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UDK 342.12

## PEOPLE'S SOVEREIGNTY AND PROBLEMS OF ITS REALIZATION DURING THE PERIOD OF DEMOCRATIC TRANSFORMATION: THE EXPERIENCE OF UKRAINE

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#### SUMMARY

The article concentrates on the separate aspects of local self-government functions and powers in the context of the process of authority decentralization in Ukraine. The author endorses the idea that the draft of Ukrainian law: "On amendments to the Constitution of Ukraine" (as to decentralization of power) that was added to the Verkhovna Rada of Ukraine agenda in 2015 does not provide for enlargement of powers of territorial communities. As a result such changes are primarily aimed at increasing the capacity of communities to exercise their powers. At the same time functions and powers of local community require to be fixed more accurately that provide financial and property autonomy of local self-government and powers with regard to local referenda.

**Key words:** functions and powers of local self-government, issues of local importance, decentralization.

## НАРОДНЫЙ СУВЕРЕНИТЕТ И ПРОБЛЕМЫ ЕГО РЕАЛИЗАЦИИ В ПЕРИОД ДЕМОКРАТИЧЕСКОЙ ТРАНСФОРМАЦИИ: ОПЫТ УКРАИНЫ

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#### АННОТАЦИЯ

В статье обращается внимание на отдельные аспекты реализации функций и полномочий местного самоуправления в контексте процесса децентрализации власти в Украине. Автором поддерживается идея о том, что Проект Закона Украины «О внесении изменений в Конституцию Украины (относительно децентрализации власти)», который в 2015 году внесен на рассмотрение Верховной Рады Украины, не предусматривает расширения полномочий территориальных общин, поскольку такие изменения, в первую очередь, направлены на повышение возможности общин осуществлять предоставленные им полномочия. Вместе с тем нуждаются в более четкой фиксации функции и полномочия территориального общества, которые обеспечивают финансовую и имущественную автономию местного самоуправления, а также полномочия относительно местных референдумов.

**Ключевые слова:** функции и полномочия местного самоуправления, вопрос местного значения, децентрализация.

#### REZUMAT

În articol se atrage atenția asupra anumitor aspecte ale punerii în aplicare a funcțiilor și competențelor administrației publice locale în contextul procesului de descentralizare a puterii în Ucraina. Autorul susține ideea că proiectul de lege a Ucrainei „Cu privire la modificarea Constituției Ucrainei (în ceea ce privește descentralizarea puterii)”, care în 2015 a fost prezentat Radei Supreme a Ucrainei, nu prevede împuternicirea comunităților locale, deoarece aceste modificări vizează în principal creșterea capacității comunităților de a-și exercita competențele acordate acestora. În același timp, au nevoie de funcții de fixare mai precise și puteri ale comunităților locale în autonomia financiară și patrimonială a administrațiilor locale, precum și drepturi la referendumuri locale

**Cuvinte cheie:** funcțiile și competențele autorităților locale, problemă locală, descentralizare.



**Problem formulation.** It is necessary to regulate the status of territorial community clearly and comprehensively as it is the primary subject of local self-government, the main provider of its functions and powers and to determine the peculiarities of its legal personality in the modern conditions of state establishment. Yurii Shemshuchenko emphasizes most appropriately that it is essential to determine the status and range of questions of local importance at the Constitutional level in the process of power decentralization that are introduced in specific functions and powers of local self-government individuals and foremost in human rights in specific spheres of municipal life. Based on European municipal traditions, in particular, depended on the principles of the European Charter on Local Self-Government, it is necessary to consolidate the provision that in relation to local issues territorial community bodies and officials of local self-government should have all the functions and powers except those that are entrusted to the bodies of state power by the Constitution and laws of Ukraine [1, p. 6].

**Analysis of recent scientific research and publications.** The issues of the functions and powers of local self-government were studied by such scholars as O. Altunin, O. Batanov, S. Boldyrev, V. Borodenyuk, I. Drobush, A. Zayets, V. Kolisnik, P. Lyubchenko, O. Skrypnik, Y. Shemshuchenko, I. Schebetun and others. It should be noted that existing scientific research and publications of the following research topic are related to both separate organizational and legal aspects of local self-government functioning and the conceptual issues of local self-government essence as a form of implementation of national sovereignty.

**Purpose of article.** The aim of the article is to examine certain aspects of the implementation of local self-government functions and powers in the context of decentralization process of power in Ukraine.

