

SECTION 1. ADMINISTRATIVE LAW, ADMINISTRATIVE PROCESS

DOI: 10.46299/ISG.2023.MONO.LEGAL.3.1.1

1.1 State-legal framework for the oversight of local self-government in Ukraine in the context of European integration processes

The recent challenges and threats to the sovereignty, territorial integrity, and national security of Ukraine have underscored the imperatives within state-legal policy for consolidating and fortifying the centralized system of public administration, as well as augmenting its institutional and functional capacities. This exigency is partly attributable to the organizational characteristics inherent in the operation of public authorities under martial law, which are expressly designed to reinforce such centralization. The Law of Ukraine “On the Legal Regime of Martial Law” [1] explicitly mandates the establishment of provisional state entities — military administrations — within areas where martial law has been declared, pursuant to a presidential decree. These entities are to function in lieu of local self-government bodies, within the territorial confines, populated localities, and regions where the latter are unable to execute their designated authorities.

In addition, a discernible trend toward centralization is evident within municipal management systems that have persisted under the constraints imposed by martial law. Notably, there has been an unparalleled enlargement of the unilateral authority of local executives at the expense of the collective powers traditionally held by the representative bodies of local self-government, namely local councils. This centralizing dynamic is mirrored in the transformation of the oversight and supervisory framework pertaining to local governance: with the diminution of public scrutiny, enhanced competencies have been allocated to state institutions, thereby broadening the scope of state supervision over local self-government operations. In instances of substantiated contraventions of the Constitution or laws of Ukraine by village, settlement, or city leaders in the discharge of their duties relating to martial law measures, the President of Ukraine is empowered to institute a military administration within the concerned locality. This action, contingent upon the recommendation of the

regional military administration and concurrence with the General Staff of the Armed Forces of Ukraine, effectively results in the suspension of local self-governing entities within that territory.

It must be recognized that the aforementioned characteristics of public administration during a state of war are exceptional, necessitated by the imperative to maintain the flexibility and responsiveness of government entities in the face of comprehensive conflict. While the exigencies of the martial law regime justify certain extraordinary measures, it remains imperative to articulate a legally sound and equitable model. This model should respect the sanctity of local self-government guarantees while amalgamating municipal, state, and societal resources towards a unified objective. The urgency for such a balanced approach is heightened by Ukraine's continued and determined progression towards European Union accession, even amidst the formidable challenges of repelling armed incursion.

Nonetheless, it is imperative to acknowledge that the refinement of the state-legal framework governing the oversight of local self-government remains a pertinent issue not only during exceptional circumstances but also under normal conditions throughout the contemporary era of state development. Since 2016, the prosecutorial bodies have been divested of their general supervisory role, resulting in a vacuum where neither central nor local executive bodies have inherited effective oversight capabilities. This development has intensified the challenge of institutional and legal mechanisms to ensure that local self-government conforms to the Constitution and the laws of Ukraine across their normative, law-enforcement, and other routine functions. The constitutional reform process, particularly the amendments to Section VII "Prosecution Office," has been incomplete in addressing the decentralization of powers. It was anticipated that this reform would introduce the institution of prefects and establish additional organizational and legal entities for oversight and supervision. However, the reform's incompleteness has culminated in the lack of a robust system for state oversight to verify the legality of municipal operations. Consequently, there is a pressing need within the legal scholarly community to delineate the status and future trajectory of legal mechanisms supporting state oversight, ensuring the

alignment of local self-government with the Constitution and the laws of Ukraine, particularly in the light of aligning with European standards.

Addressing the existing legal foundations for state supervision and control in the realm of local self-government, it is apparent that the provisions are inadequate and constricted. Article 144 of the Constitution of Ukraine [2] mandates that local self-government entities, within their legally defined purview, promulgate decisions binding within their respective territories. However, should these decisions contravene the Constitution or laws of Ukraine, they are to be suspended according to a legally prescribed procedure, with a concurrent petition to the judiciary. Yet, the requisite legislation delineating this process has not been enacted by the Verkhovna Rada. A similar constitutional directive is found in Part 10 of Article 59 of the Law of Ukraine “On Local Self-Government in Ukraine,” [3] which asserts that the acts of local self-government bodies and officials are to be deemed illegal by the judiciary if they conflict with the Constitution or the laws of Ukraine. Therefore, the exclusive state-enforced mechanism to annul the effects of local self-government resolutions that violate the Constitution or laws of Ukraine is judicial declaration of their illegality, which subsequently nullifies their legal force.

