

Parliamentary Sovereignty in the Modern Legal Policy in the Russian Federation and Great Britain

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Abstract

As far back as in the “public choice theory” of J. Buchanan and F.A. Hayek an attempt to figure out the causes of distortion of a democratic ideal and evolving of law into a corruption outrage was made. This trend was explained by the fact that at the early stages of the people’s power development the acknowledgement of parliamentary power supremacy was a coercive measure that was useful for the new statehood. The existence of parliamentary sovereignty in Great Britain and then in other European countries was initially stipulated by the fight of the bourgeoisie having gained political power and needing an absolute independence of the parliament with the feudal absolutism, then by the resistance between the bourgeoisie and the working class.

In the modern world there is no such a correlation of classes, because the estates bounds are removed and the living standards are evened. The social basis for a democratic state is the middle class. The main purpose of the state is to provide itself with nationwide support. The last one is required taking account of the growth of extremism and the appearance of various revolutionary studies calling for a forcible change of regime and an establishment of totalitarian dictatorship under socialist, nationalist and other slogans. Along with this, the number of advocates of such radical methods in the world increases from year to year.

Keywords: Parliamentary sovereignty; public choice; competition; bodies of power; federalism; system of restrictions.

1. Introduction

In spite of the existence of all the mechanisms and attributes of modern democratic states in Russia for more than 20 years already, essentially renewed legislation (civil, criminal, land, etc.), and declaration of policy for stability in all spheres of social and governmental life, the problem of improving Russian citizens’ living standards still remains. Further development of democracy, enhancement of citizens’ legal safety, and equitable distribution of incomings from the exploitation of natural resources are supposed to play an important role in solving this problem.

However, there are still some problems on this way. One of them is the corruptibility of a series of Russian laws, that was repeatedly mentioned by the leaders of the Russian state. Thus, in 2010 D.A. Medvedev pointed out in his Address to the RF Federal Assembly that “the situation has already overstepped the bounds of common sense. At a conservative estimate, inappropriate expenses including stealing, kickbacks, and other inappropriate expenses amount to not less than one trillion Russian rubles. That is why it’s time to start working on the new version of the law on state purchases, the more thought-out and up-to-date one” (Address of President of the Russian Federation D.A. Medvedev to the RF Federal Assembly).

It is noteworthy that in 2010 D.A. Medvedev spoke of the law, the lack of which caused the state’s thumping losses, that was officially confirmed by the RF Accounts Chamber’s survey. Along with this, regardless of such a clearly stated position of the Head of State, the law was passed only two years and four months later – on April 5, 2013.

There is no official statistics regarding the state’s losses and, at the same time, lobbyists’ “incomings” from the operation of other federal laws. In the meanwhile, for instance, Article 4 of the Federal Law “On the circulation of agricultural lands” No. 101-FZ passed on July 24, 2002 ignores public opinion about the inadmissibility of creating land latifundia and admits that all the agricultural areas of a municipal district can be owned by a maximum of 10 proprietors. It provided quite preferential terms for large landowners to purchase them and eliminated the major part of their competitors – small entrepreneurs, i.e. farmers. It is hard to imagine that after all the parliamentary discussions around the draft Land Code, this standard has appeared “for no particular reason” – due to the carelessness of the RF State Duma deputies.

In the meanwhile, the necessity to fight corruption by improving the current legislation, that was mentioned by D.A. Medvedev, is specific not only for the Russian Federation. This problem of “teething troubles” had already been overcome (and solved) by European countries and the USA and studied in their social sciences.

It explains more frequent referring of prominent Russian constitutionalists (B.S. Ebzeev, 1992; G.A. Gadzhiev,

2004) to the works of foreign economists, in particular J. Buchanan (1997) and F.A. Hayek (1990). Their “public choice theory” explaining the causes of distortion of a democratic ideal and evolving of law into a corruption outrage was acknowledged by leading countries in the world and won the Nobel Prize.

Unfortunately, the public choice theory is not well-known among Russian scholars including representatives of legal science.

