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IMPLEMENTATION OF THE PRINCIPLE OF PEOPLE'S POWER AS A WAY OF PARTICIPATION IN THE ADMINISTRATION OF JUSTICE

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Бисага Ю.М., Заборовський В.В. Реалізація принципу народовладдя як спосіб участі у здійсненні правосуддя.

В публікації розглянуто доктринальні засади з питань форм безпосередньої демократії та існуючі проблеми щодо реалізації народом своєї влади. На основі історичного ракурсу аналізу європейського законодавства в цій сфері запропоновано шляхи вдосконалення Основного Закону України.

Встановлено, незважаючи на незначну та суперечливу підтримку у мислителів стародавнього світу та середньовіччя щодо необхідності визнання за народом права скасовувати законодавчі акти представницьких органів держави, значного розвитку ця ідея отримала саме в епоху Нового часу, коли проголошення народовладдя супроводжується встановленням парламентаризму авторитет та довіра до якого постійно падала у простого народу. Доведено, сутність таких суджень полягала в тому, що сучасна демократія ґрунтується на ідеї народного суверенітету, тобто у необхідності створення такої системи державно-правових відносин, яка б забезпечувала примат права у всіх сферах суспільних відносин та надання можливості народу реалізовувати своє право бути джерелом і основою державної влади саме через різноманітні форми політичної участі у державному управлінні країною, однією з яких і являється участь у здійсненні судової влади.

Визначено, погляди мислителів на підтримку форм народовладдя зводяться до того, що право обмежувати державну владу визнається невід'ємними, природнім правом людини яке належить їй від народження. Тому саме народовладдя є одним із засобів, що відноситься до системи стримувань та противаг, а відтак допомагає не тільки нормальному функціонуванню органів державної

влади шляхом здійснення контролю за діями їхніх представників, але й безпосередньому здійсненні влади народом, що тим самим сприяє забезпечувати принцип народного суверенітету.

Встановлено, сьогодні практика застосування форм безпосередньої демократії значно випереджає теоретичні розробки в даній області. Саме це питання є об'ємне, а в той же час існує велика кількість прогалин і протиріч у можливості конституційного закріплення нових форм народовладдя.

Ключові слова: народовладдя, форми безпосередньої демократії, референдум, народне вето, судово влада, правосуддя, конституція, конституціоналізм.

Bysaga Y.M., Zaborovsky V.V. Implementation of the principle of people's power as a way of participation in the administration of justice.

The publication examines the doctrinal principles on the forms of direct democracy and the existing problems regarding the exercise of power by the people. Based on the historical perspective of the analysis of European legislation in this area, ways of improving the Basic Law of Ukraine are proposed.

It was established that, despite the insignificant and contradictory support of the thinkers of the ancient world and the Middle Ages regarding the need to recognize the right of the people to cancel the legislative acts of the representative bodies of the state, this idea received significant development precisely in the era of the New Age, when the proclamation of people's rule was accompanied by the establishment of parliamentarism, the authority and trust of which is constantly fell among the common people. It has been proven that the essence

of such judgments was that modern democracy is based on the idea of popular sovereignty, that is, on the need to create such a system of state-legal relations that would ensure the primacy of law in all spheres of social relations and enable the people to exercise their right to be the source and basis state power precisely because of various forms of political participation in the state management of the country, one of which is participation in the exercise of judicial power.

It has been determined that the views of thinkers in support of forms of people's power boil down to the fact that the right to limit state power is recognized as an inalienable, natural human right that belongs to them from birth. Therefore, people's power itself is one of the means related to the system of checks and balances, and therefore helps not only the normal functioning of state authorities by exercising control over the actions of their representatives, but also the direct exercise of power by the people, which thereby helps to ensure the principle of popular sovereignty.

It has been established that today the practice of applying forms of direct democracy is significantly ahead of theoretical developments in this area. This very issue is voluminous, and at the same time there are a large number of gaps and contradictions in the possibility of constitutional consolidation of new forms of people's rule.