Ukrainian domestic legislation fails to adequately specify the array of authoritative entities empowered to suspend the enactments of local self-government bodies on the basis of illegality, whilst concurrently initiating judicial review. Nonetheless, all interested parties, including entities responsible for auditing adherence to the Constitution of Ukraine, the laws of Ukraine, and other statutory instruments by local self-government entities and their officials, retain the right to seek judicial redress concerning the incompatibility of local self-government decisions with extant legislation. Such entities may encompass local state administrations which, pursuant to Article 28 of the Law of Ukraine “On Local State Administrations,” [4] are vested with the authority to ensure compliance with the Constitution, laws of Ukraine, and other legislative acts by local self-governing bodies and their functionaries on matters that fall within the purview of local state administrations, as well as territorial branches of central executive bodies within their delegated competencies. However, neither the

aforementioned Law nor other extant legal instruments within the Ukrainian legal corpus explicitly stipulate a framework for administrative supervision concerning the activities of local self-government bodies within the ambit of their self-governed jurisdiction.

The European Charter of Local Self-Government [5] provides a detailed regulatory framework for the principles governing state supervision of local self-government bodies, reflecting the practices adopted by European states in addressing this matter. Specifically, the Charter enunciates the following foundational principles:

First, it stipulates that any administrative oversight of local self-government entities must be conducted solely in accordance with procedures and circumstances prescribed by the constitution or statutory law.

Second, the Charter clarifies that such administrative oversight generally seeks to guarantee adherence to legal and constitutional mandates. Nonetheless, it concedes that higher-level authorities are permitted to administer supervisory actions concerning the punctuality with which local self-government bodies fulfill their delegated responsibilities.

Third, the Charter mandates that any administrative scrutiny of local self-government bodies should be executed in a manner that maintains the proportionality between the supervisory measures employed by the controlling entity and the gravity of the interests they seek to safeguard.

The European Charter of Local Self-Government prescribes that the mechanisms of administrative oversight over local self-government bodies should be codified at the constitutional or statutory level within the respective state, which acts as a bulwark for local self-government autonomy. In Ukraine, such legislative codification of these mechanisms has not been realized.

In conjunction with the stipulations of the European Charter, it is also pivotal to consider Recommendation No. R(98)12 “On the supervision of the activities of local authorities,” which was promulgated by the Committee of Ministers of the Council of Europe on September 18, 1998 [6]. This recommendation is principally directed at the actualization of the principles delineated in Article 8 of the Charter. The addendum to

this document delineates guiding principles intended to inform the extent and methods of administrative supervision. These principles include: 1) ensuring that local authorities are permitted to exercise their powers unabated, except where legislation stipulates otherwise; 2) promoting a clear definition of 'own powers' through the process of delegation, which, in turn, is anticipated to diminish the need for supervision; 3) articulating explicitly within statutory provisions the varieties of activities that fall under the purview of supervision; 4) constraining obligatory administrative oversight to actions that bear significant weight as determined by the official mandate; 5) curtailing the comprehensive range of administrative oversight; 6) advocating for a singular supervisory entity at the initial level of intervention, and in instances where specialized supervisory bodies are necessitated—dependent on the activity subject to review—clearly demarcating the competencies of such entities to preclude ambiguity regarding the responsible supervisory authority; 7) instituting in normative documents a prescribed duration within which the supervisory body must execute its oversight responsibilities.

It is critical to recognize the divergence between the current organizational and legal frameworks of state supervision and control over local self-government activities in Ukraine and the established European standards and guiding principles [7]. This discrepancy is compounded by the lack of a systemic approach and a robust legal foundation for such oversight.

The anticipated overhaul of the state supervision and control mechanisms concerning the legality of local self-government operations was slated to be undertaken during the constitutional reform aimed at decentralizing power. In this context, the draft Law of Ukraine “On Amendments to the Constitution of Ukraine (regarding the decentralization of power)” (registration no. 2217a) [8] envisaged the creation of a prefecture system. This system would be responsible for ensuring compliance with the Constitution and the laws of Ukraine by local self-government bodies. It would be authorized to suspend the actions of local self-governments on the premise of their non-conformity with the Constitution or legal statutes, while concurrently initiating judicial review.

