THE GENESIS OF THE CONCEPT OF “PUBLIC CONTROL OF POWER” IN THE RUSSIAN FEDERATION: CONSTITUTIONAL ANALYSIS

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ABSTRACT

This article is devoted to the constitutional analysis of the genesis of the concept of “public control of power”. We affirm that an analysis of the genesis of the concept of “public control of power” in constitutional law will allow us to identify specific priorities for ensuring the exercise of the right of citizens of the Russian Federation to exercise public control.

Keywords: Public control. Constitutional and legal aspects. Russian Federation. Public Chamber.

A GÊNESE DO CONCEITO DE “CONTROLE PÚBLICO DO PODER” NA FEDERAÇÃO RÚSSIA: ANÁLISE CONSTITUCIONAL

A LA GÉNESIS DEL CONCEPTO DE “CONTROL PÚBLICO DEL PODER” EN LA FEDERACIÓN DE RUSIA: ANÁLISE CONSTITUCIONAL

RESUMO

Este artigo se dedica à análise constitucional da gênese do conceito de “controle público do poder”. Afirmamos que uma análise da gênese do conceito de “controle público do poder” no direito constitucional nos permitirá identificar prioridades específicas para garantir o exercício do direito dos cidadãos da Federação Russa de exercer o controle público.


RESUMEN

Este artículo está dedicado al análisis constitucional de la gênese del concepto de “control público del poder”. Afirmamos que un análisis de la gênese del concepto de “control público del poder” en el derecho constitucional nos permitirá identificar prioridades específicas para asegurar el ejercicio del derecho de los ciudadanos de la Federación de Rusia a ejercer el control público.


INTRODUCTION

Public control as one of the most important civil society institutions in the Russian Federation is widely analyzed in the scientific works of O.V. Pischchulin, V.V. Grib, L.Yu. Grudtysna, D.S. Mikheev, G.N. Chebotaryov, V.E. Chirkin, S.A. Avakyan, A.A. Uvarova, A.I. Lapshina and a number of other authors. These works provide the basis for the analysis of the theoretical content of the institution of public control in relation to its social essence. However, the share of studies that sanctify the genesis of the concept of “public control of power” that underlies this institution of civil society is extremely small. In this regard, the main purpose of this research is a comprehensive constitutional and legal study of the genesis of the concept of “public control of power” in the Russian Federation, in order to expand and clarify the conceptual and categorical apparatus of the science of constitutional law in the field of public control, forming an integral concept of public control, and the subject of research is the regulatory framework of public control, as well as scientific views on the genesis of the concept of “public control of power” as a constitutional and legal category.

METHODOLOGY

This article in the process of cognition of state-legal phenomena were used: a) General scientific methods (formal-logical, systemic, structural-functional, concrete-historical); b) General logical methods of theoretical analysis (analysis, synthesis, generalization, comparison, abstraction, analogy, modeling, etc.); c) private scientific methods (technical and legal analysis, specification, interpretation, etc.) (ZALESNY, GONCHAROV, 2019: 129-142; ZALESNY, GONCHAROV, 2020: 1-6).

RESULTS

The concept of public control of power in philosophical and legal literature has been known since ancient times and is inextricably linked with the concept of democracy. As V.E. Karastelev rightly notes in this regard:
The Question of control over power appears simultaneously with the birth of the ideals of democracy in Ancient Greece, when the ruler Cleisthenes made the transition from gens (from the Greek clan, tribe) - a social order based on family norms and traditions of their ancestors - to a demos - social order necessary for the "fusion" of residents (the expression of Aristotle) into a single civilian corps. (2016: 11).

At the same time, it was not about the control of society over power in general, but the control of the people over the state apparatus in a state-organized society. Ancient Greek authors (Democritus, Protagoras, Plato, Aristotle and others) considered the institution of public control of power, on the one hand, as a guarantor of the organization and development of a better political system, (VLASTOS, 1945/1946: 578-592; VITRINGA, 1852) and on the other hand, as a means of preventing tyranny or oligarchy with the violation of the rule of law (PLATO, 2020). However, the people did not recognize the right to be considered the sole source of power in the state, and its control of state power was only an additional means of ensuring the legality of its organization and implementation. In addition, under the people in ancient Greece, only free citizens of the state were considered, and in some cases only those who were endowed with a certain minimum property (BONNARD, 1954).

