

Defensoría del Pueblo de Ecuador

Dirección Nacional de Investigación e Incidencia en Política Pública

**Contribuciones Resolución 32/31 sobre espacio de la sociedad
civil**

Organismo solicitante: OACDH

Elaborado por: David Rivadeneira

Revisado por:

Sebastián Insuasti, Director Nacional de Investigación e Incidencia en Política Pública

Cristhian Bahamonde, Director General de Política Pública

Aprobado por: Patricio Benalcázar, Adjunto de Derechos Humanos y de la Naturaleza

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Participation of Civil Society in Ecuador

Introduction

The present report is issued regarding the information required by the OHCHR to the Human Rights National Institutions in order to provide contributions for the Resolution 32/31 of the Human Rights Committee about the Civil Society Space. Additionally, the information will be considered for the High Commissioner Report about the proceedings and practices about the participation of civil society concerning the participation of civil society in regional and international organizations.

In case further information is required please contact Ec. Sebastián Insuasti, National Director of Investigation and Incidence on Public Policy (rinsuasti@dpe.gob.ec)

1) Legal framework

The Constitution of the Republic of Ecuador, approved on 2008, guarantees civil and political rights, highlighting the importance of democracy, not just representative but also participative. Hence, it establishes the conditions for promoting citizens participation on public affairs, and freedom of expression and association.

Respecting freedom of expression, the Constitution indicates, on art. 18, the right to “Look for, receive, exchange, produce and disseminate information that is truthful, accurate, opportune taken in context, plural, without prior censorship regarding facts of public interest with subsequent responsibility”. Likewise, determines the obligatory mandate of allocate “radio spectrum frequencies for the management of public, private, and community radio and television stations” (Art. 17).

Additionally, in consonance with the Covenant on Civil and Political Rights (1996), Art. 66 of the Constitution recognize “the right to associate, assemble and express oneself freely and voluntarily”. This right can only be restricted by the President of the Republic in case of state of emergency, either local or national (art. 165). However, for the guarantee of the above mentioned rights, international treaties ratified by Ecuador that recognize rights that are more favorable than those enshrined in the Constitution shall prevail over domestic law and acts of public power.

In respect to participation of public society, art. 61 of the Constitution recognize the right to participate, according to international standards. In that sense, recognize, for instance right to elect and to be elected, to participate in affairs of public interest, to hold and discharge public office and duties on the basis of merits and capacities and in a democratic selection that guarantees participation, on the basis of criteria of gender equity and parity, equal

opportunities for persons with disabilities, and intergenerational participation, among others.

In the same way, Constitution recognizes the following rights:

- Popular legislative initiative (art. 103)
- Referendum that, according to art. 104, can be called by, among other actors, the citizens.
- Mandate revocation, which is further develop in art. 105

About participation of citizens on public affairs, Art. 95 of the Constitution states:

Citizens, individually and collectively, shall participate as leading players in decision making, planning and management of public affairs and in the people's monitoring of State institutions and society and their representative in an ongoing process of building citizen power. Participation shall be governed by the principles of equality, autonomy, public deliberation, respect for differences, monitoring by the public, solidarity and interculturalism. (pár. 1)

Likewise, art. 98 of the Ecuadorian Constitution guarantees to individuals and communities the right of resistance to deeds or omission by the public power that violates or can violate their constitutional rights or in order to demand the recognition of new rights.

On the same path, art. 100 establishes:

At all levels of government, entities of participation shall be set up, comprised of elected authorities, representatives of the dependent regime, and representatives of the society of the territorial sphere of each level of government [...]

To implement this participation, public hearings, oversights committees, assemblies, gross-roots lobbying, consultative councils, observatories and other entities that promoted civic-mindedness shall be organized.

Additionally, secondary law further develops the right to participate of civil society. In that regard, there is some relevant normative that can be cited.

Firstly, Organic Law of Citizen Participation, enacted on April 20th 2010, regulates mechanisms of direct democracy established in the Constitution, determining process, requirements, times and effects of each mechanism, which are:

- Popular legislative initiative
- Referendum
- Constitutional reform by popular initiative
- Mandate revocation

- Prior consultation

In the light of the importance of the participation of civil society, the Council of Citizen Participation and Social Control was created. It is regulated by the Organic Law of the Council of Citizen Participation and Social Control.

