

SEARCH FOR CHECKS AND BALANCES SYSTEM AT THE LOCAL – GOVERNMENT LEVEL OF THE REPUBLIC OF LITHUANIA

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Annotation

In this paper examines the place of self-government in the Republic of Lithuania, the relationship of local self-government with the central government and the interaction between self-government institutions. Extensive practical and legislative analysis shows that in self-government, powers interactions are specific because they interact not only with each other but also with central government, however the fact about government interactions presupposes that leverage mechanisms are also exist in self-government. In this scientific work trying to reveal the essential features of operation of the Checks and balances system in the local - government.

Keywords: European Charter of Local Self-Government, Checks and Balances system, municipal council, democratic.

Introduction

The relevance of the topic. The theory of separation of powers has deep historical roots. The beginnings of this theory are found in the works of the great philosophers of antique times. Some of the first limitations of power have been analyzed by Plato, Socrates, Aristotle. There are descriptions in historical sources when power concentrated in the hands of one person became dictatorial without restriction, but the ancient theory did not indicate any clear mechanism for limiting power in the forms of its structure, and the purpose of the division itself was not clearly substantiated and formulated. The pioneers of the theory of the division of powers are considered to be renaissance scholars: Charles de Montesquieu (1689–1755) and John Locke (1632–1704). In their view, the separation of powers is necessary not only to guarantee individual freedoms and rights, but also to help society avoid arbitrariness of power.

One of the founders of the United States Constitution - J. Madison, raised the importance of the theory of the separation of powers and for the first time in history, Locke's and Montesquieu's theory of the separation of powers was applied and implemented in the United States Constitution. At that time, a balance of three separate powers of the State Government was invented, called the "Checks and Balances" system, which ensures the independence of the State Government.

This principle determines the organization of state power, its functioning, guarantees human freedoms, rights and equality. After this important moment, other democracies based their constitutions on the example of the United States. The principle of separation of powers is became a great importance for the development of a democratic country.

Without the full implementation of the principle of separation of powers, no one country is not protected from degradation, classical despotism or dictatorship. In order to successfully implement the principle of separation of powers, each state must choose the most appropriate form for itself.

When it comes to the principle of separation of powers, there is usually an association with the State-level, but it must be borne in mind that the power in the lowest territorial administrative units is closest to the person and directly influences the decisions relevant to the local population. In this article, the author presents a non-Orthodox approach to the State structure based on many years of practical experience in the field of local self-government.

In the context of the coronavirus, this topic has become even more relevant in Lithuania, when decisions made by municipal institutions directly restrict the rights of individuals (for example: freedom of movement, the right to conduct certain types of business, etc.). There are reasonable doubts whether the decisions made at the level of self-government do not exceed the limits of competence, therefore there is a need to study the situation of local self-government in the State, the relationship of local self-government with central government and the interaction of local self-government institutions between themselves.

Novelty of the topic: Although there are a number of scientific researches on individual elements of local government in the Republic of Lithuania, however search for checks and balances system at the local-government level not performed. It can be noted that the issue of application of the checks and balances system in the lower territorial administrative units has been studied by foreign scientists.¹

The purpose of this research: *to analyze* the situation of local self-government in the State structure of the Republic of Lithuania; From the legal - practical point of view *to reveal* the importance of the checks and balances system for self-government.

The tasks of the researches: 1. *To determine* the place of self-government in the Republic of Lithuania, the relationship of local self-government with the central government and the interaction between self-government institutions; 2. *To reveal* the essential features of the operation of the Checks and balances system at the level of local self - government of the Republic of Lithuania; 3. *To draw some solutions* for issues identified related to these analyzed questions for Lithuanian legislator in order to improve national legal regulation.

The object of the research: Political, practical and legal factors influencing the interaction between the state and self - government.