A number of scientists of Ancient Greece (in particular, Aristotle) believed that the ideal form of democracy is one in which the control of society over power is carried out solely on the basis of laws and in the forms and methods they have enshrined (ARISTOTLE, 1983: 375-645). According to other authors (in particular, Protagoras), the people (society, its majority) are authorized to determine the methods, forms, order and conditions of public control of power themselves (LARSEN, 1954: 1-14). This dualism was partly due to the contradiction between the formally democratic way of forming the state apparatus in most of the policy states of Ancient Greece and the real impossibility of electing the poorest segments of the population in governing bodies due to their insufficient education and lack of payment for the activities carried out.

In ancient Rome, ordinary people (plebeians), fighting off the arbitrariness of power controlled by the top patrician clans, established in 494 BC the first body that embodies public control over public institutions of government - the people's tribunes (PEOPLE'S, 2020), which were directly elected by the people protected their interests, could influence the decisions of the magistrate, the Senate, vetoed, fined any citizens and for any violations, had legislative rights.

The era of the Middle Ages was characterized by the almost complete destruction of any attempts to establish and consolidate institutions of public control over state power, although in a number of small states with a non-monarchical form of government, people retained the ability to control the institutions of state power. In particular, in the Novgorod Republic (Mister Veliky Novgorod) in the 12-15 centuries the supreme ruler (prince) was called to the throne. Upon his appointment, a contract was drawn up, the violation of which entailed the expulsion of the prince to the Novgorod lands - he was "shown the way". The agreement itself significantly limited the rights of the prince. For example, military affairs and participation in court were carried out under the direct control of the people and required their approval (at the city council) (MINIKES, 2003).

The institute of public control of power was reborn already in the heyday of capitalism in the 20th century. And, if in the USA and countries of Western Europe the public control of power was basically declarative in nature, being a means of populist cover for the real implementation of the fullness of state power by the ruling class of the bourgeoisie, despite the forms, methods, principles and guarantees of people's participation that were rather elaborated in the current legislation (its individual representatives and organizations) in the control of the organization and activities of the state mechanism (AUCOIN, 2007, LJPHART, 1977: 1-2), then in the USSR public control of power was carried out, in the opinion of a number of authors, indeed, in the interests of the ruling class - the proletariat, which together with the laboring peasantry constituted the majority of the country's population (and subsequently the entire society), and was distinguished by sufficiently progressive time forms and methods (TYAGUNOV, KOSTIN, 2020). Currently, in the domestic and foreign educational and scientific legal literature there is no single approach to the definition of the concept of public control of power, which is due to several reasons.

- Firstly, the concept of public control of power is often identified with the concepts of social control of power (CHESTNOV, 2016: 31-38), civilian control of power (SOKOLOV, 2015: 152-157, DAVTYAN, 2014: 23-27), people's control of power (BERDNIKOVA, 2013: 696-703), state control of power (ANKIENKO, 2017: 32-37), which is caused, on the one hand, by the terminological inaccuracy in the definitions of the concept of power as such, and on the other hand, by the predominance of the pre-reform period of our
country’s existence of national and state forms of control of power, which, in turn, gave rise to a terminological confusion in the definitions of the above the varieties of power control.

- Secondly, in the current legislation of a number of modern states, an intentional substitution of the concept of power control by society (the whole people, or the population of certain territories of the state, in particular) has been made to the concept of power control by pseudo-public organizations, which have nothing to do with the will of the majority of the people, and which are created either by the state directly [by individual state authorities and their officials], or with its participation and on its money. Such organizations, in particular, include the Public Chamber of the Russian Federation, due to the legislatively established features of its organization and activities (funding from the state budget, approval of a number of members by the head of state, etc.) (ON, 2005). With such a substitution of public control of power by state control, the semantic content of the concept of public control of power is distorted as the possibility of direct control by the people of the country of the mechanism of state power and local self-government, not caused by interference in the process by representatives of the controlled objects themselves. Otherwise, we are talking only about the self-control of state authorities and local self-government disguised as their public control.

- Thirdly, in international and national constitutional law there is no single clear understanding of the conditions, limits and forms of application of public control of power, which complicates the understanding of the meaningful unity of this concept. So, in particular, the Universal Declaration of Human Rights, adopted by resolution 217 A [III] of the UN General Assembly dated 10.12.1948, actually removes the limits of the application of public control of power, directly securing the right of the people to revolution: “Bearing in mind that it is necessary that the human rights were protected by the rule of law in order to ensure that a person was not forced to resort, as a last resort, to an uprising against tyranny and oppression…” (UNIVERSAL, 2020). At the same time, a number of researchers believe that the public control of power in general cannot have limits of application, since the right to it belongs to natural human rights and does not require confirmation by positive law (MARSAVELSKY, 2013: 266-285).

