

POLITICAL INSTITUTIONS AND PROCESSES

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DECENTRALIZATION OF POWER AS A WAY OF CONSTITUTIONALISM FORMING IN UKRAINE

The article aims to determine direction of constitutionalism formation in Ukraine - the decentralization of power. Constitutionalism is considered as a doctrine and practice of limited government. Based on the European model, constitutionalism is seen in the light of institutional mechanisms used for limiting state power in a democratic society. It is proved that decentralized system of local government is one of the elements of the institutional system of constitutionalism. Evolution of the Ukraine's local government system after independence, 1990 and the origins of its current problems are analyzed. Issues of local and regional government structure are defined. Special attention is paid to the issues of control and supervision of local governments. Conclusions regarding the problems of local authorities are done.

Key words: constitutionalism, decentralization of power, local self-government.

Introduction

In sovereign Ukraine constitutional development in late 20th - early 21st centuries has been quite active and occurred with difficult social and political processes, i.e.: formation of the multiparty system, new electoral standards, gradual decentralization of power and liberalization of public life. At the same time, the attempts were made to organize an effective system of public authority, which had to be able not only govern the state in post-socialist conditions, but to conduct a number of necessary state's reforms. Obviously, national experts tended to the model of "strong" president with authority of managing the executive branch of power, in fact, he had to lead these processes. Society, in which the need for a "strong hand" had been forming during the time of the socialist system and the paternalistic attitudes spread, inclined to follow such type of model. Other experts emphasized the risks carried by the presidential form of government in illiberal post-socialist society. However, evaluating different options, at the adoption of the Constitution of 1996 the decision in favor of the government's effectiveness, not of its limitations has been made.

Today the fallacy of this decision is obvious, in fact, the lack of appropriate "safeguards" in the system of public power led to the excessive concentration of powers in the hands of the President, who actually controlled the legislative and executive powers and had serious leverage on the judicial power as of 2013.

After the revolution of 2014 Ukraine is on the verge of another constitutional reform, therefore it is so important to change the priorities in the construction of public authority and shift the focus on to forming the system of limited and responsible government that is the essence of constitutionalism. Most of the European scholars consider constitutionalism to be a doctrine and practice of limited government, contrary to the arbitrary government actions¹. By the way, millions of Ukrainian citizens who took part in the protest actions of 2013-2014, demanded to eliminate the arbitrary conduct of the government and to fundamentally change the state, change its essence. Similar demands and revolutionary events were peculiar to other European states but such events took place there several centuries before. And constitutionalism appeared as the result of struggle for the limited character of government.

In its building, the benchmark for Ukraine is to be a European model of constitutionalism. Ukraine

¹ McIlwain, Ch. H. (1940). *Constitutionalism Ancient and Modern*. Ithaca, New York: Cornell University Press, 21; Sajo, A. (1999). *Limiting Government. An Introduction to Constitutionalism*. Budapest, 14; Cesare, P. (2011). The Combination of Negative with Positive Constitutionalism in Europe. *European Journal of Law Reform Issue, 1*; Wouter, G. Werner (2010). Democracy, Constitutionalism and the Question of Authority. *Netherlands Journal of Legal Philosophie, 3*.

belongs to the Romano-Germanic legal family, its totalitarian past formed statist traditions, which are similar to some European states, and the experience of the Eastern European states that have gone constitutional establishment of the European model, evidences of its acceptability.

The European model, based on the ideology of liberal democracy, developed on the grounds of political and legal practice of the Continental Europe states regarding the limitation of the government's tyranny in the course of struggle against absolutism. It originates in the ideas of limited government and democracy, according to which constitutionalism should be considered in the light of institutional mechanisms used for limiting the state power in a democratic society.

This is the institutional system of limited government, which includes the following elements: 1) written constitution, which is the act of the constituent power and guarantees the derivative (constituted) nature of the state; 2) constitutional rights and freedoms of man and citizen and the system of their protection, which should determine the substance and orientation of the state's activities; 3) constitutional jurisdiction (usually in the form of constitutional justice) aimed at ensuring the supremacy and stable nature of the constitution, limiting the legislative powers of the parliament, as well as ensuring the stability of the whole system; 4) parliamentary system, in which the head of state performs mainly representative functions and the executive branch of power depends on the legislative branch; 5) decentralized government (doesn't allow excessive concentration of power at the national level); 6) independent judicial branch of power which guarantees the protection of human rights and exercises control over the activities of the executive branch of power¹.

