

## REPRESENTATIVE BODIES OF LOCAL SELF-GOVERNMENT IN UKRAINE: NOMENCLATURE AND CONSTITUTIONAL REGULATION

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### Summary

Nowadays a lot of attention in Ukraine is given to the activity of the local self-government bodies. The aim of the article is to give the list of the representative bodies of local self-government (municipal bodies) in Ukraine and to propose how the relevant constitutional regulation might be improved. The author uses legal synthesis, legal analysis, deductive, inductive, comparative (historical perspectives – so called ‘vertical’ comparison) and hermeneutical methods; the article researches the issue based on the antropocentric and axiological methodological approaches

The author analyses Ukrainian constitutional developments in the democracy’s regulation, then pays attention to the theoretical aspects of democracy’s classifications. The last part of this article covers the current problems of the representative bodies of local government in Ukraine: namely, their nomenclature.

The author argues that the Ukrainian self-organizes bodies of population can’t be recognized as “representative bodies” (despite the adjectives in the name of the analyzed institute of constitutional law and the analyzed group of bodies). But they probably have a public nature – because they are an element of the system of local self-government in Ukraine. The author invites municipalists to the discussion and argues the own directions of the future researches.

**Key words:** democracy, direct democracy, people's power, public power, local self-government, municipal government.

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### 1. Introduction

Nowadays a lot of attention in Ukraine is given to the activity of the local self-government bodies. These bodies are of the high importance, when it comes about quick and very often life-saving decision, – especially representative bodies of local self-government.

One of the factors, why the classification and constitutional regulations of these bodies is essential right now is the fact, that the current stage of the municipal reform in Ukraine is paused till the end of the war. Before this stage was started, a lot of authors – both researching or not the local government issues – underlined the main vectors of such a reform (one of the municipal issues’ researcher is professor N. Mishyna (*Mishyna, 2020, 2021*), one of the more wide constitutional issues researchers is Professor C. Qaracayev (*Qaracayev, 2022*).

That is why, while the municipal reform is paused, one of the most important issues is to research the changes at the basics – to reflect these changes in the current constitutional legislation, after the reform will be re-started. So far, in 2022 this wasn’t done by the Ukrainian scholars.

Research methods, used in this article, are as follows: legal synthesis, legal analysis, deductive, inductive, comparative (historical perspectives – so called ‘vertical’ comparison),

hermeneutical. The author of the article researches the issue based on the antropocentric and axiological methodological approaches.

The aim of the article is to give the list of the representative bodies of local self-government (municipal bodies) in Ukraine and to propose, how the relevant constitutional regulation might be improved.

## 2. Democracy: Ukrainian Constitutional Developments

Democracy has a long history. As W. Churchill noted in the middle of the 20th century, “many forms of government have been and will be used in this sinful world. Everyone understands that democracy is not perfect. It is rightly stated that democracy is the worst form of government except for all the others that have been tried from time to time”. J. Mill considered the best form of government to be representative government, under which the people, or in any case a significant part of them, use the supreme controlling power, which they possess in all its fullness, through periodically elected deputies.

Even before Ukraine's independence was declared, in the Declaration on the State Sovereignty of Ukraine dated July 16, 1990, the Preamble solemnly stated that the Verkhovna Rada of the Ukrainian Soviet Socialist Republic adopts this important political and legal act, “seeking to create a democratic society” (*Declaration, 1990*).

The first lines of the Resolution of the Verkhovna Rada of the Ukrainian SSR “On the Proclamation of Ukraine's Independence” were formulated as follows:

“The Verkhovna Rada of the Ukrainian Soviet Socialist Republic decrees:

To declare Ukraine an independent democratic state on August 24, 1991.» (*Independence Act 1991*).

As for the Act of Proclamation of Independence of Ukraine approved by this Resolution, the adjective “democratic” and similar words are not used in it. This is explained, firstly, by the presence in its text of a reference to the Declaration on State Sovereignty of Ukraine (*Independence Act 1991*). Secondly, by this Resolution this Act was approved referred to Ukraine as a democratic state.

After Ukraine's independence was declared, considerable attention was paid to the continuous development and strengthening of the democratic state regime. This also applies to the period before the adoption of the new Constitution of Ukraine.

The Constitution of the Ukrainian Soviet Socialist Republic of 1978 remained in force for another 5 years after the declaration of Ukraine's independence. Its name was changed, the text underwent numerous changes and additions, some of which related to issues of the democratic state regime.