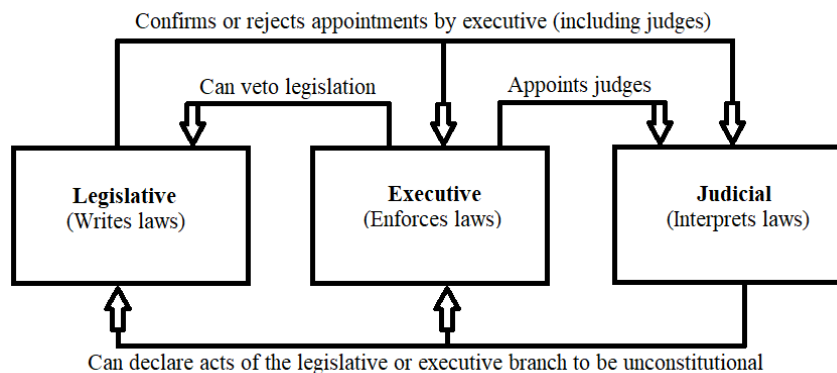
The methods of the research: The research was carried out by employing logical, comparative legal methods, system analysis, linguistic, empirical, synthesis methods and analysis of legal documents. The generalization method was used to summarize the collected (analyzed) research data and formulate conclusions and suggestions.

The place of self - government in the State structure

According to the theory of the Checks and Balances system, each branch of government is separate and has its own area of governmental responsibilities. The goal is that none of the branches would be able to become powerful enough to dominate the other two branches. Checks and balances give each branch of government the ability to change or cancel acts of another branch, preventing any one branch from becoming too powerful.

¹ Pike, F. (1958). *The Municipality and the System of Checks and Balances in Spanish American Colonial Administration. The Americas*, No. 15(2).

Table 1. Checks and Balances system (State level model)



The state governance model is usually established by Constitution. In the Constitution of the Republic of Lithuania², a separate section dedicated to local self-governance and its management, which shows not only that the state recognizes local self-government, but the principles of local self-government mentioned in the Constitution of the Republic of Lithuania, also acquire constitutional protection.

The separation of powers (Checks and balances system) is one of the most important constitutional principles of a democratic state, which influences the organization of state power, its functioning and guarantees human rights and freedoms. The separation of powers can be divided into two interrelated parts: 1.) Interaction of authorities - is usually associated with the relationship between individual authorities, which is understood as cooperation between authorities, coordination, operation of a system of "checks and balances", which ensures control and balance between authorities. 2.) Separation of powers - is not only the division of powers into branches of state power, but also the determination of their own internal formation procedure, legal status, powers and competencies, and ensuring independence.³

J. Madison, one of the main founders of the doctrine of the division of powers, also held the position that the constitutional framework defining the powers of each individual government was insufficient. He argued that a mechanism was needed to guarantee self-regulatory control over the government⁴. „J. Madison's aim was to protect freedom and the interests of the minority by creating a system in which the central authorities remain independent but at the same time control and counterbalance each other. Based on the experience of the United States, J. Madison saw the greatest danger (to democracy) in the power of the legislature.“⁵

The system of Checks and Balances is usually associated with the management of the State rather than municipalities and the institutional structure of their government differs⁶. Moreover some scholars generally take the view that *local authorities are not State structures, so the principle of separation of powers does not apply to the organization of local government*⁷. However, it must

² Constitution of the Republic of Lithuania, Valstybės žinios, (1992), No. 33-1014. Online access: <https://www.lrs.lt/home/Konstitucija/Konstitucija.htm>

³Jarašiūnas, E. (2001). *Valdžių padalijimas – demokratinės valstybės valdžios organizacijos ir veiklos principas (Separation of powers - a principle of the organization and operation of a democratic state)*. Lietuvos konstitucinė teisė. Vilnius: Lietuvos teisės universiteto leidybos centras.

⁴Madison, J. (1999). *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*. In Kesler, R. C., Rossiter, C. *The Federalist Papers*. New York: Hamilton, Madison, Jay.

⁵Griškevič, L.(2008). *Valdžių padalijimo teorija pagal J. Madisoną (Theory of separation of powers by J. Madison)*. Teisė, Nr. 66(2).