Key words: people's power, forms of direct democracy, referendum, people's veto, judiciary, justice, constitution, constitutionalism.

Relevance of the research topic. First of all, we note that the institution of direct democracy (people's rule) is currently not used to its full extent to ensure the competitiveness of the process. Thus, constitutional legal relations are characterized by: the absence of special studies devoted to the implementation of the principle of people's power in the organization and activity of the judiciary; imperfection of its legal regulation; the need to develop legal measures to stop violations of legislation in the process of implementing the principle of people's power in the judiciary.

The democratic transformations of modern society, the formation of a "rule of law" in our country, determine the development of forms of people's power, perfectly form the participation of the population in state administration and solve a number of issues of local importance. The Ukrainian people, who are the only source of power, have all the opportunities to create legal and organizational prerequisites for the direct exercise of power by citizens of Ukraine.

The Constitution of Ukraine declared the people to be the bearer of sovereignty and the only source of power, which is exercised directly and through state and local self-government bodies. Referendum and

free elections are the highest and direct expression of people's power.

The forms of direct people's power enshrined in Section 3 of the Constitution play a decisive role for modern domestic constitutionalism, determining the directions of development of public society and the state, it provides an opportunity to ensure the free expression of the citizen's will on the widest range of issues. State power and local self-government function effectively precisely in the presence of developed institutions of direct democracy. At the same time, it is necessary to consistently expand the citizen's participation in the management of state affairs through the introduction of such a form of direct people's power as the popular veto.

Today, the practice of applying general forms of direct democracy is significantly ahead of theoretical developments in this area. This very issue is voluminous, and at the same time there are a large number of gaps and contradictions in the possibility of constitutional consolidation of new forms of direct democracy, especially in justice.

The purpose of our research is to analyze the philosophical and legal views that became the basis for the formation of the principle of people's rule.

The study of certain aspects of the problem in the domestic legal doctrine, mainly in the context of the right to judicial protection or the organization of the judiciary, was carried out by such scientists as S. Afanasyev, Ya. Bernaziuk, T. Bryny, P. Vovk, A. Golovin, V. Grybanov, M. Gromovchuk, V. Gultai, Yu. Groshevy, I. Golosnichenko, V. Dolezhan, O. Zudikhin, K. Kobylanskyi, V. Kolisnychenko, V. Komarov, S. Koroyed, A. Kryshtof, V. Kryzhanovskiy, O. Kruzhilina, V. Lemak, O. Lemak, L. Lypachova, T. Lukash, I. Marochkin, O. Martzelyak, S. Nechiporuk, N. Sakara, A. Selivanov, A. Stryzhak, Yu. Todyka, M. Teslenko, I. Fakas and a number of others.

Presenting main material. In the scientific philosophical and legal literature, it is noted that even ancient thinkers in their writings devoted to the formation of the idea of the rule of law paid considerable attention, including to issues related to the problem of people's rule and the accountability of officials to the people [1, p. 87]. Thus, in particular, Aristotle wrote: "The nation itself has made itself the ruler of everything, and everything is governed by its decrees and courts, in which it is the ruler..." [2, p. 76.]

At the same time, the scientist H. Shershenevich, analyzing the works of Plato, comes to the following conclusions regarding the participation of citizens in the management of state affairs:

- the lower class, assigned to meet the material needs of the state, condemned to agricultural and industrial work, excluded from any participation in management affairs;
- absolute power should be placed in the hands of philosophers, their management should not be

limited by laws, because with their deep intelligence and good will, every case will present itself to them in all its truth [3, p. 23.]

It should also not be ignored that during the time of Pericles, despite the fairly large population of Athens, which reached almost three million people, at first there were approximately 20 thousand, and then 15-16 thousand citizens [4, p. 9].

This fact, in our opinion, indicates a limited number of citizens who had the right to exercise power functions with the help of which they could influence or directly shape the political atmosphere in the state.