Furthermore, the legislative proposals sought to institute an additional mechanism of critical importance for safeguarding the state's territorial integrity. This mechanism would enable a state response in instances where a local community head, community council, or district or regional council passed a resolution contravening the Constitution of Ukraine, thereby posing a threat to state sovereignty, territorial integrity, or national security. Under this proposed framework, the President of Ukraine would have the authority to suspend the execution of such contentious decisions and simultaneously petition the Constitutional Court of Ukraine. Concomitantly, there would be a provisional suspension of the community head's powers, as well as the functions of the community, district, and regional councils, with the President appointing an interim state commissioner. Should the Constitutional Court of Ukraine ascertain that the decision of the local community head or council violates the Constitution, the Verkhovna Rada of Ukraine, upon the President's proposal, would be empowered to dissolve the community head's mandate or the council, thereby prompting extraordinary elections in accordance with legal stipulations.

The envisioned model of state supervision within the realm of local self-government was designed to equilibrate the legally enshrined autonomy of local self-government bodies in decision-making with the state's prerogative to possess an efficacious set of tools to uphold the unitary nature of the nation-state, ensure the territorial integrity and sovereignty of Ukraine, and safeguard the rights and freedoms of its citizenry. In this vein, Ukraine contemplated the adoption of the French model for the prefect institution, which is deemed 'relatively soft.' In this model, prefects have the capacity to suspend — but not nullify — the acts of local self-governments, in contrast to the systems in place in other European nations, such as Poland, where prefects may have more stringent powers to invalidate local government actions.

Notwithstanding the deferral of the constitutional amendments related to the decentralization of power, the critical elements of the pertinent reform continue to occupy a prominent position in the discourse among experts and the public sphere. Attempts were made to delineate the fundamental tenets of state oversight in the domain of local self-government within the proposed draft Law of Ukraine “On

Prefects.” [9] This draft was subjected to a rigorous evaluation by the expert community. In its wake, further legislative proposals, namely the draft Laws of Ukraine “On Amendments to Some Legislative Acts of Ukraine Regarding State Control Over the Compliance of Decisions of Local Self-Government Bodies with the Constitution and Laws of Ukraine” [10] and “On Amendments to Some Legislative Acts of Ukraine Regarding the Suspension of Acts of Local Self-Government Bodies,” [11] were formulated. These proposals incited robust debate among professionals in the field. However, following these discussions, neither draft secured affirmative assessments or garnered support. This outcome delineates the imperative of formulating consensus-based positions and clauses that ought to underpin the creation of a legislative framework for structuring and implementing state supervision and control over local self-government. In light of this objective, it is necessary to articulate certain considerations that will inform the development of such legislative architecture.

Firstly, it is mandated by part 4 of Article 143 and part 2 of Article 144 of the Constitution of Ukraine that the procedures for overseeing compliance of local self-government bodies with the Constitution and laws of Ukraine must be precisely defined. This requirement applies to both the exercise of their inherent self-governing authorities and the administration of delegated state functions. The autonomous competencies represent the scope of self-regulation by local self-governments within the parameters established by the Constitution and laws of Ukraine. As such, state oversight is restricted to ensuring adherence to these legal boundaries during the exercise of self-governance, characterized by a supervisory form of control. In contrast, state oversight of delegated authorities encompasses a more comprehensive form of control, addressing not only the legality but also the efficacy with which various tasks are executed. Delegated competencies pertain to areas where the principle of state non-intervention, as affirmed by Article 20 of the Law of Ukraine “On Local Self-Government in Ukraine,” does not apply. In these domains, local bodies are entrusted with the execution of certain state functions, and thus, the scope of state control transcends mere observance. As instruments of state governance, the oversight of

delegated authorities necessitates not only monitoring the status of their implementation but also rectifying any violations encountered [12].

In the given context, it is considered inadvisable to consolidate the supervisory and oversight functions concerning the activities of local self-government bodies—pertaining to both their intrinsic and delegated authorities—within a singular oversight institution. Such centralization could culminate in the establishment of an omnipresent control system over these bodies, effectively integrating them into the executive hierarchy. It is posited that the oversight body in question should be limited to ensuring the conformity of local self-government bodies with the Constitution and laws of Ukraine during their normative functioning. Meanwhile, the oversight of the execution of delegated powers should be entrusted to sector-specific central executive authorities.

Secondly, state supervision ought to be confined to normative acts issued by representative and executive bodies of local communities, as well as by district and regional councils. As for individual acts, they should be subject to the usual legal process, wherein interested entities may contest their legality through judicial appeal. The rationale for this limitation is twofold: individual acts are effective immediately upon adoption, and their operational lifespan is exhausted upon execution, which complicates, and typically precludes, the application of the constitutional framework for suspension and contestation. These acts, once executed, are beyond the reach of procedures designed for extant legal instruments. This interpretation is undergirded by the jurisprudential stance of the Constitutional Court of Ukraine, articulated in the rationale of Decision No. 7-rp/2009 dated April 16, 2009, concerning the annulment of local self-government acts [13].