⁶Novikovas, A.(2005).*The Nature and the Social Mission of Local Government in the Society*. Jurisprudencija, Nr. 77(69).

⁷ Bakaveckas, A. (2005).*The problems of development of legal base of local self-government*. Public policy and administration, Nr. 12(109).

be acknowledged that in both: local government and central government, the analogy of the framework for decision-making is very similar.

At the State level: the Seimas of the Republic of Lithuania passes laws, the Government of the Republic of Lithuania is the executive power, the Courts control the legality of legislation and its application. In the municipality: The municipal council makes decisions, the administration is the executive power, the representative of the Government of the Republic of Lithuania exercises administrative supervision, i.e. Supervises whether municipalities comply with the Constitution and laws, or implement the resolutions of the Government of the Republic of Lithuania.

According to the Constitution of the Republic of Lithuania, the right of self-government is guaranteed only to municipalities - the lowest territorial administrative units, therefore Lithuania is classified as a state with one-tier self-government⁸. The wording of Article 3 (1) of the Charter⁹ on the right of self-government to conduct its public affairs under its full responsibility is enshrined in Article 120 of the Constitution of the Republic of Lithuania, which establishes, that “*Municipalities shall act freely and independently within the limits of the competence defined by the Constitution and laws*”. This provision is also enshrined in Article 4 (2) of the Law on Local Self-Government¹⁰. Together with Article 3 of the Charter, which stipulates that the local government shall have the right and ability to handle and manage the major part of public affairs represented by freely elected councils, Article 120 of the Constitution provides for the election of local government decision-making bodies and the right to vote for citizens and other permanent residents of the administrative unit. The limits within which self-government operates are established only by a law at the State level.

The Constitution of the Republic of Lithuania does not directly define the powers and duties of local self-government bodies, thus leaving them to be established by law. The law defines in detail what functions each level of government should perform. Article 6 of the Law on Local Self-Government lists autonomous functions of municipalities, such as: preparation and approval of the municipal budget; setting local tolls; management, use and disposal of land and other property owned by the municipality; maintenance, repair and construction of municipal roads and streets of local importance; the organization of road safety and many others (45 points in total). It should be noted that the list is not exhaustive, as Article 6 (46) of the Law on Local Self-Government provides that other functions of autonomous municipalities may also be included other functions not attributed to public authorities.

Article 7 of the Law on Local Self-Government specifies the functions delegated by the State to municipalities, such as: registration of acts of civil status; fire safety; involvement in managing state parks; setting up social benefits and compensation; providing free meals to students, and many others (38 items in total). It should also be noted that the list is not exhaustive, as Article 7 (39) of the Law on Local Self-Government provides that functions delegated by the State may include other functions delegated by law.

The constitutional principle of a state under the rule of law involves many different interrelated imperatives, including the requirement of a hierarchy of legislation, from whence arises the rule of law over the secondary legislation¹¹. It means that the constitutional principle does not allow sub-statutory legal acts to establish such legal regulation that would compete with the one provided by the law. Sub-statutory legal acts may not change the law or create new general legal norms that compete with one another, as this would violate the supremacy of the laws enshrined in the

⁸Grigienė, K. (2011). *Constitutional frameworks for regional selfgovernment in Lithuania and central and eastern Europe: Do the reforms of the regions determine the need of constitutional amendments?*. Socialinių mokslų studijos, Nr. 3(4).

⁹ European Charter of Local Self-Government, Strasbourg, 1985, No. 122. Online access: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.50219?jfwid=rivwzvpvg>

¹⁰ Law on Local Self-Government of the Republic of Lithuania, (1994), No. 55-1049. Online access: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.5884/asr>

¹¹Constitutional Court of the Republic of Lithuania (September 28, 2011) ruling.