Thus, decentralized system of government is one of the important components of the system of constitutionalism, though in this context and connection it is paid unjustifiably little attention. The purpose of this article is to research the role of decentralization for the constitutionalism formation in modern Ukraine.

Evolution of the Ukraine's local government system (after independence, 1990)

Evolution of the Ukraine's local government system (after independence, 1990) can be divided into 4 periods:

I. The period of transition from the inherited centralized Soviet system of state power to the system of local self-government (1990-1993): the first Law on the Local authorities and Local self-government (1990) defined local councils as state authorities (government agencies); first local self-government bodies were established by the Law on Local self-government in 1992;

II. The period of relative decentralization (1994-1995): according to the new Law on the Formation of Local authorities and self-government (1994) were established local and regional self-government authorities, mayors and heads of regional councils were elected directly, local councils of each level appointed their own administrative (executive) bodies;

III. The period of centralization (1995 – 2014): The Constitutional Agreement of 1995 provided for formation of the state local administrations instead of administrative (executive) bodies of regional and district councils, this system of local government was duplicated by the Constitution in 1996;

IV. The first steps towards decentralization (2014-2015): the Concept of the reform of local self-government and territorial organization of power was approved by the Government on 1st April, 2014, since then a number of regulations aimed at the formation of capable communities were adopted.

It should be noted that for the years of its independence Ukraine has not managed necessary reforms to create efficient, transparent, accessible and accountable system of local authorities. Territorial structure, inherited from Soviet Union, has not been changed, so the existing structure of local and regional power is too complicated and the responsibilities of local authorities are not strict. Real reforms started only in 2014 and nowadays the first stage of them is ongoing. In March 2015, the President of Ukraine created the Constitutional Commission, which has been working on drafting constitutional reform in three directions, within the decentralization of power and reform of local-self-government defined as prioritized.

According to the approved by the government Concept of the reform of local self-government and territorial organization of power, in 2014-2015 some important for this process legal acts were adopted, in particular the Law of 17 June 2014 on the cooperation of local communities (no. 1508-VII), the Law of 5 February 2015 on the voluntary association of local communities (no. 157-19), the Law of 5 February 2015

¹ More details: Бориславська, О. (2014). Конституційна реформа як шлях формування в Україні конституційної системи обмеженого правління (на основі досвіду європейської моделі конституціоналізму). *Право України*, 7, 47-54.

on the principles of regional policy (no. 156-VIII), the government's Regulation on approval of the Methodology of the capable communities forming (8 April 2015). Besides, some amendments to the Budget Code and the Tax Code of Ukraine were adopted to stimulate the amalgamation of communities, that is the first step of the planned reform (for example, redistribution of taxes between the state and communities with higher percentage of tax on personal income to the united communities).

However, the most important step - amendments to the Constitution - is yet to come. Prepared by the Constitutional Commission draft amendments on decentralization have received generally favorable opinions of the Venice Commission¹, the Constitutional Court of Ukraine and were previously approved by the Ukrainian Parliament. However, some provisions of this draft have been ambiguously perceived by the society, which casts doubt on its final adoption.

At the same time, it is necessary to realize that the current system of local government does not fit the model of constitutionalism, since it implies excessive concentration of powers of the executive branch in the center, and therefore prevents realization of placed in Section I of the Constitution of Ukraine bases of its constitutional order. Under the current system of local government it is hardly possible to transform Ukraine into a constitutional state that will be discussed in this article below.

Issues of the local and regional government structure

Local and regional government structure is based on the three-level territorial division of Ukraine. The first level according to the Constitution includes villages, settlements and cities (some of them have district division). Nevertheless, in practice there are also urban villages and village councils as the kinds of territorial unit, which are not provided by the Constitution but still have been existed since Soviet times. Along with this, in some cases on the territories of cities some other separate administrative units, such as villages or settlements, are located. Each of these units elects its own local authorities, thus on the territory of jurisdiction of the 61 local councils there are 197 other councils of the same (first) level of territorial division. Citizens of villages, settlements and cities are considered as territorial communities, which have right to elect local authorities. There are bit less than 30 thousand of such communities with different population, size and resources, which complicate the local self-governmental structure and budgetary relations.

