

СЕКЦІЯ 2 КОНСТИТУЦІЙНЕ ТА МУНІЦИПАЛЬНЕ ПРАВО

ON THE CURRENT STATE OF MUNICIPAL LEGISLATION OF UKRAINE

ЩОДО СУЧАСНОГО СТАНУ МУНІЦИПАЛЬНОГО ЗАКОНОДАВСТВА УКРАЇНИ

Currently, the development of municipal legislation – the legal basis of local self-government – is continuing in Ukraine. The article shows that, despite the ideas expressed in the literature, the priority direction of the development of municipal legislation is its systematization and alignment with the European standards formulated in the documents of the Council of Europe. It is revealed that the prospects for further creative research in this direction are the need to study the effective forms and types of systematization of the municipal legislation of Ukraine.

Key words: municipal legislation, municipal law, local self-government, legal basis of local self-government, systematization of municipal legislation.

Наразі в Україні триває розвиток муніципального законодавства – правової основи місцевого самоврядування. У статті доводиться, що, незважаючи на висловлювані в літературі думки, пріоритетним напрямом розвитку муніципального законодавства є його систематизація та приведення у відповідність з європейськими стандартами, сформульованими в документах органів Ради Європи. Виявлено, що перспективи подальших творчих розвідок у цьому напрямі полягають у необхідності дослідження ефективних форм та видів систематизації муніципального законодавства України. Наразі в Україні триває муніципальна реформа. Її поточний етап передбачає децентралізацію, підвищення громадської

активності та водночас – перегляд ролі територіальної громади у здійсненні місцевого самоврядування. Одним з проявом цього є очікування на нормативне забезпечення об'єднання територіальних громад та заохочення територіальних громад на загальнодержавному і місцевому рівнях до такого об'єднання. Слід зазначити, що у процеси об'єднання територіальних громад ймовірно що найбільш активно залучатимуться територіальні громади сіл та територіальні громади селищ. Що ж до міст, то міські територіальні громади здебільшого менш потребують об'єднання, менш зацікавлені у ньому – тому що вони є значно крупнішими за кількістю членів територіальної громади. Невеликі ж територіальні громади сіл та селищ, у разі прийняття відповідного закону, матимуть можливість здійснити добровільне об'єднання та значно укрупнитися. Водночас слід зазначити, що кількість членів територіальної громади міста робить більш вірогідною можливість знайти з-поміж них кваліфікованих фахівців-юристів, що є обізнаними з муніципальним законодавством. У селах та селищах ймовірність зустріти таких спеціалістів значно менша. Це актуалізує питання систематизації муніципального законодавства України.

Ключові слова: муніципальне законодавство, муніципальне право, місцеве самоврядування, правова основа місцевого самоврядування, систематизація муніципального законодавства.

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Relevance of research. Municipal reform is underway in Ukraine. Its current stage provides decentralization, increasing civic activity and, at the same time, reviewing the role of the territorial community in the implementation of local self-government. One of the manifestations of this is the expectation of regulatory support for the amalgamation of territorial communities and the encouragement of territorial communities to be amalgamated at the national and local levels. It should be noted that the territorial communities of villages and settlements are likely to be most actively involved in the process of amalgamation of territorial communities. As for cities, urban territorial communities are generally less in need

of amalgamation, less interested in it because they are much larger of members of the territorial community. In case of adoption of corresponding law, small territorial communities of villages and settlements will have an opportunity to carry out voluntary amalgamation and enlarge significantly. At the same time, it should be noted that the number of members of the territorial community of the city makes it more likely to find qualified legal professionals among them who are familiar with municipal law. In villages and settlements, the probability of meeting such specialists for the proper regulatory support of decentralization and other reform processes taking place in Ukraine is much lower.

This raises the issue of systematization of municipal legislation of Ukraine.

The degree of development of the problem.

We should note that the greatest attention in this area was paid to the development of the Municipal Code of Ukraine, which was updated in early 2000s. As for the other issues of systematization, almost no attention was paid to them, i.e. there were only a number of single articles on this topic in scientific periodicals.

The purpose of the article is to analyze the publications by O.V. Chumakova on the directions of development of the constitutional and legal basis of local self-government in Ukraine.

Presentation of the main material. In 2008, O.V. Chumakova published an article "Directions for the development of the constitutional and legal basis of local self-government in Ukraine", in which she paid considerable attention to the systematization of municipal legislation. Given the lack of work in this area, this article is of great interest because it is a contribution to the study of systematization of municipal legislation. However, reading the mentioned article raises a number of thinking and comments. It should be noted at once that the article is published in the journal "State Formation", which is a specialized periodical for public administration, not legal sciences. Perhaps, this is the reason of not very accurate formulations of the author in the issues analyzed in the article.

