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IMPLEMENTATION OF THE PRINCIPLE OF SUBSIDIARITY IN THE PROCESS OF DECENTRALIZATION IN UKRAINE

***Annotation.** The article is devoted to the study of the principle of subsidiarity as a European standard for the formation of interaction between levels of power, its theoretical and practical potential for a successful reform of decentralization in Ukraine. The main objective of decentralization is the provision of local self-government and creation of an effective system of territorial organization of power in Ukraine. Understanding the essence of decentralization requires an in-depth study of the nature of the principle of subsidiarity, that is creating a certain basis for the transfer of powers from the central to the lower organizational levels.*

The question of the quality of legal acts in the field of local self-government is still an acute problem. A scientific and analytical assessment of the current regulations and the development of recommendations for improving the legal regulation in the field of decentralization are required. Special attention should

be given to legal technique, terms and categories used in regulations. Today, the current legislation of Ukraine does not define the concepts of «subsidiarity», «decentralization», «decentralization of public power», and as a result, in practice, the principles of decentralization and subsidiarity are substituted.

Keywords: *subsidiarity, delegation of authority, decentralization, local self-government, European Charter of Local Self-Government.*

Relevance of the research topic. One of the strategic principles of constitutional reform in Ukraine is the provision of decentralization of state power, which acts as a key tool for the transformation of social relations based on the doctrinal constitutional values of today. In most detail the issue of decentralization was studied by G. Vedel: he defines it as the transfer of power of authority not to civil servants and bodies representing the central government, but to other bodies that are not hierarchically subordinate to the latter, mainly those elected by the population [3]. The main goal of decentralization is to ensure the capacity of local self-government and build an effective system of territorial organization of power in Ukraine. The Decree of the President of Ukraine dated January 12, 2015 No. 5/2015 approved the Strategy for Sustainable Development «Ukraine – 2020», in which decentralization was recognized as one of the key tasks of the state's development, and it was defined «moving away from the centralized model of governance in the state, ensuring the capacity of local self-government and building an effective system of territorial organization of power in Ukraine, fully implementing the provisions of the European Charter of Local Self-Government, the principles of subsidiarity, universality and financial self-sufficiency of local self-government» [13].

Understanding the essence of decentralization requires an in-depth study of the nature of the principle of subsidiarity, as it creates the necessary basis for the transfer of authority from the central to lower organizational levels. At the same time, insufficient attention is paid to issues related to the mechanisms of its implementation.

Analysis of research and publications. Issues of theoretical and practical-applied aspects of the application of the principle of subsidiarity, both indirectly and directly, were investigated in the works of domestic scientists M. Baimuratov, O. Batanov, I. Bodrova,

S. Seryogina, O. Skakun; modern Western scientists R. Agranoff, M. Brunner, B. Gurnet, D. Dietrich, T. Heglin, K. Endo. Subsidiarity as a concept was highlighted in the writings of A. Tocqueville and J. St. Mill; as a principle, it was developed on the basis of the works of R. Aron, A. Mark, and Deni de Rougemont. But along with this, the indicated issues do not lose their relevance due to the incompleteness of the reform of the decentralization of power in Ukraine, the renewal of the strategic goals of the sustainable development of the state.

The purpose of the study is to determine the main content of the principle of subsidiarity, its theoretical and practical potential for the successful implementation of the decentralization reform.

Presentation of the main material. The analysis of views expressed in the legal literature on the content of the concept and understanding of the essence of the principle of subsidiarity indicates a diversity of opinions on this matter. For the first time, the idea of subsidiarity appeared in the works of Aristotle, as the antithesis of the Platonic understanding of the unity of society and the state. Thomas Aquinas also paid special attention to the role and place of lower social groups in the social structure of society. In his opinion, the inability of these social groups to satisfy existing needs leads to the need for intervention in this process by public authorities, but only if it is necessary to achieve the common good [2, p. 120]. This phenomenon received the name «subsidiarity» in 1931 in the encyclical of Pope Pius XI «Quadragesimo Anno». In particular, it says: «that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them» [10].

The essence and idea of «subsidiarity» develops in a fairly wide conceptual space, and covers the spheres of public administration, economy, social policy, and the interaction of state power and local self-government. For a correct definition of this concept, it is necessary

to establish its etymology, proper goals and objectives. «Subsidiarity» means «providing assistance», «additionality», «inferiority». In the scientific literature, there are different interpretations of this term: in particular, in the theoretical dimension, «subsidiarity» involves the delegation of decision-making powers from the central to lower organizational levels; as a principle of the institutional organization of power and management – the idea of the intervention of political power only within those limits, within which society and its component groups are unable to satisfy various needs [1, p. 53; 14, p. 22–30].

