, unethical person with a suitcase full of money and shifting eyes; in contrast, in countries where lobbying is regulated and the status of lobbyist is legally set out, efficient lobbyist is a person or legal entity with good and honest standing²⁷.

Lobbyists may be political, economic, social, and regional – depending on the interests they represent.

We would like to pay special attention to the Public Chamber as a lobbyist in Russia, acting under Federal Law No. 32-FZ dated

4 April 2005. According to Mr. V.V. Grib, the deputy secretary of the Public Chamber, the Public Chamber is an institutional form of civilized lobbying of civil society interests in Russian political and legal sphere. The Public Chamber conforms with the criteria characterizing lobbyist organization: it represents different interest and pressure groups, analyses state bodies decisions, appraises work of government branches, takes measures for active involvement of electorate into state affairs management, carries out informational work, gathering of data required for lobbying activities²⁸. Forms of lobbying in the Public Chamber include work in social councils under executive bodies (ministries, services), holding public hearings to discuss draft bills, sending requests to authorized state bodies etc.

Taking into account different status of lobbyists (especially as far as individuals-lobbyists, representing different sides of authority and business, are concerned) it becomes clear why legal regulation of lobbying is complicated. Research should be carried out in relation to the development of the most efficient methods of lobbying regulation provided that lobbying is one of the elements of legal regulation mechanism²⁹.

Legal regulation mechanism is a system of legal means organized in the most logical way for adjustment of public relations and contribution to serving the interests of right-holders³⁰. The elements of legal regulation mechanism are legal rules, statutory acts, legal interpretation acts, legal facts, legal relationships, enforcement acts, legal consciousness and law order. Each of these elements has its regulative functions, has effect on people's actions and public relations. Lobbying is a part of these elements of legal regulation mechanism as a

law-making process, law consciousness and legal culture. As has already been mentioned, the purpose of lobbying is taking a decision in a statutory form: in form of a law or regulation. Thus, influence of lobbying is obvious at the first stage of legal regulation – the stage of rulemaking. The lobbying methods determine what this influence and the legal rule will be at the output. Lobbying methods are chosen by a person having law consciousness and legal culture.

Existence of lobbying is caused by objective reasons of difference in interests of state operated society's participants. However, lobbying as a social institute could only appear under certain circumstances, including advantageous liberal democratic political regime, strict compliance with constitutional principles of state organization: its republican form of government, the separation of powers, absence of state ideology, multiparty system. The principle of parliamentary government, which is designed to establish conditions for finding ways for alignment of different social groups interests, holds a specific place. The parliamentarianism itself can efficiently operate when the society has reached certain system of values and is ready to compromise, find ways to overcome complex political and economic problems on the basis of respect of rights and freedoms of a person and a citizen. Lobbying in real-world life is an additional mechanism of interest alignment for the purposes of working out a state decision in terms of parliamentary democracy³¹.

According to Mr. A.Yu. Kalinin, existence of lobbying institute is caused by ontological failure of parliamentary democracy to implement its set of values in full. This fact confirms that any state-legal phenom-

enon is impossible without influence of a certain social class. Lobbying is expression of social classes influence in terms of liberal ideology³². In this respect, social class is not regarded in a strictly economic sense (from Marxism perspective), but in pluralistic sense (as a cultural, religious or other group).

As to the models of lobbying activities regulation, it should be noted that in current practice of lobbying legal regulation there is no uniformity in understanding of lobbying. Special laws regulating lobbying are issued in Poland, Hungary, Lithuania, Georgia, Philippines, Peru, besides the United States and Canada. Italy (besides the region of Tuscany) does not statutory recognize lobbying. In France, as we have already mentioned, the lobbying is prohibited under the Regulation of National Assembly, and in India is considered as a corruptive institute. In Peru: (a) the procedure for promoting interests is set out for the purposes of ensuring transparency of state functioning; (b) moreover, the requirement for registration of persons engaged lobbying activities is established; and (c) it is stated that the lobbyists register is maintained by special administration office. In Australia a law regulating lobbying was enacted in the 80s. It required that an application request containing client details and the substance of request should be sent to a special registrar prior to each contact with a state official and only after such registration and issuing a permit a contact with the official was possible. In 1996 this procedure was regarded inefficient due to unfair fulfillment of the requirements and the code of ministers' conduct, which prohibited the corruption only.

In general, there are two models of lobbying regulation: European and American. American model is based on the right of a citizen to apply to a legislative body with petitions, which is based on the First Amendment to the US Constitution dated 1787. Lobbyists may provide prepared draft bills, consult with lawmakers, and register in legislative bodies. European model is described by the fact that it regulates financial status of lawmakers in order to mitigate influence from the lobbyists' side on them³³. In particular, income generating activities of the members of the House of Commons in the United Kingdom are to be registered. In France each member of the National Assembly provides declaration on its financial position within fifteen days after the date of its entry into the office. The Bureau of the Parliament's Chamber assesses the financial position on the basis of the declarations provided on a regularly basis.

Let's now return to the model of lobbying activities regulation in the United States, which, as already noted, are home to lobbying. Lobbying in the United States as a political and legal institution is characterized by the following features.

Structural characteristics. Lobbying is a well-formed structure of organized interest groups. In addition to hundreds of large corporations there are about six thousand entrepreneurial unions, associations, hundreds of NGOs and specialized organizations at the federal level. Regardless of the location of its head office corporate departments responsible for carrying out lobbying activities, are located in the capital – the District of Columbia. As to the structural organization, it should be certainly noted that in 1979 the American League of lobbyists was established in the United States,

the main purpose of which is the adoption of lobbying as an independent professional activity, devoid of negative public opinion ratings, which continues to regard it as a product of the intricacies of political life and still quite often associates it with corruption³⁴. As a part of achieving this goal the League organizes its work in specialized committees: professional training of its members, improvement of their skills (purpose of the work is to present the members of the League as competent professionals in the field of public administration, law), lobbying programs planning, public relations, ethics, organization of meetings with the leadership of the legislative bodies and agencies.

Material resources. Independent lobbyists acting through law firms and PR agencies present the most part of material resources. Entrepreneurial and professional unions mainly engaged in lobbying activities are occasionally created.

Personnel. It is well known that personnel are all-important. It has already been mentioned that representatives of wide variety of professions are engaged in lobbying but most of them have had experience of working in state bodies. There are many lobbyists who are ex-counsels of the President, ministers, congressmen and former officials of the Congress' administration office. Lobbyists are well informed regarding formal and informal procedures for taking decisions in legislative and executive authorities, have all necessary connections with current congressmen and state lawmakers and all necessary means to determine the most efficient pressure tactic.

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