

REPRESENTATIVE DEMOCRACY IN RESEARCH OF UKRAINIAN CONSTITUTIONALISTS

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Summary

The aim of the article is to give the state of the art, when it comes about the representative democracy in research of Ukrainian constitutionalists. Using the axiological and antropocentric methodological approaches and the legal analysis, legal synthesis, inductive, deductive, comparative, hermeneutical and sociological methods, the author analyses the doctrinal provisions on such problems as: a) people's sovereignty and the mechanism of its implementation by public power: theoretical and legal aspect (researched at the monographic level by Ya. S. Bohiv); b) realization of the principle of national sovereignty in Ukraine: theoretical and legal aspect (analyzed at the monographic level by O.O. Skrypnyuk); c) people's sovereignty in the political and legal construction of the modern state (researched at the monographic level by O.V. Shcherbanyuk).

The article shows the gaps in the state of art and the author proposes the directions for the future researches in the field based on the current political situation in Ukraine. The author invites constitutionalists to the doctrinal discussion and argues the own directions of the future researches.

Key words: democracy, direct democracy, the principle of people's power, people's sovereignty, people's power, public power, axiology, hermeneuticus.

DOI <https://doi.org/10.23856/5521>

1. Introduction

Nowadays, Ukrainian state is under the aggression. One of the many negative consequences is the impossibility of organization of both all-Ukrainian and local elections, while the war lasts. Because of that, even more attention should be paid to the activity of the representative bodies in general and of their members in particular. Currently, not only their professional performance is important (though it is, even more than before) – but also their loyalty to the Motherland. In such a situation, it is an important scientific task – to continue the development of the representative democracy institute of the national constitutional law. In order to understand the modern trends and problems of the field, it is advisable to look to the state of the art. This will allow to summarize, what is already done in this field, and will give the directions for the future researches.

A lot of Ukrainian and foreign scientists, that write about Ukraine, underline and research the problems of the representative democracy. Looking at the activity of the bodies of constitutional jurisdiction, C. Qaracayev underlines, that they pay a lot of attention to the correlation of the direct and indirect democracy (*Qaracayev, 2022 (1)*), and N.Mishyna continues, that it is extremely important in terms not only of the axiological approach, but for the hermeneutical methodological basis (*Mishyna, 2021*). One should consider, that this problem is important not only when it comes about the democracy at the state (all-Ukrainian)

level, but also for the local democracy. The cited authors argue, that for the municipal level the representative democracy is even more crucial in terms of the effect on the civil society and local government, than at the state level. Citing the European Charter of Local Self-Government 1985, they prove, that the combination of the direct and indirect democracy at the local level can be used for the experiments of their synergy – and later such a synergy can be introduced at the state level (*Qaracayev, 2022 (2)* and *Mishyna, 2020*).

Research methods, used in this article, are as follows: legal analysis, legal synthesis, inductive, deductive, comparative, hermeneutical and sociological. The author researches the problem based on the axiological and antropocentric methodological approaches.

The aim of the article is to give the state of the art, when it comes about the representative democracy in research of Ukrainian constitutionalists.

2. People's sovereignty and the mechanism of its implementation by public power: theoretical and legal aspect

One of the topics, closely related to the indirect democracy, is ‘People's sovereignty and the mechanism of its implementation by public power: theoretical and legal aspect’. It is the title of the monographic research by Ya. S. Bohiv. He analyzed this topic to gain the degree of the Doctor of Legal Sciences, and successfully finished this project in 2020.

Firstly, Ya. S. Bohiv proposed his definition of the term ‘people's representation’. This attempt is of the high hermeneutical interest, as there is no legal definition of this term in the Ukrainian legislation.

According to the author, the people's representation is defined as ‘one of the most effective mechanisms for implementing the principle of popular expression, which is not limited only to elected representatives of the people, but also includes institutions of civil society that can effectively perform the functions delegated to them by public authorities, as well as judicial bodies, in particular constitutional courts designed to protect human rights and the foundations of democracy’ (*Bohiv, 2020: 6-7*). It should be underlined, that the definitions are usually more precise (in terms of the characteristics) and more laconic. That gives the grounds to argue that there is still a gap in the Ukrainian constitutional law science, when it comes about the understanding of the term ‘people's representation’.

