

## THE SPECIFICS OF THE CORPORATE MODEL OF LOCAL SELF-GOVERNMENT AND THE DIVERGENCE OF MODERN APPROACHES TO SELF-GOVERNMENT AT THE LOCAL LEVEL IN THE COMMONWEALTH COUNTRIES

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The subject of the article is models of local self-government in Commonwealth countries.

The purpose of this article is to substantiate or refute the hypothesis post-corporate model of local self-government is evolved.

Methods of theoretical analysis are used, as well as legal methods, including the formal legal method and the method of comparative law.

The main results and scope of their application. The corporate model of local government can be characterized by the following features: the lack of full constitutional recognition of local government as an independent form of public authority; formal institutional autonomy of municipal units as public (private-public) corporations of a special type that are not included into the system of state power; limited functional autonomy; lack of constitutional recognition of citizens' or local communities' right(s) to local self-government; limited accountability of local governments to the population, including the lack of sufficient legislative guarantees for the election of local authorities. These characteristics, grounded also in the historical specificity of local government development in Great Britain and its colonies, as well as in peculiarities of development of municipal units' status in English law, are determined by the corporate character of municipal government, which does not arise from the power of communities, but is formed by the state "from above". The author also ana

lyzes the differences in approaches to regulation and organization of local government in the Commonwealth countries.

Overcoming the historical heritage, laid by the genesis of municipal corporations, in a number of Commonwealth states, indicates the formation of a new, post-corporate model of local government, which can be characterized by some features: the establishment of constitutional autonomy of local government as a special form of public power, its development as a form of democracy with greater control over the forms of self-government and governance at the local level by the population, as well as the establishment of a link between self-government and the local community. The proposed analysis may become a crucial point for future research in the field of post-corporate model of local self-government.

Conclusions. Such countries as Australia and Ireland can presently be considered in a state of transition to the post-corporate model of local self-government.

### 1. Introduction

The corporate model of local government as a consequence of the development of the municipal corporation is most prevalent in the Anglo-Saxon countries. At the same time, the current trends in the development of legislation of these states indicate the evolution of this model.

### 2. Features of the corporate model of local self governance

2.1. Considering the corporate model as a consequence of the development of the institute of municipal corporations, it follows the classical characteristics of this model, which determine its specificity, to include, firstly, the absence or difficulty (as opposed to, for example, the community model) in the constitutional (legislative) recognition of local self-government as forms of public authority and the establishment of guarantees of its autonomy and activities.

If we take into account the institutional autonomy of municipalities as a meaningful feature of local self-government, then it should be assumed that within the corporate model it is formal in nature and lies in the heterogeneity of the legal nature and legal structure of the institutions of local self-government and state power.

Having a different political and legal essence, municipalities as public corporations in a number of Anglo-Saxon states “do not fit” with the system of state power (such a situation is typical, for example, for Great Britain [1, p. 19-20] and Canada). Therefore, before we specifically regulate local self-government at a constitutional level, it is necessary to determine the form that the relevant institutions should take. Apparently, the revision of the constitutionally regulated concept of “public authority” in the direction of its expansion is also necessary.

It should be noted that the influence of the corporate nature of the municipality at present is not the same, and in some Anglo-Saxon states the processes aimed at solving these problems, including the constitutional recognition of local self-government as a form of public authority and the establishment of guarantees for its functioning, are becoming dynamic.

Thus, in the USA, a number of state constitutions contain institutional guarantees of municipalities, including those concerning the preservation of their borders. For example, according to Part 2 of Art. 8 of the Constitution of Virginia, a state legislature cannot enact a law that extends or reduces the boundaries of a municipal unit. The article also prescribes obtaining the consent of citizens, expressed in the form of a vote, in the event that a state develops a structure of municipal administration in a particular municipality.

In Australia, local government is also governed by constitutions in most states and territories. In some of these documents, for example, in the Victoria Constitutional Act, institutional guarantees of municipalities are established. According to Art. 74A of the Constitutional Act, local government is recognized as separate and important (*distinct and essential*) level of government, consisting of democratically elected councils. According to Art. 74 B, the municipal council may be dissolved only by an act of the state parliament.

