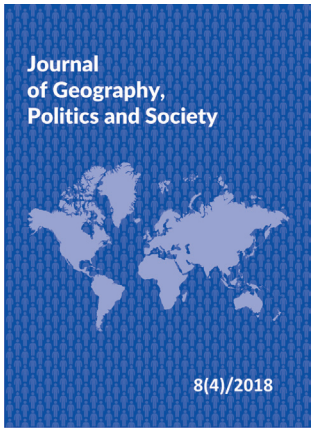

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DECENTRALIZATION OF THE POWERS OF LOCAL COUNCILS IN THE SPHERE OF LAND RELATIONS

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Abstract
Public authorities practically have no noticeable influence on the development of land relations. This necessitates the transfer of the full power of authorities to local governments for land management. This can be achieved by decentralizing governance, adherence to the principle of universality of local self-government, which should take place throughout the country without any restrictions. This approach will allow the administrative-territorial units to have content resources in their own assets (land outside of settlements), as well as management tools for its effective application.

Key words
land within settlements, land management, land relations, bodies of local self-governments, local communities, communal property, decentralization.

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1. The essence of decentralization

Decentralization of state power is considered by the international community as one of the key elements of a comprehensive reform of the public administration system and is a priority area for the activities of international and national organizations. Support of local self-government by the state and creation of conditions for sustainable and independent development of territorial communities in Ukraine is one of the most important tasks of the present.

The development of local self-government is characterized by the following aspects, for example, the fact that the share of state authority, which previously exceeded 50% in the structure of public tasks performed at the municipality level, continues to increase. Concerning the main directions of the development of local self-government, it should be noted that municipal institutions in many ways increase the share of the state nature, since local affairs are closely intertwined with the state. This fact puts elective municipal institutions in a strong dependence on the government and ministers, which are both an administrative and financial nature.

At the international level, this position is also reflected. Many authoritative experts (R. Gravert (Germany), S. Monti (Sweden), S. Maheshvary (India)) believe that local territorial units are increasingly drawn

into the implementation of the constitutionally legal principles of social statehood, and therefore they are forced to abstract from local characteristics, which is predetermined by the unity for the whole country of the principles of state policy (Граверт, 1992).

The transfer of power, as a general legal principle proclaimed by the European Union, and also enshrined in the European Charter of Local Self-Government of 1985, is becoming increasingly widespread in the member states of the European Union. The application of the considered practice is actively spreading in such countries as Germany, Spain, Sweden, the Netherlands. In France, the transfer of powers to local authorities from state agencies projected a transition from centralization to relative decentralization in the sphere of public administration. In the opinion of D.I. Cherkasov (Черкасов, 1998), obligatory and entrusted powers are being extended to the detriment of the communal affairs proper. The share of the latter is decreasing, since tasks that are of national importance actively integrate into the level of local authorities. In turn, in Germany, compulsory and transferred cases account for 80–90% of the total volume of cases performed by local authorities.

In common, Ukraine is not far behind from the European Union in this issue, because today at least 70% of the powers of local authorities are directly related to the resolution of issues that in turn relate to state functions in various sectors of the economy. At the present time, it is no longer relevant to say that local self-government bodies are actually endowed with separate state powers. Although in their legal nature they are actually separate powers.

It should also be noted that any decentralization processes have certain risks of disintegration of public administration. But the key to their minimization is the verifiability of state-legal decisions, systematic, gradual and consistent state policy of decentralization of power. And in this case, the use of the institution of delegation of authority has a positive effect, since diversifying the organizational model of public administration allows to ensure the preservation of the state of controllability and control of a certain sphere of social relations. According to A.M. Nikonchuk (Нікончук, 2011), decentralization is one of the ways of optimizing public administration. On the basis of this principle, the vector of delegation of powers has a centrifugal character, aimed at strengthening the functionally-competent component of the status of municipal structures. In the current conditions of transition from a centralized model of organization of public power to a decentralized, carried out through the delegation of powers, decentralization of power acts, more likely, a way of forming the volume of powers of local self-government, which should belong to it in accordance with the principle of subsidiarity (Новак, 2016).

Delegation of certain powers by authorities of executive state power to local self-government bodies is proposed to be understood as based on the law municipal legal relations that arise, change, or terminate between the state in the person of the authorized bodies of state power and local self-government bodies regarding the empowerment of the latter to exercise certain powers within the Constitution and laws of Ukraine.

