

Legal Aspects of Granting and Entrusting State Government to the Local Self Governance

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Abstract: *The article includes provisions of local self-government. In this aspect, exceptional and entrusted powers of local self-government are distinguished. Both acts of international law and domestic legislation are in a mutual comparison. Differences in terminology between Constitution of the Azerbaijan Republic and municipal legislation are noted and appropriate legal unification is being recommended. Empowering of local governments with certain state powers - is one of the forms of interaction between public authorities and local self-government, softening the rigid organizational and competency dilution between the state and local government. To avoid the blurring of the constitutional model of local self-government, the issue of delegating powers to local authorities should be regulated in more detail.*

Keywords: *public authorities, local self-government bodies, international law, national legislation, separation of powers, decentralization policy, Council of Europe, local population, principle of subsidiarity, administrative control, human rights.*

INTRODUCTION

The next crucial development step after establishment of local self-governance is to ensure comprehensive relationship with state government. Legislative regulation includes division of responsibilities between self-governing authorities and central authorities, bringing authorities closer to citizens during decision-making, inter effect and cooperation among different levels of authorities, freedom by self-governance authorities in implementation of its responsibilities and participation in defining the responsibilities to be delegated to them, subsidiary with regard to remaining and main responsibilities. Model coordination between local self-governance authorities and state government helps to strengthen political system and state government on one side, and ensure human rights, as well as group rights by implementing social and economic functions on the other side. Coordination shall enable re-establishment of public government in country, distribution of fields of activities, resources and responsibilities. According to L. Stein, supporter of public theory of self-governance, even though local self-governance is an independent structure and is not direct government body, but still participates in implementing some of the state management assignments.

Anglo-Saxon law system refers to municipalities as autonomous structure, this authority is being entrusted to these bodies by the parliament. Despite this or another theory and different systems, the reality is that the independence, existence of municipalities not depending on state government is being accepted by everybody. At the same time, currently there is a trend on granting certain functions of state government to the municipalities permanently (exclusive powers) and some other functions temporarily, or in ad hoc procedure. Empowerment can be realized in two cases. It can be

either granting of state powers to the local municipalities or powers not belonging to the state government, but actualized through emergence of new public relations. Granting the right for solution of issues belonging to the authority of governmental bodies to the municipalities encompasses the inclusion of governmental powers into the list of municipalities. However, in the second case the concept of “state powers” changes, thus, through adopting the relevant law on “adopting” those powers are included into the framework of municipality authorities, and this in its turn reveals the incomplete reflection of concept of the Article 144 (2) of the Constitution by the interpretation of the term “granting”. In contrast to the domestic legislature, the European Charter stands for the distribution of public government, not from the part of state government. The necessity of conducting proper consultations during the planning of any issue and decision-making process at local municipalities is being reflected in the Charter.

LEGAL REVIEW

In accordance with the legislation, municipalities can be involved to the organization of national actions. In this case, (according to the Article 7, par.1.10 of the Law on Financing of Municipalities) issue of controlling financial resources allocated for the cost recovery emerges during decision-making related with the state actions and with state governmental bodies. The necessity for allocation of important financial resources for the realization of “additional authorities” considered in the Article 144, par.2 of the Constitution, the controlling right of relevant state bodies on implementation of those authorities should not be considered acceptable in terms of the independence issue of municipalities. The regulation of relations between municipalities and relevant governmental bodies can be more efficient for this case. “Contractual commitment” of the municipality instead of “control” cannot destroy the ensurance for independence. Such kind of rule can also be relevant to the requirement of Administrative control legislation. The solution of the problem can be expressed as “additional powers can be granted on the basis of the contract” in the relevant provision of the Constitution. Such kind of amendment should be provided for the Article 13.2 of the Law on the Financing of Municipalities (the control on the financial resources for the implementation of authorities granted to the municipalities by the legislation and executive powers).

The permanent granting of authorities is being expressed as “transferring” or “granting” and means that the regulation of the power capacity is being exempted from the activity sphere of other state body and granted to the local municipality [1]. Granting is an irreversible process and is typical for the period of first-time establishment of municipalities. For example, authorization can be involved to the controlling of property granted to the municipalities. Authorization is being carried out as one-sided mandatory state act. Exception is the perpetual or permanent, or one-time granting of authorities by the governmental body to the municipality during authorization [2]. In this case, the opportunity for exercising this authority by the local municipality is being the discussion object and procedures, legislative agreement adopted for this issue is being formulated by mutual consent of the parties.

