СЕКЦІЯ 2
КОНСТИТУЦІЙНЕ ТА МУНІЦИПАЛЬНЕ ПРАВО

MUNICIPAL LAW OF UKRAINE AS A BRANCH OF LAW: THE CURRENT ISSUES

МУНІЦИПАЛЬНЕ ПРАВО УКРАЇНИ ЯК ГАЛУЗЬ ПРАВА: ДО ПОСТАНОВКИ ПИТАННЯ

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In the article the author analyzes the concept of "municipal law of Ukraine as a branch of law" in the context of the theory of municipal dualism, provides its advanced definition and outlines methods of legal regulation of this complex field of the national legal system. It is suggested to take into the account that the municipal law of Ukraine is a set of legal norms that form a complex branch of national law and regulate social relations connected with local self-government, including the direct democracy at the local level, the creation and functioning of local self-government bodies according to their own and delegated powers. It is formulated that municipal law as a branch of law applies the same methods of legal regulation as a branch of constitutional law (imperative and dispositive), but the proportion of the imperative method's application is less than in municipal law is less than in constitutional law. This is because, above all, of the theory of municipal dualism, that suggests a certain degree of local self-government independence from the state.
Key words: *municipal law, branch of law, complex branch of law, local self-government, municipal law of Ukraine.*

В юридичній літературі поки що немає єдності щодо того, чи є муніципальне право галуззю права України. Незважаючи на те, що часи, коли місцеве самоврядування ототожнювалось з державним управлінням, а органи місцевого самоврядування (місцеві ради, їхні голови, виконавчі комітети місцевих рад тощо) уважались органами місцевого самоврядування, для України вже позаду, подібний підхід все ще зустрічається. Автор статті пов'язує це з такою, що є досі розповсюдженою, державницькою теорією місцевого самоврядування, та на прикладі альтернативної теорії місцевого самоврядування – теорії муніципального дуалізму – наводить свої міркування щодо визначення поняття «муніципальне право України як галузь права» та до окреслення методів, які застосовує муніципальне право України. У статті проаналізовано поняття «муніципальне право України як галузь права» у контексті теорії муніципального дуалізму, надано його удосконалене визначення та окреслено методи правового регулювання цієї комплексної галузі національної правової системи. Запропоновано уважати, що муніципальне право України – це сукупність правових норм, що утворюють комплексну галузь національного права та регулюють суспільні відносини, пов'язані з місцевим самоврядуванням, у т.ч. з прямою демократією на місцевому рівні, створенням та функціонуванням органів місцевого самоврядування в межах власних та делегованих повноважень. Сформульовано, що муніципальне право як галузь права застосовує ті ж самі методи правового регулювання, що й галузь конституційного права (імперативний та диспозитивний), але питома вага застосування імперативного методу є меншою, ніж в конституційному праві. Це слід пов'язувати понад усе з обумовленою теорією муніципального дуалізму певною незалежністю місцевого самоврядування від державної влади.
Ключові слова: *муніципальне право, захист права, комплексне відрахування права, місцеве самоуправління, муніципальне право України.*

Relevance of research. There is still no consensus in the legal literature whether municipal law is a branch of Ukrainian law. In Ukraine, the times when local self-government has been identified with public administration and local self-government bodies (local councils, their chairmen, executive committees of local councils, etc.) have been considered public administration bodies are gone; however, such an approach is still common. The author connects this with the still widespread statist theory of local self-government and gives her views on the definition of municipal law of Ukraine as a branch of law on the example of an alternative theory of local self-government – the theory of municipal dualism, as well as outlines methods, which are applied by the municipal law of Ukraine.

The degree of development of the problem. All authors and co-authors of textbooks on municipal law devoted their works to define the concept "municipal law of Ukraine as a branch of law" (M.O. Baimuratov, O.V. Batanov, P.M. Liubchenko, V.F. Pohorilko, O.F. Frytskyi in, for example, [1-2]). Also, the authors of textbooks on constitutional law did not ignore the issue of defining "municipal law as a branch

law" (these were often the same scientists, for example, V.F. Pohorilko, O.F. Frytskyi, as well as V.M. Shapoval, M.N. Mishnyna and others, for example, [3-5]).

The developments of the specialists in the theory of law, who studied the problem of genesis of the branches of national law and the emergence of new branches of law of a complex nature (R.M. Dudnyk, V.P. Khriapchenko and others), were useful in creating the article.

In general, there have been no new publications on the definition of the analyzed concept in the legal literature for a long time, and the concept of "municipal law of Ukraine as a branch of law" is rarely considered in the context of the theory of municipal dualism. The article claims to close this gap.

The purpose of the article is to analyze the concept of "municipal law of Ukraine as a branch of law" in the context of the theory of municipal dualism, to provide an improved definition and outline methods of legal regulation of this complex branch of the national legal system.

Presentation of the main material. It should be re-emphasized that only those authors who support the statist theory of local self-government express the opinion that municipal law has not been considered a branch of the national legal system yet.