Delegation of powers can be considered in three main aspects: 1) as a legal way of forming the competence of local self-government bodies; 2) as a special group of municipal-legal relations; 3) as a form of interaction between public authorities and local self-government bodies. All these aspects are interrelated, since, being one of the main ways of legal influence of the state on the content of the functioning of the municipal government. Delegation is embodied in legal relations between state authorities and local self-government bodies and is a special administrative link between these bodies in mechanism for the exercise of public powers.

Consequently, the decentralization of management in the sphere of land relations consists mainly in the transfer of powers vertically from the central structures to the structures of the regional and local levels of government, and also involves a "horizontal" redistribution of roles - from the public sector to private and non-governmental organizations. The state, with the help of legal supervision, seeks to implement the statutory powers that are inherent in local self-government.

2. Optimization of land legislation in the process of decentralization of power

Decentralization is supported by the legislative changes. On April 1, 2014 the Cabinet of Ministers of Ukraine has approved the Concept of Reform of Local Self-Government and Territorial Organization of Power in Ukraine (Про схвалення…, 2014). On December 28, 2014 amendments were approved to the Tax (Податковий…, 2010) and Budget (Бюджетний…, 2010) codes of Ukraine, which established a new financial basis of local self-government bodies, a new distribution system of national taxes and introduced new local taxes and also has changed the system of budget equalization. The Strategy for Sustainable Development «Ukraine 2020», approved by the Decree of the President of Ukraine dated January 12, 2015 No. 5, provides for the implementation of the constitutional reform in

the part of decentralization of state power. The goal of decentralization policy is to abandon the centralized model of governance in the state, to ensure the capacity of local self-government and to build an effective system of territorial organization of power in Ukraine, implementation of the provisions of the European Charter of Local Self-Government, the principles of subsidiarity, universality and financial self-sufficiency of local self-government (Про Стратегію…, 2015). The Verkhovna Rada of Ukraine, August 31, 2015, previously approved amendments to the Constitution of Ukraine regarding the decentralization of power.

In addition, the enactment of the Laws of Ukraine «On Cooperation of Territorial Communities» dated 17.06.2014 (Про співробітництво…, 2014), «On the Voluntary Association of Territorial Communities» of 5.02.2015 (Про добровільне…, 2015), «On the Principles of State Regional Policy» of 5.02.2015 (Про засади…, 2015), has necessitated certain changes and additions to a significant number of current legislative acts. In particular, they provide for the reform of local self-government through the association of territorial communities, which changes their legal personality in land relations. The Law of Ukraine «On voluntary association of territorial communities» (Про добровільне…, 2015) determined that the territory of the united territorial community should be inseparable, the boundaries of the united territorial community are determined on the external borders of the jurisdiction of the councils of territorial communities which have been united.

Since the territory of the community will not be limited to the boundary of the settlement, but will include the territory of the respective village, town and city councils that functioned prior to the unification, it is obvious that the ownership of the land of newly formed territorial communities should not be limited to the boundaries of the settlement. It should be distributed to all the land within such territorial communities or the territories of the respective councils that remain at present. Such an approach fills in the actual content of the proposed proposals on the construction of the administrative-territorial structure of Ukraine on the basis of decentralization of power, the widespreadness and capacity of local self-government, sustainable development of administrative and territorial units taking into account historical, economic, ecological, geographical and demographic features, ethnic and cultural traditions. After having communal land ownership, local governments will be able to provide real financial and economic independence and development of the relevant areas.

However, it should be noted that local self-government is currently managing land resources only within the administrative-territorial units (settlements). The existing approach does not correspond to the practice of foreign countries. In them, local self-government is implemented within the administrative-territorial units, including at the primary level, which combine both directly with the territory of the settlement and the adjacent territory.

There are two approaches of solving such issues which are called in the literature of the land law. The first is connected with the transfer of land plots located outside of settlements into communal ownership of future united territorial communities. Thus, the right to dispose of these lands, as objects of ownership, will be received by local governments. They will carry out the disposal of such lands on behalf of local communities. The second approach involves the delegation of authority to dispose of state-owned land plots outside settlements to local self-government bodies. According to this approach, land plots will remain in state ownership, and delegation becomes temporary (Шульга..., 2017, p. 64).