By expression, the transferring of state authority to the local municipalities with “granting”, “transferring”, “entrusting” etc. terms, there is a shift of governmental authority from one level to the another. In this case, the legal nature of the authority changes and this issue obtains not only legal, but also practical significance. Empowerment serves for the rationalization of municipal governance. For having information regarding local problems, municipality has more flexible and mobile

opportunity than central government for getting solution of such kind of problems. It also serves for the elimination of additional problems on wasting resources. The empowerment has certain specific features as one-sided will act regarding alienation of one or another authority in relation with one subject to the another in legal relations. For example, during the exercising of entrusted state governmental authorities should not create obstacles to the exclusive authorities of municipal bodies. Both in the legislation of different countries and in international law, the transferring or entrusting authority from the government to the local governance system in most cases is being expressed as “empowerment” term. “Empowerment” in constitutional law as a division of authorities among the subjects of public law serves to the elimination of excessive domestic problems on central governmental level.

In the legislation of most states and local governments, the exclusive or the authorities belonging to them or granted with certain conditions are being differentiated. For example, Articles 117-118 of the Constitution of Italy, Articles 140 and 148.1 of the Constitution of Spain and Article 132 of the Constitution of the Russian Federation identifies this differentiation. Exclusive or non-divisional authorities of central government can be expressed by constitutions without such differentiation. As a rule, municipalities cannot adopt or take actions with political nature and in general affecting state interests. However, such kind of decision-making can be shown in practice. For example, several Japanese municipalities made decisions on announcements their districts as nuclear-free zone and refused against the deployment of military bases of the USA in the territory of municipalities.

Municipalities having equal significance level with government, in most cases leads to the general division of authorities in constitutions. Along with the reflection of certain spheres in the Constitution of the Republic of Azerbaijan, additional authorities are being expressed in the content of the activity sphere or the subject of the activity. The exclusive authorities of the municipalities are stated in the Article 144, part 1 of the Constitution. The supposed authorities are being emphasized in the Article 144, part II of the Constitution. According to the article, municipalities and executive powers can entrust additional authorities to the municipalities. For the exercising these authorities, relevant finance should be allocated for the municipalities. The implementation of these authorities is being controlled by legislative and executive powers. In accordance with the relevant article of the Constitution, the authorities of municipalities can be divided into: exceptional; and entrusted authorities.

If the first group of powers encompasses the issues with local importance, entrusted authorities is being directed to the solution of national problems, including social-economic, environmental problems among municipalities. In this case, local governance connecting to the actions integrated on international level, and to the urban commune diplomacy [3] is being involved to the implementation of regional (international) projects.

THE TERMINOLOGICAL INTERPRETATION

During the entrusting of additional authorities, the terminological interpretation of empowerment in legislation, the regulation form of mutual rights and duties between municipality and state executive power are of great importance. Regarding terminological interpretation, it should be noted that there is an argument on “additional authorities” in the Constitution (art.114(II)). Terminologies as “transferred additional powers”, “entrusted authorities” are widely used in different legislative acts. This definition is

certainly expressed in the Article 42.1 of the Law “On the status of municipalities” of the Republic of Azerbaijan dated 1999. This article includes “entrusted authority”. It is noted that, legislative and executive powers during entrusting additional authorities, these bodies provide municipalities with sufficient financial resources for the exercising of these powers. This terminological clarification has been implemented with the legislative amendment dated March 9, 2004. The differentiation has legal-political significance. Additional authority can be interpreted as, relevant authorities belong to the municipality and the empowerment of these authorities delayed due to different reasons. However, in the case of “entrusted authority” the owner is the central authority in the solution of this issue and it is ascertained that this authority will not be disputed by municipalities.

The empowerment of state powers to the municipalities necessitates the regulation on the legal base. Because of the governmental nature of entrusted authorities, during the exercise of these powers, municipality acts on behalf of state and is responsible for the material and financial resources allocated for the implementation of this authority by state body. In this case, the important issue is the transferring process of entrusted authority. Due to the failure in developing procedures for entrusting authority from state bodies to the local self-governance, this case will lead to the unrest in states with the incomplete municipal system. During the entrustment of authorities, the following issues should be regulated on the legal base:

- 1) the entrustment spheres of governmental authorities to the local municipalities;
- 2) the basis of entrusting form (agreement) of the authority;
- 3) the mechanism of control during granting the entrusted authorities;
- 4) responsibility issue of relevant local municipalities, and their authorized persons during failure in exercising of those powers in the case of empowerment of state authorities, etc.