Secondly, Ya. S. Bohiv comes to the controversial conclusion – that ‘the power of the people is a way of realizing the sovereign will of the people directly or through public authorities, the characteristics of which are its public and legitimate nature, which is implemented in three forms - state power, local self-government and public control’ (*Bohiv, 2020: 7*). It is rather interesting, how this statement corresponds with the axiomatic statement, widely used in the Ukrainian constitutional law, that the public power is represented by the state power and the municipal power (local self-government). Why the public control has suddenly ‘joined’ this group – the author doesn't explain. It seems, that the nature of the public control should be researched in this relation – in order to understand, if Ya.S. Bohiv's approach could be shared or not.

The connection between the direct and indirect democracy is of the high importance, when it comes about the constitutional researches. It is essential to understand, how the voters can perform the effective control over the officials they have elected. Not a lot of Ukrainian scientists support the idea of the recall, but Ya. S. Bohiv does. In his work he pays attention to it – he underlines, that ‘any form of legal dependence of a member of parliament on the voters (imperative mandate) or the party – the subject of his nomination (party imperative mandate)

contradicts the principle of popular sovereignty' (Bohiv, 2020: 8). So, the author doesn't support the idea of the official's recall by voters at all. It is important to underline, that Ya. S. Bohiv comes to this conclusion based on the Ukrainian pre-war reality – after analyzing 'current issues related to parliamentary autonomy, removal of deputy immunity, party imperative mandate, advantages and disadvantages of electoral systems and, in particular, open party lists' (Bohiv, 2020: 17). One may agree with his approach, when it comes about the Parliament of Ukraine, but in general his analysis of the official's recall by voters lack depth – especially in terms of the local level researches.

At the end of the section, there is a very interesting part in the Ya.S. Bohiv's work – it is dedicated to the indirect democracy in Ukraine. It is subsection 3.3 of the dissertation, and the title of this part is "Representative democracy as a means of realizing popular sovereignty". According to the author, the indirect democracy:

- is one of the forms of realization of national sovereignty;
- consists in the formation through direct and free elections of representative authorities, as well as in the implementation of constitutional control over their activities by judicial authorities and civil society.

In the dissertation 'it is emphasized that in the conditions of the development of a modern democratic state, such an approach to representative democracy becomes possible, according to which people's representatives are not only those persons for whom citizens voted in the elections, but also those who openly and honestly protect the interests of the people, controlling the functioning of state authorities. The mechanisms of improving the institution of parliamentarism, as one of the most effective forms of people's power, are revealed. Legislative amendments to the laws on the status of a people's deputy, on the regulations of the Verkhovna Rada of Ukraine, on political parties, on local self-government, as well as the Electoral Code are proposed' (Bohiv, 2020: 17). It is very controversial, how the representative democracy is characterized with the stress on its control functions and how few forms of the control are distinguished by Ya.S. Bohiv's. It seems this part of his paper has a lot of contradictions to be discussed.

3. Realization of the principle of national sovereignty in Ukraine: theoretical and legal aspect

One more topic, closely related to the representative democracy, is 'Realization of the principle of national sovereignty in Ukraine: theoretical and legal aspect'. It is the title of the monographic research by O.O. Skrypnyuk. He analyzed this topic to gain the degree of the Candidate of Legal Sciences, and successfully finished this project in 2015.

Firstly, O.O. Skrypnyuk starts with giving the definition of the term 'democracy'. He argues, that 'according to its etymology, the term "democracy" is a combination of such concepts as people's rule and the supremacy of people's power. Thus, any analysis of both the current state of Ukraine's development and the prospects for its further democratization, formation and formation of democratic institutions is impossible without addressing the theoretical problems of ensuring the principle of people's sovereignty, as well as researching the mechanisms for ensuring and guaranteeing the principle of people's sovereignty' (Skrypnyuk, 2015 (6): 2). As this term doesn't have a stable definition in the Ukrainian constitutional law, his invitation to the scientific discourse is relevant.

