

# STATE-LEGAL SCIENCES AND INTERNATIONAL LAW

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## LOCAL SELF-GOVERNMENT AS A SEPARATE BRANCH OF POWER IN UKRAINE: THEORETICAL AND METHODOLOGICAL ISSUES

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***Annotation.** The author once more raises the issue that though the theory of Charles de Montesquieu is brilliant, it yet deals with the problems of the state power organization and is dedicated to the state power separation into branches. However, Montesquieu's studies have not covered the issue of the people's power separation. The people's power is to be considered a separate branch of power, combining the state power and the self-governance power. Exploring the problems of the local self-government reform in modern Ukraine, the author thus defines a chronological framework of work as follows: it is a modern reform in the form of decentralization of power in Ukraine, which has led to significant changes in the legal regulation of local self-government. In this regard, the author recalls that there have been several reforms of the kind in Ukraine, so the author cites scholars who have written about local government reform in recent decades.*

***Key words:** civil society, system of representation, rule of law, self-governance power, the distribution of power, local self-government, the self-governing branch of power, the reform of local self-government.*

The issue of organization of power on democratic basis remains the focus of attention of both politicians and public figures, as well as scholars today. Recalling the ancient times and the Renaissance period, the ones who found the answers to the questions posed by society to the state, entered the arena of revolutionary decisions and remained

forever in the memory of the people. In this regard the reforms of Solon and Cleisthenes in Ancient Athens should be mentioned [4]. These reforms ensured broader access of the people to the exercise of power through participation in the election of the Council of 400 (the Council of 500 during Cleisthenes time) and the formation of a democratic court.

Even then, Plato noted the importance of power branching as a guarantee of its democratic nature and the unacceptability of its usurpation in sole hands. It was Plato who, among the three branches of power, indicated both the legislative and the judiciary, and as well the need to separate the power of the magistracy [3].

The author of this article has numerous [20] raised the issue of necessity modern interpretation of the theory of Charles de Montesquieu: as brilliant as it is, it yet fails to cover the whole range of power execution issues, because it deals with the problems of the state power organization and is dedicated to the state power separation into branches only. The people's sovereignty and sovereign rights of the people has to be concerned though. However, Montesquieu's studies have not covered the issue of the people's power separation. The people's power is to be considered a separate branch of power, combining the state power and the self-governance power. Such approach nonetheless was obvious for the ancient philosophers. Following the principle of a systematic approach to the study of power, it should be noted that state power is not the only form of power of the people, nor is the power of the people monopolistic even if the people is supreme sovereign. At the same time, the whole system of power includes subsystems of spiritual power (the Divine power and the church power), the people's power, executed directly or within the mechanism of power, organized due to the representation system (state and self-governance), the power of the capital (in the financial mean-

ing) and the fourth power, or fourth estate (media, TV, the Internet).

The author does not aim at researching the issue of the separation of powers in the historical and philosophical context, but mentions Aristotle as one of the oldest sources, to substantiate the idea that local self-government together with the state power form the system of representative power of the people in the last thesis context [2].

Exploring the problems of the local self-government reform in modern Ukraine, the author thus defines a chronological framework of work as follows: it is a modern reform in the form of decentralization of power in Ukraine, which has led to significant changes in the legal regulation of local self-government. In this regard, the author recalls that there have been several reforms of the kind in Ukraine, so the author cites scholars who have written about local government reform in recent decades. Hence, the number of references to the last three years' literature is limited, as the issue may be covered by the last decades' research only, and the course on decentralization of power in Ukraine, announced in 2018, has not yet collected enough publications.

Therefore, not aiming at writing a historical and legal study of local self-government, the author tried to solve a double problem: on the one hand, to prove that local self-government is a separate branch of power, and, on the other hand, to show that in such circumstances the reform of local self-government in Ukraine is required. In this context, one of the most important tasks is the organization of local

self-government on the basis of the division of functions of local self-government entities into representative bodies and executive authorities [6].

Let us reiterate that local self-government is a democratic form of self-organization and functioning of any society. At all times, society remains a complex system of communication in the economic, political and socio-cultural fields, and therefore requires a complex system of self-government to guarantee the self-development of such society.

