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Comparative-Legal Analysis of the Legal Responsibility of the Bodies and Official Functionaries of Local Self-Government in Foreign Countries

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Abstract: The scientific literature offers different approaches to the analysis of the interrelations between the central and local government and the need for an effective control of the center over local government and its legislative consolidation has never been in question. However in a number of countries the municipal level of government is independent and any direct interference of the state in the affairs of a local community is forbidden. In this situation the legislation of various countries secures a whole range of possibilities of the indirect control over the municipal level of government. And such a need is motivated specifically by the fact that many functions fulfilled by local authorities are essentially national, therefore it is necessary that at least some of the municipal standards of their realization should be kept up. Besides, there is the necessity to build effective mechanisms of state control over the municipal level, which on one hand will ensure the protection of the interests of the population of the municipality, while on the other hand will not violate the democratic principles of the organization and of the functioning of the public authority at the municipal level.

Key words: State control · Responsibility · Local government · Legality · The system of municipal governance

INTRODUCTION

The state control is finally intended to guarantee such a development of local government that would prevent it from becoming a state within a state, but would enable it to solve its problems within a framework of the national laws". "From the point of view of the integrity of the power constructions, the supervision should be considered as a natural counterbalance to the rights guaranteed to communities" and this control is first of all "a correction of their right to self-government", aimed to secure the legitimacy of the activities of communes and guarantee the interests of communes".

The state control over local self-government also manifests itself in the application of the measures of responsibility to the bodies and official functionaries of local self-government. The responsibility for the state for the non-execution or improper execution of the powers placed by the law on the bodies of local self-government is based on such a principle of government as centralization and decentralization.

The principle of the decentralization of government should be understood not as a complete absence of central government, but as a combination of central and local government proceeding from the principle of the essential division of power between the levels of public power and the territorial jurisdiction of administrative bodies. Thus, for example, in conditions of the federal Russian state, the central power is represented at the level of the federation and the subjects of the federation and the local power – at the level of the municipal formations. [1].

In the past the control of the center over the work of the local bodies was chiefly exercised by means of the so-called "administrative guardianship", which stipulated that the decisions of the local authorities could only come into force after their approval by the appropriate central supervision authority. Such approval could be denied for reasons both of legitimacy and appropriateness. Today in the democratic countries the administrative guardianship practically and generally has given way to the so-called "administrative control", which stipulates that the

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decisions of the local bodies on the issues of their own competence can be appealed against only for reasons of legitimacy by order of the court. In the sphere of the delegated competence the supervision can be more rigid and can partially resemble the administrative guardianship, as in this case the control from the point of view of not only legitimacy, but also appropriateness, is possible and the forms of response from the central authorities can be more rigid [2].

The aforesaid approach was secured in the 1985 European Charter of local self-government, whose p.2 c.8 notes that "any administrative control over the work of the local self-government should, as a rule, aim at the observance of the legitimacy and constitutional principles". At the same time "administrative control can also include the control over the appropriateness, exercised by the higher authorities with regard to the tasks whose execution is delegated to the local self-government" [3].

The problem of the responsibility of the subjects of the municipal-legal relationships in different foreign countries will be considered in the light of M.A. Shtatina's classification of the systems of local self-government [4].

In the countries of the continental law (the Roman-Germanic bipolar system) an important role in the realization of the supervision over the work of the local authorities is played by the representatives of the public administration in the provincial organizations. In Hungary, for example, the control over the observance of laws by the local self-government is exercised by the special representatives of the Republic appointed from above, who are entitled to appeal in legal form against the decisions of the local authorities that are, in their opinion, illegal. In Lithuania the principal institution of the supervision over the work of the local self-government is the government's plenipotentiaries. They have a right not only to appeal against the decisions of the local authorities, but also to suspend their realization, in case such decisions infringe upon the rights of the citizens and organizations (the case is subsequently submitted to the court for its final verdict).