The use of methodology and terminology of political and economic science in Russian legal studies is yet to gain momentum. In the meantime, the application of these interscientific methods allows a more profound analysis of the whole variety of social phenomena and processes. The necessity of such an approach was emphasized by S.V. Polenina (1996), who pointed out that “the scientific foundation of legislation supposing the application of different fields of knowledge (philosophy, political science, jurisprudence, social science, mathematics, etc.) in the law-making process must be related to all stages of the legislative process. This is because science is intended to be a generator of new ideas about the development of legislation and ways of its renewal.” Among other representatives of this methodology there are also M.Y. Chelyshev (2010), G.N. Chebotarev and A.A. Mishunin (2009), A.Y. Chikildina (2010), and so on.

The interpenetration of economic and legal sciences gave rise to a series of new lines of research in constitutional law. First of all, this is the “economic constitution” and, as a consequence, the creation of constitutional economy (Z.Z. Bilalova, 2010). It appears that it is the use of interscientific methods that will allow Russian legal science to get to a new level. The economic and political analysis of the legal basis of democracy is the most objective. It helps figure out the real causes of the existing state legal system inefficiency, while legal science considers it to be a result of shortcomings of legal standards or their inappropriate application. The issue of parliamentary sovereignty, in particular its negative impact on the state of democracy, is not sufficiently studied not only in Russian constitutional law (N.I. Shaklein, 2008), but also in jurisprudence on the whole. The parliamentary sovereignty is mentioned only by Russian researchers of history of English parliamentarism (I.A. Dudko, 2005) as well as by constitutionalists in view of the general traditional positive trend to enhance the legislative power and invest it with new functions, for instance, in the form of a parliamentary control (A.A. Kornilaeva, 2002) or a parliamentary investigation (D.B. Troshev, 2008) in order to prevent the executive power enhancement. Along with this, the independence and broad powers of the legislative power are traditionally considered by Russian constitutionalists as a positive phenomenon.

Consequently, the purpose of this study is to find out informative aspects of the parliamentary sovereignty theory in science and practice of European countries as well as to outline those positive issues of this practice which should be taken into account in Russia.

2. The main provisions of the parliamentary sovereignty theory

In his Nobel lecture J. Buchanan considered economic relations in the context of the state legal sphere and formulated a public choice theory studying various ways and methods for people to take advantage of governmental institutions. According to this theory, corruption is determined by human nature. A natural desire of a certain person to act in a rational way (i.e. on an economically feasible basis) and stand out from others (get promoted at work or get incentives on performance) is typical for all types of human activities including public service, that initially runs counter to the interests of service. That is why “...when making political and governmental decisions, a person judges by comparing additional benefits and extra costs. Additional benefits of a politician are not only material. They also imply boosting his prestige and fame, expanding the sphere of his power, the possibility to go down in history and be remembered by the people. Extra expenses are related to the loss of connections with friends and the reduction of spare time, the impossibility to afford some pleasures and enjoyments of life that ordinary people can have...” (Economics. Part 2: Textbook for lawyers, p. 38).

From this point of view based on typical human qualities, “...the state is an arena for competition of private interests to win influence on decision-making, access to distribution of resources, and positions in the social ladder.” (R. Nuriev, 1997, pp. 454-455).

It appears that even a state machinery democratically chosen to provide public interests eventually acts in the name of a great number of private interests. In this context P. Heyne points out, “However exalted, generous and disinterested the official goals of a governmental institution are, its every-day activities are determined by decisions that are made by mere mortals under the influence of stimuli that are very similar to those acting in the private sector” (P. Heyne, 1997). In this regard, advocates of the public choice theory (J. Buchanan, P. Heyne, F.A. Hayek) do not consider bodies of state power even divided into legislative, executive and judicial branches, and, moreover, so currently significant “fourth estate” (mass media) to be ideal bodies of power the only and exceptional purpose of which is to improve the population’s wellbeing.

In Friedrich von Hayek’s reasonable opinion, democratic institutes were established for the administration needs and not for the legislation ones. Under democracy they initially understood not even the content of administration but only a form (or a procedure) of decision-making. This form had nothing to do with the

administration goals and means of their achievement. With the course of time, however (not without the influence of the English tradition), the representative assembly (parliament) acquires not only the supreme power but also the unrestricted power in society. It means that it is the parliamentary sovereignty principle that dominates in society (R. Nuriev, 1997, pp. 476-478). However, in the modern world, particularly in Russia, the constitutions declare the principles of state or popular sovereignty but not the parliamentary sovereignty principle.