Thirdly, the exercise of supervision must be characterized by its continuity rather than a selective approach, and it should be subsequent, not preemptive. Normative acts promulgated by local self-government bodies are to be transmitted to the supervisory authority expeditiously, yet such acts shall take effect following the general procedures as prescribed by the Law of Ukraine “On Local Self-Government in Ukraine.” Upon identifying any inconsistencies with the Constitution or laws of Ukraine within such acts, the supervisory authority is obliged to notify the issuing body of the detected legal

infractions promptly, providing a reasonable period for the rectification of these issues. In the event that the act is not amended to achieve legal compliance within the allotted timeframe, the operation of the municipal normative act is to be suspended, accompanied by an immediate judicial appeal. This protocol aligns with Article 144 of the Constitution of Ukraine.

Additionally, while the supervisory authority may proffer a preliminary assessment on the constitutionality and legality of proposed municipal legal drafts, reflecting their public significance, such opinions are to be deemed advisory and non-binding for the local self-government bodies. The imposition of a compulsory preliminary verdict by the supervisory authority would infringe upon the legal autonomy of local self-government, as enshrined in the European Charter of Local Self-Government, and would be at odds with the administrative practices of European states, where preemptive administrative supervision is not a prevalent norm.

Fourthly, the state supervision framework ought to eschew the establishment of hierarchical relationships between local self-government entities and the supervisory body, preclude the formation of an overarching control body, and abstain from the inspection and appraisal of public service quality standards, as these fall within the ambit of substantive (sectoral) control. The competencies ascribed to the supervisory body must be commensurate with its functional mandate, serving to ensure legality, counteract corruption, and fulfill other objectives of significant public interest.

Fifthly, the determination of the supervisory body's placement within a specific segment of the state apparatus is of paramount importance. It is posited that this body should not fall under the purview of local state administrations or the direct control of the Government, to prevent the emergence of a state-dictated supervisory mechanism over local self-governments through executive channels. Institutional logic supports the association of the supervisory body with the presidential subsystem, given that the President of Ukraine is vested with the constitutional role of safeguarding the Constitution, as well as the rights and freedoms of citizens (Article 102 of the Constitution of Ukraine). Sectoral oversight of the execution of delegated powers by local self-government should be the remit of the executive authorities.

In light of the establishment of amalgamated territorial communities and the reconfiguration of district administrative roles, it is deemed prudent to institute supervisory entities at the regional tier. However, legislative provisions must be crafted to facilitate the establishment of their territorial branches at subordinate levels of the territorial power structure, as necessitated by practical considerations.

Sixthly, the envisioned supervisory subject is to be an authoritative, proficient, and efficacious state institution. The appointment process for the head of the supervisory body necessitates a resolution regarding the body's hierarchical alignment. It is suggested that the President of Ukraine appoint the head based on a recommendation from the Cabinet of Ministers of Ukraine, selecting from candidates who have emerged victorious in a competitive process for membership within this institution.

The numerical strength of the supervisory body should reflect the density and diversity of local self-government entities within the jurisdiction, the specificity of their operations, and the idiosyncrasies of the territory. Recruitment should hinge on open competitive selection, anchored in objective and transparent criteria such as educational background, practical experience, professional competencies, and so forth. It is imperative that this body operates insulated from political maneuvering and duress, upholding political impartiality.

Seventhly, it is essential for the law to articulate the feedback mechanism employed by the supervisory subject towards local self-government bodies and their conglomerates. Such a mechanism is a pivotal component of the interplay between state power and local self-governance, and as such, its principal forms and methods warrant codification at the legislative echelon. Among the recommended provisions are the establishment of a consultative council within the supervisory body, the synthesis and circulation of summaries encapsulating the practices of supervisory activities, educational initiatives, and other related measures.

Within the purview of the ongoing analysis, it is critical to elucidate the legal framework governing state oversight of local self-government bodies' performance of certain executive powers. Article 143 of the Constitution of Ukraine mandates that

local self-government entities, in the realm of their executive powers, fall under the supervisory domain of the corresponding executive authorities. Echoing this, Article 11 of the Law of Ukraine “On Local Self-Government in Ukraine” states that executive bodies of city councils, in the context of delegated powers, are accountable to and operate under the aegis of the related executive authorities.