The issue of constitutional recognition of local self-government in Australia was repeatedly raised at the federal level (1974, 1988 and 2013), although in the first and last cases it was about determining the financial guarantees of local self-government, primarily in the form of establishing the possibility of direct funding for municipalities from side of the federal center. The last attempt was made in 2013.

As stated in the expert report to the Parliament and the Government of Australia, prior to the last attempt to hold a referendum, despite the fact that the special recognition of local government as a democratically formed government level ( “institutional recognition», *institutional recognition* ) not recommended for federal referendum [2, p. 8], “financial recognition” ( *financial recognition* ) would in itself contribute to the recognition of the increasing role of local self-government in the governance mechanism and the satisfaction of requests from local communities [3, p. 17].

The largest amount of constitutional regulation of local self-government is contained in the basic law of Ireland, which, among other things, “recognizes the role of local self-government in the democratic representation of local communities” (Article 28A of the Constitution of Ireland).

2.2. Secondly, the functional autonomy of the municipalities within the framework of the corporate model, although present, is seriously limited to the restrictive mechanism for determining the competence of local governments and the effect of the *ultra* doctrine. *vires* ( “That which is expressly prescribed by law is permitted”). At the same time, the position of the municipalities remains subordinate to the higher authority - due to the fact that the authority obtained through the incorporation mechanism by local authorities is exclusively delegated and limited. In this regard, municipalities are considered only as a subordinate mechanism ( *subordinate mechanism* ) by which the paternalistic government can provide services to the public [4, p. 22]. This significantly distinguishes the position of municipalities from the position of subjects of a federal state, which receive their power as a result of an equal distribution of competences through a constituent or constitutional act [5, p. 31].

In Great Britain, for example, the discretion of local governments in resolving issues of local significance is limited to interference from various ministries and governments, whose directives and prescriptions for local authorities are made quite often. [1, p. 1, 25].

It cannot be said that the conditions under consideration are not subject to change. Thus, in recent years there has been a departure from the definition of the competence of municipalities according to the principle: “that which is directly prescribed by law is allowed” (positive regulation).

A major change in the UK, for example, was the adoption in 2011. Act of Localism ( The Localism Act), in accordance with which local authorities are vested with general competence and receive extended legal personality. In 2016 of the Act on Devolution of Power to City and Local Government was adopted (

Cities and Local Government Devolution Act), providing for the transfer to the local level of the most important issues in the field of housing, transport, spatial planning and police.

However, these processes have not yet been completed, in addition, a number of legal and institutional factors prevent them from accelerating. The results of research on the reform of local self-government in the countries of the Anglo-Saxon model reflect similar data for Australia, Ireland, New Zealand and the USA [6, p. 8-14].

Local government experts point out that enhancing the functional role of local governments is impossible without restricting the activities of specialized bodies (the so-called *quangos* in the UK, *ABCs* - in Canada and the United States), not part of the mechanism of municipal government [7; 8]. The presence of these bodies at the local level not only weakens the functional autonomy of municipalities, but also hinders the expansion of controllability of the mechanism for solving local issues to the population, since most of them form specialized bodies on a professional, non-elected basis.

2.3. Thirdly, including taking into account the above, the corporate character of the municipal government impedes the perception of local government as a factor in the development of democratic institutions and calls into question the key issue for local government about the controllability of forms of local government and self-government to the population.

On the one hand, local self-government was investigated in detail in this vein by representatives of Anglo-Saxon political and legal thought, who emphasized its merits.

According to A. Tocqueville, "local meetings of citizens ... there is for freedom the same as primary schools for science; they bring it within reach, teach people how to use and enjoy it. The people can create a free government mechanism, but without the spirit of municipal institutions they cannot find the spirit of freedom" [9].

The idea of local self-government as a kind of school of democracy was shared by D.S. Mill, W. Odgers. According to Mill, the mixed, unequal composition of local institutions turns them into a school for the acquisition of skills in political affairs and for the lower classes. [10, p. 266-274].