The parliamentary supremacy principle was formulated by the English lawyer, constitutionalist Albert Dicey when characterizing a high role and importance of the British parliament in the system of bodies of state power after the revolution of 1688. It provided the basis for the so called Westminster system of parliamentarism. In England the parliamentary sovereignty was established due to the tough rules, according to which the parliament possesses the overall authority “to pass or not to pass any, whatsoever law” (A. Dicey, 1965; P. Hogg, 1985) in “the absence of whatsoever legal restrictions in the process of preparation and adoption of laws” (K. Eddey, 1987).

Today the parliamentary sovereignty in the West draws criticism from different sides. During the whole 20th century in the native land of the most severe parliamentarism the trends toward a gradual renunciation of the parliamentary sovereignty principle and an enhancement of executive power can be seen (the Parliament Act 1911, the Parliament Act 1949, the Life Peerages Act 1958, and so on up to the 1997 labor reform).

The mentioned trend is determined by the fact that at the early stages of the people’s power development within the country the acknowledgement of parliamentary power supremacy was a coercive measure that was useful for the new statehood. The existence of parliamentary sovereignty in England and then in France and other European countries was initially stipulated by the fight of the bourgeoisie having gained political power and needing an absolute independence of the parliament with the feudal absolutism, then by the resistance between the bourgeoisie and the working class. However, nowadays there is no such a correlation of several classes, because the estates bounds are removed and the living standards are evened. The social basis for a democratic state is the middle class. The main purpose of the state is to provide itself with nationwide support. It is necessary taking account of the growth of extremism and the appearance of various revolutionary studies calling for a forcible change of regime and an establishment of totalitarian dictatorship under socialist, nationalist and other slogans. Along with this, the number of advocates of such methods increases from year to year.

To prove our statements, the opinion of contemporary German constitutionalists can be given, “The parliamentary sovereignty... denies the current priority of the Constitution. It allows the parliamentary majority to neglect the protection of the minority rights that must be provided by a democratic state, i.e. it is incompatible with democratic principles...” (A.V. Kryazhkov, 1999).

The necessity to represent the interests of all the population strata in legislative bodies of power is declared by political leaders of Russia. Thus, D.A. Medvedev emphasized that “the political system of any configuration must be constructed in such a way that the opinions of all the social groups including the smallest ones would be clearly heard and taken into account. Ideally the voice of each person must be taken into consideration. In this respect, the system must be transparent and responsive toward any individual. Everyone must be aware that he has like-minded people in representative bodies of power. By the way, this is the main idea of representative democracy – when someone represents the interests of a significant number of people” (Video blog of Dmitry Medvedev, November 23, 2010).

We suppose that in modern society the premises of the existence of parliamentary sovereignty as a means to restrict access of undesirable groups of the population (feudal aristocracy, working class) to decision-making in the legislative sphere through the election system have been lost. In this regard, the meaning of parliamentary sovereignty has changed and begun working against the state. It doesn’t allow the representation of interests of the whole population and replaces them with corporate interests of parliamentarians. That is why the most important goal of modern Russia is to drift away from the parliamentary sovereignty, develop the true rule of the people by distributing and demonopolizing the power, and expand the social basis of the state.

However, in the opinion of representatives of the public choice theory and some foreign scholars, to prevent the distortion of democratic values as a result of the presence of private interests in any state legal phenomenon and natural human pursuits to act in a rational way, any power needs to be restricted – “any power... must be restricted, especially the democratic one. The almighty democratic government due to the absoluteness of its power becomes a toy in the hands of organized interests, since it has to please them in order to provide a majority for itself” (F.A. Hayek, 1990).

3. Ways of overcoming the parliamentary sovereignty

3.1. Theory of the issue and practice in Russia

In the works of the public choice theory founding fathers two ways of overcoming the parliamentary sovereignty can be found. They can be conditionally called “principled” (J. Buchanan) and “organizational” (F.A. Hayek). J.