Furthermore, Article 20 of the Law of Ukraine “On Local Self-Government in Ukraine” decrees that state oversight of the powers of local self-government bodies and officials is to be conducted strictly in accordance with the Constitution and laws of Ukraine. This oversight must be confined to legally defined boundaries and executed in a legally prescribed manner, ensuring that it does not transgress into undue interference with the autonomous powers endowed upon local self-government bodies.

However, the prevailing state control over local self-government bodies currently transgresses the stipulations of the Constitution of Ukraine and the Law of Ukraine “On Local Self-Government in Ukraine,” due to its lack of legislative regulation. The only statutory provision is found within the Law of Ukraine “On the Cabinet of Ministers of Ukraine,” [14] which prescribes that the Cabinet of Ministers exercises control over the adherence to legislation by local self-government bodies in matters of legal policy, legality, and human rights protection, specifically concerning the execution of delegated executive powers (Article 20). Furthermore, pursuant to the Constitution and national laws, it is tasked with ensuring control over the performance of delegated powers by local self-governments (Part 5 of Article 39). Yet, this control is conducted in the absence of a comprehensive legislative framework, reliant instead on subordinate legal enactments.

The procedural aspects governing the executive authorities' control over the delegated functions of local self-government bodies have been delineated by the Cabinet of Ministers of Ukraine in Resolution No. 339, dated March 9, 1999, as subsequently amended [15]. This mandate of control resides with local state administrations and, where legally stipulated, with ministries and other central executive bodies, including their territorial divisions. It encompasses the scrutiny of local self-government acts, soliciting reports on the execution of delegated functions,

and the inspection of the operational facets of executive bodies of village, settlement, and city councils.

It is patently clear that there exists an imperative necessity to legislate the organizational and procedural aspects of state control over the exercise of certain executive powers by local self-government bodies at the level of a dedicated law. Such a law ought to establish the fundamental principles, imperatives, participating entities, methodologies, and protocols of control activities. It should also define the rights and obligations of the controlling and the controlled entities, the regime of measures to address identified infractions in the execution of delegated powers, safeguards for local self-government bodies against control measures, and the framework, processes, and grounds for accountability of local self-government bodies in instances of failure to execute or improper execution of delegated powers.

In synthesizing the findings of the investigation into the legal regulation of state supervision concerning the conformity of local self-government bodies with the Constitution and laws of Ukraine, it is imperative to concede the deficiency of a robust legislative framework, the absence of an efficacious supervisory mechanism, and the non-fulfillment of European benchmarks in this domain.

The rectification of these issues is intrinsically linked to the enhancement of constitutional and legal strategies pertaining to local self-government. This encompasses a comprehensive rejuvenation of the constitutional underpinnings for the structuring and functioning of local self-governance as a whole, as well as state supervision over the adherence to legal provisions within the operations of municipal authorities. Furthermore, it necessitates the enactment of specific legislation that governs state supervision ensuring compliance of local self-governance bodies with the Constitution and national laws, in addition to legislating state oversight over the execution of certain executive powers by these local entities.

In the endeavor to evolve the organizational and legal frameworks for state supervision, and with the objective of assimilating European norms within this sphere, several proposals have been advanced:

1) To institute a clear demarcation between the modalities for supervising the observance by local self-government bodies of the Constitution and national laws when exercising their autonomous (self-government) powers, as opposed to the methodologies for overseeing the fulfillment of state-delegated powers by these entities.

2) To broaden the scope of state supervision to encompass municipal legal instruments of a regulatory character.

3) To ensure that state supervision is conducted consistently and on an ongoing basis, in response to the normative activities of local self-government entities.

4) To avert the establishment of any hierarchical dynamics between the supervisory apparatus and local self-government structures.

5) To affiliate the supervisory organ with the presidential subsystem, thereby reinforcing its alignment with the constitutional provision of the President as the guarantor of state and legal order.

6) To institute the supervisory entity as an authoritative, proficient, and efficacious state body, with personnel recruitment predicated on open, competitive selection processes that adhere to objective, comprehensible criteria and transparent protocols.

7) To mandate, through legislative action, the establishment of a consultative mechanism from the supervisory body to local self-government units and their conglomerates.

The task of constructing a well-calibrated mechanism for state control and oversight, which addresses systemic-structural, legal, functional-competence, and procedural-processual components, is especially pertinent in the context of martial law and the subsequent recovery period in Ukraine. This subject could form the nucleus of future investigative endeavors.