Secondly, O.O. Skrypnyuk gives his opinion on the essence of the principle of sovereignty. According to his position, 'the principle of people's sovereignty and the process of

its implementation are organically connected not only with direct democracy and its inherent institutions, but also with the general system of interaction between society and the state, when there are real mechanisms and ways of transferring the interests, aspirations and will of the people to the state level' (*Skrypnyuk, 2015 (6): 2*). This opinion of how the direct and indirect democracy are connected is just axiomatic – more interesting is how the author connects these 2 types of the democracy with the people's sovereignty.

Then, O.O. Skrypnyuk pays attention to the elections – both at the state level and at the local level. According to this author, 'elections are a mechanism that makes it possible to transfer sovereignty from all citizens to individual representatives of these citizens, who exercise sovereign power on behalf of the entire people. That is, it is precisely thanks to the institution of elections that the entire democratic system is brought into action, since in democratic societies power is distributed and redistributed precisely through elections' (*Skrypnyuk, 2015 (7): 75*). One of the drawbacks of his research is that the author doesn't pay attention to the theories of representation. This might add not only multidisciplinary to the research, but also allows him to come to the deeper essence of the elections in the democratically governed state.

O.O. Skrypnyuk also (continuing the ideas of Section 1 of this article) pays attention to the recall of the elected officials. He underlines, that 'the institution of recall was almost never actually applied. That is, despite the norms stipulated by the legislation, the institution of recall as such practically did not act due to the complexity of the revocation procedure itself, as well as the objective reluctance of state authorities to ensure the functioning of this institution' (*Skrypnyuk, 2015 (7): 96*). But the author underlines the problems without giving the solutions or the ways of improving the situation. Maybe it is because his research is the shortest of the works, that are briefly reviewed in this article.

4. People's sovereignty in the political and legal construction of the modern state

One of the topics, closely related to the indirect democracy, is 'People's sovereignty and the mechanism of its implementation by public power: theoretical and legal aspect'. It is the title of the monographic research by O.V. Shcherbanyuk. She analyzed this topic to gain the degree of the Doctor of Legal Sciences, and successfully finished this project in 2014.

O.V. Shcherbanyuk starts with the definitions of the terms – like the previously mentioned authors.

She defines – for the purposes of her research – that 'national sovereignty is the state and social order from other methodological positions, in particular, the natural approach, according to which national sovereignty is the natural possession of the people by socio-economic and political means that ensure the real participation of all social groups and strata in the management of society's affairs and the state' (*Shcherbanyuk, 2014: 6*). This definition isn't very precise and is too laconic. But, the positive side of it is that the author doesn't recommend it for each and every research – she underlines, that this definition was worked out for the purposes of her monography. It doesn't make her position clear – but at least, the author understands, that this definition can't be considered universal.

One more thesis O.V. Shcherbanyuk formulates is as follows: 'It is the people who have the right to create such state institutions that correspond to their ideas about the most favorable variants of the state system and correspond to the traditions of state formation' (*Shcherbanyuk, 2014: 15*). She doesn't give any arguments to support this thesis – so it is difficult to object. But, at least, this thesis contradicts with her statement that 'in the modern understanding, democracy should be considered not as the power of the people, but as the participation of

citizens (people) and their associations in the exercise of power (*Shcherbanyuk, 2014: 16*). At least, from the point of view of the constitutional law it seems there is a contradiction – do the people has the mentioned right, or they don't – and only their associations have, and the people in general just do the participative actions?

O.V. Shcherbanyuk has enriched the national constitutional doctrine by giving the axiological characterization of the principle of popular sovereignty as a principle of legal regulation. According to her work, the main characteristics are:

- firstly, the limitation of normative and legal regulation in the sphere of political relations;
- secondly, the use of a predominantly dispositive method for legal regulation of the behavior of subjects of political relations;
- thirdly, granting the subjects of political relations such a complex of rights and obligations that will allow them to become real participants in political processes, effectively influence their development and prevent abuse of rights, restrictions on the rights and legitimate interests of other subjects;
- fourth, establishing legal consequences aimed at protecting the democratic system of political relations (*Shcherbanyuk, 2014: 14*).