According to W. Odgers, only through such lessons as the organization and functioning of a city assembly, does a nation rise to a true understanding of the meaning of freedom and ways of self-government [11, p. 236].

Well-known British local government theorist J. Toulmin Smith shared the conviction that freedom is an important principle, both for communities and individuals. "Centralization drowns out any sense of generous emulation; destroys all incentives to improve and dampens the excitement to the progressive development of resources" [5, p. 42].

A less idealized and more rational approach to the role of local self-government can be traced in the writings of the English philosopher and state scholar I. Bentham. In particular, although Bentham considered it necessary to preserve the sovereignty of the central government, however, in his opinion, the solution of local issues can be entrusted to local residents in the event that this allows them to achieve the optimal effect. His concept of a new government, set out in the work "The Constitutional Code", assumed the election of local chapters by the population (*local headmen*), however, were in complete subordination to higher authorities [12, p. 20-21].

Many English authors linked local government with the mechanism of representative democracy in England, in particular the functioning of parliament. In 1264 representatives of cities and counties (*Shirov*) were firstly included in the national representative body. Since the middle of the XIV century. their participation in parliament has become permanent [13, p. 251-261, 331-352].

The English historian A. Smith pursued the idea that the English Parliament had grown on the basis of local self-government. To him, however, the author refers primarily county (*shire*). According to A. Smith, local government based on the county system gained political significance due to the fact that the royal power in its struggle with the feudal lords and papal power sought support in the counties [14, p. 255]. The union of local units (including cities and counties) and the Crown, as opposed to political feudalism in England, was also pointed out by the Austrian scholar I. Redlich [15, p. 399].

At the same time, in English literature, the basis of the traditions of self-government, which formed the basis of the modern Anglo-Saxon model, is not considered to be the counties, which had some functional autonomy, but were controlled nevertheless centrally, and above all urban corporations (*borough*). It appears, however, that the influence of the latter on the development of representative democracy in England should also not be exaggerated.

Thus, Professor William Stebbs of the University of Oxford, in his classic work "The Constitutional History of England: Its Beginning and Development", while not rejecting in general the beneficial effect on the constitutional development of England of the institution of the representation of cities in parliament, indicates that in its early stages ( XIII - XV centuries), the decisive role in this process was played primarily by representatives of the counties ( *knights of shires* ), while the representatives of the cities did not always take an active position on the key issues of the struggle for authority and privilege with the Crown, preferring extra-parliamentary agreements [16, p. 514, 588-589].

Speaking about the formation of the system of representative democracy in England, one should also not forget about the principles of suffrage, which until the second half of the XIX century. provided for a hard property qualification in the counties [17, 18]. The system of financial and property qualifications in cities was even more diverse and at times was even more restrictive. The management of municipal corporations, as mentioned above, was in the hands of the trading elite for a long time, and it was their interests, and not the interests of the local population in general, that were protected and represented at the national level.

With regard to county management and members of their parishes (*parishes*), holds (*manors*), as well as other units, there is the domination of the aristocracy and wealthy classes was unconditional. For representatives of the aristocracy, the principle of obligatory participation in the activities of local bodies acted, and positions, as a rule, did not imply payment. At the same time, this principle provided for the *self-election* (i.e., "self-appointment"). Replacement of posts was mainly carried out by the Crown according to the decision (representation) of closed elite groups, without the participation of the general population and, with a few exceptions, without elections, even on the basis of qualifications. The corresponding system existed until the reforms of the XIX centuries. [19, p .18].

Thus, ensuring the representation of the interests of regions and localities in Parliament, balancing the interests of the central government, is in itself a great achievement and a feature of the state model in England already at the early stages of its development, but it is hardly a question of the direct connection of the municipal mechanism with the evolution of democratic forms of management.

The discussion about the role of municipal institutions in the system of democratic governance is also characteristic of modern sources. Thus, the well-known Canadian specialist in local government, C. Crawford, defined the level of local government as ideal for the development of democracy. As the author pointed out, it is much easier for a citizen to navigate in local matters, rather than more complex and complex issues that are under the authority of higher authorities. In addition, since the results of local decisions are visible to the population, it is easier for them to evaluate the work of local authorities and the extent to which these promises are fulfilled [20].