Firstly, the title of the article – "Directions for the development of the constitutional and legal basis of local self-government in Ukraine" – calls for comments because it reflects the content of the article not accurately. The publication deals with the norms of the Constitution of Ukraine and with the Law "On Local Self-Government in Ukraine", other regulatory acts and international treaties ratified by Ukraine. Therefore, it would be more appropriate to talk about the "legal basis of local self-government in Ukraine", rather than about the "constitutional and legal basis of local self-government in Ukraine".

Secondly, O.V. Chumakova claims that "for many years of reforming the current state system, a stable legal framework for local self-government has not been created yet" [1, p. 1]. It is hardly possible to agree with this conclusion, especially because the author almost immediately states: "the normative basis of this study is the Conclusion of Ukraine, the Law of Ukraine "On Local Self-Government in Ukraine", the European Charter of Local Self-Government, relevant orders of the President of Ukraine, recommendations of the regional authorities of Europe, etc." [1, p. 1]. With the exception of the recommended acts of the Congress of Local and Regional Authorities of Europe, all other regulations, as well as the European Charter of Local Self-Government ratified by Ukraine, are only a small part

of the municipal legislation of Ukraine. For example, the laws of Ukraine regulating issues related to the establishment and operation of local governments in Ukraine may also include the Law "On Service in Bodies of Local Self-Government" dated June 7, 2001, the Law "On Status of Deputies of Local Councils" dated July 11, 2002, the Law "On Elections of the People's Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, Local Councils, and Village, Township and City Mayors" dated June 10, 2010, and others. It is unlikely that the long-term work of lawmakers in the field of municipal legislation should be so underestimated. When it comes to municipal legislation in Ukraine, the problem is rather its instability, low level of systematization, but by no means a small number of relevant acts.

In the following pages of the article, the author refers to the by-laws of municipal legislation, in particular those adopted by the Government of Ukraine. O.V. Chumakova writes: "If we analyze the regulatory activity of the Cabinet of Ministers of Ukraine regarding its compliance with the European standards of local self-government, the monitoring of governmental documents shows that it has not realized the key importance of the European Charter of Local Self-Government for the development of our territorial groups yet... The outlined above necessitates the harmonization of Ukrainian legislation with the legislation of the EU member states" [1, p. 3].

First of all, it should be emphasized that the Government of Ukraine is actively involved in the implementation of municipal reform, but its acts have almost no impact on the current problems of establishment and operation of local self-government bodies. Therefore, it is hardly expedient to pay so much attention to the acts of the Cabinet of Ministers of Ukraine to distinguish them from other by-laws of municipal legislation as the author does.

But the main thing to note in this quote is that the author confuses the EU law with the European law. At first, the author talks about the European standards of local self-government and the European Charter of Local Self-Government, i.e. a document of the Council of Europe. And then, after a sentence the author concludes that "it is necessary to harmonize the legislation of Ukraine with the legislation of the EU member states". Although all the EU member states are members of the Council of Europe at the same time, it is hardly appropriate to equate the standards of the EU and Council of Europe (traditionally referred to as the European standards).

The author's call about the need to harmonize the legislation of Ukraine with the legislation of the EU member states in terms of municipal law is also surprising. Indeed, Ukraine's European integration aspirations make it important to harmonize Ukrainian legislation with the EU

standards (but not with the legislation of the EU member states; there are many of them, so it is unclear what the EU member state the legislation of Ukraine should be harmonized with and why). But it is in the field of municipal law that the EU member states are guided by the European standards without forming their own standards.

Accordingly, the analyzed paragraph of the article by O.V. Chumakova demonstrates a very low awareness of international and supranational legal systems. This is evidenced by another sentence from her work: the author argues that “the complexity of the implementation of the principles of the Charter is due to the fact that they, on the one hand, are the rules of law in force” [1, p. 3]. It is extremely difficult to understand how the norms of the analyzed Charter can be “norms of law in force” because the charter is valid only if it is ratified by the member states of the Council of Europe. For example, Ukraine ratified the Charter by the Law “On Ratification of the European Charter of Local Self-Government” dated July 15, 1997 [2]. The relevant norms became the part of the national law only after ratification.

O.V. Chumakova also makes a meaningful analysis of the European Charter of Local Self-Government and states: “a number of principles of the Charter are not implemented by us, and some of them contradict the constitutional principles of local self-government provided by national legislation. First of all, it concerns the definition of the primary framework of local self-government in Ukraine” [1, p. 3]. Once again, in our opinion the author assumes inaccuracies because the European Charter of Local Self-government does not define the primary framework of local self-government. It states that:

– “local self-government denotes the right and the ability of local self-government bodies, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population”;

– “this right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. The provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by law” [3].