Being used as a generic term, self-government includes any form of self-organization of the society. In broad understanding the state itself can be considered as the self-governing system, which operates on the basis of a combination of direct and representative democracy. In the narrower meaning, self-government stands for the forms of organization of fragmented social communities, which compose the society as the utmost holistic social system [7].

As legal scholars indicate, magistracy is the power of the people rather than the state power. A system of local self-government is a way of representing the interests of the whole people, but interests of a different nature than in the case of parliamentary or presidential representation of the interests of people related to economic development and social life in a particular locality. The indication on the “local” nature of self-government means that it is conducted not merely on the local level. Scholars interpret local self-government as: (1) form of power organization at the level of villages, towns, cities; (2) means of power

organization at the basic territorial level (in villages, towns, cities) and at the regional level (regions, districts); (3) form of power organization at the level of certain territorial communities or within their territorially defined groups (united territorial communities) administrative-territorial units) [5]. Mistakenly local self-government of territorial communities is sometimes considered both at the basic territorial level (in villages, towns, cities) and at the regional level (regions, districts), because united territorial community is limited to the territory of the respective village, town or city.

Local self-government as a separate branch of representative power is characterized by certain dualism. On the one hand, in a legal sense local self-government is a form of management of a territorial community in the respective territory; it is a form of public authority exercised by the territorial community, both directly and by means of local governments (local councils) and officials – village, town and city mayors. On the other hand, local self-government, though not an element of state power, carries out certain functions of state power based on law, in particular in the form of delegated powers.

The municipal reform launched in Ukraine is intended to resolve the aforementioned contradictions in the development of local self-government. The above methodological observations, which are fundamental in nature, fit into the methodological foundations of municipal reform, reflecting the nature of local self-government and contributing to its improvement.

Scholars should find out the reasons for the deviation of the law from its ideal image as it has been shaped in the municipal law doctrine and in the outlook and vision on democratism of the local power arrangement [8]. Therefore, the following question should be answered: what should the Law of Ukraine “On Local Self-Government in Ukraine” (which has by now lost its relevance and needs radical changes) be like now and in the future.

Definitely, local self-government is a significant and multidimensional socio-political phenomenon, which is extremely difficult to limit with rigorous scientific definitions and categories. It is an extremely mobile object of research, whose content varies depending on the specific political, socio-economic, socio-cultural situation and the public order presented to this institute of democracy by the society” [1].

The history of the development of local self-government as an institution of power and municipal law in modern Ukraine begins with the adoption of the Law of the USSR “On Local Councils of People’s Deputies and Local and Regional Self-Government” on 7 December 1990. Since then, a lot has changed in organization of public authorities both in the center and the regions: the Constitution of Ukraine [9] has been adopted, several versions of the Law on local self-government have been passed, the mechanism of self-government “Europeanization” has been launched (in particular, in connection with ratification of the European Charter of Local Self-Government by Ukraine in 1997) [10].

It should be noted that modern Ukraine has experienced four reforms of local government with the first one starting in 1992: (1) due to introduction of local state administrations headed by the representatives of the President of Ukraine in regions, districts, the Kyiv city, the Sevastopol city and in regions of these cities; (2) due to liquidation of these authorities and re-establishment of the executive committees of councils as bodies of local self-government; (3) due to liquidation of the executive committees of councils and re-establishment of the local state administrations headed by the heads of the respective regional, district, Kyiv city and Sevastopol city, regional in cities councils (each head of administration held the position of the head of council); (4) due to introduction of the executive committees of local councils under the Constitution of Ukraine in regions, districts, the Kyiv city and the Sevastopol city [5].

Ukrainian municipal law studies, being in a state of shaping the municipal reform methodology as a component of the doctrine of municipalities, has to take not only Ukrainian experience, but as well the achievements of the representatives of the municipal law doctrine of other countries into account. At the same time, we agree with the opinion of O. V. Batanov, a specialist in the local self-government field, that a “significant conceptual potential, both in regard to comprehension of the political notion of the prospective ways of the constitutional model of organization of local self-government and domestic municipality development, and to understand-

ing of potential scenarios in the development of municipal reform” has already been accumulated in Ukraine [11].

Municipal reform has relatively recently become the subject of research in Ukrainian legal studies. Latter is mainly explained by the necessity of a number of legal, organizational and other measures in this regard, including changes to a number of legal documents in the field of local self-government constitutional provisions to bring them in line with the Constitution, as well as systematic update of basic laws in this area, or adoption of new laws of the upmost quality.