Constitution of the Republic of Lithuania over sub-statutory legal acts¹². A sub-statutory legal act must implement the norms of the law, therefore it must be adopted on the basis of law. A sub-statutory act is an act of application of the rules of the law, whether it is of one-time application or of permanent validity.¹³

The principle of municipal autonomy is not absolute and it does not relieve public administration entity (municipal councils) from the obligation to comply with all the principles of public law, including the principle of legality. Municipal councils, implementing the functions entrusted to them, has no discretion to establish legal regulation that does not comply with the provisions of higher-ranking legal acts.¹⁴

Under Article 123 (1 p.) of the Constitution of the Republic of Lithuania: "*In higher administrative units, the government shall organize the management in accordance with the procedure established by law.*" In accordance with the provisions of the second and third paragraphs of Article 123 of the Constitution of the Republic of Lithuania and Municipal Administrative Supervision law¹⁵ - administrative supervision of municipalities is performed by state officials appointed by the Government - representatives of the Government. They supervise the compliance of municipalities with the Constitution and laws of the Republic of Lithuania or the implementation of Government decisions.

This way the control of the legality of administrative acts adopted by municipal administration entities is within the competence of the Government representative¹⁶. Government representative oversees the municipalities' compliance with the Constitution and laws, or enforces government decisions, proposes (must propose) to repeal or amend unlawful legal acts of municipal administrative entities, and when the entities of municipal administration do not agree to repeal or amend the disputed legal act, refuse to implement the law or execute the decision of the Government, apply (must apply) to the court.

Article 4 of the new version of the Law on Administrative Supervision of Local Governments of the Republic of Lithuania, which came into force on 01-07-2011, provides that representatives of the Government of the Republic of Lithuania shall be appointed on the recommendation of the Prime Minister of the Republic of Lithuania. In this way, the tender procedure established for the position of the representative of the Government of the Republic of Lithuania was waived. The representative of the Government of the Republic of Lithuania has become a state of political trust, subordinate and accountable to the Government of the Republic of Lithuania. Because the Government itself is a political entity in which political parties play a major role - there is a clear risk that decisions related to administrative control in individual municipalities will be taken selectively, not by law-based arguments, but by political agreements. After the Seimas of the Republic of Lithuania adopted amendments to the Law on Administrative Supervision of Municipalities of the Republic of Lithuania, also in the public space there are many fears that administrative supervision will be carried out in accordance with political decisions, which could undoubtedly complicate the democratic process in the future.

Local authorities shall have the right to use judicial means to safeguard the right to exercise their powers unrestrictedly and to ensure respect for the principles of local self-government enshrined in the Constitution and in domestic law. Accordingly, Article 122 of the Constitution

¹²Constitutional Court of the Republic of Lithuania (August 21, 2002; December 13, 2005; January 19, 2005) rulings.

¹³Constitutional Court of the Republic of Lithuania (September 6, 2007; March 9, 2010; April 18, 2012; February 20, 2013) rulings.

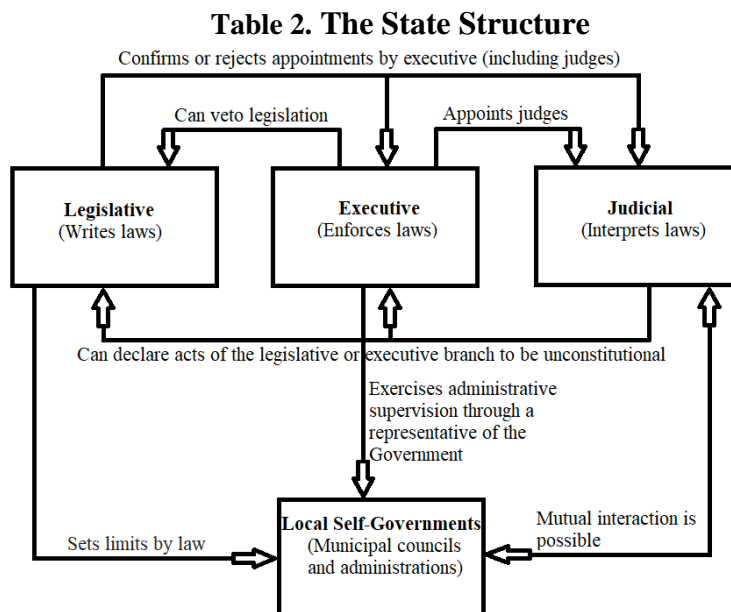
¹⁴Supreme Administrative Court of Lithuania (October 19, 2015) ruling in the administrative case, No. A-737-552/2015. *Administracinė jurisprudencija*, 30 p.