The next interesting idea of O.V. Shcherbanyuk is about the problem of representation and the relationship between the concepts of people's representation and parliamentarism. She has formulated, that 'people's representation is a broader concept than parliamentarism, as it includes legal and non-legal social relations that arise in connection with the resolution of issues of state importance not only through deputies and parliament, but also through people's elected higher officials. The relations of people's representation are at the basis of the concepts of representative system, representative and representative body of the state' (*Shcherbanyuk, 2014: 13*). This connection between the direct and indirect democracy covers the modern theories of representation (in Chapter 3 it was noted as a drawback of the analyzed paper, that that author paid no attention at all on it); that is definitely the plus of her research.

Also, this gave O.V. Shcherbanyuk enough doctrinal grounds to come to the certain conclusions, when it comes about the perspectives of the development of the constitutional provisions on the direct democracy. The author claims that the 'the main direction of the development of modern democracy is the improvement of the mechanisms of representative democracy, which is transformed into a model characterized by the involvement of citizens in the process of making and making public-power decisions. The people of Ukraine, through the parliament, determine the tasks and functions of the state, the limits of state intervention in the spheres of private and public interests, and the parliament, with the help of its legislative function, influences the development of civil society, forms legislation that regulates relations in the sphere of people's power' (*Shcherbanyuk, 2014: 16*). It is only one of the proposals, that are grounded on the doctrinal theses, formulated by the author (O.V. Shcherbanyuk). Her paper is one of the most profound, when it comes about both direct and indirect democracy, though the title is 'People's sovereignty and the mechanism of its implementation by public power: theoretical and legal aspect'.

5. Conclusions

The aim of the article is to give the state of the art, when it comes about the representative democracy in research of Ukrainian constitutionalists. Using the axiological and antropocentric methodological approaches and the legal analysis, legal synthesis, inductive,

deductive, comparative, hermeneutical and sociological methods, the author analyses the doctrinal provisions on such problems as: a) people's sovereignty and the mechanism of its implementation by public power: theoretical and legal aspect (researched at the monographic level by Ya. S. Bohiv); b) realization of the principle of national sovereignty in Ukraine: theoretical and legal aspect (analyzed at the monographic level by O.O. Skrypnyuk); c) people's sovereignty in the political and legal construction of the modern state (researched at the monographic level by O.V. Shcherbanyuk).

To generalize, there is still a gap in the Ukrainian constitutional law science, when it comes about the understanding of the term 'people's representation' and other terms, mentioned in the article. There is definitely a gap here, because there are terminological sections in all of the reviewed works.

As for the Ukrainian constitutional law, nowadays in legal science, the concept of people's sovereignty is experiencing a certain crisis, which has raised questions about the relevance of this problem. One of the ways to overcome this crisis is working out on the correspondence of the relevant terms. For example, Ya.S. Bohiv's proposed his definition of the term 'people's representation'. This attempt is of the high hermeneutical interest, as there is no legal definition of this term in the Ukrainian legislation (it is essential to understand, how the voters can perform the effective control over the officials they have elected; not a lot of Ukrainian scientists support the idea of the recall, but Ya. S. Bohiv does). O.O. Skrypnyuk started with giving the definition of the term 'democracy'. As this term doesn't have a stable definition in the Ukrainian constitutional law, his invitation to the scientific discourse is relevant. O.V. Shcherbanyuk defined (for the purposes of her research) the term 'national sovereignty, and gave the axiological characteristics of this principle. All of the above terms' definitions were given in one period of time, and it seems they should correspond – but they not. So, there is still a long way for the Ukrainian constitutional science to be developed, when it comes about the democracy in general and the representative democracy in particular.

The article also shows other gaps in the state of art and the author proposes the directions for the future researches in the field based on the current political situation in Ukraine. The author invites constitutionalists to the doctrinal discussion and argues the own directions of the future researches, and it is the main direction for the further researches in this area.

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