Undoubtedly, the municipal reforms that took place in the 19th, the first half of the 20th and at the turn of the 20th-21st centuries have significant differences: different conceptual and ideological approaches to the design of the model of local self-government and its re-formation (within the commune, state or dualistic paradigms of the municipality); different level of institutionalization of local self-government (initial or mostly customary, legislative, constitutional, integrated), etc.

In other words, the fundamental question is what a qualitative point of reference for municipal reform actually is. In our opinion, municipal reform has to be indicated as a reform by its initiator. In modern conditions, the form of public identification of the commencement of a municipal reform may be the official proclamation of the goals, objectives and stages of the reform at the level of conceptual and/or strategic documents, which are usually adopted and made publicly available by the supreme bodies

of state power in accordance with their powers and authority.

Undoubtedly, theoretical-methodological, political-legal, scientific-design, as well as legal-technical aspects of municipal reform are complementary, but they obviously do not exhaust the whole content of the complexity of the relevant reform process, as it also implies the use of a system of organizational measures for the implementation of planned conceptual and legal levels of implementation of reform in life [12]. Therefore, the organizational side can be considered as an independent way or aspect of municipal reform, however, derived from the theoretical, methodological and law-making ones.

Theoretical-methodological basis for the local self-government in Ukraine constitutes article 7 of the Constitution of Ukraine [9], which stipulates that “local self-government is recognized and guaranteed in Ukraine”, constituting local self-government as a separate branch of power.

Latter can be proved by the following features [13,14]:

- presence of territorial communities that set up local governments to resolve local affairs;
- possibility of holding local referendums on the most important issues regarding the territorial community;
- local self-government is constituted and provided with the appropriate legal status, system of powers, rights, freedoms and responsibilities towards the territorial community;
- local self-government as branch of power is entitled to material and financial

basis in the form of movable and immovable property;

- local self-government is entitled to incomes from local budgets, other funds;

- local self-government administers land, natural resources owned by local communities;

- local self-government has certain rights in regard to objects of joint ownership, which are in the management of district and regional councils according to article 142 Constitution of Ukraine;

- there are also elements of powers division on the local level: local councils as local parliaments form executive power (executive committees) and their own control bodies (commissions).

Issues of local self-government in recent times are increasingly moving into the epicenter of scientific and political debate. Solving the problems of local self-government is often considered to be the key to solving many complex issues of today – increasing the level of efficiency in the activity of the authorities, overcoming the alienation between the authorities and the population, promoting political mobilization, shifting the center of gravity from capitals to regions, “setting hands loose” and activating a variety of local initiatives, etc.

From the theoretical-methodological perspective, peculiarities of the legal regulation of local self-government are closely related to its functional purpose and social orientation within the limits of each particular country. Local self-government is based on the fact that virtually no countries can be managed from the center only. Therefore, territory of

the country is divided into certain administrative-territorial units of different levels (regions, districts, communities, etc.), which commonly have elected representative bodies simultaneously (often referred to as local self-government bodies) and such bodies are appointed by the central authorities (governors, prefects, commissars of the republic, etc.) [15]. Notwithstanding the differences in the formation of these bodies, they all form a single system of public authority performance on the local level.

In particular, current state of local self-government in Ukraine should be characterized as follows:

- lack of unified theoretical-methodological basis for legal of local self-government;

- absence of an effective system of guarantees of performance of the local self-government functions;

- lack of relevant material, financial, personnel and other resources to support them. The state has not fulfilled its obligations to establish conditions for the development of local self-government and civil society;

- crisis of housing and communal services, system of energy-, fuel- and water supply, as well as social infrastructure;

- absence of a well-organized system of financial support for healthcare at the primary level and sufficient funds from local self-government bodies to solve health problems within the territorial community;

- deepening of disproportions in the social and economic state of the territorial communities and regions;

- unsolved urgent issues of the reform of the administrative-territorial structure of Ukraine.

As an example to illustrate the current state of affairs, local self-government activities are governed by more than 80 normative legal acts of the highest legal force, all of which are adopted at different times and contradict each other.