**Core material presentation.** The issues of local importance as an object component of local self-government according to the Article 140 of the Constitution of Ukraine are resolved within the Constitution and laws of Ukraine. As previously mentioned the Constitutional list of such issues is

determined in article 143 of Basic Law its legislative regulation of functions and powers of local self-government was implemented primarily by the Law of Ukraine «On Local Self-Government in Ukraine».

It is worth agreeing with above-mentioned criticism about domestic legislation approaches to functions regulation and local self-government functions. So, O. Batanov comes to the conclusion that in Ukraine there was only a constitutional and declarative recognition of the issues of local importance in the form of establishing the principle of regulating the powers of local self-government bodies under the scheme «only permitted by law», since local self-government in Ukraine can only be performed within the framework of the Constitution and laws of Ukraine.

Criticism of Ukrainian Law «On Local Self-Government in Ukraine» is conditioned by the fact that it is a kind of catalog of functions and powers of local self-government bodies and officials. In essence, this is not a law on local self-government, not a law on territorial communities, but a law on governments and authorities of local self-government, their powers and subjects of jurisdiction. In addition, the existing procedure for establishing functions and powers of local self-government bodies is based on the traditionally sectoral, in fact, Soviet principle of legislative fixing [2, p. 19].

O. Batanov conceives that the transition from current traditional for Soviet era establishment of functions and powers of local governments to the system-function-target principle facilitates the problem solving process. The idea of this approach is to introduce a detailed definition of the status of each element of local self-government system, first of all, the territorial community distinguishing initially the functions of these entities between themselves, and then their powers. It requires precise and detailed regulation in the legislation of the main purpose of territorial community activity and municipal authority main object - questions of local importance [2, p. 19–20].

Experts opinion about Draft Law of Ukraine «On Amendments to the Constitution of Ukraine Concerning the Decentralization of Power» that was submitted for the Parliament's

consideration in 2015 and didn't presuppose the extension of local communities powers is believed to be right [3, p. 83; 4]. The proposed changes are primarily aimed at increasing the capacity of communities to exercise their jurisdiction. Meanwhile, the conceptual consolidation of local issues in abovementioned draft amendments to the Fundamental Law of Ukraine was also criticized. According to the judge of the Constitutional Court of Ukraine M. Gultay in a separate Opinion regarding the Conclusion of the Constitutional Court of Ukraine of July 30, 2015, No. 2-b / 2015, the proposed amendments to the draft law to Article 140 of the Constitution of Ukraine, in its part one, is excluded the provision that local self-government is the right of territorial community to resolve issues of local importance independently in terms of the Constitution and Laws of Ukraine. On that score, M. Gultay reckons that the exclusion from the first part of Article 140 of the Constitution of Ukraine of such wording may lead to the restriction of this right and the right of citizens to participate in the management of public affairs [5, p. 31].

Nowadays there are different approaches to the consideration and classifications of local self-government functions and powers in scientific literature. Thus, the classification of functions of local self-government is possible by such criteria as objects, subjects, methods, territory, means, forms of activity, etc. The objects are distinguished by political, economic, social, cultural, ecological and external functions of the municipal government; the subjects - the functions of the municipal authority, which are implemented directly by territorial communities, functions performed by representative bodies of local self-government, functions that are implemented by village, settlement, city mayors, functions that are implemented by executive bodies of local self-government; the territory - functions of the municipal authority, which are exercised at the level of territorial communities of a village, settlement, city or region; the methods and means - informative, planning and programming of corresponding administrative-territorial units development, rule-making, budget-financial, material-technical, of social control [6, p. 7; 2, p. 21]. Another approach involves the classification of local



government functions and general, special and supporting (auxiliary) functions, and, as a result, the distribution of the entire normative list of issues of local significance within such a system [7, p. 11].

For this reason, when considering questions of local importance as the basis of local government activities, it is necessary to differentiate such categories as functions and powers of local self-government. In particular, the specifics of local self-government functions include the fact that they are derivative from the purpose and objectives of local self-government bodies; arise, occur and develop in accordance with the tasks to be performed by local self-government authorities in Ukraine; are specified in the powers of local self-government bodies; are not specified in special legislation; the exercise of functions by local self-government authorities has a constant systematic nature and takes place throughout the time of their existence; promote the optimal combination of local and national interests, the most effective implementation of the socio-economic potential of self-government territorial units. The powers of local self-government authorities are defined as the rights and obligations fixed in normative acts of various legal force, by which they fulfill the tasks assigned to them and implement the provided functions for solving issues of local importance [8, p. 9].

