

**LEGAL REGULATION OF LOCAL REFERENDUM RELATIONS –  
A PREREQUISITE FOR REAL SELF-GOVERNANCE  
OF MUNICIPALITIES IN UKRAINE**

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**INTRODUCTION**

Over the past seven years, Ukraine has been dynamically implementing the decentralization reform of state power. Its goal, as noted in the “Concept of local self-government and territorial organization of power in Ukraine”, approved by the Cabinet of Ministers of Ukraine on 1 April 2014 № 333-r (hereinafter – the Concept)<sup>1</sup>, is not only the formation of effective local self-government and territorial organization of power, creation, and maintenance of full living environment for citizens, providing them with high-quality and accessible public services, the satisfaction of citizens’ interests in all areas of life on the relevant territory people’s government.

One of the possible ways to achieve this goal, according to the above-mentioned Concept, should be the maximum involvement of the population in management decision-making, ensuring the right of territorial communities to a local referendum, promoting the development of forms of direct government, as well as the development and adoption of draft legislation for the introduction of direct government, improvement of legal regulation of procedures for the conduct of improvement of legal regulation of procedures for holding general meetings of citizens at their place of residence and establishment of additional guarantees for the activity of self-governing bodies of the population, creation of favorable legal conditions for broad involvement of the population in decision-making by local self-governance bodies.

However, contrary to the requirements of the Concept, over the seven years during which the decentralization reform of state power in Ukraine has been implemented, the legislator has not yet formed a legal mechanism for involving the territorial community in the direct resolution of issues of local importance in the form of a referendum. During this time, the territories of territorial communities and their administrative centers have been substantially updated, the powers of local authorities have been significantly expanded, and new legislation aimed at regulating administrative, budgetary,

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<sup>1</sup> Про схвалення Концепції реформування місцевого самоврядування та територіальної організації влади в Україні : Розпорядження Кабінету Міністрів України від 01.04.2014 р. № 333-р. URL: <https://zakon.rada.gov.ua/laws/show/333-2014-%D1%80#Text>.

electoral, land, healthcare, inter-municipal, urban planning, educational, tax and many other relations have been adopted. Involving local authorities, four draft laws have been prepared and submitted to the Verkhovna Rada of Ukraine (one in July 2015, two in December 2019, and one in October 2021) aimed at amending the Constitution of Ukraine regarding decentralization of power.

On February 11, 2021, the European Parliament approved the Report on the Implementation of the Association Agreement with the European Union by Ukraine. It notes the effectiveness of the implementation of decentralization reform, which the EU considers to be among the most successful in Ukraine and calls for its completion through a wide-open dialogue between the central government and local authorities<sup>2</sup>. The Group of Seven (G7) Ambassadors also noted in their statement that they hail Ukraine's success in uniting its territorial communities as an example of its potential and ability to implement the reforms necessary not only for good governance but also for future prosperity and stability<sup>3</sup>.

The reform of decentralization of power is also supported by the Ukrainian population. This is evidenced by the annual sociological surveys on the topics of local government reform and decentralization of power, which were launched in 2015 by the Council of Europe in cooperation with the Ukrainian state. Thus, more than 80 % of well-informed respondents support decentralization and consider it necessary for Ukraine<sup>4</sup>.

According to part one of Article 140 of the Constitution of Ukraine<sup>5</sup>, local self-government is the right of a territorial community to independently decide issues of local importance within the limits of the Constitution and laws of Ukraine. Using such forms of direct democracy as local elections, referendums, etc., a territorial community can exercise its power directly according to Article 69 of the Basic Law of Ukraine.

Therefore, a local referendum, as one of the possible forms of direct self-governance of territorial communities, can become a tool to implement the requirement of part one of article 140 of the Constitution of Ukraine. After all, according to part two of article 7 of the Law of Ukraine "On Local Self-Government in Ukraine" of 21 May 1997 № 280/97-VR (hereinafter – Law

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<sup>2</sup> European Parliament resolution of 11 February 2021 on the implementation of the EU Association Agreement with Ukraine. URL: [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0050\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0050_EN.html).

<sup>3</sup> Посли G7 закликали прийняти законодавчі та конституційні зміни для невідворотності децентралізації в Україні. URL: <https://decentralization.gov.ua/news/13656>.

<sup>4</sup> Соціологічний барометр реформи: що думає населення про децентралізацію. URL: <https://decentralization.gov.ua/news/13071?page=5>.

<sup>5</sup> Конституція України від 28 червня 1996 року. URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

№ 280/97-VR), the subject of a local referendum may be any issue attributed to the Constitution of Ukraine, this, and other laws to the local self-government<sup>6</sup>. In addition, several laws of Ukraine further emphasize that the territorial community directly through a local referendum can take a number of decisions, in particular regarding the support of the unification of territorial communities (in accordance with part five of Article 7 of the Law of Ukraine “On Voluntary Associations of Territorial Communities”<sup>7</sup>), or withdraw from the united territorial community (paragraph 7 of Section V “Final and transitional provisions” of Law № 280/97-VR); early termination of the authority of the village, settlement, city, district town council (paragraph 2 of Article 78 of Law № 280/97-VR), and village, settlement, city mayor (paragraph 3 of Article 79 of Law № 280/97-VR) formation (not formation) of district town councils (paragraph three of item 2 of Section V “Final and transitional provisions” of Law № 280/97-VR), etc.

In addition, according to part one of article 143 of the Constitution of Ukraine, the territorial communities of a village, settlement, or city directly or through the local self-government bodies created by them ensure the holding of local referendums and the implementation of their results. That is why in the text of the Law of Ukraine № 280/97-VR, in compliance with the mentioned constitutional norm, the legislator has entrusted the local self-government bodies with several powers to ensure the conduction and realization of the results of local referendums. Particularly, it refers to points 18 and 19 of part one of article 26, according to which the village, settlement, and city council make the decision about conducting of local referendum and organization of referendums; point 11 of point four of article 42, according to which the village, settlement, city council ensures execution of decisions of the local referendum; point 8 of point three of article 50, according to which the secretary of the village, settlement, city council organizes in accordance with the legislation implementation of measures connected with a referendum. according to which the chairman of the district, regional or city council organizes, in accordance with the legislation, the holding of referendums<sup>8</sup>.