According to the content of authorities of governmental bodies delegated to the local municipalities: participation in the determination of legal status of different organizations and institutions with various forms ownership; participation in the implementation of state control for the observance of legislation within the territory of local municipalities; participation in the realization of legal norms on the social security standards and other issues can be specified. The required issue is that the legislation should identify general directions for the entrusted spheres. As a rule, social-economic, and in certain cases non-profitable directions from political point of view can be included to this issue. Undoubtedly, the interests of the population of local municipalities should be accepted as crucial factor. As mentioned above, entrusted powers should not affect permanent authorities or daily activities of the municipality.

Several provisions of the European Charter on local self-government is dedicated to the solution of this issue. One of the provisions of Charter regarding municipal government with special importance is the entrusting of governmental authorities to the local self-governance. The article 4 of the Charter is wholly devoted to the authority of local self-government. Here includes the necessity for determination of authority with constitution or law, the possibility of granting additional authorities, the right of initiative in issues of their authority, the integral and exceptional authorities, etc. We would like to draw your attention to the special issue. The mistranslation of “public” term in several articles of Charter in the context of “state” in the legislation of the Republic of Azerbaijan.

In the first part of the article 3 of the Charter, during determination of local self-governance “regulating most part of public works” and in the third part of article 4 as “implementation of public authorities”, the term “public” is accepted as “state” by mistake

in Azerbaijani language both in the official translation [4] of Charter and in separate legislative acts. First of all, this issue has been identified in the second part of the article 144 of the Constitution of the Republic of Azerbaijan. According to the article, municipalities and executive powers can entrust additional authorities to the municipalities. For the exercising these authorities, relevant finance should be allocated for the municipalities. The implementation of these authorities is being controlled by legislative and executive powers. The content of the article cannot be considered as successful. The wrong understanding of terminology affected to the substance of relevant provision. Here the content can be as “granted additional authorities identified in accordance with legislation” but not as “granting additional authorities by legislation and executive power”. Otherwise, there can be misunderstanding as local self-governance depends on state bodies in terms of administrative structure, however it is unacceptable by legislation (Law on the status of municipalities, art.2.2). This negative trend has been reflected in the 1st paragraph of the Article 1 of the Law on the status of municipalities (it gives opportunity for implementation of state responsibilities in accordance with the second part of the Article 144 of the Constitution of the Republic of Azerbaijan) and in other acts.

According to the article 4.3 of the European Charter on the self-governance, the implementation of public authorities, as a rule, should be entrusted to the governmental bodies that are closer to citizens. The transfer one of these authorities to the other governmental body, should implement the targeted goal with the consideration of volume and nature, as well as efficiency and economic requirements. The financial ensurance of entrusted additional authorities is being expressed in the articles 40.3 and 41.2 of the Law of the Republic of Azerbaijan on the status of municipalities. According to the article 40.3 of the law, the financing of the solution of local issues and exercising of authorities entrusted to the municipalities by legislation and executive powers is being considered separately in the income and expenditure part of local budget.

The framework of granted authorities being different from entrusted authorities in the practice of the states, is also changing its level of difference according to the states. Municipality tradition plays an important role in this issue. Agreement mechanism is of great importance during entrusted authorities. During empowerment, legislation should identify the basis not affecting the independence of local self-governance. Currently, the failure in consideration of mutual agreement mechanisms of empowerment both by Constitution and special legislative acts provokes the growing tension of relevant state executive bodies/ Subsidies allocated for the implementation of targeted projects and different allocation fail in reaching destination. Legislative act “On the entrusted empowerment” can be adopted for the solution of the mentioned issue. Large number of populations, indigenous people should join to the adoption process of legislative acts and carry out consultations for the interests of local self-governance in advance.

The legislation on the entrusted empowerment should give priority to the contract method in the regulation of mutual rights and duties. As the agreement is based on an equality of arms, it will prevent the violation of municipality rights as weaker party in the “state-municipality” relations. The characteristic feature for the entrusted authorities is the condition for non-creation of obstacles by those powers to the exclusive authority of municipality [5]. In this sense, the entrusted powers cannot have purpose on mandatory increasing the municipality in accordance with the one-sided act of the state. According to the article 4.5 of the European Charter, local self-governance bodies have independence for the adaptation of entrusted authorities of central and regional bodies to the local condition during their implementation. The concept “shall have discretion” expressed in

the article conditions the contract form on the entrusted authorities in state-municipal relation. It is noted that, the planning of any decisions belonging to the local self-governance bodies and consulting with the bodies in the acceptance process and realizing it beforehand and in relevant form is essential.