Buchanan considered constitutional principles and rules fixing such a macroeconomic model that couldn't be evaded by politicians-legislators to be the main direction of fighting the parliamentary sovereignty tendency. It also implied the creation of the system of effective control over them from the side of all the participants of public relations (J. Buchanan, G. Tullock, 1962). In our study this problem should be interpreted in a broader way in order not to allow the politicians to distort the order within the country the people are satisfied with, that was enshrined in the Constitution of the Russian Federation adopted in 1993.

The Constitution and principles of law formed as a result of reaching a social compromise are the component that represents the values and interests of society and doesn't allow parliamentarians to drift away from them in the current legislation. In such a way it restricts their monopolism. In case of non-conformity to the Constitution and principles of law in the law-making process, the interests of society in the current legislation are replaced with the interests of parliamentarians and their lobbyists. This trend causes a burst of corruption as well as a new wave of disputes about the correlation of law and legislation, the spirit and the letter of law in theory of law (M.I. Baytin, 2001; G.V. Maltsev, 1999; V.A. Chetvernin, 1997; O.V. Martyshin, 2006; V.A. Muravsky, 2005; T.N. Radko and N.T. Medvedeva, 2005; V.A. Tolstic, 2008). In fact there is an obvious conflict between the idea enshrined in the principles of law and its turning into reality of the legislation by the parliament.

It should be noted that the RF Constitutional Court acquires an increasing significance in the state mechanism. It is the RF Constitutional Court that plays a dominant role in providing the balance between the interests of branches of power stipulated by the Constitution. The professor of Goettingen University, the former judge of the Federal Constitutional Court of the Federal Republic of Germany Hans H. Klein referred to the main tendency of the modern democracy development as "from the legal state to the constitutional state". The theoretician and practician of constitutional law reasonably points out that "the constitutional development has already renounced radical democratic positions. The modern democracy appears to be... the constitutional-legal, tame democracy. It is necessary to provide the balance of powers that is based on the superiority of making a political decision by the parliament and the government, on the one hand, and the competence of the Constitutional Court to make a final decision on the interpretation of the Constitution, on the other hand" (A.V. Kryazhkov, 1999).

The Constitutional Court of the Russian Federation has continually supported the policy of the RF Federal Assembly on the enhancement of its parliamentary sovereignty in the confrontation between federal and regional parliamentarians. Thus, the autonomy of the RF constituent entities enshrined in the RF Constitution is quite restrictively interpreted in the practice of the RF Constitutional Court. The federal legislator took a stand against even such token issues as the use of the Latin alphabet for national languages of the republics (the choice of an official language is the right guaranteed by Article 68 of the RF Constitution that must involve the choice of a language of writing) and won support of the RF Constitutional Court.

One more vivid manifestation of parliamentary sovereignty of the federal power undermining the foundations of federalism, i.e. the violation of the constitutional principle of unity of the system of state power (Part 3 Article 5 of the RF Constitution), is that since 1997 (since 1999 in a full scale) the supervision over the conformity of the RF constituent entities' legislation to the federal legislation has been carried out in the practice of the Public Prosecutor's Office of the Russian Federation. However, there is no reverse supervision, i.e. over the compliance of the statutory framework with the legislation of the RF constituent entities.

This practice was established on the basis of "moving" the RF constituent entities' laws from the category of "laws", as they were understood earlier, to the category of "legal acts passed by the RF constituent entities' representative (legislative) and executive bodies of state power." Besides, the Constitution of the Russian Federation determines the "belonging" of the RF constituent entity's law to the public-territorial entity as a whole and not to any body of state power of the RF constituent entity (Part 2 Article 5, Part 4 Article 76). The mentioned prosecutor's practice is an atavism of the Soviet system of state structure, in which territories and regions were not acknowledged as equal constituent entities of the Federation (A.Z. Enikeev, 2007).

The policy of "non-acknowledgement" of the regional rule-making results as part of the Russian legislation system was continued in the federal judicial system activity. Thus, in the resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 17468/08 passed on April 14, 2009 it was indicated that "acts of bodies of executive power of the Russian Federation constituent entity in virtue of Article 3 of the Civil Code of the Russian Federation do not belong to legal acts containing regulations of civil law. That is why the non-conformity of a deal to these acts is not a ground for acknowledging it as invalid on the basis of Article 168 of the RF Civil Code." The given facts prove that the federal legislator has overcome the last "organizational" barrier splitting up the legislative power horizontally and vertically. It led to the establishment of the principle of not popular but parliamentary sovereignty in Russia that is typical for European democracies of the 17th-19th centuries.