However, according to Article 92(1)(20) of the Constitution of Ukraine, the organization and procedure for elections and referenda are determined exclusively by the laws of Ukraine. Apart from Articles 69–74 of the Constitution of Ukraine, which also regulate relations regarding the organization and holding of local referenda, these public relations should be

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<sup>6</sup> Про місцеве самоврядування в Україні : Закон України від 21.05.1997 р. № 280/97-ВР. URL: <https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80#Text>.

<sup>7</sup> Про добровільне об'єднання територіальних громад : Закон України від 05.02.2015 р. № 157-VIII. URL: <https://zakon.rada.gov.ua/laws/show/157-19#Text>.

<sup>8</sup> Про місцеве самоврядування в Україні : Закону України від 21.05.1997 р. № 280/97-ВР. URL: <https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80#Text>.

regulated only by a special law. It is for this reason that in paragraph 7 of point 3 of the motivation part of its decision of 16 April 2008 № 6-RP/2008 the Constitutional Court of Ukraine states “the organization and procedure for holding referendums shall be determined exclusively by the laws of Ukraine”<sup>9</sup>.

On May 19, 2021, the Verkhovna Rada of Ukraine registered another draft law “On Local Referendum” (reg. № 5512) (hereinafter – the draft law № 5512)<sup>10</sup>, and on October 30, 2021, the Chairman of the Verkhovna Rada of Ukraine Ruslan Stefanchuk sent it to the European Commission for Democracy through Law of the Council of Europe (hereinafter – the Venice Commission) to get an objective expert opinion on the compliance of this draft legislative act with European standards and values. On February 10, 2022, the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights distributed an “Urgent General Opinion on the Draft Law of Ukraine on Local Referendum, according to Article 14a of the Venice Commission Regulations”<sup>11</sup>.

Under these conditions, it is extremely important to study the content of this draft law and propose possible ways of its finalization based on the European standards of organization and holding of local referendums to form an effective legal mechanism of exercising the right of the territorial society to independently decide the issues of local importance within the framework of the Constitution and laws of Ukraine.

Under these conditions, it is extremely important to study the content of the draft law and propose possible ways of its finalization, based on the European standards of organization and holding of local referendums, to form an effective legal mechanism of realization of the right of the territorial society to independently decide questions of local significance within the framework of the Constitution and laws of Ukraine.

Under these conditions, it is extremely important to study the content of this draft law and to suggest possible ways of its further improvement, based on the European standards for the organization and holding of local referendums, to form an effective legal mechanism for the implementation of the right of the territorial community to independently decide on issues of

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<sup>9</sup> Рішення Конституційного Суду України від 16.04.2008 р. № 6-рп/2008. URL: <https://zakon.rada.gov.ua/laws/show/v006p710-08#Text>.

<sup>10</sup> Про місцевий референдум: проєкт Закону України від 19.05.2021 р. (реєстр. № 5512). URL: <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=71942&pf35401=547636>.

<sup>11</sup> Urgent joint opinion European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights on the Draft Law On local referendum, issued pursuant to Article 14a of the Venice Commission’s Rules of Procedure. URL: <https://www.osce.org/files/f/documents/3/9/512098.pdf>.

local significance within the framework of the Constitution and laws of Ukraine.

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Indeed, as rightly pointed out in paragraphs 11 and 23 of Opinion № 1066/2021 (OSCE/ODIHR Opinion № ELE – UKR/438/2022) of 10 February 2022, any successful changes to electoral legislation, in particular concerning referenda, must be based on at least three basic elements 1) clear and comprehensive legislation that meets international obligations, standards, and prior recommendations; 2) the adoption of legislation based on broad consensus after numerous public consultations with all stakeholders; and 3) a political commitment to fully implement such legislation in good faith. An open and transparent process of consultation and preparation of such amendments increases confidence and trust in the adopted legislation and state institutions<sup>12</sup>.

### **1. The local referendum is an important tool for municipality-level democracy**

According to Article 1 of the Constitution of Ukraine, our state has been proclaimed not only a sovereign, independent, social, and legal, but also a democratic country. That is why the Ukrainian people have been declared the bearer of sovereignty and the sole source of power in Ukraine, they can exercise their power both directly and through state and local government bodies (in accordance with Article 5 of the Fundamental Law of Ukraine). As was rightly stressed by the Constitutional Court of Ukraine in paragraph 3 of subparagraph 4.1 of paragraph 4 of its decision of 5 October 2005

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<sup>12</sup> Urgent joint opinion European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights on the Draft Law On local referendum, issued pursuant to Article 14a of the Venice Commission’s Rules of Procedure. URL: <https://www.osce.org/files/f/documents/3/9/512098.pdf>.

№ 6-RP/2005<sup>13</sup>, the prescription “the bearer of sovereignty... is the people” enshrines the principle of popular sovereignty, according to which the power of the Ukrainian people is primary, unified and inalienable, and the bodies of state power and local self-government exercise power derived from the people in Ukraine.

Consequently, the Ukrainian people and the territorial community as collective communities are declared by the Constitution of Ukraine to be holders of power, which they may exercise not only indirectly through the activities of state and local authorities, but also directly. Therefore, “a referendum is one of the ways to exercise power through voting”, as rightly stressed in paragraph 3 of section 3 of the Decision of the Constitutional Court of Ukraine of 16 April 2008 № 6-RP/2008<sup>14</sup>.

The local referendum is also mentioned in the European Charter of Local Self-Government of 15 October 1985, ratified by the Law of Ukraine of 15 July 1997 № 452/97-VR<sup>15</sup>. The text of its preamble alone repeatedly notes the utmost importance of embodying democratic values and principles in the activities of local government. In particular, it affirms that local government is one of the main pillars of any democratic regime; the right of citizens to participate in the management of public affairs is a democratic principle shared by all Council of Europe member states; this right can be exercised more specifically at the local level; the existence of a local government with real powers can ensure effective and close to the citizen governance; from this follows the need for local governments to have democratically established decision-making bodies and wide autonomy over their powers, the ways and means of exercising those powers, and the resources needed to carry them out.