In France (the Roman model) up to the beginning of the 80-s XX century fairly rigid control over the work of the communal and departmental bodies was exercised by the representatives of the central government in the department – by the prefects. Within a framework of the guardianship (the indicated term was considered not quite appropriate by the French researches, as it gave grounds to assume certain "incapacity of the local body in the sense this notion is used in the civil law") [5]. The prefect having considered this or that decision of the local council illegitimate has a right to declare it null and avoid. In response the commune could through its mayor appeal to the administrative court with a petition to cancel the prefect's resolution. However, the law of March 2, 1982 changed the system of control over the local government bodies. Now the decisions, resolutions and other acts of the local government bodies "are executed in full measure after their publication or notification" [6]. All the acts of the local authorities that enter the category of the acts bound to be submitted for impaction (the decisions of the local councils, decisions of mayors of communes and chairmen of the general councils of the departments of the police district, decisions of individual nature with reference to employees of local groups, etc.), within 15 days after their adoption should be sent to the prefect. The latter has a right within two months to submit to the administrative court any act he has received that he will consider as running counter to law, having previously (not less than 20 days in advance) informed the mayor and the chairman of the general council about his intention. Simultaneously with the appeal to the court the prefect has a right to the immediate suspension of the execution of the inappropriate decision until the court has established the degree of its legitimacy. The idea of this right of the prefect is to prevent the council from putting into effect in the speediest possible way the unlawful decision with the purpose of creating an irreversible situation in case the administrative court cancels such a decision.

In comparison with the control over the legitimacy, the control of the prefect over the budgetary acts of the territorial bodies goes a little further, as in a certain situation he has a right to independently fix the budget of a corresponding self-government body. For this the prefect must previously appeal to a new judicial body – the Regional Accounts Chamber that establishes the violation of the budgetary norms and sanctions the appropriate actions of the prefect.

The general administrative control over the local self-government bodies is exercised by the central government or by the government of the appropriate subject of the federation (as a rule, in the face of one or several ministers). In Japan the Ministry of local self-government is in charge of the self-government bodies are in charge of, in Norway – the Ministry of local government, in France, Italy, New Zealand and in a whole number of other countries – the Interior Ministry.

In Denmark (the Scandinavian model) the Interior Ministry exercises the general control over the work of the regional level (provinces). Here the municipal councils are controlled by the so-called provincial inspection committee with the prefect of the province at the head. Four other members of this committee are elected from among the number of the provincial counselors.

The provincial committee exercises, in the first place, the financial and legal control over the municipalities. All the financial reports of the latter are to be submitted to its consideration. [7]

Besides, individual citizens as well as members of the municipal council may appeal to the provincial committee with a request to consider the legitimacy of this or that decision of the local council. In case such a decision is declared by the committee illegal it must be cancelled by the appropriate council, otherwise a fine can be imposed on the council (or its individual members). The committee itself has no right to make any decisions for the municipal council. Thus, members of the local councils bear not only general political but also legal responsibility for their actions and "if they get involved in making illegal decisions, the appropriate enforcement measures can be taken against them" [3].

The most radical measure is the dissolution of the local councils stipulated, specifically, by the legislation of France, Italy, Ireland, Portugal, Poland, Mexico, India.

In the democratic countries such dissolution is made possible usually under certain circumstances strictly specified in the law. The Portuguese Constitution, for example, contains the general principle according to which "the dissolution of the bodies of self-governed units elected by direct vote can only be realized either for the reason of the actions grossly violating the law or inaction (paragraph 3 Article 243) [8].

In France a municipal council can be dissolved by the decree of the President of the republic passed by the Council of Ministers. As practice shows, the local representative body in this country is most frequently dissolved owning to the inability to secure control over the work of the commune (for example, as a result of the split within the council between the mayor and the majority of the members of Council). Within a week after the dissolution of the Council the prefect sets up a special committee of three to seven members (depending on the size of the population of the commune) who elect the chairman of the committee (and his deputy). Thus, the committee exercises the powers of the municipal council and its chairman – those of the mayor's. It only has a right to make decisions on the current and urgent issues (with the purpose of maintaining the commune's vital activity), but it may not make long-term decisions related to the development of the commune. Within two months after the dissolution of the council, the new municipal elections must be held (this condition is not observed only in the case when from the moment of the dissolution of the representative body there is no more than three months left before the elections).

The legislators of many countries have become aware of the need for the securing in the norms of the law of the institution of responsibility of the local self-government bodies. Strict execution of both their own and the state functions by the local self-government bodies is secured by the threat of the application of sanctions. The concrete forms of the realization of the responsibility are the dissolution of the municipalities, dismissal of the municipal councilors, delegation of these or those powers of the municipality to the government agents, removal from the post, recovery of penalty, cancellation of the acts of the municipal bodies, deprivation of subsidies, etc.

The possibility of the dissolution of the local elected bodies in case they commit actions conflicting with the Constitution; and also the infringement of the laws, refusal to execute the decrees of the central government is stipulated by the legislation of a number of countries (France, Italy, Portugal, India, etc. can serve as examples).The governments of a number of the German lands (North Rhine-Westphalia, Rhineland-Palatinate, etc.) also have a right of the dissolution of the representative body of the commune. However, in some other German lands (for example, Schleswig-Holstein), the Interior Minister can only substantially cut or suspense the financing of this or that commune.