It should be noticed that the structure of the first level of territorial division demonstrates its organizational independence from the central government. But it depends financially. The local self-government structure at the first level of the territorial division contains a mayor, a local council and its executive bodies (administration). Mayor is elected directly for 5-years term; at the same time a mayor is the highest official of the territorial community, the headman of the local council and the head of the system of executive bodies (administration). Thereby, mayor combines representative power, decision-making and executive power at the local level. Mayor signs contracts, which should be approved by the local council if they concern matters within its exclusive competence. It's mayor's prerogative to propose the structure and the number of members of the executive bodies (administration), which should be approved by the council. Formally, the mayor is accountable to the territorial community and responsible before the relevant local council, which can make a decision of no confidence to the mayor. However, in case of political support of the majority in the council this control never becomes true.

Local council is a representative and decision-making body of the territorial community. It is responsible for the approval of socio-economic and cultural programs of the administrative units' development, approval of local budget, making decisions on local borrowing, transfer of funds from the relevant local budget, alienation of communal property, adoption of local privatization programs etc. Local council is entitled to abolish acts of the executive council in case of their contradictory with the Constitution or the laws of Ukraine, other legislative acts, the decision of the council.

Each local council has the ability of free defining its administrative structure in order to adapt it to local needs and ensure effective management (as it demands art. 6 of the Charter)². The Law on local self-government only requires the creation of executive committees of local councils, besides the council in

¹ European Commission for Democracy through Law (Venice Commission). Preliminary Opinion on the Proposed Constitutional Amendments regarding the Territorial Structure and Local Administration of Ukraine // Opinion No. 803/2015 / CDL-PI(2015)008. Strasbourg, 24 June 2015. <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)008-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)008-e)>.

² European Charter of Local Self-Government. Strasbourg, 15.X.1985. <<http://conventions.coe.int/Treaty/EN/Treaties/Html/122.htm>>.

order with the proposal of mayor forms other administrative bodies. The competence of councils and mayors are distributed as follows. The mayor: proposes the structure of executive bodies, appoints heads of departments and other executive bodies, who are ex officio the members of the executive committee, heads the executive committee and the whole system of executive bodies, signs the acts of committee. Council: approves the structure and number of members of executive bodies of jurisdiction between them; controls administration in its managing; cancels acts of the executive committee on the grounds of non-compliance with the Constitution or laws of Ukraine, other legislative acts, the decisions of the council.

But at the same time the Constitution of Ukraine (art. 19) demands local authorities and their officials to act only on the basis, within the powers and in the manner determined by the Constitution and laws. Accordingly, the law provides that local authorities have only competence, defined in the Law on self-government and other laws. This makes impossible the implementation of the principle of subsidiary and effective activity of local authorities in interests of their communities. According to Law on self-government, local councils of the first level have exclusive competence, which covers decision-making in different areas of local affairs. They do not have any delegated responsibilities, while the executive bodies have own and delegated competence, moreover the amount of defined by the Law on self-government own competence is 93, delegated competence – 86.

Besides, described organizational autonomy isn't enough for the independent managing the local affairs without financial component. Local budgets are dependent on the central government. The material and financial basis for local self-government according to the Constitution is movable and immovable property, revenues of local budgets, other funds, land, natural resources that are in the communal property of villages, towns, cities territorial communities and objects of their common property, which are managed by district and regional councils. However, in fact relatively capable are only the local authorities of cities of regional significance, since they are based on a more or less adequate finance, infrastructure and personnel resource bases. 5 419 of local budgets are subsidized for 70%, 483 local budgets of communities are subsidized for 90%. So, having the decision-making power, most of the local authorities of the first level don't have real power to operate the local affairs.

The second and the third levels government structures are identical: there are district or regional councils and district or regional state administrations. It must be emphasized that regional and district councils are the only bodies of local self-government at the appropriate level of territorial division, they have no their executive bodies.

District and regional councils are responsible for approval of socio-economic and cultural development programs of the appropriate administrative units, approval of local budget, distribution of transferred from the state budget in the form of grants, subsidies between district budgets and local budgets of territorial communities of the first level of territorial division. Managing the local affairs is being done by the regional and district state administrations, which belong to the vertical of the state executive power (heads of administrations are appointed and dismissed by the President of Ukraine on the proposal of the Government).

According to the Law on self-government, district and regional councils delegate powers to the appropriate local state administrations. They are: drafting programs of socio-economic and cultural development of the territories; ensuring balanced economic and social development of the territory; management in the fields of science, all kinds of education, health, culture, physical culture and sports, tourism etc. At the same time, the Law on the local state administrations a number of own powers of district and regional councils in other words fixes by the state administrations. For example: property management, privatization (p. 4 art. 13); management in the field of science, education, culture, health, physical education and (p. 6 art. 13); the use of land, natural resources, environmental protection (p. 7 art. 13) etc.