According to Article 3 of the Charter, local self-government means the right and the ability of local authorities to regulate and manage, within the framework of the law, a substantial share of public affairs, under their own responsibility, in the interests of the local population, exercised by councils or assemblies composed of members elected by free secret direct equal and universal suffrage, but does not exclude the use of a referendum, or any other form of direct citizen participation in local matters, if the law so permits. The Charter specifies the number of cases in which a local referendum must be

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<sup>13</sup> Рішення Конституційного Суду України від 05.10.2005 р. № 6-рп/2005. URL: <https://zakon.rada.gov.ua/laws/show/v006p710-05#Text>.

<sup>14</sup> Рішення Конституційного Суду України від 16.04.2008 р. № 6-рп/2008. URL: <https://zakon.rada.gov.ua/laws/show/v006p710-08#Text>.

<sup>15</sup> Європейська хартія місцевого самоврядування від 15.10.1985 р. URL: [https://zakon.rada.gov.ua/laws/show/994\\_036#Text](https://zakon.rada.gov.ua/laws/show/994_036#Text).

held when the boundaries of territories in which local self-government is exercised are changed<sup>16</sup>.

In the Council of Europe, Recommendation № R (96) 2 of the Committee of Ministers “On referendums and citizens’ initiatives at a local level”, dated 15 February 1996, it is stated that a local referendum is a means, by which a decision of a local representative body is presented to the local community, at the initiative of the body or the citizens themselves<sup>17</sup>. In this Case, it is noted that the right of citizens to participate in important decision-making is one of the democratic principles common to all member states of the Council of Europe.

According to Article 1 of Law № 280/97-VR, a local referendum is a form of decision-making by the territorial community on issues within the competence of local self-government through direct voting<sup>18</sup>. That is why the definition is embodied in Article 1 of the draft law № 5512: “A local referendum is a form of independent decision-making by the territorial community on issues of local importance through direct voting”<sup>19</sup>.

Having analyzed scholarly writings that have investigated the concept of a local referendum, we found that domestic scholars, when formulating their own definitions, have mainly focused on the following: 1) who participates in a local referendum; 2) who decides on its appointment; 3) what issues can be the subject of a local referendum; 4) whether any public authorities or their officials need to approve the results of a local referendum, etc. Most of the important aspects of the concept of local referendum identified by scholars are not reflected in the current or prospective legislation. Therefore, we propose our own author’s notion of a local referendum, which we propose to embody in the text of Article 1 of draft law № 5512: “A local referendum is a form of direct exercise of local democracy, which provides for members of a municipality who are entitled to vote, by secret ballot, to adopt decisions on issues related to the powers of local government, the results of which have supreme legal force in respect of the acts of local government and their officials and are binding on the territory of the respective municipality”.

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<sup>16</sup> Європейська хартія місцевого самоврядування від 15.10.1985 р. URL: [https://zakon.rada.gov.ua/laws/show/994\\_036#Text](https://zakon.rada.gov.ua/laws/show/994_036#Text).

<sup>17</sup> Recommendation № r (96) 2 of the Committee of Ministers to Member States On referendums and popular initiatives at local level. URL: [https://localgovernment.gov.mt/en/DLG/Legislation/Documents/Legislation/R\(96\)2.pdf](https://localgovernment.gov.mt/en/DLG/Legislation/Documents/Legislation/R(96)2.pdf).

<sup>18</sup> Про місцеве самоврядування в Україні : Закону України від 21.05.1997 р. № 280/97-ВР. URL: <https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80#Text>.

<sup>19</sup> Про місцевий референдум : проект Закону України від 19.05.2021 р. (реєстр. № 5512). URL: <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=71942&pf35401=547636>.

## **2. The range of persons who should be entitled to vote in a local referendum**

In our opinion, the subject of decision-making in a local referendum should be the totality of the members of the municipality entitled to vote. Such wording would meet the requirements of the Constitution of Ukraine. After all, citizens of Ukraine who have reached the age of eighteen on the day of the election or referendum have the right to vote, but citizens who have been declared incompetent by a court (Article 70 of the Ukrainian Constitution) do not have the right to vote. However, this provision contradicts the UN Convention on the Rights of Persons with Disabilities (UN CRPD), which Ukraine ratified on 16 December 2009 by Law of Ukraine № 1767-VI “On Ratification of the Convention on the Rights of Persons with Disabilities and its Optional Protocol”. After all, persons with disabilities, in accordance with Article 1 of this Convention, include persons with persistent physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

An individual may be recognized by a court as legally incapable if, due to a chronic, persistent mental illness, they are unable to recognize the meaning of their actions and/or manage them (Article 39(1) of the Civil Code of Ukraine). Thus, persons with disabilities also include incapacitated persons.

The Convention on the Rights of Persons with Disabilities (under Article 1) is adopted to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. Article 4 therefore also notes that States parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination based on disability.

The Venice Commission and the OSCE Office for Democratic Institutions and Human Rights in paragraph 65 of their Opinion on the Draft Law of Ukraine on Local Referendum also note the importance of granting voting rights to all categories of persons with disabilities<sup>20</sup>.

However, to grant such part of the disabled with the status of incapacitated person the right to vote in general and the right to vote in a local referendum in particular, the Constitution of Ukraine must be amended. If the bill in question were to grant incapacitated persons the right to vote, such a provision would rightly be deemed unconstitutional.

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<sup>20</sup> Urgent joint opinion European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights on the Draft Law On local referendum, issued pursuant to Article 14a of the Venice Commission’s Rules of Procedure. URL: <https://www.osce.org/files/f/documents/3/9/512098.pdf>.



Therefore, we propose that the text of the draft law on amending the Constitution of Ukraine (on decentralization of power) should also include amendments to Article 70 of the Constitution of Ukraine to remove part two of Article 70 of the Constitution as contradicting the principles of the constitutional order embodied in Articles 1, 3, 5, 8, 9 of the Constitution of Ukraine as well as Articles 21, 24, 38 and 140.