Part 1 of Article 143 of Ukrainian Constitution specifies the issues of local importance for the territorial communities of the village and city, which they are authorized to decide on their own or through the bodies of local self-government established by them. Part 2 of the mentioned article of the Basic Law determines a list of issues of local significance, which is set for the regional and district councils. It should be accepted the idea that the right for real local self-government is recognized today only by the territorial communities of villages and cities, since only representative authorities of local self-government operate on the level of districts and regions, which are deprived of the opportunity to create their own executive bodies [9, p. 71]. Taking into consideration this circumstance local self-government bodies are obliged to «delegate» to the relevant local state administrations the majority of their powers, which lead to violations of the

principles of legal, organizational and financial autonomy not only of district and regional councils, but also of local authorities of the primary level.

The constitutional list of issues of local significance of primary level local governments includes the management of property that is in communal ownership; approving the program of socio-economic and cultural development and monitoring their implementation; approval of the budgets of the respective administrative-territorial units and control over their implementation; establishment of local taxes and fees in accordance with the law; ensuring local referendums and implementing their results; formation, reorganization and liquidation of communal enterprises, organizations and institutions, as well as control over their activities; resolution of other issues of local importance, assigned by law to their competence.

Regional and district councils approve programs of socio-economic and cultural development of the respective regions and districts and control their implementation; approve rayon and oblast budgets, which are formed from the state budget funds for their respective distribution between territorial communities or for implementation of joint projects and funds borrowed on a contractual basis from local budgets for the implementation of joint socio-economic and cultural programs, and control their implementation; decide other issues assigned by law to their competence.

The authority to manage property that is in communal ownership is logically conditioned by the material autonomy of local self-government, which is guaranteed by Article 142 of the Constitution of Ukraine. In accordance with this norm, the material basis of local self-government is movable and immovable property, land, natural resources owned by territorial communities of villages, settlements, cities, urban areas, as well as objects of their joint property, which are in the management of district and regional councils. Article 60 of the Law of Ukraine «On Local Self-Government in Ukraine» previsions that local self-government bodies, in accordance with the law, exercise on behalf of and in the interests of territorial communities, the power to own, use and dispose of objects of the right of communal property, including all

property transactions, can transfer objects of communal property rights to constant or temporary usage by legal entities and individuals, rent them, sell and buy, use as a mortgage, solve and the issue of their exclusion determined in agreements and contracts terms and financing of the privatized and transferred to the use and lease. The expediency, the order and conditions for the alienation of the objects of the right of communal property are determined by the relevant council. Revenues from the alienation of the objects of the right of communal property are credited to the corresponding local budgets and are directed at financing the events provided for by the development budgets [10].

The next constitutional power of local self-government, which is conditioned by the financial autonomy of local self-government, is the authority to approve the budgets of the respective administrative-territorial units and exercise control over their implementation. According to Article 61 of the Law of Ukraine «On Local Self-Government in Ukraine», local self-government bodies in villages, settlements and cities, and urban areas (if created) independently develop, approve and implement relevant local budgets in accordance with the Budget Code of Ukraine. District and regional councils approve district and regional budgets, which are formed from the state budget funds for their respective distribution between territorial communities or for the implementation of joint projects and funds borrowed on a contractual basis from local budgets for the implementation of joint socio-economic and cultural programs, control their execution. Formation and execution of district and regional budgets is implemented by the respective state administrations in accordance with the Budget Code of Ukraine. Independence of local budgets is guaranteed by their own and assigned to them on a sustainable basis by law national income, as well as the right to determine independently the directions of using local budget funds in accordance with the law. Intervention of state authorities in the process of preparation, approval and execution of local budgets is not allowed, except in cases that are envisaged by this and other laws.

Meanwhile, according to Article 142 of the Constitution of Ukraine and Article 67 of the Law of Ukraine «On Local Self-



Government in Ukraine», financial support is provided for the expenses related to the implementation of the powers of executive power bodies and the implementation of decisions of state authorities by local self-government bodies. Thus, the state funds the full actualization by the local self-government bodies of executive power governments provided by law at the expense of consolidating the sources of budget revenues from the relevant local budgets, providing transfers from the state budget, as well as transferring the corresponding state-owned objects to local governments. At the same time, decisions of state authorities that lead to additional expenditures of local self-government authorities are necessarily accompanied by the transfer of necessary financial resources to them. The indicated decisions are executed by local self-government bodies within the limits of financial resources transferred to them. Expenditures of local self-government authorities that arose as a result of decisions of public governments and previously not provided with adequate financial resources are compensated by the state.