The following reasoning of V.O. Baranchykov is the example of the above statement: "Municipal law is a complex branch of legislation, which includes norms and institutions of various branches of public and private law. It cannot be a branch of law because it does not have a single subject and a single method of legal regulation; it includes numerous rules of various branches of public and private law. There are no complex branches of it in law because the branch of law is characterized by substantive branch homogeneity and the presence of a single method of legal regulation. In addition, the branch homogeneity of the main part of the structure of the legal norm – disposition – suggests that municipal law cannot be the branch of law, which is characterized by substantive branch homogeneity. Since municipal law cannot be the branch of law, it cannot include norms of different branches of law as a new branch of law. They can be included in it as in a complex branch of legislation that does not have its own branch core. This is particularly true in relation to the regulations of the Constitution" [6, p. 17].

Accordingly, those authors that prefer the statist theory of local self-government does not single out municipal law as a branch of law (at the same time, they do not deny that there is objectively a branch of municipal law); in the above example, V.O. Baranchykov also adds that he is not a supporter of the idea of having complex branches of law. Firstly, it is worth noting that most scholars do not deny the evolution of branches of law in the direction of the emergence of "classical" complex branches, and, secondly, it should be emphasized that researchers, who express a commitment to social theory of local self-government or municipal dualism, suggest that municipal law is the branch of law.

Acquaintance with modern publications on this issue shows that in recent years it has been increasingly disputed in the legal literature that municipal law is the branch of law. After Ukraine had been declared independent, local self-government was just beginning its development. Nowadays, success in developing local self-government in Ukraine leaves no doubt that the municipal law of Ukraine is the branch of the national legal system with its unique subject of legal regulation conditioned by a legal regulation methodological complex.

Researchers define the concept of "municipal law" in relation to the branch of law differently.

According to V.F. Pohorilko, "municipal law of Ukraine is a branch of law of Ukraine, the rules of which express the will and interests of its people, state and territorial communities, regulate public relations in the field of local self-government" [1, p.12]. In this definition, its conciseness is an advantage, but at the same time it is a disadvantage, because it provides minimal indication of the features of the analyzed branch of law.

Similar concise definitions are quite common, especially in the educational literature. Accordingly, O.P. Alekseiev and S.M. Bratanovskyi believe that municipal law is a complex branch of law that includes a set of legal norms to consolidate and regulate social relations that arise in the process of organization and functioning of local self-government [7, p. 59] (in fact, an indication of the complexity of the analyzed branch is added to the previous definition); I.V. Uporov and O.V. Starkov have formulated that "municipal law is a public, complex branch of law that includes a system of legal norms regulating social relations arising in the process of formation, establishment of principles and activities of local self-government in municipal settlements" [8, p. 35] (substantively, adding an indication on the affiliation of a branch of municipal law to public branches of law to the previous definition).

With regard to the last point on the affiliation of municipal law to public branches of law, it should be emphasized that in comparison with constitutional law, municipal law has a much greater share of rules, which are not of public private, but private legal nature. Considering its complex nature, it is hardly necessary to include the reference to publicity in its definition – in this regard, O.P. Alekseiev and S.M. Bratanovskyi quite rightly summarized: "the peculiarity of municipal law is that this new branch is at the junction

of private and public law. This is due primarily to the complex nature of social relations, which are the subject of municipal law. Municipal law uses both universal methods of legal regulation in a fairly large volume (compared to other industries), it is formed on the basis of a combination of imperative and dispositive methods [7, p. 62]. We should also join the opinion of P.M. Liubchenko, who notes that "the nature of local self-government is manifested in the fact that it contributes to the balance of public and private interests. At the local self-government level it is possible to achieve an organic combination, balance of power and freedom, external (subordinated) governance of the population" [9, p. 210].

Given the above, it should be noted that municipal law as a branch of law uses the same methods of legal regulation as a branch of constitutional law (imperative and dispositive), but the share of the imperative method is less than the constitutional law. This should be associated, above all, with the theory of municipal dualism conditioned by a certain independence of local self-government from power of the state. It should be emphasized that such a conclusion about the methods of municipal law is not in conflict with the research of specialists in the theory of law; in particular, L.M. Dobroboh states that "the methodology of the complex branch is a system of basic methods of legal regulation: imperative and dispositive methods" [10, p. 29].

Further to the analysis of approaches to the definition of the concept of "municipal law as a branch of law", it should be emphasized that in comparison to the above, there is the definition of P.M. Liubchenko, who believes that "this is a complex branch of law, which is a set of legal norms governing social relations formed in the process of organization and functioning of local self-government, as well as the implementation of forms of direct democracy to address local issues" [2, p. 19]. It should be noted that almost similar definition belongs to O.S. Shuhrina: "Municipal law is a complex branch of law, which is a set of legal rules governing social relations arising in the organization and activity of local self-government, in the process of exercising the right of local self-government directly by its population and via local self-government bodies" [11, p. 34]; N.M. Chepurnova and A.V. Filippova [12, p. 39] suggest the same opinion.