Several Council of Europe instruments notes the desirability of widening the circle of persons entitled to vote in a local referendum. In particular, the Parliamentary Assembly of the Council of Europe Recommendation 1704 (2005) 1 “Referendums: Towards Good Practice in Europe”, on the one hand, recommends that referenda should be used as a means to strengthen the democratic legitimacy of political decisions, enhance the accountability of representative bodies, make decision-making processes more transparent and encourage direct participation of the electorate in the political process, while on the other hand, calls for the extension of the circle of persons who should be entitled to participate in accordance with the provisions of the 1992 Convention on the Participation of Foreigners in Public Life at Local Level<sup>21</sup>.

Paragraph 1.1 (b) of the Revised Guidelines on the holding of referendums of the European Commission for Democracy through Law (Venice Commission), approved by the Democratic Electoral Council at its 69th online meeting (7 October 2020) and adopted by the Venice Commission at its 124th online plenary meeting (8 October 2020), notes that it would be appropriate for foreigners to be able to vote in local referenda after a certain period of residence in a particular country<sup>22</sup>.

Recently on 18 May 2021, the Congress of Local and Regional Authorities of the Council of Europe approved Resolution 472 (2021) and Recommendation 459 (2021) on “Conducting referenda at a local level”. Subparagraph 3(c) of Recommendation 459 (2021) states: “Similarly to the provisions on participation in local elections contained in the Convention on the Participation of Foreigners in Public Life at the Local Level, foreigners legally residing in the country for five years should be entitled to vote in local referendums”<sup>23</sup>. Point 6 of the Explanatory Note to Resolution 472 (2021) it

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<sup>21</sup> Референдуми: на шляху до вироблення належної практики в Європі : Рекомендація Парламентської Асамблеї Ради Європи 1704 (2005) 1. URL: [http://www.coe.int/T/t/Parliamentary\\_Assembly/Russian\\_documents/2005/%5BApr2005%5D/Rec1704\\_rus.asp](http://www.coe.int/T/t/Parliamentary_Assembly/Russian_documents/2005/%5BApr2005%5D/Rec1704_rus.asp).

<sup>22</sup> Revised guidelines on the holding of referendums. Approved by the Council of Democratic Elections at its 69-th online meeting (7 October 2020) and adopted by the Venice Commission at its 124-th online Plenary Session (8–9 October 2020). URL: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)031-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)031-e).

<sup>23</sup> Проведення референдумів на місцевому рівні : Резолюція 472 (2021) та Рекомендація 459 (2021) Конгресу місцевих та регіональних влад Ради Європи від

is stated: the inclusion of non-citizens in local referendums will facilitate their effective integration into the territorial community and point 15 of the Explanatory Note details the content of this rule: according to the Venice Commission, the requirement of community duration as a precondition for eligibility to participate in local referenda should not be less than 6 months and can be introduced only in local (and regional) referenda.

The European Court of Human Rights (hereinafter referred to as the ECHR) follows a similar approach. Its recent Decision of 21 October 2021 in the Case of Seligenenko and Others v. Ukraine<sup>24</sup> embodies a similar legal position. However, the ECHR granted the claims of four female citizens of Ukraine – three complainants, whose place of residence is registered in the Autonomous Republic of Crimea and one – in the city of Donetsk. The complainants appealed to the ECHR because of violations of Article 1 of Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which no one can be discriminated against by any public authority on any ground such as sex, race, color, language, religion, political or another opinion, national or social origin, membership of a national minority, property, birth, or another status.

According to the complainants, they were discriminated against because of their place of residence registration. After all, they had lived in Kyiv for more than a year but had not registered their place of residence. They were registered in the Autonomous Republic of Crimea and Donetsk city, respectively. They had the status of internally displaced persons in Kyiv. Therefore, they were not allowed to take part in the local elections in 2015. The court of appeal upheld the decision of the first-instance courts, rejecting their claims. In its judgment, the ECHR found a violation of Article 1 of Protocol 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR noted: although the applicants had lived in Kyiv for about a year without registering their place of residence, they had paid local taxes and used local services, so they were interested in the results of the local elections. As a result, the ECHR ruled that Ukraine should pay the applicants 4,500 euros each for moral damages within three months after the ruling came into force.

Summarizing the above, we propose amending Article 6 of the draft law to allow not only citizens of Ukraine who have registered their place of residence in the respective municipality, but also those who have registered their residence there and have been paying local taxes for at least six months

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18.05.2021 p. URL: <https://rm.coe.int/holding-referendums-at-local-level-monitoring-committee-rapporteur-vla/1680a287be>.

<sup>24</sup> The Case of Selygenenko and Others v. Ukraine (application no. 24919/16 and 28658/16). URL: <http://hudoc.echr.coe.int/eng/?i=001-212439>.

to participate in a local referendum. Such rule would comply with the requirements of Articles 70 and 140 of the Constitution of Ukraine and the international acts and the legal position of the ECHR. After all, under Article 17 of Law № 3477-IV of 23 February 2006 “On Enforcement of Judgments and Application of the Practice of the European Court of Human Rights”, the courts apply the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the ECHR as a source of law in their judicial practice.

### **3. Consequences of declaring the Law of Ukraine on All-Ukrainian Referendum unconstitutional**

Under Article 92(1)(20) of the Constitution of Ukraine, the organization and procedure for elections and referendums shall be determined exclusively by the laws of Ukraine. Article 2 of the draft law states: “The organization and procedure for local referendums shall be regulated by the Constitution of Ukraine, the Law of Ukraine on Local Self-Government in Ukraine, the Law on the Central Election Commission, the Law on the State Voter Register, and other legislative acts of Ukraine”.

According to the decision of the Constitutional Court of Ukraine dated 9 July 1998, № 12-RP/98, the term “legislation” should be understood to mean “the laws of Ukraine, the international treaties of Ukraine whose consent to be bound has been granted by the Supreme Council of Ukraine and also decrees of the Supreme Council of Ukraine, decrees of the President of Ukraine and decrees and decisions of the Cabinet of Ministers of Ukraine adopted within their authority and in accordance with the Constitution and laws of Ukraine” (paragraph 1 of the Resolution № 12-RP/98)<sup>25</sup>.