Accordingly, it does not follow from this article of the Charter that it is the primary framework of local self-government. Such a phrase as “the primary framework of local self-government” is also absent in the Constitution of Ukraine. Instead, the Basic Law states that:

– “local self-government is the right of a territorial community – residents of a village or voluntary amalgamation in a rural community of residents of several villages, settlements and cities – to

resolve issues of local significance within the Constitution and laws of Ukraine independently”;

– “local self-government is carried out by the territorial community in the manner prescribed by law, both directly and via local self-government bodies: village, settlement, city councils and their executive bodies” [4].

The phrase “primary framework of local self-government” is absent in the Law “On Local Self-Government in Ukraine”. However, it is about the “primary subject of local self-government”. According to Article 6 “Territorial communities”, “the primary subject of local self-government, the main bearer of its functions and powers is the territorial community of the village, settlement, city” [5]. But, firstly, the primary subject of local self-government is by no means the primary framework of local self-government, and secondly, the European Charter of Local Self-Government is not in conflict with the above provision of Art. 6 of the Law “On Local Self-Government in Ukraine”, as well as with the provisions of the Constitution of Ukraine.

O.V. Chumakova also expresses the opinion that, “taking into account the principles of the European Union law, we must provide for the principle of subsidiarity in our Basic Law” [1, p. 5]. In this regard, it is worth noting the following. The author continues the terminological confusion in the part of the European law and the law of the European Union. The principle of subsidiarity in the context of the EU law applies to the relationship between the EU bodies and public administration bodies of the EU member states. The principle of subsidiarity in the context of a document with the norms of the European law, such as the Charter, applies to the relationship between public administration bodies and local self-government bodies. By the way, the Charter also does not mention the name principle of subsidiarity, but has its characteristics. Article 4, paragraph 3 of the Charter states that public responsibilities shall generally be exercised, in preference, by those authorities, which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy” [3]. But it is hardly expedient to include such a regulation in the Constitution. It would rather be rational to include it in current legislation. However, there is no need to do so because after its ratification by Ukraine, the European Charter of Local Self-Government has become part of national legislation.

It is difficult to agree with one more point described by O.V. Chumakova. The author says that the Law of Ukraine “On Local Self-Government in Ukraine” should clearly define the concepts of “competence” and “powers”; without them it is impossible to distinguish between the concepts of “competence of local self-government” and “competence of territorial

community” [1, p. 9]. It should be noted that it is hardly expedient to transform the laws of Ukraine – the Law “On Local Self-Government in Ukraine” is no exception – into explanatory dictionaries with the definitions of the commonly used concepts. Especially, there are still discussions about the relationship between the concepts of “competence” and “powers” in the legal literature.

Finally, analyzing the directions of development of the constitutional and legal basis of local self-government in Ukraine (more precisely, the directions of development of municipal legislation of Ukraine), O.V. Chumakova supports the necessity to adopt the Municipal Code of Ukraine. She argues this with reference to the CLRAE Recommendation 102 (2001) on the state of local and regional democracy in Ukraine [1, p. 10]. It should be noted that the Recommendation does not refer to a “municipal” but to a “communal code” [6] in the context of the division of powers between public administration bodies and local self-government bodies. Taking into account the content of the relevant provision of the Recommendation, the author’s conclusion that “the Municipal Code should become a fundamental act for the creation of a system of local self-government” [1, p. 10] is true but it is not sufficiently justified. However, we should agree with O.V. Chumakova that codification of municipal legislation “will help to overcome the crisis of the legal basis of local self-government, to eliminate gaps in legislation and effective implementation of the law” [1, p. 10]. The author’s conviction that “the adoption of the Municipal Code is premature today, as the primary laws have not been adopted yet, particularly, the Law “On Territorial Community”, which is the primary subject of local self-government in Ukraine” [1, p. 10] is objectionable. It should be emphasized that the opinion was expressed by the author in 2008, however, a few years before scientists had convincingly argued the need for the adoption of the Municipal Code (for example, see [7]), as well as formulated proposals for the content of systematized acts of municipal legislation and the application of innovative approaches

in the implementation of such systematization (for example, see [8; 9]).

Conclusion. The development of municipal legislation – the legal basis of local self-government – is underway in Ukraine. Despite the views expressed in the literature, the article argues that the priority of municipal legislation is its systematization and bringing into compliance with the European standards formulated in the documents of the Council of Europe. It is revealed that the prospects for future creative researches in this direction are the need to study effective forms and types of systematization of municipal legislation of Ukraine.

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