Due to the fact that local self-government is the sphere with perhaps the most vulnerable financial base, largely dependent on the state in Ukraine, reduction of state power in the financial sphere automatically affects local self-government. Technical condition of networks and structures operated by enterprises of housing and communal services is currently extremely unsatisfactory. In particular, 30% of water supply and 27% of sewage networks, almost 14 thousand kilometers of heating networks are in state of emergency. Ukrainian housing stock is constantly deteriorating, about 40 thousand houses (consisting more than 4% of the housing stock of Ukraine) fall into the category of emergency, and every third house needs to be seriously repaired [19].

The idea of decentralization as the basis for the self-government shaping is considered as a panacea for solving all problems, a means of decentralization of the systems of administrative and territorial state organization, which would involve the “unification” of villages and cities, since “the mechanistic interpretation of the constituent parts of the territorial system as the administrative-territorial units listed in the Constitution would

require such a shredding of the present village councils, which would bring the number of self-government bodies from the current 12 to 27 thousand – corresponding the number of settlements” [16].

As far as the state of things in Ukraine is now, 47% of territorial communities have population of up to one thousand people, so, therefore, the proposals for the consolidation of territorial communities not upon the decision of the relevant councils, but upon the decision of the communities (via a local referendum) are more favorable, and this way is the most democratic one. Moreover, such consolidation does not automatically lead to budget savings, but raises additional problems with the access the population to local councils, namely the access of a human to power. Discussions on the elimination of district state administrations and fulfillment of the requirements of the European Charter of Local Self-Government ratified by Ukraine regarding the division of powers of local self-government and the state are ongoing.

These circumstances raise the issue of recognition of local self-government as a separate branch of power both in legal studies and in practice of constitutional reform and state building.

Implementation of this task should lead to clear demarcation between the functions of executive power and local self-government at the constitutional level. The latter requires expansion of the functions and powers of local self-government at the district and regional levels. At the same time, it is necessary to transform local state administrations into bodies that would have executive

functions, non-transferrable to the system of local self-government. Such bodies should also have control and oversight functions.

Such organization of power corresponds to the European practice, provides a clear division of competences, organizes the budget process and eliminates the issue of the “election of governors”. It is clear that the heads of district and regional self-government bodies are elected, whilst the heads of local state executive bodies power, as it is common all over the world, are appointed.

In particular, this involves implementation of the following requirements of the European Charter of Local Self-Government into Ukrainian legislation:

- any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles, territorial integrity and sovereignty in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests that it is intended to protect. (Article 8 of the Charter);

- local authorities’ financial resources shall be commensurate with the responsibilities provided for by the constitution and the law. Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate. The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible

with the real evolution of the cost of carrying out their tasks. The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility. (Article 9 of the Charter);

- local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest (Article 10 of the Charter) [10].

Under such conditions “local self-government acts as an effective element of the system of checks and balances in regard to the performance of executive power by the state at the local level, which is an additional lever for the exercise of democracy in relations with the state” [13, 14]. The relevant tendency is in line with the principles of modern constitutionalism, which, in particular, lead to “the establishment of legal means and mechanisms that are consistent with the constitution and are used to restrict (self-restraint) state power in favor of the civil society, whose functioning is an important social and legal precondition for constitutionalism.

Therefore, we are facing the necessity to reinterpret the understanding of public authorities, both state and self-government, and as well the division of public and territorial interests.

Consequently, the core characteristic of public authority, in this approach, is precisely the fact that it serves certain public interests that have a geographical attachment to a particular territorial community that is institutionalized in a public-law formation in a certain way (state, autonomous formation, territorial community or their union, etc.). In addition, public authority is characterized by the fact that it affects all social processes in society in one way or another, manages general affairs of the society, achieves its tasks and goals – serving the people as the only source of power, contributes to the formation of rule of law and a democratic state [17].

As an independent form of public authority in its subject-object structure, its nature and essence, the range of its func-

tions, local self-government is the most socially oriented form of the exercise of public authority. This is explained by the following: (1) local self-government is the catalyst for the civil society, since the conscious participation of residents in the process of creating decent living conditions in a certain territory contributes to forming a sense of responsibility for solving local problems, increasing their overall social and civic activity; (2) territorial community (as the primary subject of local self-government, the main carrier of its functions and power) bears municipal power; (3) local self-government as a separate branch of power of the people should be built on the principle of division of functions, balance of interests and powers, representation and responsibility to the territorial community.

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