Therefore, considering the requirement of Article 92 of the Constitution of Ukraine, the phrase “The organization and procedure for holding a local referendum shall be regulated by... other legislative acts of Ukraine” in Article 2 of the draft Law should be replaced by “The organization and procedure for holding a local referendum shall be regulated by... other laws of Ukraine”.

Having researched the legal regulation of relations on organization and holding of local referendums since the restoration of independence of the Ukrainian state, we found that the first and only special law aimed at regulating these relations was the Law of Ukraine “On All-Ukrainian and

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<sup>25</sup> Рішення Конституційного Суду України від 09.07.1998 р. № 12-рп/98. URL: <https://zakon.rada.gov.ua/laws/show/v012p710-98#Text>.

Local Referendums” of July 03, 1991, № 1286-XII (hereinafter – the Law № 1286-XII)<sup>26</sup>.

On November 6, 2012, the Verkhovna Rada of Ukraine adopted the new Law of Ukraine “On All-Ukrainian Referendum” № 5475-VI (hereinafter – the Law № 5475-VI), in paragraph 4 of section XIII “Final Provisions” of which it noted that from the date of its official promulgation, the Law № 1286-XII has lost its force<sup>27</sup>.

Subsequently, on 26 April 2018, the Constitutional Court of Ukraine found a violation of the procedure for consideration and adoption of Law № 5475-VI, found that its purpose was not legitimate and that its provisions did not meet the requirements of the Basic Law of Ukraine. That is why the sole authority of the constitutional jurisdiction of Ukraine, by its Decision № 4-R/2018, declared it unconstitutional and null and void as of the date of adoption of that decision (paragraph 2 of the operative part of Decision № 4-R/2018)<sup>28</sup>.

Since the Law of Ukraine № 5475-VI expired due to the declaration of its unconstitutionality in its entirety, the provision of paragraph 4 section XIII “Final Provisions” according to which the Law of Ukraine № 1286-XII expired on the day of its official promulgation should not be valid either. That is, the Law of Ukraine № 5475-VI should have renewed the force of the Law of Ukraine № 1286-XII. That is why one of the people’s deputies of Ukraine of the eighth convocation, A. O. Kornatsky sent his appeal dated 28 April 2018 № 21/04–18 to the Central Election Commission, demanding that the obstacles to the registration of one of the initiatives groups for the local referendum be removed. After all, in his opinion, the recognition of the Law of Ukraine “On All-Ukrainian Referendum” as unconstitutional in its entirety resumed the force of the Law of Ukraine “On All-Ukrainian and Local Referendums” from 26 April 2018.

Given the lack of legal certainty regarding the recognition of the Law of Ukraine “On All-Ukrainian Referendum” as unconstitutional and the consequent loss of its effect, the Central Election Commission, by letter № 21-18-860 dated 22 May 2018, requested clarification from the Verkhovna Rada Committee on Legal Policy and Justice regarding the legislative regulation of the organization and procedure for local referendums in Ukraine. The appeal was addressed to the Committee of the Verkhovna Rada of Ukraine and not to the Constitutional Court of Ukraine precisely because after

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<sup>26</sup> Про всеукраїнський та місцеві референдуми : Закон України від 03.07.1991 р. № 1286-XII. URL: <https://zakon.rada.gov.ua/laws/show/1286-12#Text>.

<sup>27</sup> Про всеукраїнський референдум : Закон України від 06.11.2012 р. № 5475-VI. URL: <https://zakon.rada.gov.ua/laws/show/5475-17#Text>.

<sup>28</sup> Рішення Конституційного Суду України від 26.04.2018 р. № 4-р/2018. URL: <https://zakon.rada.gov.ua/laws/show/v004p710-18#Text>.

the completion of the so-called “judicial reform of 2016”, the only body of constitutional jurisdiction in Ukraine since 1 September 2016 has lost its powers to perform official interpretation of laws of Ukraine due to the change of paragraph 2 of Article 150 of the Constitution.

As the aforementioned Verkhovna Rada Committee did not respond to the appeal, the CEC adopted Resolution № 122 of 09 August 2018 “On Addressing the Verkhovna Rada Committee on Legal Policy and Justice”, which was amended on 12 October 2018 to request “clarification of the current legislative regulation of the organization and procedure for holding all-Ukrainian and local referenda in Ukraine, the possibility, given the provisions of part two of Article 6 of the Law of Ukraine “On All-Ukrainian as well as, if necessary, to introduce relevant amendments to the legislative acts in order to eliminate legal collisions and inconsistencies”<sup>29</sup>.

To date, however, the Central Election Commission’s appeal remains unanswered by the Verkhovna Rada Committee on Legal Policy and Justice.

On January 26, 2021, the Verkhovna Rada of Ukraine adopted the new Law of Ukraine “On All-Ukrainian Referendum” № 1135-IX (hereinafter – the Law № 1135-IX), which defines the legal basis for the expression of the popular will through an all-Ukrainian referendum, its organization, and procedure<sup>30</sup>. Since this Law of Ukraine does not contain any reservations about the Law of Ukraine “On All-Ukrainian and Local Referendums” of July 03, 1991, № 1286-XII, then, in our opinion, the Law of Ukraine № 1286-XII should be applied in the part that does not contradict the Law № 1135-IX.

#### **4. Analysis of local referendum practices in Ukraine**

Despite the imperfection of the domestic legal framework aimed at regulating the relations of organizations and holding local referendums, during the period from 1991 to mid-2012, 165 local referendums took place in Ukraine<sup>31</sup>.

The highest number of them was initiated in 2004–28, while the lowest number was initiated in 1992, 2011, and 2012 – only 1 local referendum per year. In terms of territorial dimension, the highest number of local referendums was held in the Rivne region (25 referendums), the Zakarpattia region

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<sup>29</sup> Про звернення до Комітету Верховної Ради України з питань правової політики та правосуддя : постанова Центральної виборчої комісії від 9 серпня 2018 року № 122. URL: <http://consultant.parus.ua/?doc=0BA70A3359>.

<sup>30</sup> Про всеукраїнський референдум : Закон України від 26.01.2021 р. № 1135-IX. URL: <https://zakon.rada.gov.ua/laws/show/1135-20#Text>.