At present, in the Verkhovna Rada of Ukraine there is a draft law "On some measures to strengthen the role of territorial communities in land administration" (Reg. No. 1159) (Про деякі..., 2014), which provides for the automatic assignment to territorial communities of villages, settlements, cities of all lands of state property located outside settlements within the territories of rural, settlement, city councils. In turn, the draft law (Reg. No. 4355) (Про внесення…, 2016), instead of the transfer of state-owned land to the ownership of territorial communities, provides local governments with the right to dispose of such lands.

However, it should be borne in mind that today local authorities within the territory subordinated to them are not the landlords. In connection with this, there are problems with the fact that the state executive bodies almost never take into account the interests of territorial communities in the disposal of lands outside of settlements. According to Article 84 of the Land Code of Ukraine, land plots that belong to state-owned land within the boundaries of settlements, also serve as the object of administrative actions by state authorities (Земельний…, 2001). Consequently, the Law of Ukraine «On Local Self-Government» (Про місцеве…, 2017) requires amendments related to giving local authorities the power to manage land resources local community in full accordance with established procedures and regulations, except for those categories of land that have a national strategic significance. This will enable to concentrate financial revenues to the budget

of the local council for the use of land of the administrative-territorial unit. As we know, the economic mechanism of concentration of finances from the use of land resources in the local budget expands the possibility of forming an additional trust fund, mainly, with regard to the purposeful use and protection of land resources of the administrative-territorial unit. In the future, financial reserves should be used exclusively for improving the ecological and economic condition of land resources of the subordinate territory.

In order to continue the implementation of the principles of reform the State Service of Ukraine for Geodesy, Cartography and Cadastre has drafted a draft Law of Ukraine "On Amendments to certain legislative acts of Ukraine regarding the delegation of powers to local self-government bodies with the disposal of state-owned land and strengthening state control for the use and protection of land" (Про внесення…, 2015). Adoption of such a law will allow the normative consolidation of the provisions on the decentralization of powers in the sphere of land relations.

This law also proposes amendments to Art. 12 of the Land Code of Ukraine (Земельний…, 2001). If it is adopted, then the village, town and city councils will have the following powers: disposal of state and communal land in the territory of the village, settlement, city council in accordance with the laws; the transfer of land plots of state and communal ownership to the ownership of citizens and legal entities in accordance with the Land Code of Ukraine; the provision of land plots for use from the lands of state and communal property again according to the Land Code of Ukraine; seizure of land from state and communal property lands, etc.

At the same time, it should be noted that from 01.03.2016 Article 12 of the Land Code of Ukraine began to operate in an updated version. Changes to it were made by the Law of Ukraine "On amending certain legislative acts of Ukraine on extending the powers of local self-government bodies and optimizing the provision of administrative services" (Про внесення…, 2015). The mentioned legislative act has added Part 2 to the Article 12 of the Land Code of Ukraine, in which the powers of executive bodies of village, settlement, city councils in the sphere of land relations in the territory of villages, settlements and cities were found. These include: providing information from the State land cadastre, and resolving other issues in the sphere of land relations in accordance with the law.

Also, on the basis of the Concept of Reform and the plans adopted for the reform of the system of government, their functions and the implementation of decentralization of power, including in the sphere of land relations, a number of laws were adopted on amendments to certain legislative acts of Ukraine concerning the extension of the powers of local authorities self-government in the sphere of land relations.

At the moment, amendments to the Law of Ukraine "On State Land Cadastre" (Про Державний…, 2011) have been adopted. According to them the powers of local self-government bodies and provide that the provision of information from the State Land Cadastre may also be carried out by administrators of centers providing administrative services in accordance with the procedure established by the Law of Ukraine «On administrative services» (Про адміністративні…, 2012), or by authorized officials of executive bodies of local self-government, who have successfully undergone internship in the field of land relations and meet the relevant qualification requirements. Internship in the sphere of land relations is conducted free of charge by the state cadastral registrar for a period not exceeding one month. On the basis of the results of successful internship, the relevant cadastral registrar shall be issued an appropriate certificate.

The local state administration, village, settlement, city council determines the possibility of exercising their powers in the sphere of providing information from the State Land Cadastre, taking into account the possibilities of organizational and technical support for their implementation.