At the same time, most national constitutions, including the Constitution of the Russian Federation, although formally proclaim national sovereignty, suggesting that the only source of power in the state is the people, which, therefore, has the right to resist usurpation of power or its abuse, but ignores the very possibility of radical control of power by society up to its dispersal and replacement with a new representation with the adoption of a new constitution or other supreme law of the country (THE, 1993). Moreover, the current legislation on public control of power makes an attempt to push public control of power into the framework of artificially created legal restrictions that are not directly provided for even by the main law of the country (ON, 2014), which, according to a number of authors, narrows the field for people to constructively protest imperious arbitrariness (RIEKKINEN, 2017).

It seems that in order to concretize the definition of the concept of public control of power, it is necessary to consider this concept through the prism of the concept of power both in the broad sense [as a philosophical and general sociological category] and in the narrow sense [as a legal category]. This will make it possible to specify the object [power] in respect of which the company exercises its control, delimiting it from other forms of influence existing in any society, and to define the concept of public control of power as a legal category. Power as a philosophical and general sociological category is a condition for the formation and functioning of any socially organized society, corresponding to the level of development of social relations, characterized by the presence of the corresponding rights and obligations of the ruling and subordinate subjects of power relations with the subordination of the latter to the governing [ruling] in this community, reinforced by the possibility of applying to the subordinate subjects of coercive measures, including violence. Power in the narrow sense [as a legal category] is a property of state bodies endowed with legislation with a certain set of state-power powers.

It is through the implementation of this property that people exercise their right to power (Article 3 of the Constitution of Russia). However, in a broader sense [according to the mentioned article of the Basic Law of the country], people exercise power not only through state authorities, but also through the organization and activities of local governments. Article 1 of the Federal Law “On the General Principles of the Organization of Local Self-Government in the Russian Federation” dated 06.10.2003 № 131-FL specifies this circumstance, referring local self-government to one of the forms of exercise by people of their power: “Local government in the Russian Federation is a form of exercise by people of their power providing, within the limits established by the Constitution of the Russian Federation, federal laws, and in cases established by federal laws, - the laws of the constituent entities of the Russian Federation, independently and, under its own responsibility, the decision of
the population directly and (or) through local authorities on issues of local importance based on the interests of the population, taking into account historical and other local traditions” (ABOUT, 2003a). Thus, power as a legal category in the context of our study from the standpoint of the traditional doctrine of constitutional law, whose representatives believe that public authority is the exclusive monopoly of the state (AVAKYAN – ROBOSKIN, 2014), is a property of state and local self-government bodies endowed by the current legislation with a specific set of authority carried out on behalf of the state. However, in a modern state-organized society, authority can be vested not only with government bodies and local governments.

- Firstly, the current legislation in the Russian Federation and especially abroad, envisages the possibility of delegating state powers to non-state organizations. As rightly pointed out by O.V. Romanovskaya:

Despite the fact that … the Constitution determines the subject of power and forms of its implementation, setting the monopoly of public institutions (state bodies and bodies of local self-government), … currently many well-established principles of social organization: the creation of international organizations with supranational powers, the internationalization of justice, the dictates of transnational corporations, the globalization of economies, instant spread of information… the continuation of such a policy is the transfer (delegation) of certain state powers to private entities. All this fits into the logic of liberal ideas about building such an organization of society in which the state will set aside a minimum role (2020).

And, although the Constitution of the Russian Federation does not contain concepts of the delegating state (or municipal) authority for using other legal structures (for example, vesting of public powers local self-government bodies in accordance with Article 132, the redistribution of powers between subjects of the Russian Federation according to Article 66, the devolution of powers in the framework of a unified system of Executive power on the basis of Article 78, changes in the status of subject of the Russian Federation the carrier of public authority in the manner of Part 5 of Article 66), but the jurisprudence of the constitutional Court of the Russian Federation since the late 90-ies of the last century provided an opportunity not only for the redistribution of power within public authorities (state and municipal), but granting a separate public authority non-governmental organizations (in particular, various self-regulatory organizations, notary chambers, etc.) (IN, 1998; IN, 2008). Today, state and municipal authority can be exercised by non-governmental organizations (within the framework of delegated authority) on the basis of current legislation in the following forms:

1) By joint regulation by government bodies and non-governmental organizations of certain spheres of society’s life, which can be carried out in the form of joint adoption of regulatory legal acts (for example, the Federal Notary Chamber is empowered to jointly adopt regulatory legal acts with the Ministry of Justice of the Russian Federation, regulating the activities of notaries and the notarial community) (Fundamentals, 1993), and by creating joint governing bodies (in particular, a number of Federal laws provides for the establishment of governing bodies through the participation of non-governmental organizations in the current managerial activities of the state body that regulates certain markets for goods, works and services) (ABOUT, 2003b).