<sup>31</sup> Проблеми проведення місцевих референдумів в Україні. Аналіз законопроекту «Про місцевий референдум в Україні» № 7082 та пропозиції громадських експертів. *Часопис Парламент*. 2012. № 1. С.5.

(23 referendums), and the Ivano-Frankivsk region (22 referendums). That is, this institution was more actively applied in the western regions of Ukraine. However, not a single local referendum was held in 6 regions – Dnipropetrovsk, Zaporizhzhia, Lugansk, Poltava, Kherson, and Cherkasy<sup>32</sup>.

Regarding the subject matter of local referenda, the largest proportion of them concerning issues of administrative-territorial structure (about 33 %), changes in the names of settlements (over 25 %), as well as institutional issues, mainly the creation of new local councils and trust in local government bodies and officials (a total of about 20 %). The remaining local referenda (about 22 %) were held to address environmental, land, and beautification issues<sup>33</sup>.

Specifically, simultaneously with the All-Union referendum on the preservation of the USSR, on 17 March 1991, a Galician referendum on Ukrainian independence was held in the Ivano-Frankivsk, Lviv, and Ternopil regions, as well as on 1 December 1991 a Zakarpattia referendum on the autonomy of the territory of Transcarpathia as part of independent Ukraine.

The analysis of the practice of local referenda revealed another interesting feature: in the year of national elections, as well as during political-legal crises, the number of local referenda increased. In addition, the local referendum was most often held on the territory of rural territorial communities (72.8 %), while in urban communities only 17.9 % and at the level of districts and regions – 4.6 %<sup>34</sup>.

At the same time, the imperfection of domestic legislation has led to several problems during the organization and holding of local referendums in Ukraine. The practice of local referendums on subjects outside the competence of local governments has become quite widespread. They were held mainly to put pressure on the higher state authorities. For example, in 1994, in the Donetsk region, a local referendum was held on granting state status to the Russian language, on the form of Ukraine's state structure, and on membership in interstate associations – that is, on those issues regulated by the Constitution and laws of Ukraine. A city referendum in Sevastopol in 2005 included the question of electing the mayor. In Kharkiv in 2002, a local referendum was held to give the city national status and the status of the Russian language.

Obstruction of referendums. The greatest impediment to local referendums, as evidenced by domestic experience, has been the granting of final decision-making powers to local self-governments. This gave them

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<sup>32</sup> *Місцеві референдуми в Україні: теоретичні та нормотворчі аспекти* : матеріали «круглого столу», 23 липня 2009 р., м. Київ / В. Л. Федоренко, І. В. Ляшко, В. Д. Базилевич та ін. К. СПД Москаленко О. М., 2011. С. 37.

<sup>33</sup> *Ibid.* С. 32.

<sup>34</sup> *Посібник з питань партисипативної демократії (демократії участі) на місцевому рівні / під ред. В. В. Толкованова. Київ : Крамар, 2011. С. 185.*

leverage for administrative interference in the process of popular expression of will, including in cases where local authorities were not interested in certain results of the local referendum.

At the end of 2006, three meetings of citizens gathered in Kyiv to form initiative groups to prepare a local referendum on the resignation of the Kyiv mayor. After checking the documents submitted by the initiative group for compliance with the requirements of the Law of Ukraine “On All-Ukrainian and Local Referendums”, conducted by the Legal Support Department of the Kyiv City Council Secretariat, formal disagreements were found. However, the justification for the refusal to organize and hold the local referendum in the capital was that 42 people did not sign a commitment to comply with the law of Ukraine on the local referendum, 23 people were found to have some mistakes in their personal data. Usually, when such inaccuracies were discovered by the CEC, it gave time to correct them or crossed out specific persons. In the cited case with the initiative group for the preparation of a local referendum on the resignation of Kyiv’s mayor, the city authorities did not register the initiative group<sup>35</sup>.

Selective attitude to the declaration of referendums by local self-government bodies, and the absence of a guarantee that local referendums will be held by popular initiative. According to the findings of the experts of the Laboratory of Legislative Initiatives, most local referendums were held at the initiative of local self-government bodies, and precisely in those cases where this was required by law<sup>36</sup>. Referendums initiated by members of territorial communities (mainly regarding the expression of no confidence in the local councils or village, town, or city mayors), as a rule, were not even announced.

In exceptional cases, experts observed the disruption of the meeting at which initiative groups were to be established to hold referendums of no confidence in the local authorities. In the city of Kherson, this was done by the mass use of those carcasses that constantly disrupted and prevented the meeting of the initiative groups.

Difficulties in the process of implementation of local referendum results. Statistics show that, as of 2009, over 25 % of the decisions passed in referendums have not been implemented in six Ukrainian regions<sup>37</sup>, while in 2010, such a level of non-implementation of decisions was observed in nine

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<sup>35</sup> Проблеми проведення місцевих референдумів в Україні. Аналіз законопроекту «Про місцевий референдум в Україні» № 7082 та пропозиції громадських експертів. *Часопис Парламент*. 2012. № 1. С.10.

<sup>36</sup> *Ibid*, p.5-6.

<sup>37</sup> Місцеві референдуми в Україні: теоретичні та нормотворчі аспекти: матеріали «круглого столу», 23 липня 2009 р., м. Київ / В. Л. Федоренко, І. В. Ляшко, В. Д. Базілевич та ін. Київ : СПД Москаленко О. М., 2011. С. 32.

regions<sup>38</sup>. However, from the formal point of view, many decisions were simply in the process of implementation. After all, the legislation does not clearly stipulate the terms within which the decisions adopted in the local referendum should be implemented, which led to such massive delays (in fact, due to the disinterest of local self-government bodies).

Another common cause for non-compliance with local referendum decisions is the invalidation of their results by the courts. These are referendums that have been declared valid by electoral commissions (and hence the commissions found no irregularities in their preparation). Thus, in the Rivne region, two referendums on changing the boundaries of territorial communities were appealed in court and one – on the expression of no confidence in the local council. In the latter case, because of a lengthy judicial review of the referendum results, the work of the village council was paralyzed for more than one year<sup>39</sup>.