¹⁵Law on Municipal Administrative Supervision of the Republic of Lithuania, Valstybės žinios, 1998, No. 51-1392. Online access: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.56962/asr>

¹⁶Supreme Administrative Court of Lithuania (December 6, 2010) ruling in the administrative case, No. A662-1429/2010.

provides that municipal councils shall have the right to apply to the courts for violation of their rights, which is also enshrined in Article 11 of the European Charter of Local Self-Government.

The place of self-government in the State structure could be depicted like in table 2:



Undoubtedly, the municipal council has the greatest influence on the management of self-government, therefore in each municipality council, the presence of an opposition (minority) is not only a normative phenomenon, but also a necessary expression of democracy. In essence, the opposition has two main functions: One, it does not allow one party to come entrenched and curtails government selfishness, it helps to maintain the Constitutional model of Local - Government. Secondly, because the political decisions are not perfect, the opposition points out the mistakes and shortcomings of the government. Opposition works like instrument to restrict government and cultivate social peace.

Conclusions

1. In self-government, powers interactions are specific because they interact not only with each other but also with central government, however the fact about government interactions presupposes that leverage mechanisms also exist in self-government.
2. Considering that the municipal council has the greatest influence on the decisions made in the municipality, and in order to maintain democratic governance at the municipal level (Checks and Balances mechanism), it is necessary to strengthen the capacity of the opposition and ensure proper implementation of laws in the local government.
3. Municipal administrative supervision must be carried out - not on political, but on legal arguments, so reform is needed in this area.

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STABDŽIŲ IR ATSVARŲ SISTEMOS PAIEŠKA LR VIETOS SAVIVALDOS LYMENYJE**Karolis Kaklys**

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Santrauka

Straipsnyje yra nagrinėjama LR vietos savivaldos padėtis Valstybės sąraigoje, vietos savivaldos santykis su centrine valdžia ir pačių vietos savivaldos institucijų tarpusavio sąveika. Plati praktinė ir teisės aktų analizė rodo, kad savivaldoje valdžių sąveika yra specifinė, kadangi jos sąveikauja ne tik pačios tarpusavyje, bet ir su Valstybės valdžiomis (Skirtingu lygmeniu). Pats faktas apie valdžių sąveikas suponuoja tai, kad svertų mechanizmai savivaldoje irgi egzistuoja. Šiame moksliniame darbe bandoma atskleisti esminius stabdžių ir atsvarų (angl. Checks and balances) sistemos veikimo LR vietos savivaldos lygmenyje bruožus.

Atsižvelgiant į mokslinio straipsnio tematiką, tikslus ir uždavinius *Dokumentų analizės metodas* taikytas renkant ir tiriant duomenis. Duomenų šaltiniai: Nacionaliniai teisės aktai, Europos sąjungos ir tarptautiniai teisės aktai, LR Konstitucinio teismo nutarimai, aktuali teismų praktika, susiję mokslo darbai ir kt. *Sisteminės analizės metodas* taikytas kompleksiškai tiriant teisės normas, aktualią teismų jurisprudenciją bei įgyvendinimo praktiką. *Stebėjimo metodas* taikytas tiesiogiai dalyvaujant praktinėje veikloje. Straipsnio autorius turi sukaupęs praktinės patirties LR Vietos savivaldos teisinio reguliavimo srityje, nuo 2011 m. iki dabar yra savivaldybės tarybos narys, taip pat 2011-2012 m. buvo LR Seimo vicepirmininko visuomeniniu konsultantu. *Apibendrinimo metodas* taikytas apibendrinant surinktus ir išanalizuotus tyrimo duomenis bei formuluojant išvadas.