This positive perception, however, does not share the French researcher J. Langrod quoted in the Anglo-Saxon literature, who considers local government to be only a technical tool within the system of administrative management. In his opinion, "structural anachronisms, a high degree of internal functional separation, the dominance of non-elected positions in the mechanism of the management apparatus ..." are only a brake on democratization" [21, p. 25-33]. These ideas have something in common with the ideas of the well-known English law theorist J. Austin, who saw in local government a tool to increase the efficiency of solving local issues, but considered decentralization only a source of chaos and corruption [22, p. 248, 253-254].

Canadian experts R. and S. Tyndaly, in turn, point out that Canadian local government was never conceived as an instrument of mass democracy, which is evident from Canada's restrictions on electoral rights for a long time in favor of real estate owners [23, p. 8].

The conceptual limitations of the corporate form of the municipality already discussed above are also given. Thus, according to the professor of the University of York (Canada) H. Kaplan, local government cannot combine the role of an instrument of mass participatory democracy and a corporation for owners [24, p. 63].

A departure from the perception of municipalities as business units in favor of approaching them as units of democratic governance, according to Canadian researcher A. Carrell, is possible, but requires transferring the main role in the mechanism to local residents, and this new approach should be recognized not only at the regional level, but at the municipal level itself. "The municipal council should understand his duty to involve the population in democratic processes, which should be even higher than the duty to exercise the powers delegated by the provincial government" [25, p. 108]. There are precedents for the

activity of the population at the local level, but to support it, it is necessary to move away from the paradigm of "comfortable subordination" and colonial-provincial paternalism that has developed in the past two hundred years [26].

### **3. Description of the status of municipal units in the legislation of English states with the n states.**

It should be assumed that legal terminology used to describe the status of municipal units is of great importance for solving problems related to the legal nature of municipalities in the framework of the Anglo-Saxon approach to local self-government.

For example, if in Canadian law the term "municipal corporation" (*municipal corporation*) is directly used to designate such a unit, in which the "municipal council" (*municipal council*) is the governing body that creates a picture of *corporate governance*, then, for example, in Australian lawmaking practice the legal construction is more widespread, in which the municipality is a collective concept consisting of "council acting within the territory". It is the elected *council*, and not the municipality as a corporation, that is mentioned in most cases in the legislation in relation to issues of competence, interaction with other units and levels of government.

The shift of emphasis seems to be important in this case for the dynamics of perception not only of the essence of municipal units, but also of local self-government as a whole in a more democratic way.

In some cases, this shift can be traced to the subordinate reference to the corporate nature of local government. For example, in the Queensland Local Government Act of 2009 (Local Government Act 2009) in Australia, the following definition of the basic concept is given: "Local self-government is an *elected body* responsible for managing and resolving local issues in part of Queensland" (Article 8), and only later on in the text does the corporate status of a self-governing unit (Art. 11).

It should also be noted here that if, for example, in Canada, the election of local governments is not legally guaranteed, the legislation of a number of subjects of the Union of Australia emphasizes the electoral character, in any case, of municipal councils. The requirement for election of councils is contained in the national legislation on local self-government of New Zealand. Finally, in Ireland, the election of local governments is constitutional (Article 28A of the Constitution of Ireland).

### **4. Relationship between citizens (territorial groups) to local government as a criterion for distinguishing models of local governments.**

Considering the corporate model of local self-government in contrast with the communal (post-communal) model, it should be noted that the corporate character of municipalities is due to the lack of development of the *communal* rights doctrine and non-recognition of the rights of citizens or territorial collectives to implement local self-government.

The idea of rights is based on broader views of public sovereignty and the individual right to participate in solving public issues, developed in detail in the works of the Enlightenment. As T. Jefferson wrote, a person is able to live in a society governed by laws adopted by a given society *independently* and guaranteeing its members life, freedom, property and peace [27].

In the XIX century, in Europe, the theory of local self-government was developed, which actually defined the right to local self-government as the natural right of communities ("public theory"), or positive law given by the state ("state theory") [28].