In the political dimension it acts as a kind of means that should ensure the exercise of powers as close as possible to the citizens; it is assumed that political action takes place at the level that most corresponds to the solution of the problem. This division of powers enables and directs higher-level authorities to assist lower-level authorities only when necessary and when this necessity has an adequate form and dimension. Therefore, it is implemented only in the case of insufficient capabilities of an individual (or a small group of people) in solving the necessary tasks, which requires subsidiary intervention on the part of state institutions. At the same time, the priority of the lower level in the distribution of powers should prevent any attempts to centralize the system of territorial organization of power [5, p. 34]. The famous German professor O. von Nell-Breuning, explaining the essence of this principle, indicates that it is about the assistance that the whole should provide to its «parts». At the same time, this principle means not only reasonable assistance to those who really need it, but also protection of a lower level of management from excessive centralization; non-interference in those areas where individuals can cope without any help from the whole (the state). «At the same time... the whole must provide assistance to those of its «parts» that really need such assistance and simply cannot exist without it. Moreover, the principle of subsidiarity is an obligation to assist» [9].

In the concept of the social state, which is oriented primarily on the welfare of society and individual, and which is called to consistently ensure the implementation of the principle of social justice in society, it is one of the main ones aimed at the development of individual potential, self-determination and self-responsibility.

In the sphere of social policy, which carries out the practical implementation of the provisions of the welfare state, this principle provides for the legislative regulation of the interaction of state and non-state structures in the social sphere and the support of the latter. Its implementation allows not only to use existing material resources more effectively, but also to respond more flexibly to new social requests and involve citizens in solving social problems. S. Ladyvirova states that the principle of subsidiarity is a legal one given that the problem of distribution solved with its help is a legal one [6, p.16]. This is a certain formula for the distribution of competences of the elements of the social whole in legislative acts, according to which the lowest level of power receives such powers that the territorial level of power that follows it cannot exercise more effectively. P. de Laubier states that subsidiarity is «the principle of decentralization and distribution of responsibility, which is the basis of the modern democratic process» [7]. It is worth noting that the current legislation of Ukraine does not define the concepts of «subsidiarity», «decentralization», «decentralization of public power» so far, although there were such attempts in the past.

Enshrining the principle of subsidiarity as a standard in the legal system of Ukraine is conditioned by the ratification of the European Charter of Local Self-Government, since current international treaties, the binding consent to which was given by the Verkhovna Rada of Ukraine, are part of national legislation (Part 1, Article 9 of the Constitution of Ukraine; Part 2, Art. 19 of the Law of Ukraine «On International Treaties of Ukraine»). Ukraine became the 37th member of the Council of Europe and ratified the Charter without any reservations [11], however, the issue of an effective mechanism for implementing the requirements of Council of Europe law into national legislation remains unresolved today. It should be emphasized that during the ratification of the European Charter, Ukraine did not make any reservations (although such a possibility is provided for in the special provisions of this international legal act), and therefore, assumed the obligation to fulfill all the norms set forth in it without exception.

Along with this, a number of principles of the European Charter are not implemented in Ukraine, and some of them contradict the

national legislative acts regulating local self-government issues. In this context, attention should be paid to the following circumstances:

Firstly, the term «subsidiarity» is almost never used in national legislation. Despite the fact that the principle of subsidiarity is reflected in the Budget Code, it is absent in the Basic Law; in the Law «On Local Self-Government in Ukraine» it is traced indirectly in the definition of «local self-government».

Secondly, the issue of the quality of legal acts in the field of local self-government is an acute problem at the current stage. S. Serohina emphasizes the need to deepen the scientific and expert assessment of draft laws in the field of local self-government, paying special attention not only to foreign experience, concepts and presentation of projects, but above all to legal techniques, terms and categories used in these projects. Regulation of these relations which is insufficiently clear or contradictory leads to misunderstandings, the need to make changes and additions, additional interpretation of the acts [12, p. 45]. A negative example of such a state is the practice where the principle of subsidiarity is established even in those spheres in which it has indirect influence. I. Bodrova draws attention to the inclusion in the content of Art. 132 of draft law No. 2598 of the principle of subsidiarity to the principles of the territorial system of Ukraine along with the unitarity, unity and integrity of the state territory, decentralization of power, ubiquity of local self-government, balanced and sustainable socio-economic development of territories taking into account their historical, economic, ecological, geographical and demographic features, ethnic and cultural traditions. Since subsidiarity characterizes the basics of the functional and competent sphere of local self-government bodies, determining the conditions, criteria for its formation and provision, it affects the legal status of territorial units indirectly. In this regard, the scientist writes, it would be more logical to constitutionally enshrine the principle of subsidiarity in the article of the Basic Law that regulates the competence of territorial communities, local self-government bodies [3, p. 32].