3. Extending the powers of local self-government bodies

In order to ensure the realization of the tasks of the reform processes, the principle of universality enshrined in the law becomes of great importance. The universality is usually understood as such a territorial organization of public administration, in which each part of the country is governed by a specific municipal government (Marcou, Wollman, 2009). Ensuring the universality of local self-government in Ukraine is also one of the important components of decentralization, building an effective system of territorial organization of power with financially capable local self-government.

The principle of universality is inextricably linked with the principle of subsidiarity, according to which managerial decisions in the state are taken at the lowest possible level, and the upper management units resort to any managerial action only if these actions are more effective than the corresponding actions of the lower units. Consequently, according

to this principle, district and regional councils pass only those administrative powers that cannot be implemented by city, village and settlement councils, and not vice versa, which are currently in force. In addition, the powers of state authorities in the sphere of land relations regulation should be transferred to local self-government bodies not at all levels, and mainly to the bodies of local self-government of the basic level, which are the councils of the combined territorial communities.

As you know, optimization of land legislation is one of the areas of improving the effectiveness of the mechanism of realization of land rights, which consists in improving the procedure for the provision of communal land ownership and the transfer of ownership rights and the creation of legal prerequisites for the most effective implementation of land rights.

At present, the Land Code of Ukraine and the Law of Ukraine «On Local Self-Government in Ukraine» include the resolution of a number of procedural issues related to the transfer of land plots of communal property into ownership or use, prior to the session of the local council. In accordance with Article 12 of the Land Code of Ukraine, the authorities of village, settlement, and city councils in the sphere of land relations in the villages, towns, cities are disposed of by land of territorial communities. Councils manage the lands of the respective territorial communities by transferring the land plots to the ownership of citizens and legal entities (clause «B» of Article 12 of the Land Code of Ukraine), granting of land plots for use (clause «B» Article 12 of the Land Code of Ukraine), seizure land plots of communal ownership for use (Article 12 of the Land Code of Ukraine), changes in the purpose of land plots in cases not related to their seizure and transfer to ownership or provision for use.

The Constitutional Court of Ukraine on this subject emphasizes that the powers specified in the points «a», «b», «c», «d» of Article 12 of the Land Code of Ukraine, are covered by the clauses specified in art. 143 of the Constitution of Ukraine by the term "other issues of local importance", and therefore, village, settlement and city councils act as subjects of authority that implement regulatory and other management functions (Конституційний…, 2010).

Thus, when granting a land plot in the order of assignment, which is owned by a citizen or legal entity, the local council must decide on: (a) approval of issues related to the redemption of land for public needs or reasons of public necessity (Article 151 of the Land Code of Ukraine), which provides for the further transfer of redeemed plots for use; (b) granting permission for the development of a land management project for the allocation of the relevant land plot (Part 3 of Article 123 of the Land Code of Ukraine); (c) the provision of land for use, approval of the land management project and seizure of land from land users (Part 6, Article 10, Article 123 of the Land Code of Ukraine). At the same time clause 34 of Article 26 of the Law of Ukraine "On Local Self-Government" actually requires that all these issues be resolved at plenary meetings of the councils (Про місцеве…, 2017).

At least it would be advisable to refuse (of course, by making appropriate changes to the law) from agreeing on the «issues related to the purchase of land plots», and from granting permission to develop a land management project regarding the land allocation. However, if such a proposal is not adopted, the assignment of part of decisions taken in the procedure for granting land plots for use or transfer into ownership, to the authority of the city (village, settlement) chairman, his deputy or secretary of the council could be a certain compromise variant. This would significantly (and fully justified) reduce the procedure for the provision of land for use or transfer to ownership.

Local self-government bodies exercise the rights of the owner or the rights of the controller in relation to land and other natural resources, therefore land administration, land management, land regulation, control over rational use and protection of land resources in one or another volume can be solved by local self-government bodies. In order to reduce the duplication of functions of the local self-government bodies and local bodies of executive powers, it probably makes sense to create appropriate structures in the executive bodies of local self-government with the transfer of certain state powers to them.

Since local self-government is not in the interests of the state, but namely in the interests of citizens living within a particular settlement, it is necessary to broaden the rights of local self-government and grant them the relevant rights to form their own executive bodies, including in the sphere of land relations.

Provision of various public services should be transferred to territorial communities as much as possible. These communities will be able to increase the efficiency of this sphere of relations. Territorial communities should receive sufficient sources of financial revenues. While forming the local budget, these entities should take into account the legal framework for the development of land relations, the creation of a favorable investment climate for the territory. It also seems important to expand the tax base to form local budgets and ensure the sustainable development of territorial communities.