On this occasion, the scientist M. Kovalevskiy, investigating the problems of the direct exercise of power by the people, including in ancient times, believes that "pure democracy" has always existed in limited forms of its manifestation. Moreover, the author proves that everywhere it was combined with elements of representative government, and in some cases even gave rise to them due to the presence of its own internal contradictions. Therefore, the researcher concludes that the people as a subject of direct rule, which makes universally binding public-authority decisions, in the considered ancient Greek model of direct democracy is represented by rather limited communities formed on the basis of citizenship, property status, gender, etc. [4, p. 11].

A similar situation followed in ancient Rome as well. Thus, according to M. Bartoshek, in the Roman Republic, ordinary citizens were deprived of the right of legislative initiative, which belonged exclusively to magistrates and the senate. The researcher points out that, in most cases, it was the higher magistrates (*magistratus maiores*) who developed drafts of legal acts, the texts of which were handed over to the meeting participants for preliminary reading and discussion. At the same time, the author points out that citizens in Rome had the right to discuss the above-mentioned draft laws and propose changes to them, after which voting was held according to a simple principle – "for" or "against" the adoption of the law [5, p. 179]. Despite a certain democratization of people's assemblies, citizens could not solve fundamental issues, since the law adopted by the people's assembly passed one more stage - the approval of the senate, without which it could not become a law [6, p. 90]. Despite the fact that popular assemblies were held both in Rome and in Athens, in Rome their significance was much smaller than in Athens. The reason for this was a number of circumstances. So, in particular, in contrast to Athens, in Rome citizens' participation in meetings was not paid, peasants and the urban poor were not always present at them [7, p. 59].

At the same time, H. Lebon notes that after Greco-Roman antiquity, for centuries, all the most important political decisions in the countries of the world, as a rule, were made mainly by monarchs. At

the same time, the author points out that until the end of the 18th century, the rivalry of sovereigns and the politics of states were the main factors of historical events, and the opinion of the masses was not taken into account, since it mostly did not exist. As a result, H. Lebon comes to the conclusion that almost until the end of the 18th century, the authorities did not allow even the abstract possibility of direct participation of the people in the exercise of official functions [8, p. 126].

Investigating the historical doctrines of people's rule, which is the main element of modern democracy, the professor of public law of the Royal Academy in Poznań, Y. Haček, in his work "The Law of Modern Democracy" (1913), notes that "modern democracy is based on the idea of popular sovereignty. This idea was also expressed in the Middle Ages, but always with the proviso that when the state was founded, the people, by means of the "lex regia" of Roman law, transferred once and for all the fullness of their power to the monarch. In this way, the principle of popular sovereignty as a guiding directive for all state institutions of the Middle Ages was completely eliminated. Only at the beginning of the New Age, the activities of reformers, especially Calvinists, made this question relevant again. The rudiments of democracy were already expressed in the reformation principle. This was the beginning of the free interpretation of the Holy Scriptures and the universal priesthood. But at the time when Lutheranism soon became dependent on the German territorial state, which aspired to absolutism, and Calvin was able to turn his church on the continent into an aristocratic-ruled theocracy, modern democracy took root only on the soil of England" [9, p. 5–6].

Despite a number of difficulties of people's participation in the exercise of power functions that existed in ancient times and the Middle Ages, according to V. Rudenko, the doctrine of popular sovereignty had far-reaching consequences. According to the scientist, first of all, a certain absolutization of democracy and even democratic authoritarianism resulted from it. If the bearer of power is the people themselves, then according to the author, there is no need to limit their will in any way. However, the scientist emphasizes that the consistent implementation of the doctrine of popular sovereignty threatened to turn into one of the most terrible tyrannies – the tyranny of the masses. Therefore, as it is not paradoxical, along with the struggle against the absolutism of the "third estate" it was necessary to solve another task – under the slogan of popular sovereignty, to minimize the possibilities of real exercise of political power by the popular masses. This task was solved by introducing the already known representative board [10, p. 87–88].