Thus, in the fall of 1991, one of the articles of Section I underwent changes. It was presented in the following version:

“Article 9. The main direction of the development of the political system of society is the further development of democracy: the ever-wider participation of citizens in the management of the affairs of the state and society, the improvement of the state apparatus, the increase in the activity of public organizations, the strengthening of the legal basis of state and social life, the establishment of freedom of speech, the constant consideration of public thoughts” (*Constitution 1978*).

In the following year, 1992, the text of the Constitution 1978 was supplemented by a provision that later became effective in the Basic Law of 1996. It is about the fact that Article 68 was stated as follows: “Ukraine is an independent democratic state governed by the rule of law”

(*Constitution 1978*). It is worth reminding that Article 1 of the 1996 Constitution of Ukraine is formulated as follows: “Ukraine is a sovereign and independent, democratic, social, legal state” (*Constitution 1996*).

### 3. Theoretical Aspects of Democracy’s Classifications

Democracy is classified according to different characteristics. Depending on the method of voter participation in its implementation, it is divided into direct (direct) and representative (indirect).

Direct democracy assumes that power is exercised by the people themselves – decisions can be made at elections, referendums (most often, but there are also other forms of direct democracy). Researchers consider the imperative mandate to be one of the manifestations of direct democracy.

Representative democracy assumes that power is exercised by representative bodies that are formed by voters and whose composition is periodically renewed. Researchers put forward various proposals regarding the nomenclature (list) of these bodies, which will be discussed in further parts of the study. Experts in constitutional law consider a free mandate to be one of the manifestations of representative democracy. An interesting fact is that a free mandate is associated with representative democracy, while an imperative mandate is associated with a direct one. But scientists do not correlate other types of mandates (for example, a mixed mandate) with direct and/or representative democracy.

Having analyzed the works of ancient philosophers, famous political and legal figures of the Middle Ages and the era of bourgeois revolutions, P.V. Romanyuk summarized that “according to these studies, modern representative democracy as a developed and dynamic institution of representation and consideration of public interests reflects the views of the entire political palette of society in the process of formation of state power bodies, ... because it is the order of formation of people's representative bodies that ensures the participation of the largest number of citizens in solving the tasks facing society and the state” (*Romanyuk, 2015, 25*). One should fully agree with this generalization.

J.-J. Rousseau noted that “the concept of representatives belongs to the new era; it was inherited by us from the Feudal Rule, that unjust and senseless Rule, when the human race was in decline, and the rank of man was dishonored. In ancient Republics and even in monarchies, the people never had Representatives; this very word remained unknown” (*Rousseau, 1998, 281*). Thus, the theory of representation has its roots in ancient times, but its modern essence was formulated in the era of bourgeois revolutions.

The traditional legal literature division of democracy into direct and representative, and the subject of our research determine the importance of the analysis of doctrinal approaches to the issue of representation (people's representation).

### 4. Representatives Bodies of Local Government in Ukraine: Current Situation

Most modern researchers have no doubt that representative bodies include not only state authorities, but also local self-government bodies.

The existence of a representative mandate at the level of local self-government is evidenced by the provisions of the Constitution of Ukraine of 1996 (for example, articles 140-141), as well as the decision of the Constitutional Court of Ukraine (for example, section 2 of paragraph 3 of the motivational part of the Decision on the case of concurrent positions of people's

deputy of Ukraine and the mayor of July 6, 1999). However, the specified provisions do not contain a complete list of such bodies and persons when it comes to local self-government – the title of this Decision of the single body of constitutional jurisdiction indicates that it refers only to the city mayor (the heads of villages, townships remained outside the attention of the Constitutional Court of Ukraine). And therefore, this question needs a more thorough scientific analysis.

Does Verkhovna Rada of the Autonomous Republic of Crimea and local councils, as well as village, township, and city mayors exercise public representation?

In the legal literature, there is an opinion that no. For example, well-known Ukrainian researchers formulated that “the answer to the question of the ratio of people's representation and representative bodies of local self-government, as scientists note, lies in the scale and nature of representation. The functions of local self-government bodies are determined by the needs of the population of the administrative-territorial units where these bodies were created and function, and are focused on solving local affairs. Instead, state-wide affairs usually require political decisions, which are authorized to be made by the highest bodies of the state, in particular the parliament and the president. Therefore, it turns out that the representative bodies of local self-government do not have a direct relationship with the people's representation. The scale and nature of the mandates of local council deputies indicate local (local) representation” (*Shapoval, 2011, 45-47*).

One should agree with the author's arguments. However, the exercise of local representation by the Verkhovna Rada of the Autonomous Republic of Crimea and local councils, as well as village, settlement, and city heads make it fair to say that the relevant persons have representative mandates.