Furthermore, the Organic Electoral and Political Organizations Law, Democratic Code, enacted on April 2009, amplifies constitutional norms related to civil and political rights. In that sense the Code regulates the organization of the Electoral Branch, electoral processes, the mechanisms of direct democracy, the political organizations and financing of parties and political movements during electoral campaign. The Code establishes diversity, ideological pluralism, equity of opportunities as guiding principles of the citizen participation.

In addition, on 2010, the National Assembly passed the Organic Code on Territorial Autonomy and Decentralization (COOTAD). In the section of citizen participation, it established the figure of the “Empty Chair” for the autonomous decentralized governments. (Art. 311). This mechanism allows citizens representatives, depending upon the topic discussed, to participate in the session of the Council. Representatives that exercise vote have administrative, civil and criminal responsibility in relation to the session.

Additionally, is relevant to address the importance of social organizations as collective instances of citizen participation. In that regard, on June 20th 2013, it was enacted the Executive Decree 16, (Registro Oficial Supplement 19) which created the Regulation for the Functioning of the Unified System of Social Organizations Information. This decree regulates recognition of social organizations, its regime of functioning, registry, control and grounds for dissolution. Besides, it was issued the Executive Decree 739 which modifies the Executive Decree 16. On the principle it homogenize the requirements for the concession of legal personality to social organizations.

Respecting Decree 16, some actors and social organizations have brought charges before the Constitutional Court. The suits were presented by: a) Magali Margoth Orellana Marquinez, Lourdes Licenica Tibán Guala y César Umaginga Guamán, (case No. 16-13-IN) which was admitted on January 23th, 2014; b) Carlos Ranulfo Pérez Guartambel, as the President of “Pueblos de las Nacionalidades Kiwcha del Ecuador, (ECUARUNARI) (case No. 19-13-IN), admitted on January 30th, 2014; c) Carlos Fernando Castellanos Ballesteros, as President of Unitary Confederation of Retail Traders and Autonomous Workers of Ecuador, CUCOMITAE, (case No. 25-13-IN) admitted on January 30 2014; admitted on January 30th, 2014, and finally, d) Mauricio

Martín Alarcón y Marpía Dolores Miño Buitrón (case No. 20-13-IN), admitted on January 30th, 2014¹.

Plaintiffs argue Executive Decree 16 regulates and control social organizations without complying with international standards that protect the right to freedom of association. In that regard, they note that even though the Decree doesn't have the status of law it regulates the exercise of a constitutional right. Besides, they indicate that the grounds for dissolution or denying register are ambiguous, and therefore it could open space for arbitrary restriction of the right to association. For instance, the reason for dissolution based on the social organizations participation in politics and decisions related to public policies (Case 16-13-IN).

Additionally, they states that Decree 16 does not observe the right to self-determination of indigenous people, and does not consider de facto association, since if the organization does not official register it can't operate.

2) Policies, programs and general institutionalism to promote citizen participation and space of civil society

a. Council of Citizen Participation and Social Control (CPCCS)

Council of Citizen Participation and Social Control was created with the aim of fostering participation of civil society. According to art. 208 of the Constitution, the attributions of the Council are:

- To promote the exercise of participation rights, control of public administration and accountability.
- To establish mechanisms and policies to combat corruption and conduct investigations regarding cases that impact on citizen participation, public interest or generate corruption. In that sense, CPCCS manage citizens complains, maintaining confidentiality during the investigative process.
- To conduct process for the appointment of national authorities in the legal and constitutional framework.

Additionally, CPCCS regulates other mechanisms of citizen participation, such us citizen oversight committees. Through this mechanism citizens monitor, and control public administration, as well as private sector that manage public resources and develop activities of public interest.

¹ Currently, these sues are been processed by the Constitutional Court. Process that, to the date, has taken more than four years.