T. Hobbes in his work "Leviathan" emphasizes that the state is something created by man and

put at the service of his goals. At the same time, T. Hobbes argued that under a democratic form of government, only the assembly of all citizens should have the prerogative of the government. Citizens are both rulers and objects of government, but the unity of power is preserved due to the exercise of this power only by the assembly, in which binding decisions are made by majority vote [11, p. 53]. In fact, Hobbes became the founder of the popular veto theory.

The direct connection of the principle of popular sovereignty with the requirement of the rule of law was substantiated even in the political and legal thought of the New Age (this was written by J. Beaudin, S.-L. Montesquieu, J. Locke, J.-J. Rousseau, S. Pufendorf, etc.). At the same time, the content of the main idea that was formulated at that time was that the valuable meaning of the state (state power) consists in creating such a system of state-legal relations that would ensure the primacy of law in all spheres of social relations. And this is possible only when the basis of legal relations is the general perception of the people about justice, which they are able to implement (through various forms of political participation, state administration, etc.) through their exclusive right to be the source and basis of state power [12, p. 349-350].

According to R. Hrynyuk, from the point of view of the theory of democracy, recognition of the people as the only source of power is a condition for the implementation of such a form of government, when power is exercised by the people and in the interests of the people (in this sense, as historical experience proves, any theories of the "good ruler", which takes care of the interests of the people, have a utopian character and are not able to ensure real freedom and real well-being of citizens). However, the consolidation of this principle has significant consequences for the formation of a legal state, since it is through the establishment of popular sovereignty that a significant limitation of state power occurs, and in the relationship "state - man (society)" parity is established in favor of the latter [12, p. 350].

Drawing a parallel between the principle of popular sovereignty and the development of the rule of law, J. Mere emphasizes that only the recognition of the people as the only source of state power makes it possible to limit the arbitrariness of the state administration inherent in the rule of law. J. Mere also believes that any state where the principle of popular sovereignty is not proclaimed will sooner or later spread its influence over the entire society, make law dependent on considerations of efficiency and seek to free itself from the influence of the law. In connection with this, "the rule of law is a minimal feature of any democracy capable of existing in the regime of sovereignty" [13, p. 173]. At the same time, J. Mere emphasizes that the democratic

principle of popular sovereignty ensured by the rule of law should not be interpreted "narrowly", i.e. only as the presence of a system of control by the higher legislative and, at the same time, representative body of state power over the executive power. In this sense, ensuring people's sovereignty means: "Not only control over the executive power exercised by representatives, the legislative body, which is provided to a greater or lesser extent in existing democratic institutions, but also control over the legislative body, over its will" [13, p. 174].

It should be noted that even in the 17th century J. Locke proposed limiting the absolute power of the ruler [14, p. 351], it is true that S. Montesquieu defined it as the fundamental principle of the state system of democratic states, supplementing it with another very important provision – the system of checks and balances [15, p. 289]. Even then it was obvious that the normal functioning of state authorities is impossible without their mutual restraint and control [16, p. 18].

Of all the institutions of direct people's power in the constitutional law of modern democratic states, the institutions of the people's veto (abrogative referendum), the institutions of recall and dissolution correspond most closely to the concept of direct democracy. It is these institutes, as a rule, that provide for increased requirements for the turnout of voters, for summarizing the results of voting, etc. However, they have not become widespread in the world. At the same time, the constitutional and legal institutions of "direct democracy" (referendum, people's law-making initiative and, especially, elections) have become widespread in their characteristics and are very close to the institutions of representative democracy (the adoption of public-authority decisions by a minority of registered voters is allowed, decision-making is impossible without party mediation, etc.) [17, p. 14].

S. Kozhevnikov believes that a legal state is distinguished from a non-legal state by specific features, to which he attributes: democracy and the real exercise of people's power; existence of a regime of democratic constitutional government; division of power into legislative, executive and judicial; the dominance of law and the law over state power; the leading role of the law in regulating the most important social relations; recognition and guarantee of human and citizen rights and freedoms; existence of a regime of strict legality in the state and society [18, p. 146-152].