Paragraph 116 of the Law of the North Rhine-Westphalia Land calls this the total supervision. But together with these ones the supervision bodies, in particular, the bodies of the Land's government in the provinces have a right to make it incumbent upon the communes to execute the duties imposed on them by setting the deadline (§120) [9].

The legal supervision is exercised over the entire legally significant work of the commune and consists in the appeal against the decisions and actions contradicting the law. This supervision can not be applied to legally correct but essentially disputable decisions, for example, on a bus route and its timetable, whether to build another swimming pool, etc. The legal supervision, accordingly, excludes the right to give the commune some general instructions.

The official supervision implies the ability of both the legal and factual appraisal (from the point of view of the effectiveness of the adopted decisions and actions).

In Italy when they reveal an infringement of the constitution and other actions contradicting the law, refusal to execute the decrees of the central government, the regional council and other bodies of local self-government can be dissolved and the chairman and other official functionaries who have committed illegal actions can be dismissed. The dissolution of the local self-government body can be realized in the case of mass resignations of the deputies or total inefficiency of the work of the local self-government body due to a steady majority and also for reasons of national security. Such a decision can only be made by a motivated decree of the president of the Republic after a hearing by a special ad hoc committee. By the decree on the dissolution of the regional council the president of the country sets up an ad hoc committee including three members who possess a full measure of the rights to vote.

Within three months the committee fixes the date of the elections of a new regional council and attends to the routine administrative work being within the competence of the executive body. The committee makes decisions that cannot be cancelled by some other body and which, subsequently, are to be submitted for the approval by the newly elected regional council.

In France in the event of the conflict between the mayor and the council, when this conflict does a lot of harm damage to the local affairs, the commissar of the republic intervenes in this conflict. If such a measure fails to deliver the result, the commissar has a right to submit a proposal to dissolve the council which comes into force after the appropriate act of the Council of Ministers. In such cases, quite rarely, the commissar appoints a special delegation authorized to assume some administrative functions reduced to the support of the regional government and solution of some urgent issues, prior to the new elections. It does not make long-term decisions with reference to the commune's development. The elections are to be held not later than two months from the moment of the dissolution of the council [9].

So, the appropriate decision on the early dissolution of the municipal council is recognized legitimate provided that it observes two conditions: firstly, it must be legalized by the issue of a special normative legal act and, secondly, the solar reason for the early dissolution of the municipal council is its inability to exercise control over the local affairs [10].

The legislation on the local self-government in Latin American countries (the Latin American model) was chiefly developed under the influence of the French practice. Thus, according to the Constitution of Mexico, the legislative bodies of the Mexican states by the majority of the two thirds of the votes of their members can suspend the work of the municipalities, announce their liquidation and suspend or cancel the mandate of any of their members for one of the serious reasons stipulated by the laws of the states at any time and on condition that the indicated members of the municipality have had sufficient opportunities to produce evidence and recruit the council for the defense should they consider it necessary. In the event of the announcement of the liquidation of the municipality or by virtue of the resignation or a total inability of the majority of its members to execute their duties and the impossibility to call a new election, the legislative body of the state appoints from among the number of the residents of this locality members of the municipal council for the rest of the term. In case one of the members of the municipal council ceases the performance of his ahead of time, his post can be filled by the deputy who is elected simultaneously with the municipal counselor and stays in the job for the rest of the term. However, the ways of the realization of the local self-government in Latin American countries are different. For example, the Constitution of Brazil, unlike other countries, secures the grounds for the interference of the states in the affairs of the municipalities and the appointment by the government of its representatives who can be empowered for a certain period of time to administer the municipal district with the simultaneous suspension of the work of the municipal council.

The control over the local government on the part of the ministries plays a significant role in the countries of the Anglo-Saxon law. In Great Britain (the municipal (Anglo-Saxon) system – the unified British model), for example, the Environment Agency is chiefly in charge of the local government (more precisely, of its functional branch, uniting the departments of planning and local development). Together with the local government this Agency tackles the issues of house-building, water resources, the environmental protection, etc. It works out the laws on local government, prepares its reforms, controls local finance, work conditions, work payment and provision of pensions for municipal employees, land-tenure, etc. Certain aspects of the work of the local authorities are controlled by some other ministries (interior, health, social security, finance, etc.).