In our opinion, in the context of budgetary discretion of local self-government, criticism of the provisions of the Draft Law on Amendments to the Constitution of Ukraine Regarding the Decentralization of Power № 2217a dated July 1, 2015 on the exclusion from Article 142 of the Constitution of Ukraine of a principle according to which «the state participates in the formation of revenues of budgets of local self-government, financially supports local self-government». From the point of view of the Constitutional Court of Ukraine judge S. Sas such a change is not opportune since it does not take into account that of twenty seven entities – administrative and territorial units – only a few are donors who autonomously provide themselves and fill the income of the state budget of Ukraine, and the rest – recipients who need financial assistance from the state. The deletion of this provision from Part 3 of Article 142 of the Constitution of Ukraine reduces the level of constitutional social and economic guarantees of the state for residents of subsidized territorial communities, as it limits their rights and freedoms [11, p. 51].

Other powers of local self-government, in particular of the territorial

communities of villages, settlements and cities have the authority to establish local taxes and charges. In accordance with Article 69 of the Law of Ukraine «On Local Self-Government in Ukraine» and the provisions of Section III of the Budget Code of Ukraine concerning the structure of incomes of local budgets general funds, local taxes and charges are fully credited to the revenue part of such budgets. The current list of local taxes and duties is defined in Article 10 of the Tax Code of Ukraine, according to which such mandatory payments are a property tax, a flat tax, fees for parking vehicles and tourist fees. In this case, local councils are required to establish a single tax and property tax (in terms of transport tax and land fee), as well as resolve issues regarding the establishment of property tax (in terms of the tax on real estate property which does not include the land) and establishment of a charge for parking places, a tourist tax. The norms of Article 12 of the Tax Code define the powers of local self-government bodies (village, settlement, city councils and councils of joint territorial communities) in the field of local taxation. These powers should include: 1) the decision of local taxes and duties establishment; 2) local taxes and fees rates setting within the rates defined by the Tax Code of Ukraine; 3) granting tax privileges in accordance with the tax law established by the Tax Code.

The authority to ensure the holding of local referendums and the implementation of their results is a distinct problem authority of local self-government bodies. Despite such a constitutional norm, the possibility of conducting a local referendum has not been provided at the legislative level, since the issue of a local referendum has not yet been regulated by law since the Law of Ukraine «On All-Ukrainian and Local Referendums» the issue of local referendum was not regulated by law in 2012.

Part one and part two of Article 143 of the Constitution of Ukraine wording contains an indication that local self-government bodies may decide the issues of local significance, which are assigned by law to their competence. The official interpretation of such a formation was made by the Constitutional Court of Ukraine in the Decision of April 1, 2010 and the example of the powers of local self-government bodies in the field of land relations. Thus,

in paragraph 4 of the reasoning part of the specified Decision, the Court noted that, in accordance with the items «a», «b», «c», «g» of Article 12 of the Land Code, the authority of rural, settlement, city councils belongs to the disposal of land of territorial communities, the transfer land plots of communal property owned by citizens and legal entities, the provision of land for utilization from communal land, and the withdrawal of land from communal land. The Constitutional Court of Ukraine considers that these powers are covered by the notion «other issues of local importance» mentioned in Article 143 of the Constitution of Ukraine, and therefore, in their implementation, rural, settlement and city councils act as subjects of power, exercising administrative and other functions [12].

**Conclusion.** In the process of decentralization of power it is necessary to determine the status and the spectrum of issues of local importance at the level of the Constitution, that are realized in legislation and in practice with the help of specific functions and powers of local self-government entities in specific areas of municipal life. The question of local significance as the basic object of the municipal government requires the constitutional and legal fixation which is based on the principle: “EVERYTHING THAT IS NOT EXPLICITLY PROHIBITED BY LAW IS PERMITTED”

The draft of Law of Ukraine «On Amendments to the Constitution of Ukraine Regarding the Decentralization of Power» that was submitted to the Parliament for consideration in 2015, now does not provide the extension of territorial communities powers, since such changes primarily aim at increasing the capacity of communities to exercise their powers. However, in the course of adopting amendments to the Basic Law on the decentralization of power, it is necessary to provide a wording in accordance with which local self-government is the right of a territorial community to independently solve local issues, and also to determine the definition of the concept of «issues of local importance». In addition, the functions and powers of the territorial community that provide financial and property autonomy of local self-government, as well as authority over local referenda, should be fixed precisely.





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