Sometimes the delay in implementation of the decision taken in the local referendum was caused by the imperfect procedure of approval of some acts. We are talking about the long consideration of the statutes of some territorial communities by the Ministry of Justice of Ukraine (for example, the registration of the Charter of the territorial community of Massandra township, subordinate to the Yalta City Council in the Autonomous Republic of Crimea, was delayed). However, similar obstacles appeared with the charters of those territorial communities, which were approved by the decisions of local councils, without holding referendums. It took a long time to register the Charter of the territorial community of Kyiv.

## **5. Amendments to be made to the draft Law of Ukraine on Local Referendums**

An analysis of law enforcement practice prompts us to propose several other amendments to draft Law № 5512. We propose amending Article 13 of the draft law by deleting the reference to the possibility to vote “only once and at only one polling station from a local referendum by submitting a ballot paper in the manner prescribed by this Law”. At the same time, we propose to introduce the possibility to use electronic services when voting in a local referendum. This would be consistent with Article 18 of the Electoral Code of Ukraine, according to which the Central Election Commission may decide to introduce innovative technologies, technical and software tools when

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<sup>38</sup> Посібник з питань партисипативної демократії (демократії участі) на місцевому рівні / під ред. В. В. Толкванова. Київ : Крамар, 2011. С. 11.

<sup>39</sup> Місцеві референдуми в Україні: теоретичні та нормотворчі аспекти: матеріали «круглого столу», 23 липня 2009 р., м. Київ / В. Л. Федоренко, І. В. Ляшко, В. Д. Базілевич та ін. Київ : СПД Москаленко О. М., 2011. С. 23–24.



organizing and conducting voting in the form of an experiment or a pilot project, as well as under several international acts. In particular, the Venice Commission on the 2002 Code of Good Practice in Electoral Matters recommends the use of electronic voting, but only under a few conditions: 1) the electronic voting system introduced must be secure (able to withstand attempted deliberate hacking) and reliable (able to function autonomously, independent of any hardware and software failures); 2) the electronic voting system should be transparent and ready for continuous verification of its functioning; 3) voters should be able to correct an error that may have occurred during their voting without compromising the secrecy of the vote; 4) it should be possible to print out the ballots submitted to facilitate recounts (part IV of paragraph 3.2)<sup>40</sup>.

We also propose to remove part two of Article 19 of the draft law, which makes it impossible to hold elections and a local referendum at the same time and initiate amendments to Articles 15 and 16 of the draft law. In our opinion, the subject for appointing a local referendum should not be a territorial commission for a local referendum but a village, settlement, city mayor, or chairman of a district, regional, or city district council. After all, it is easier to induce a single public authority to comply with the law, even based on a court decision, than a collegial one.

Draft Law № 5512 does not allow local referenda to be held at the level of such administrative-territorial units of Ukraine as districts, regions, and the Autonomous Republic of Crimea. Although there is no direct prohibition in the text, it is implicitly reflected in several articles of the draft Law. According to paragraph 4 of part three of Article 3 of the Draft Law, issues referred by the Constitution of Ukraine and the laws of Ukraine to other officials and public authorities cannot be the subject of a local referendum.

The note to this article states that “other officials and public authorities in this article mean state bodies, public authorities, authorities of the Autonomous Republic of Crimea, regional and district councils, other bodies, as well as officials who form and implement public policy, implement, protect public interests, ensure and/or protect human rights and other public values, are funded from the state budget of Ukraine, the budget of the Autonomous Republic of Crimea, regional and district budgets”. Or in Article 23 of the draft law, according to which “the borders of a single local referendum district coincide with the borders of the territory of the community in which the local referendum is held”, or in Article 35 of the draft law, which states that the permanent rural, village, city territorial election commissions acquire the status of territorial commissions for a local referendum.

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<sup>40</sup> Кодекс належної практики у виборчих справах. URL: [https://eos.cartercenter.org/uploads/document\\_file/path/279/CoE\\_Venice\\_Commission\\_Code\\_of\\_Good\\_Practice\\_UK.pdf](https://eos.cartercenter.org/uploads/document_file/path/279/CoE_Venice_Commission_Code_of_Good_Practice_UK.pdf).

In our opinion, it is advisable to allow local referendums at least at the district and oblast level. After all, district, and regional councils, according to Article 1 of the Law of Ukraine “On Local Self-Government in Ukraine”, have the status of local self-government bodies representing the common interests of territorial communities of villages, settlements, and cities. On the other hand, the legislator is not always consistent in his prohibition of local referenda at the district-city level. Article 26 of the draft law specifies only the village, settlement, city council, village, settlement, and city mayor among the subjects of initiation and appointment of local referenda. Part three of Article 23 of the draft law states: “In a single local referendum district in a city with a district division, there are territorial local referendum districts whose boundaries coincide with the boundaries of districts in the city”; parts 2 and 3 of Article 35 provide for the formation of “a territorial commission for a local referendum, the powers of which are limited to the district of the city with district division – within the limits of the territorial district”; “the territorial election commissions in the cities with district division have the status of territorial commissions from the local referendum and exercise the powers provided for in this Law”; in parts two and four of Article 46, etc.

In addition, current legislation allows for local referenda to be held at the district level in a city. In particular, according to the third paragraph of point 2 of section V “Final and transitional provisions” of the Law № 280/97-VR, decisions on holding referenda of territorial communities of cities with district division regarding creation (not creation) of district councils in cities are made upon demand of not less than one tenth of members of such communities or half of the total number of deputies of respective city councils; part four of article 16 of the above-mentioned law of Ukraine notes that decisions on granting rights of city councils to manage property and finances shall be made on request of not less than one-tenth of members of such communities; the second part of Article 78 of the same Law of Ukraine states that the powers of a city district council can be terminated prematurely by a decision of a local referendum, which can be initiated by at least one-tenth of the citizens residing in the respective territory and entitled to vote (part three of Article 78 of Law № 280/97-VR).

Therefore, the legislator should not deprive residents of districts in cities of their right to independently decide issues of local importance by direct vote. But if the legislator decides to allow local referendums at the district-in-city level, then Article 26 of the draft law should be amended accordingly, and the district city council and the chairman of the district-in-city council should be added to the subjects of initiation and appointment of a local referendum respectively.