In the USA (the North American diversified model) the control on the part of the state's authorities over the local government is chiefly exercised on the functional basis, i.e. different administrative units of the municipality are controlled by the appropriate government department of the state. Today in the majority of the states (California, New-Jersey, New York, Connecticut, Illinois and others) there are also specialized departments tackling the issues of local government; the main task of such departments is the control over the local finances, collection of the essential statistics, giving advice to the municipal bodies on these or those issues.

In the charters of the counties the regulations on the responsibility for the organization of the government in the counties are placed on the county's professional manager, appointed, displaced and controlled by the Council [10]. The general responsibility rests with the representative body and is not to be divided between the electoral Council and the elected chief manager. The members of the Council continue to bear responsibility to the electorate, moreover, they realize this responsibility for the government with the help of the agent-manager appointed by them.

In a similar way in the majority of the Canadian provinces the control over the local government is exercised by the department of municipal affairs, headed by a member of the provincial cabinet. For the first time such a department was set up in the Manitoba province in 1886 under the title "the municipal commission-agent is department". Then a similar department was set up in some other provinces (in the Saskatchewan province, for example, "and it began to operate in 1968").

The administrative control of the central authorities over the work of the local bodies is expressed first of all in their practice to pass some acts and sanction some individual actions of the latter, to displace the local government official functionaries. Among the issues the local bodies have no right to make independent decisions on, are their financial acts and deals with the municipal property, etc. In Great Britain, for example, the drafts of the local normative acts, plans of capital investments, development of populated areas, purchasing of plots of land, taking out loans, etc. are subject to the approval by the central authorities.

One of the means of control is the issue by the central ministries of various circulars establishing the standards of local services, interpreting the legislation, explaining the government policy and also giving this or that advice to the local authorities. The majority of such circulars do not contain any instructions, but are chiefly recommendations. The direct inspection of the work of the local bodies by the interested ministries is also practised. Thus, in Great Britain the inspectors exercise control over the services of education, police, fire-prevention and others. The main task is to ensure the conformity of these services with the minimal standards set by the central authorities. Besides, the inspectors' functions are the spreading of the advanced methods in the sphere of their control. The legislation of some individual countries (Great Britain, the Scandinavian countries) stipulates the exercise of control over certain spheres of the work of the local bodies and, in the first place, the financial sphere, by special controllers (ombudsmen), having a right to raise the question of the responsibility of the municipalities' official functionaries for the improper execution of the financial-budgetary and some other powers.

In Great Britain, though, the most severe punishment for the local representative body for the non-execution of these or those duties is only the delegation of some of its powers and services to the appropriate ministry and the officials appointed by it and as a preliminary stage – the issue by the minister himself of the instructions that the municipality has failed to give [11].

In Japan the central government and in the USA the government of the states may withdraw from the municipalities' jurisdiction and charge its own officials with the work which, in the higher authority's opinion, the municipality fails to cope with [12].

In Ireland the Environment Minister has a right to dissolve the local council in the following cases:

- If after the conducting of the appropriate investigation he comes to a conclusion, that the local council fails to execute its functions in a proper way;
- If the local council refuses to act in compliance with the court's decision;
- If the local council runs counter to the unequivocal requirements of this or that law;
- If the local council refuses to submit its accounts for the audit;
- If the number of the council members does not constitute the quorum needed to conduct its meetings.

In Latvia the municipal council can be dissolved by Parliament in case it infringes on the Constitution, the laws, the resolutions of the government and court decisions or attempts to carry out the activities that are in the jurisdiction of the central government. Besides, the Latvian local council can be also dissolved in case it proves to be incapable of achieving a working quorum at three successive meetings [13].

Thus, the dissolution of the local councils, as the most radical of the possible sanctions, is chiefly characteristic of the countries with a continental model of local self-government, though, as we can see from the aforesaid examples of Ireland, Poland, Latvia, they are referred by the scientists to different models, though exceptions are possible.