At the same time, a significant part of the local budget should be formed at the expense of local taxes. The community should have the real capacity and financial basis for solving local issues, be able to use all available resources independently, including all agricultural land in its territory.

We consider an appropriate and well-grounded proposal for the transfer of agricultural land outside of the administrative-territorial units from the management of district state administrations under the jurisdiction of local self-government bodies. In this regard, appropriate corrections should be made to the Land Code of Ukraine. This will change the subject of management of agricultural land and provide an opportunity to solve a number of important key issues of different orientation, namely: (1) improvement of the land legislation of Ukraine (by changing the legal personality); (2) rational and ecologically safe use of agricultural land (by intensifying the production of agroecological and ecologically safe agricultural production); (3) the inclusion in the circulation of land plots of unclaimed units of citizens and the use of land at their discretion purchased from their owners, with subsequent transfer to a lease; (4) increase in revenues to local budgets (by obtaining funds for providing tenants with land plots outside the rural communities and will be transferred to the ownership of local communities).

The issue of the interaction between public authorities and local self-government bodies in the sphere of land relations becomes more and more important n the effective legal regulation of the procedure for the transfer of land plots into ownership and the provision of land plots for use. However, such interaction is not always effective in practice. Periodically there are conflicts and disagreements between executive bodies, often pursuing departmental interests, and local self-government bodies that represent the interests of territorial communities.

Consequently, the negative legal phenomenon, which significantly reduces the effectiveness of land legal regulation in modern conditions, in fact, is a collision of powers of state authorities and local self-government in the sphere of regulation of land relations. This is one of the types of legal conflicts in the land law of Ukraine. And the conflict of powers is observed not only at the level of law enforcement, but also at the level of law-making activity. The latter further complicates the enforcement process.

The problems of the unclear definition of the powers of state bodies in the field of land resources are indicated by the analysis of the provisions of the content of Article 188 of the Land Code of Ukraine (Земельний…, 2001), Articles 16, 17 of the Law of Ukraine «On the protection of land» (Про охорону…, 2003), Articles 5, 6, 7, 9 of the Law of Ukraine «On state control over the use and protection of land» (Про державний…, 2003) and Article 4 of the Law of Ukraine «On the basic principles of state supervision (control) in the sphere of economic activity» (Про основні…, 2007), etc. This leads to the need for a clear separation of powers, for example, with regard to exercising state control over the use and protection of land and the authority to exercise state control over compliance with the requirements of environmental protection legislation. Meanwhile, there is no clear understanding of the differences in these concepts even in the practice of the Higher Administrative Court of Ukraine. All this once again confirms the existence of the problem of imperfect legal regulation of the issue of the relationship between the powers of state bodies and local self-government in the sphere of land resources and the need for its solution. It seems that the identification of the problem clearly indicates the way to solve it – the above functions should be combined. Moreover, this should be done at the lowest possible level – at the level of local self-government bodies.

Such an approach would be in line with the subsidiarity principle, which has been successful in the legislation of the European Union and its individual countries. Its essence is that the powers should be transferred to a higher level only in the case when the lower level does not have economic, social and other possibilities for their realization. Thus, the maximum number of functions in the procedure for the provision of land plots of communal ownership to the use and transfer of ownership is not only an issue of expediency but also a measure that follows from the obligations of Ukraine regarding the harmonization of its legislation with the legislation of the European Union (Article 51 of the Agreement on partnership and cooperation between Ukraine and the European Communities) (Про партнерство…, 1994).

4. Conclusions

Consequently, the laws passed on amending certain legislative acts of Ukraine regarding the implementation of the Concept of Reform and plans for extending the powers of local self-government bodies in the sphere of land relations have initiated decentralization of power in the sphere of land relations.

Currently, powers of local self-government bodies in the field of land relations are considerably expanded at the legislative level. But these changes only initiate the implementation of the Concept of Reform. It is necessary to continue its implementation through normative consolidation and

introduction of amendments to the current legislation. According to the concept of land management reform, local self-government bodies should become main bodies of management and provision of services in the sphere of land relations. In turn, state bodies of executive power will have functions for generalization, control over observance of legality in the process of exercising their powers by local self-government bodies.

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