According to Article 140 of the Constitution of Ukraine, local self-government is the right of a territorial community – residents of a village or a voluntary association of residents of several villages, settlements, and towns into a rural community – to independently decide issues of local importance within the limits of the Constitution and laws of Ukraine; local self-government is implemented by a territorial community in the manner prescribed by law both directly and through local self-government bodies: village, settlement and town councils and their executive bodies. According to the second part of Article 7 of the Law of Ukraine “On Local Self-Government in Ukraine”, the subject of a local referendum may be any issue attributed by the Constitution of Ukraine, these, and other laws to local government.

Article 3 of draft law № 5512 states: “The subject of a local referendum may be: 1) approval of the charter of the territorial community or amendments to it; 2) approval of the development program of the territorial community or amendments to it; 3) early termination of powers of the village, settlement, city council; 4) early termination of powers of the village, settlement, city mayor; 5) invalidity of the regulatory legal act of the local self-government or certain provisions thereof; 6) other issues of local importance referred by the Constitution and laws of Ukraine to the jurisdiction of the territorial community, its bodies and officials”. If indeed, the issues falling within the competence of the local self-government bodies or their officials can be the subject of a local referendum (this is proved by the provision of Point 6 of this Article and Article 15 of the draft law, according to which “a local referendum on the solution of any issue of local importance”) shall be appointed by the territorial commission of the local referendum, then points 1–6 of Point 1 of Article 3 of the draft law should be removed, as there is no need to enumerate them. Instead, it should be specified that “the subject of a local referendum may be any issue, referred by the Constitution of Ukraine, the laws of Ukraine to the authority of local self-government bodies and their officials”.

“Approval of a territorial community development program or amendments there to” is consistently mentioned in the text of Draft Law № 5512 as one of the possible subjects of a local referendum (e.g. in Paragraph 2 of Part One of Article 3, Paragraph 2 of Part One of Article 17, Part Five of Article 26, Paragraph 1 of Part One of Article 84, Part One of Article 109, etc.). None of the laws of Ukraine provide local self-government bodies with the authority to elaborate and approve specifically a “territorial community development program”. Law № 280/97-VR states that the executive committee of the village, settlement, and city council prepares (item 1 of part one of article 27), and the respective council approves “the program of social, economic and cultural development of respective administrative-territorial units, targeted programs on other local self-government issues”

(item 22 of part one of article 26 of the mentioned Law № 280/97-VR). Therefore, the reference to the “territorial community development program” in the text of the draft Law should be deleted and the issues that may be the subject of a local referendum should not be listed.

According to the second part of Article 3 of draft law № 5512, “issues cannot be the subject of a local referendum: 1) which are the subject of an all-Ukrainian referendum; 2) which contradict the provisions of the Constitution and the laws of Ukraine; 3) which are aimed at the liquidation of the independence of Ukraine, the violation of state sovereignty and territorial integrity of Ukraine, the threat to the national security of Ukraine, the incitement of interethnic, racial or religious discord; 4) which are referred by the Constitution of Ukraine and the laws of Ukraine to officials and public bodies other than those envisaged in paragraph 5 of point one of this Article; 6) concerning decision-making on approval, change of local budgets, tariffs for housing and communal services, loss of validity of such decisions”.

According to paragraph 24 of the first part of Article 26 of Law № 280/97-VR, the village, settlement, or city council has the authority to establish local taxes and levies in accordance with the Tax Code of Ukraine. According to Article 74 of the Constitution of Ukraine, no referendum is allowed regarding bills on taxes, budget, and amnesty. Therefore, if one aims to list all the issues that cannot be the subject of a local referendum, then one should add the prohibition to set rates of local taxes and fees as well. However, all the cases specified in paragraphs 1–5 of part two of article 3 of the Draft Law (including local taxes and fees) are covered by the following wording: “if they contradict provisions of the Constitution and laws of Ukraine”. Therefore, all of them could be removed and replaced with the phrase just mentioned.

## CONCLUSIONS

Having studied the national legislation and international legal acts aimed at regulating relations of organizations and holding local referendums, we can state the urgent need to adopt a new Law of Ukraine aimed at regulating the above-mentioned relations. After all, it can eliminate legal uncertainty caused by the loss of Law № 1286-XII (in accordance with paragraph 4 of section XIII “Final provisions” of Law № 5475-VI) and the subsequent decision of the Constitutional Court of Ukraine of April 26, 2018, № 4-р/2018, which declared Law No. 5475-VI unconstitutional in full (paragraph 1 of the resolute section of the Decision of the Constitutional Court of Ukraine)<sup>41</sup>.

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<sup>41</sup> Рішення Конституційного Суду України від 26.04.2018 р. № 4-р/2018. URL: <https://zakon.rada.gov.ua/laws/show/v004p710-18#Text>.

In general, we positively assess the content of the draft law “On Local Referendums” (reg. № 5512), submitted by one hundred- and eleven-people’s deputies of Ukraine to the Verkhovna Rada of Ukraine on 19 May 2021. However, to strengthen its content by bringing it in line with acts of supreme legal force, we propose to make several amendments to it, the text and rationale of which have been implemented above.

## **SUMMARY**

The relevance of the chosen topic of the study stems from several reasons. First, a local referendum is one of the effective tools through which a territorial community can exercise its power independently. Secondly, since 2018 in Ukraine the legal uncertainty that arose after the Law of Ukraine “On All-Ukrainian and Local Referendums” became null and void and the Law that terminated the law was declared unconstitutional. Thirdly, a new Draft Law on Local Referendums (№ 5512) was recently submitted to the Verkhovna Rada of Ukraine. Its text was sent to the Venice Commission on October 30, 2021, and its Immediate Joint Opinion on the bill was received on February 10, 2022. The study analyzed compliance of the content of the draft law “On Local Referendums” with the Constitution of Ukraine and the European standards embodied in the acts of international organizations, of which our state is a member. Overall, having positively assessed the content of the draft law, a few proposals aimed at improving the text of the draft law have been formulated.

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