3.2. Practice of constitutional reform in Great Britain and the necessity of its application in Russia

As a counter to the current trends toward the legislative power monopolization at the federal level in Russia, in

Great Britain since 1997 the labor party has begun conducting reforms directed at changing the position of the parliament in the state mechanism. The decline of the role and status of the parliament as a body of state power and the increasing political apathy were among the causes of constitutional reforming in Great Britain. The constitutional reforms conducted in Great Britain resulted in the increase in the number of factors providing the restriction of the parliament from the side of society.

First of all, it is related to the development of practice of referendum application on the most important issues of the social life. It began acquiring a status of political tradition, because, in the reasonable opinion of English reformers, the popular sovereignty is considered to be the main restricting factor of the parliamentary sovereignty. As opposed to this trend, in Russia the institute of referendum is almost never used.

Moreover, in the Russian electoral system the election of a deputy is connected directly with the party, while in Great Britain a new type of parliamentarians is being formed. These parliamentarians as representatives of a corresponding district and the people place a priority on their obligations and not on the party loyalty interests. Taking into account that the majority electoral system based on the relative majority method doesn't reflect the real state of affairs anymore, and the existence of two strong parties doesn't express the opinions of all the voters, in Great Britain the transition to the system with proportionality elements was initiated. It was applied in the regional elections in Scotland, Wales, Northern Ireland, and London. It was also used in the European Parliament elections. The reform was marked by the establishment of representative bodies in three large regions of Great Britain (Scotland, Wales, and Northern Ireland). It proves the regionalization to be an effective means of counteracting against the parliamentary sovereignty (I.V. Kasymov, 2010).

In Russia, on the contrary, one can see the profanation of the idea of regional parliaments as well as the system of knowingly inefficient appointment of a governor by the RF President. As a rule, such a governor is not always well-known to the population of the region and not often distinguished by any special achievements. The attempts to discuss half-way decisions that the issue of the direct election of governors or their continued appointment should be left to the discretion of legislative bodies of the RF constituent entities are also groundless. In all the RF constituent entities the qualified majority of seats in the regional parliament are taken by representatives of the United Russia party ruled directly from the Kremlin and also having the right to vote.

4. Conclusions

1) as far back as in the "public choice theory" of J. Buchanan and F.A. Hayek an attempt to figure out the causes of distortion of a democratic ideal and evolving of law into a corruption outrage was made. This trend was explained by the fact that at the early stages of the people's power development the acknowledgement of parliamentary power supremacy was a coercive measure that was useful for the new statehood. The existence of parliamentary sovereignty in England and then in France and other European countries was initially stipulated by the fight of the bourgeoisie having gained political power and needing an absolute independence of the parliament with the feudal absolutism, then by the resistance between the bourgeoisie and the working class.

2) in the modern world there is no "feud between classes", because the estates bounds are removed and the living standards are evened. The social basis for a democratic state is the middle class. The main purpose of the state is to provide itself with nationwide support. The last one is necessary taking account of the growth of extremism and the appearance of various revolutionary studies calling for a forcible change of regime and an establishment of totalitarian dictatorship under socialist, nationalist and other slogans. Along with this, the number of advocates of such radical methods in the world increases from year to year.

3) in modern society the premises of the existence of parliamentary sovereignty as a means to restrict access of undesirable groups of the population (feudal aristocracy, working class) to decision-making in the legislative sphere through the election system have been lost. In this regard, the meaning of parliamentary sovereignty has changed and begun working against the state. It doesn't allow the representation of interests of the whole population and replaces them with corporate interests of parliamentarians. There is a vital necessity to drift away from the parliamentary sovereignty, transit to the true rule of the people by distributing and demonopolizing the power, and expand the social basis of the state. In Great Britain the legislator took measures to fight the parliamentary sovereignty that are of particular interest to science and practice in Russia, the parliament of which represents the population's interests less and less from year to year. One of possible ways to expand the rule of the people in Russia could be the institute of referendum that is still used in no way, in spite of the formal proclamation.

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