In North America the debate on this issue included the well-known judgments, which gave the food a wide scientific debate and known today as the "*rule Dillon*" (*the Dillon's rule*) and "*doctrine Cooley*" (*Cooley the doctrine*). In the Coulee Doctrine, in contrast to the decision of the American judge JF Dillon, already mentioned in this study, the idea of the inalienable right to local self-government was formulated. In his opinion on the case of 1871. Michigan State Court judge T. Cooley wrote: "The right to local self-government refers to absolute rights; the state cannot deprive him. Both approaches are widely quoted today in Canada.

In his scientific article published in 1900 at Harvard, the well-known lawyer A. Eaton pointed out that the right to local self-government exists from the common law borrowed by the English colonies in America, even though this right is not reflected in the Constitution [29, p. 47 7]. In another classic article, however, American lawyer H. McBein, referring to a broad review of judicial practice, considered the

“natural” right to local self-government ( *inherent right to local government* ) extremely exotic and almost unrecognizable [30, p. 216].

The Canadian theorist of local self-government William Magnusson, in turn, has consistently put forward the idea of the *right to a city* as an integral part of the right to self-government. Considering the corresponding right to be a *collective* , Magnusson at the same time opposes his right to private owners, calling to consider him the carrier of all those who live in a certain location in the neighborhood ( *neighborhood* ) [31, p. 277]. In this sense, the idea of “the right to local self-government” belonging to the local community is antagonistic to the principles laid down in the idea of the municipality as a corporation, and therefore its implementation is impossible without breaking the existing political and legal structure of the municipal mechanism impregnated with “corporate spirit”.

It should be noted that the concept of the “right to the city” is recognized at the international level, in particular, it is reflected in the 2005 international Charter of the same name , developed with the support of UNESCO, where this right is interpreted as a collective right to organize and act to resolve issues associated with self-determination and ensuring a decent standard of living in cities.

However, in the report of the working group of the UN General Assembly on human rights at the local level refers to the limited implementation of the law, in this case is an example of including the Charter of Rights and Duties of the City of Montreal in Canada (Charte Montréalaise des Droits et des Responsabilités), which is related to the “weak” forms of its implementation [32, p. 12], without recognition at the state legislative level.

Considering the right to local self-government in comparison with the right to self-government of the indigenous people of Canada, U. Magnusson considers the actual lack of recognition of the first in Canadian law as a vestige of the state-right tradition of “absolutist sovereignty” transferred from the former metropolis [33, p. 6].

The scientist also proposes to consider municipalities' I A locally State »( *local state* ), with autonomy in dealing with their own issues with respect to the provinces, as well as the provinces are endowed with autonomy in relation to the federal center. Ideal for W. Magnusson is the coincidence of the *local state* and the community, the interests of which it expresses [31, p. 94, 96].

It should, however, be noted that despite the existence of separate studies, the theoretical discussion on the right to self-government in Canada is more related to the study of the nature and content of the right to self-government of small indigenous peoples living in the country than with the right to local self-government however, this discussion is far from complete, including regarding the collegial or individual nature of its forms [34; 35].

In the theory and legislative practice of other Anglo-Saxon states, a similar picture is observed, at the same time some recent changes testify to the search for legal registration of rights that may be associated with the functioning of the institution of local self-government.

The Constitution of Ireland does not contain a direct recognition of the right to local self-government, but it fixes (Article 28A) “the right of citizens to vote in elections for municipal officials ( *local authority* , in this context - *councils* [ A. L.]”.

It is now also gaining popularity of the idea of a new mechanism of self-organization of citizens to participate in addressing local issues, referred to as *community governance* ( «community management”) [36; 37; 38] . Providing a significant degree of autonomy of local communities in addressing local issues, this mechanism assumes the active role of the citizens themselves in the development of relevant institutions “from below”.

In Australia since the early 2000s. the presence of special “rights of the local community” was recognized at the regional level as part of the state strategy for the development of “associative management” (involving the population and public groups in management), although this right was not legally enshrined [39, p. 51].