Thereby there is a duplication of powers of local self-government and governmental authorities. Besides, there are no effective mechanisms for district and regional councils to control the local state administrations activities (this control includes only two forms - hearing reports of local state administration heads and decision of no confidence of the head of the local state administration, which is rarely applied in practice).

Issues of control and supervision of local governments

One of the controversial issues, which have caused a negative attitude of Ukrainian society, concerns the problem of control over legality of local self-government after decentralization. It requires special attention. The draft on decentralization contains some novels in this area. They are related with the

establishment of the prefect, who is to exercise such control. Prefects shall be appointed by the President on the proposal of the Cabinet and retired in the same manner. They will get the right of suspending the acts of local authorities in case of their non-compliance with the Constitution or laws with simultaneous appeal to court.

Besides, President of Ukraine will get some control power. Article 144 provides that in the case of the adoption of the Chairman of the Community Council, community, district, Regional Council Act not in conformity with the Constitution of Ukraine, posing a threat of violation of State sovereignty, territorial integrity or a threat to national security, the President of Ukraine stops the action of the relevant act with a simultaneous appeal to the Constitutional Court of Ukraine, temporarily stops the powers of the head of the community, the Council of the community, district, Regional Council and shall appoint an interim State Commissioner.

Indeed, it is essential novel as compared with the current legislation. According to the current law there are four modes of control and supervision of local governments:

1. The administrative control within the system of local self-government: village, settlement and city councils control the activities of mayors and executive bodies of local self-government; can cancel acts of the executive committees; mayor can stop the act of the executive committee and bring the matter to the relevant council; territorial community has right to terminate the powers of local councils and mayors through the local referendum¹.

2. The administrative supervision and control of state administrations over local self-government: executive bodies of village, settlement and city councils are under control of local state administrations within delegated power; however, acts of local self-government cannot be cancelled out of court.

3. The administrative supervision and control of regional and district councils over local state administrations: heads of local state administrations report to appropriate councils about realization of delegated power; regional and district council can make the decision of no confidence to the head of the local state administration which is to be considered by the President of Ukraine, if such decision will be passed by the majority of 2/3 of the council, the President has got the duty to dismiss the head of administration.

4. The judicial control over local authorities: all of the acts and decisions of the local authorities can be reviewed by the court.

The current control is significantly weaker compared with that which is proposed to introduce. But it is quite logical, because current system is more centralized and most decisions are being taken by the central government and its local representatives. While decentralization implies a much broader autonomy in decision-making as well as in management, respectively more serious state control over the local government is needed.

Conclusions

The existing system of local government in Ukraine is rather centralized and has a number of shortcomings that need elimination. The most important of them are the following:

1. Lack of regional and district democracy: the current Constitution does not provide for the creation of executive bodies by district and regional councils (chapter XI), so two levels of territorial division are directly managed by the government through the local state administrations.

2. Duplication of powers of local self-government and state administrations: Law on self-government (art. 27-38, 43, 44) and Law on local state administrations (art. 17-25).

3. Restrictions on the discretion to exercise the initiative of local authorities with regard to any matter which is not excluded from their competence nor assigned to any other authority and difficulties of managing the subsidiarity: the powers of local authority are strictly defined in laws and belong to local self-government bodies and to state administrations (art. 19 of the Constitution, p. 1, 2 art. 10 Law on self-government).

4. Absence of discretion in adapting delegated by a central authority powers, because they are delegated not to the decision-making body (council), but to the executive body (art. 11, 27-38 Law on self-government).

¹ It should be noticed that the Law on local referendum isn't adopted by the parliament, while the Law on national and local referendums lost its validity.

5. Excessive number of delegated powers of the government in the structure of executive competence of local authorities, which allows redundancy of control the central government over local government (art. 27-38 Law on self-government).

6. Absence of distribution of competences between the state and local self-government in the Constitution, which allows the government to centralize powers of management, removing them from among delegated to local government.

7. Political dependence of local councils on political parties leaders because of the applied electoral system, when the deputies guided not by personal convictions but attitudes of political parties on voting (Law on the local elections).

8. Financial dependence on central government: lack of sufficient own funds in local budgets (Tax Code, Budget Code).

9. Lack of real autonomy at the disposal of the own financial resources of local self-government: the impact of government on the local budget expenditures through the State Treasury (Budget Code).

The reform on decentralization is aimed at addressing most of these problems. It's implementation is vitally important for the forming of the constitutionally limited, internally balanced system of government, that is the essence of constitutionalism and its practical component.

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