The contract form of authorization should be estimated as one of the material legal conditions of independence determined by constitution and international law. As a rule, issues not related to the authority of local self-governance, as well as to not related to the institutions and organizations not being in the property of municipalities, also their relations with physical persons are based on the contract [6]. Entrusted authorities belong to the exception. These authorities being the topic of discussion and conditioning with provision of financial and material resources mean that during entrusting these issues to the local self-governance bodies based on one-sided state act will be contrary to the independence of municipalities. After the provision of entrusted authorities, the control mechanism of those authorities should be different from the control of exclusive authorities. The control over the implementation of entrusted authority can be ensured through commission with the participation of representative body of local self-governance and with the representative of state body entrusting the authority. Different from the administrative control of state authority, the representative body of local self-governance body has opportunity to influence more closely to the actions accepted by management of municipality. The exclusive authority of the representative body of the municipality encompasses the control over issues with local significance, as well as over the authorized persons and bodies of the municipality in the exercising of entrusted authorities. Exclusive authorities of the representative body include the organizational cooperation between municipalities, and other such kind of issues [7]. The controlling function of representative body on the regulation of non-exclusive authorities of municipalities should be valid for the entrusted authorities on the same level.

The administrative control over the activity of municipalities is being ensured by the relevant executive power of the Republic of Azerbaijan. This issue is being regulated by the Law of the Republic of Azerbaijan on the Administrative control over the activity of municipalities. Article 3 of the Law is specially dedicated to the solution of the problem. Along with the relevant state body (art.3.1) implementing control, relevant commissions and voters of the municipalities are expressed for administrative control. According to the third part of the article 4 of the law, relevant to the second part of the article 114 of the Constitution of the Republic of Azerbaijan, bodies granting authority to the municipalities can entrust the control over the exercising of additional authorities to the body exercising administrative control. However, in this case administrative control cannot limit right of the municipalities to solve the local problems within the legal framework independently and freely (art 4.4). Regarding entrusted authorities, focus should not be only over the authority of municipality. As mentioned, the contract form should identify mutual rights and duties for the parties and apply trial procedure for the solution of disputed problems. The legislation of municipality, along with the ensurance of independence of local self-governance also prohibits governmental bodies interfere to the activity of municipalities in the solution of local problems. Municipal bodies identifying general mandatory rules on the issues within their authority sphere adopt plan and programs of local self-governance [8].

The main purpose in entrusting governmental authorities to the municipal bodies is the promotion of social-economic development with the consideration of their opportunities. Along with other provisions during empowerment, provision with material and financial resources requires legal regulatory system. Without provision of relevant

financial allocation, local self-governance body cannot carry out relevant authority. The financial independence of the municipality should be considered during each empowerment. For example, according to the article 119 of the Constitution of Italy, provinces have financial autonomy by the extent and form prescribed by the laws of the Republic and this autonomy considers the catch effect with the finance of state, provinces and communes [9].

THE CONSTITUTION

The Constitution and other legislative acts of the Republic of Azerbaijan also prescribe the financial independence for the municipalities. The allocation of “necessary financial resource” for the additional authorities prescribed in the second part of the article 144 of the Constitution is being regulated in the large extent by the Law on status of municipalities. Along with the financial independence for the exclusive authorities, financial insurance for the “entrusted authorities” is also being expressed by Law. The financial allocation for the entrusted authorities should be differentiated from the finance considered for the exclusive authority of the municipalities (article 41). According to the article 40.3 of the law, the financing of the solution of local issues and exercising of authorities entrusted to the municipalities by legislation and executive powers is being considered separately in the income and expenditure part of local budget [10]. We consider that this differentiation should be expressed in accordance with constitution. The entrusting of additional authorities to the municipalities has certain social, political and legal importance. Entrusting additional authorities to the local self-governance bodies by approving the ability of this body to carry out several functions of governmental bodies, also serves to the distribution of government among indigenous people in broad context. It accelerates the strengthening of municipalities as self-determination facility of the local population, and democratize the political system, state regime with the administrative- regional structure. Undoubtedly, the independence of local self-governance bodies from the material, financial and other practical facilities of state government should be excluded with the strict legislative regulation, and should not allow municipalities becoming state governmental system, and its structure.

CONCLUSIONS

We can conclude our investigation on the entrusting authorities in the following form: granted additional authorities have different peculiarities according to the content, character and material (financial) base; empowerment base on the subsidizing principle and should prescribe equality of arms between state government and local self-governance; like exclusive authorities, entrusted authorities also have constitutional basis, however in most cases terminological difference is being expressed in the legislation; the controlling institution of state government considered for the implementation of entrusted authorities should be provided together with the representative body of the municipality; mutual rights and duties should be regulated in accordance with contract.

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