In UK law, within the framework of the movement "localism" in the regulatory framework (localism Act 2011) reflects these "rights of communities" ( *community rights* ), as the right to purchase, planning and construction of public infrastructure, the right to run the alternative of public mechanisms services, the right to demand the provision of unused publicly owned land [40].

Meanwhile, as indicated in the report of the Council of Europe Working Group on the study of the state of local and regional governance, in UK legislation, in addition to the rights enshrined in the Act of Localism 2011 , the right to local self-government is not fixed as such. The authors of the study also note

the symbolic refusal of the UK to ratify the Additional Protocol to the European Charter of Local Self-Government, which stipulates the need to protect the right of citizens to participate in the activities of local authorities [1, p. 1-3]. Despite the increase in election officials at the local level and the grounds for applying various forms of direct public participation in resolving issues of local importance within the framework of legislative changes in recent years, experts note their half-heartedness, pointing to the ingrained "centralist approach" to the organization and implementation of local government [41].

The practice of implementing the "community management" model in the Anglo-Saxon states shows that it means self-organization of citizens primarily at the local, *submunicipal* level. Thus, the growth of interest in "community rights" cannot be identified with the movement towards the formation of the concept of a territorial public collective, which has independent aggregate communal rights within the boundaries of a single municipal unit.

## 5. Conclusions.

Based on the above, it should be considered that the corporate model of local self-government is characterized by such features as the lack of full constitutional recognition of local self-government as an independent form of public authority and the formal institutional autonomy of municipal units as public (private-public) corporations of a special type not included in system of state power, limited functional autonomy, lack of constitutional recognition of the right (s) to the local self the board of individual citizens or local communities, limited accountability of local governments to the population, including the lack of sufficient legislative guarantees for the election of local authorities. These characteristics taking into account the historical specifics of the development of local self-government in the UK and its colonies, as well as the peculiarities of the formation of the status of municipalities in English law, are directly determined by the established corporate character of municipal government, which does not arise from the authority of communities, but is formed by the state "from above".

At the same time, the analysis carried out above shows that not all Anglo-Saxon countries develop the institution of local self-government of the same nature and unambiguously fit into the characteristics of the corporate model. For example, in Australia and the USA local government is governed by the constitutions of the states (territories) and municipalities receive some guarantees of their functioning. In Ireland, the institution in question is already recognized at the national constitutional level, in Australia preparatory work is under way for its constitutional recognition.

In Australia, New Zealand and Ireland, the election of local governments is established by law, in the latter case it is supported by the existence of a special constitutional right of citizens. Although there is no clear doctrine of communal rights, there are obvious attempts to develop it, while the legislation has an appeal to *local communities*, whose interests should be expressed by local government (Great Britain, Ireland).

Thus, the overcoming of the historical heritage in a number of Anglo-Saxon states laid down by the genesis of the institute of municipal corporations may indicate the formation of a new, *post-corporate* model of local self-government, which is characterized by the establishment of constitutional autonomy of local self-government as a special form of public authority, its development as a form of democracy with a greater control over the forms of self-government and governance at the local level, the establishment of a link between self-government and the local community as a carrier of the right to it. In the event of a final transition to such a model, the corporate status of the municipality can be revised or retained as the status of a legal entity in business, without, however, affecting the resolution of public-law issues (competence, accountability and accountability of municipal authorities to self-government entities, interaction with other power levels).

Increasing the role of local communities in the mechanism of local self-government does not seem to mean unconditional adaptation in the Anglo-Saxon states of the institution of the territorial public collective and, as a result, the transition to the settlement principle of the territorial organization of local government. In all Anglo-Saxon states, the trend towards territorial reorganization in the form of mergers and consolidation of municipalities persists, so the realization of the rights of local communities is likely to occur mainly at the submunicipal level. At the same time, within the framework of both models, local self-government should be perceived primarily as a democratic institution of expression of the population, guaranteed by law.

Based on the above characteristics of the post-corporate model, it should be concluded: today, states such as Australia and Ireland can be considered to be in transition to this model, while the United Kingdom and especially Canada, even taking into account some dynamics of the status of municipal units and local governments continue to be part of the corporate model.

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