2) By transferring certain functions of state bodies to commercial and non-profit organizations or individuals, in which not power is transferred, but a state function, the implementation of which underlies the adoption of a decision by a state authority (while maintaining the state’s control over its proper execution). Especially often these functions are transferred in the field of banking and monetary activity (ON, 2003). Individuals are often given the execution of certain state orders in the field of science and education. So, for example, the current legislation obliged, when conducting state accreditation of educational activities, to use experts who are not in the state or municipal service, with whom a civil law contract is concluded, and based on the results of the expert opinion of which the authorized state body issues an order on state accreditation (or its deprivation) of an educational organization (ON, 2013).

3) By means of self-regulation, when subjects of entrepreneurial or professional activity carry out independent and initiative activities authorized by the state, “the content of which is the development and establishment of standards and rules for these activities, as well as monitoring compliance with the requirements of these standards and rules” (ON, 2007).

4) By managing commercial territories in certain territories, when the functions of state authorities and local self-government are limited to parts of the state’s territory, which are transferred to specially created management companies, which are usually joint-stock companies (ON, 2011; ABOUT, 2014). Such management companies include, in particular, the joint-stock company Special Economic Zones.
which controls 17 special economic zones in the Russian Federation (ON, 2005b). The country has similar special economic zones at the regional level (industrial, industrial (ABOUT, 2005a), technical-innovative (ABOUT, 2005b), tourist and recreational (ABOUT, 2007) port (ABOUT, 2010a)).

5) By creating organizations with special status, which include the Russian Academy of Sciences and industry academies of sciences (About, 2013), State Scientific Centers of the Russian Federation (SSC RF) and Federal Scientific and Production Centers (FSPC) (ON, 1996), innovation centers (in particular, “Skolkovo”) (ABOUT, 2010b), state-owned corporations (for example, the state-owned corporation Deposit Insurance Agency in the Russian Federation) (ABOUT, 2003c), as well as gradually replacing them with public law companies (ON, 2016). These organizations combine the features of a public authority and non-profit organization with the right to engage in entrepreneurial activity.

Secondly, legal entities and individual entrepreneurs in the framework of civil law, labor, administrative and legal relations possess authority. For example, a representative of a carrier company (controller), which may be privately owned, has the right to levy a fine on a stowaway passenger on the basis of Article 11.18 of the Code of administrative offenses of the Russian Federation (CODE, 2002).

A number of normative legal acts provide authority, in particular, to the contractor for the provision of utility services, to suspend the provision of these services even if the consumer does not violate his obligations under the contract (for example, in the event of a threat or emergency, or if the occurrence of natural disasters and (or) emergency situations, as well as, if necessary, their localization and elimination of consequences (ABOUT, 2011)).

In view of the foregoing, power as an object of public control is a property of state authorities and local governments, as well as authorized legal entities and individuals who are endowed by the current legislation with a specific set of authority exercised by them independently, or in conjunction with state and local governments, either on their behalf and (or) on their behalf. In this regard, it seems that public control of power is a set of principles, norms and public institutions vested in a legal form, which are associations of citizens whose mass and voluntary activities are aimed at monitoring the formation and functioning of government bodies and local self-government, as well as the activities of authorized legal entities and individuals who are endowed with the current legislation with a specific set of authority, operated by them on their own, or jointly with state and local authorities, or on their behalf and (or) on their behalf.

CONCLUSIONS

The study of public control of power in the Russian Federation as a constitutional legal category made it possible to identify, as the main problem of defining its concept, the lack of uniformity in the conceptual and methodological apparatus of international and national Russian legislation, as well as constitutional legal and socio-humanitarian doctrine (due to the presence of various approaches to the definition of the concept of “power” in the broad sense (as a philosophical and general sociological category) and in the narrow sense (as a legal category of) on which it is based). The author substantiates the author’s definition of public control of power, which is understood as a system of legal forms, principles, norms and public institutions, which are associations of citizens whose mass and voluntary activities are aimed at controlling the formation and functioning of public authorities and local self-government, as well as the activities of authorized legal entities and individuals who are endowed by the current legislation with a certain set of power powers that they exercise independently, or in conjunction with public authorities and local self-government, or on their behalf and (or) on their behalf.

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