In respect to accountability processes, art. 12 of the Organic Law of Council of Citizen Participation and Social Control, states:

The Council must monitor and periodically follow up accountability processes concerted with institutions and citizens; analyze methods employed, quality of information received and formulate recommendations.

Reports about accountability processes of public institutions and entities, must be submit to the Council of Citizen Participation and Social Control within the thirty days after the presentation of the report, in order to verify the fulfillment of the obligation and disseminate the report through the mechanism available for the Council.

b. National Councils for Equality

These councils are entities of public law, that aim to eliminate structural discrimination and human rights violations that affect people and groups traditionally exclude.

The Organic Law of National Councils for Equality, published on Registro Oficial Supplement 286, on July 7th 2014, respecting the conformation of the councils, establishes on art. 7 that: National Councils for Equality shall be composed, on a basis of parity, of counselors, who shall be State and civil society representatives.

c. Sectoral Citizen Councils

Organic Law of Citizen Participation establishes in its art. 52 that Sectoral Citizen Councils are instances of dialogue, deliberation and monitoring of national and sector public policies. These councils are mechanism for the discussion of the guiding lines and tracking the evolution of ministerial policies. They should be conceived as spaces for the participation of civil society on decision making of Executive Branch. Therefore, government ministries must call sectoral Citizen Councils, establishing its participants in attention to the action sphere of each institution. Once conformed, councils can be self-convened by majority of its members.

3) Right to the access of public information

Right to public information was recognized in Ecuador, for the first time, in the 1998 Constitution. This legal framework was the basis for the Organic Law on Transparency and Access to Public Information (LOTAIP), enacted on May 18, 2004.

Due to the promulgation of this law, information possessed by public institutions and legal entities of public and private law that participates in the State is subjected to publicity principle.

La Defensoría del Pueblo, according to LOTAIP, is the entity in charge of the reception and evaluation of public information and the list of information classified as confidential. The Ombudsman Office has specific competences related to the promotion, monitor and guarantee of the Law. It has to look out for the quality of the information; it can provide legal sponsorship respect actions for the access to public information; dictate corrective actions when information submitted by institutions is unclear or incomplete.

In this context, art. 12 of LOTAIP states that all institutions that possess public information are obligated to present to the Defensoría del Pueblo an annual report, which should include:

1. Information of the previous period about the fulfillment of the obligations established in the LOTAIP
2. Detailed list of access to public information requests and the management of each request.
3. An updated six-monthly report about the information classified as confidential.

In addition, in order to elaborate a registry that allows compliance with LOTAIP, the Ombudsman office contract a consultancy. As a result, it was established, as a first phase of reference, a registry fed by two sources: database of the extinct Technical Secretary of International Cooperation, database of the Single Registry of Social Organizations, which is in charge of the Ministry of Economic and Social Inclusion, taking into account social organizations that manage or receive public funds above 0.000002 per cent of the State's General Budget, private entities that are State's concessionaires and, therefore, administrate public funds; and, finally, private entities of Higher Education that receive public funds.

4) Challenges

- The establishment of the mechanisms of citizen participation articulated to the different levels of government requires permanent monitoring and evaluation, from the Council of Citizen Participation as well as from the citizens in general, in order to guarantee the effective functioning of these mechanisms, according to the purposes established on the Constitution and the Law. In that sense, should be acknowledge the importance of the legislation relative to the exercise of the right to participation, at the same time it is highlighted the necessity of permanent monitoring in order to guarantee its fulfillment.

- Even though, the importance of citizen participation inside the public institutions is recognized, it is also necessary to bear in mind the importance of promoting and creating spaces of participation for organized civil society, through mechanism or direct democracy, such as, referendum, revocation of mandate, legislative initiative, among others. In that regard, it is worth mention complains of citizens regarding restrictions to these mechanisms, due to the guidelines and acts of institutions in charge of the coordinating processes of direct democracy.
- As stated above, Executive Decree 16, which regulates creation, functioning and dissolution of organizations of civil society, has motivated claims from various social organizations. In that regard, it would be important that the Constitutional Court of Ecuador asses complains in the light of the rights related to participation, in a reasonable, proportional and legitimate form.

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