Nevertheless, these definitions need to be clarified in terms of the recommendation of consistent application of the theory of municipal dualism in Ukraine, as there is no influence of this theory, the connection between local self-government and power of the state. From the point of view of emphasizing this connection, we consider appropriate the definition by O.F. Kutafin, who has proposed to consider municipal law as a complex branch of law, which is a set of legal norms that consolidate and regulate social relations that arise in the process of organizing local self-government and resolving municipalities directly, through elected and other local self-government bodies, as well as in the process of implementing certain state powers that may be vested in local self-government bodies [13, p. 16]. O.V. Yakushev [14, p. 3] uses the same definition.

The most obvious reference to the theory of municipal dualism in this definition is the remark that local self-government not only addresses issues of local importance (through direct or indirect democracy), but also implements a number of powers delegated by public administration bodies.

Another reference to the theory of municipal dualism in the definitions of O.F. Kutafin, P.M. Liubchenko, A.V. Filippova, N.M. Chepurnova, O.S. Shuhrina, O.V. Yakushev and other scientists, can be considered the point that municipal law is a complex branch of law. We suggest, this view should be explained.

In the times of the totalitarian past, there was no need for municipal law, as well as municipal legislation, because in the UkrSSR the statist theory of local self-government was widespread both in doctrine and in legislation; therefore local councils, their chairmen, their executive committees and other bodies were public administration bodies. However, they are traditionally considered local self-government bodies now. The situation has changes with the beginning of municipal reform shortly after the declaration of independence, precisely as a result of the abandonment of the statist theory of local self-government in favour of the theory of municipal dualism.

The separation of state and municipal power has not only led to a paradigm shift in the nature of local councils and other local bodies listed above, but has also given rise to the separation of local self-government as a separate branch of municipal law from the constitutional law. This has happened quite recently, so it should be noted that constitutional and municipal law still have familiar features. One of such features is complexity.

It should be noted that in the legal literature there are still very different opinions on the possibility of distinguishing complex areas of law and on the content of this concept. It is not the subject of our study to analyze them, but we should refer to the successful generalization of scientific positions on this issue conducted by V.P. Khriapchenko, who has counted six scientific approaches to these problems [15]. Our position on this issue is as follows:

– we agree with R.M. Dudnyk who suggests that currently one of the main directions of development of branches of Ukrainian law are

the process of formation of complex branches of law, which arise as a result of differentiation, specialization and integration of legal regulation of public relations [16, p. 8];

– we agree that: a) "a complex branch is a branch of law, many norms of which are at the same time norms of other branches of law. For example, some norms of municipal law are at the same time norms of constitutions, financial, civil, land and other branches of law" [14, p. 3]; b) "complex branches of law, which include municipal law, are usually considered as secondary entities that combine the rules that belong, first of all, to the other, main branches" [17, p. 22] "constitutional, administrative, financial and other branches of law" [7, p. 86]; c) the branch of municipal law of Ukraine is at the development stage, and "with the development of municipal law its norms become a priority in relation to the norms contained in other branches (obviously, if they relate to the local self-government issues)" [7, p. 89].

Accordingly, we can summarize: the municipal law of Ukraine is a set of legal norms that form a complex branch of national law and regulate public relations with local self-government, including direct democracy at the local level, the establishment and functioning of local self-government bodies according to their own and delegated authority.

It should be noted that not all features of constitutional and municipal law as branches of law coincide. For example, the constitutional law is a primary branch of law, but it is unlikely that such a statement will be fair in relation to municipal law. Despite the fact that there are similar views expressed in the literature (for example, S.V. Arbuzov argues that municipal law is an independent branch of law, priority in relation to other legal entities [18, p. 11]), this statement lacks credibility. The statement of V.L. Fedorenko that the system of constitutional law is a kind of "coordinate scale" for the proper functioning of the national legal system as a whole" seems more fair [19, p. 4]. Although "local self-government is raised to the level of one of the principles of the constitutional order" [20, p. 8], it is unlikely that a similar remark can be addressed to municipal law, i.e. it is obvious that it cannot be considered as the "coordinate scale" for the proper functioning of the national legal system as a whole".

Conclusion. The article analyzes the concept of "municipal law of Ukraine as a branch of law" in the context of the theory of municipal dualism, provides a developed definition and outlines methods of legal regulation of this complex branch of the national legal system. It is suggested to consider that the municipal law of Ukraine is a set of legal norms that form a complex branch of national law and regulate public relations with local self-government, including direct democracy at the local level, the establishment and functioning of local self-government bodies according to their own and delegated authority. It is stated that the municipal law as a branch of law uses the same methods of legal regulation as the branch of constitutional law (imperative and dispositive), but the share of the imperative method is less than in the constitutional law. This should be associated, above all, with the theory of municipal dualism conditioned by a certain independence of local self-government from power of the state.

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