Another form of the exercise of control over the work of the local self-government bodies in foreign countries is the legal control. It is connected with certain grounds, subjects of the realization, but also with the specific sanctions, applied as a result of this control. Such control is mostly developed in the countries with the Anglo-Saxon system of local self- government with the court precedent being the most important source of the municipal law. The legal sanctions against the local authorities can include the cancellation of the latter's decisions, their recognition as anient and also other enforcement measures. The court, in particular, has a right to issue mandamus (which literally means "order"), usually stipulating the implementation of certain active measures by the body or an official functionary of the local government it is addressed to. Thus, mandamus is more often than not an order for the body or an official functionary to perform the duties stipulated by the law and not performed that cannot be performed in any other way stipulated by the law. In Great Britain this form of the rights protection is used not so often, as the majority of the acts of public law stipulate sanctions against the non-fulfillment of their orders (i.e. the law prescribes some concrete means of protection). In a definite situation the court can also issue its mandamus, binding the body or the official functionary of the local self- government to refrain from the realization of this or other action infringing the rights of the citizens. [14]

So, the foreign municipal-legal practice clearly demonstrates an active use of the institution of responsibility. Foreign researchers mark the positive effects of the use of the institution. The procedure of making somebody responsible is subject to fairly strict requirements, regulating the well-defined mechanism of their establishment and realization: the reason for origin, the circle of subjects, issue of special normative legal acts, strictly defined ("not vague") negative effects.

Abroad there is a tendency towards the development of the interrelations between the central authorities and the local authorities, where the elements of the local self-government in a municipal organization pass in to the background thus turning the municipal government into a "variety of the executive activity", realized within a framework of the general state policy, while the local self-government, performing its own and state functions, is responsible for their realization. [15]

Similar processes are under way in this country, therefore, in the long run, the use of this experience in Russia will promote the realization of the main task – the creation of the common effective system of the government of the society, the proper organization of its work, a well-adjusted mechanism of the interaction between all the links of public government including local self-government.

However it should be noted that the aforesaid mechanisms of the application of the measures of responsibility to the bodies and official functionaries of the local self-government can also be applied to our system of local self-government with certain corrections. It is, in the first place, about the administrative control on the part of the state over the law-making activity of the local self-government bodies. The administrative control over the work of the subjects of the municipal-legal relationships, as the practice shows, is necessary and is very efficient. Incidentally, one distinguishes between the two types of control: firstly, on the part of the bodies, official functionaries of the state power; secondly, on the part of the judicial bodies [4].

When there are sufficient reasons to qualify the action or inaction of the bodies and (or) of the official functionaries of the local self-government, the bodies and the official functionaries of the state power should give them a warning and in case of that insubordination this warning must be followed by sanctions.

When there are reasons against this or that decision, the judicial bodies should suspend its execution up to the moment of the actual court examination (pre-awarded relief). Such action is necessary so that the bodies and official functionaries do not violate the law and then, in case of its cancellation, do not try to rectify the situation in any way. Besides the decisions concerning exceptionally important issues such as plans of capital investments, development of the populated areas, purchasing plots of land, taking out loans, etc. should be subject to the additional examination and not only in the procurator's office.

The conducted study of the foreign experience shows that the local self-government is accountable to and controlled not only by the population of the municipal formation, but, to a certain degree, it is accountable to and controlled by the bodies of the state power. We recommend this experience to be used in Russia in the part of the intensification of the control on

the part of the legislative and executive bodies of the state power of the subjects of the Russian Federation and the judicial bodies over the realization of the appropriate powers by the bodies and official functionaries of the local self-government for their more effective realization. This measure is essential for the prevention of possible violations of the law by the bodies and official functionaries of the local self-government in the process of the realization of their powers.

The administrative control over the work of the subjects of the municipal-legal relationships, as the practice shows, is essential and very effective. The application of such control will enable the judicial bodies, showed the grounds for the appeal against this or that decision arise, to suspend its execution up to the moment of the actual court examination (pre-awarded relief).

The responsibility of the bodies of local self-government (municipal government) to the bodies of state power, to the population, to other subjects of public relations is characteristic of the legislation of foreign countries, as well as of the legislation of the Russian Federation.

The local-territorial nature of the municipal-legal relationships and the targeted function of the local self-government necessitate the need for the singling out of a special legal institution of responsibility of the subjects of the municipal-legal relationships and, in its turn, of the municipal-legal responsibility as its part, for the specific character of the application of responsibility to the subjects of the municipal-legal relationships is the violation of the norms of the legislation of the Russian Federation regulating public relations with reference to the organization and realization of the local self-government; doing harm to the municipal formation and the local self-government bodies; a violation of the legitimate rights and interests of the population of the municipal formation.

The conducted analysis showed that in foreign countries the singling out of a special legal institution is possible. At the same time, the legislation of foreign countries does not have analogues of the municipal-legal responsibility, which, incidentally, is compensated for by special mechanisms of the administrative control over the work of the local self-government bodies, their responsibility to the country.

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