Thirdly, an important factor for improving the existing legislative framework for new needs is terminological clarity and specification in domestic legislation. In domestic practice, the principles of decentralization and subsidiarity are substituted, as two essentially

«counter» flows of redistribution of powers. Thus, the principle of subsidiarity is disclosed only as a basis of state regional policy (Article 3 of the Law of Ukraine «On the Basis of State Regional Policy»), and decentralization was mentioned as a process of transfer of functions in the Procedure for conducting a functional survey of executive authorities [3, p. 33].

Summing up, it should be noted that the practice of developed democratic countries proves that the combination of decentralized state power with developed local self-government is one of the most effective models at the current stage. The main prerequisites for the activation of the decentralization process in Ukraine are related to the fulfillment of the requirements that candidate countries for joining the EU must meet. However, Ukraine is moving somewhat slowly in the direction of implementing the provisions of the European Charter of Local Self-Government into national legislation, and the problem of complex reform of local self-government is still not fully resolved. The ways to solve the outlined problems are not least related to the improvement of the constitutional regulation of the institute of delegated powers. A scientific and analytical assessment of the current normative acts and the development of a recommendation for the improvement of legal regulation in the field of decentralization are necessary. Special attention should be paid to legal techniques, terms and categories used in regulatory acts, because insufficiently clear regulation of relations leads to misunderstandings, contradiction and open conflicts [8, p. 56]. Currently, in accordance with the Sustainable Development Strategy «Ukraine – 2020», a set of measures is being implemented in Ukraine for legislative, scientific, methodological and information support of local self-government reform.

Conclusions from this study are the possibility of recommending to introduce amendments and additions to the Law «On Local Self-Government in Ukraine», and other acts regulating local self-government, to adopt a law on local referendums and pay significant attention to the development of local democracy, taking into account the principle of subsidiarity at the local level. Prospects for further research in this area may include be to intensify the implementation of the principle of subsidiarity at the level of local government closest to the population.

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І. В. Гарашук**Реалізація принципу субсидіарності в процесі децентралізації в Україні**

***Анотація.** Стаття присвячена дослідженню принципу субсидіарності як європейського стандарту формування взаємодії рівнів влади, його теоретичного та практичного потенціалу для успішного здійснення реформи децентралізації в Україні.*

Сутність та уявлення про «субсидіарність» розвивається в досить широкому понятійному просторі, і охоплює сфери державного устрою, економіки, соціальної політики та взаємодії державної влади і місцевого самоврядування. Висловлені в юридичній літературі погляди на зміст поняття й розуміння сутності принципу субсидіарності свідчить про розмаїття міркувань з цього приводу.

Закріплення принципу субсидіарності як стандарту у правовій системі України обумовлюється ратифікацією Європейської хартії місцевого самоврядування, оскільки чинні міжнародні договори, згода на обов'язковість яких надана Верховною Радою України, є частиною національного законодавства, проте, і сьогодні залишається невирішеним питання дієвого механізму імплементації вимог права Ради Європи у національне законодавство. Наголошується, що під час ратифікації Європейської хартії Україна не внесла жодних застережень (хоча така можливість передбачена в особливих положеннях цього міжнародно-правового акту), а отже, взяла на себе обов'язок виконання всіх без винятку викладених у ній норм. Разом і цим, низка принципів Європейської хартії не реалізується в Україні, а деякі з них суперечать національним законодавчим актам, що регулюють питання місцевого самоврядування.

Звертається увага на відсутність терміну «субсидіарність» в Основному Законі і його опосередковане визначення у Законі «Про місцеве самоврядування в Україні»; наголошується на проблемі якості правових актів у сфері місцевого самоврядування на сучасному етапі, оскільки термінологічна чіткість і конкретизація у вітчизняному законодавстві виступає важливим чинником для удосконалення існуючої законодавчої бази для нових потреб.

Окреслені чинники, які зумовлюють реалізацію цього принципу в світлі вимог закріплених Європейською хартією місцевого самоврядування як першого документу, що гарантує його виконання; з'ясовано відповідність українського законодавства цим вимогам, виокремлено

ключові питання правового регулювання та вдосконалення правової основи й практики його реалізації в сучасних умовах. Розуміння сутності децентралізації вимагає поглибленого дослідження природи принципу субсидіарності, як такого, що створює необхідне підґрунтя для передачі повноважень із центрального на нижчі організаційні рівні. Разом із тим, питанням, пов'язаним із механізмами його реалізації приділяється недостатньо уваги.

Ключові слова: субсидіарність, делеговані повноваження, децентралізація, місцеве самоврядування, Європейська хартія місцевого самоврядування.