Investigating the evolution of the formation and development of the idea of people's rule, A. Michel draws attention to a historical document, namely the Declaration of the Rights of Man and Citizen adopted in 1789, which is of great importance for the establishment of the above-mentioned idea. The scientist notes that the text of the specified document consists of a short introduction, which

states that the only causes of social ills and the decline of government are ignorance, forgetfulness, and disregard for the natural, sacred, and inalienable rights of man. At the same time, there are 17 articles based on two ideas of the political philosophy of natural law – the idea of individual freedom and the idea of people’s rule, among them:

all people are free and equal in rights;

the goal of society is to preserve the rights of the individual: freedom of property, security and resistance to oppression;

supreme power belongs to the nation;

the law is an expression of the general will: all citizens have the right to participate in the issuance of laws personally or through representatives;

public authority exists for the common good; taxes for its content must be distributed evenly, through their representatives, citizens have the right to determine their size and methods of administration;

society has the right to demand a report from its representatives: the guarantee of rights and the separation of powers is the first condition of the constitution.

Therefore, according to A. Michel, the historical significance of the Declaration and its variations of 1793, 1795 consisted in the desire to give legislative sanction to the most important principles of the political philosophy of natural law, which made a revolution in the political views and relations of the New Age [19, p. 248].

The French jurist M. Gunel believes that the representative government formed in the countries of Europe and America after the French Revolution was created not only to replace the state representative institutions that existed under monarchical regimes, but also to keep the masses of the people on the periphery of the political system. Representative democracy essentially became a political tool for combining the ideas of popular sovereignty, the sovereignty of the nation, with effective governance carried out by the elite [20, p. 89–97].

A similar opinion is followed by the famous Hungarian scientist A. Shayo, who believes that the ideas of “popular sovereignty”, “national sovereignty” in state constitutions have become the most important legitimizing fictions. At the same time, the researcher is convinced that already at the dawn of its formation, constitutionalism turned out to be very contradictory and actually broke with the theory of democracy. The reason for this, according to the scientist, is that constitutionalism as a set of ideas and principles could not bypass the most popular legitimizing idea, but as a set of current legal norms, it could not but become an opposition to democracy. Thus, A. Chaillot claims that “Constitutionalism - refers to democracy with distrust. This does not necessarily mean his hostility. Constitutionalism, regardless of what opinion some

of its representatives hold about people’s power, generally takes a neutral position on this issue, as long as democracy does not threaten despotism” [21, p. 61].

In our opinion, it is also indicative that literally two years after the adoption of the Declaration of the Rights of Man and the Citizen, the French Constitution of 1791 almost completely excludes the institutions of direct democracy: it states that the people, who are the only source of power, can exercise this power only through representation; a ban on imperative mandate is introduced [21, p. 116].

Conclusions from the conducted research.

Despite the insignificant and contradictory support of the thinkers of the ancient world and the Middle Ages for the need to recognize the right of the people to cancel legislative acts of the representative bodies of the state, this idea received significant development precisely in the era of the New Age, when the proclamation of people’s rule was accompanied by the establishment of parliamentarism, the authority and trust of which was constantly falling in common people. The essence of such judgments was that modern democracy is based on the idea of popular sovereignty, that is, on the need to create such a system of state-legal relations that would ensure the primacy of law in all spheres of social relations and enable the people to exercise their right to be the source and basis of state power precisely because of various forms of political participation in the state management of the country, one of which is participation in the administration of justice.

As we can see from the above, the views of thinkers boil down to the fact that the right to limit state power is recognized as an inalienable, natural human right that belongs to them from birth. Therefore, it is the implementation of individual forms of people’s power that is one of the means related to the system of checks and balances, and therefore helps not only the normal functioning of state authorities by exercising control over the actions of their representatives, but also the direct exercise of power by the people, which thereby helps to ensure the principle national sovereignty.

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