The opinion of the well-known Ukrainian local self-government expert O.V. Batanov. He noted that “it is important to understand the essence of direct people's power to take into account the fact that, according to the content of the Constitution of Ukraine, direct people's power as an expression of the will of the people can be exercised both by the people in general and by certain parts or communities in particular. First and foremost, direct people's power is exercised through the manifestation of the will of the Ukrainian people in general, in particular in the case of holding parliamentary and presidential elections, all-Ukrainian referenda, etc. However, at the same time, the official manifestation of the will of the people is considered to be: the manifestation of the will of individual communities (territorial communities, labor collectives, etc.)» (*Batanov, 2019, 186-187*). It is worth to agree with the reasoning of this authoritative scientist.

When studying the institution of representative democracy in Ukraine, considerable attention is paid to the formulation of proposals for further improvement of the implementation of this type of democracy at the local level. One of the manifestations of this is the creation and functioning of bodies that were directly elected by members of territorial communities to perform representation, and at the same time belong to the number of public authorities.

It is common knowledge that public power in Ukraine is represented by two types – state power and local self-government. In the conditions of the current stage of constitutional reform, which also includes the reform of local self-government, the basis for making changes to the Constitution of Ukraine has been developed. Therefore, an important scientific task is the analysis of which representative bodies of public power represent the institution of representative democracy when it comes to local self-government. The need to analyze this issue is related to ensuring compliance with the principle of systematicity when reforming this institution in the area of local self-government. The main question that should be resolved is whether the norms

of the institution of representative democracy are extended to the self-organization bodies of the population.

The Constitution of Ukraine in the first part of Article 140 stipulates that “local self-government is the right of a territorial community – residents of a village or a voluntary association of residents of several villages, towns and cities into a rural community – to independently resolve issues of local importance within the limits of the Constitution and laws of Ukraine” (*Constitution 1996*). The next part of the analyzed article details the provisions on local self-government, namely:

- it “is carried out by the territorial community in the manner established by law”;
- it is carried out “both directly and through local self-government bodies: village, settlement, city councils and their executive bodies” (part three of Article 140).

However, the list of local self-government bodies given above is not exhaustive, there are other local self-government bodies. The very next (fourth) part of Article 140 provides that there are also local self-government bodies that represent the common interests of territorial communities of villages, towns and cities – district and regional councils, and the fifth part of the same article emphasizes that “issues of organization management of districts in cities belongs to the competence of city councils” (*Constitution 1996*), and therefore, representative bodies of local self-government can be formed at the level of districts in cities.

Questions regarding districts in cities arising from Art. 140 of the Constitution of Ukraine, were officially interpreted by the Constitutional Court of Ukraine in the decision on the administrative-territorial system. The subject of the right to constitutional submission appealed to the single body of constitutional jurisdiction with the question that “the meaning of the terms “district” and “district in the city” is not defined in the current legislation, as well as which body decides the issue of the formation and liquidation of districts in the city.» (clause 1 of the motivational part of the Decision). In the main part of the decision, the Constitutional Court summarized that “under the concept of “organization of management of districts in cities” contained in the fifth part of Article 140 of the Constitution of Ukraine, in a systematic connection with its Articles 142, 143, it is necessary to understand the powers of city councils as bodies of local self-government in cities with district division to make decisions regarding: ... the formation or non-formation of district councils in the city and, in the event of their formation, determining the scope and limits of the powers of district councils ... and on other issues within the limits and in the order determined by the Constitution and laws of Ukraine” (section 2 of the main part of the Decision).

Based on the provisions of Article 141 of the Constitution of Ukraine, village, settlement, city, district, oblast councils (the first part of the analyzed article), village, settlement, city mayors (the second part of the analyzed article) are elected by the population through direct elections. There is no mention of district council elections in those cities with district divisions, where a decision was made to form them. This is a gap in the Basic Law, which should be recommended to be eliminated when the Constitution is amended again.

Provisions of the Constitution of Ukraine regarding local self-government are detailed in the current legislation. The codified law on local self-government – the Law of Ukraine dated May 21, 1997 “On Local Self-Government in Ukraine” contains Article 5 “System of Local Self-Government”. Some of the elements of this system are chosen directly by the population. Among these elements, the population directly chooses:

- village, settlement, city council (Part 1, Article 5);
- the head of a village, settlement, or city (Part 1, Article 5);
- district and regional councils (Part 1, Article 5);
- bodies of self-organization of the population (Part 1, Article 5);

– district councils in the city (part 2 of article 5).

It is interesting that some of these elements of the system of local self-government in Ukraine belong to those that must be present, and some are not. It was already mentioned above that district councils in the city are not formed in all cities with district division. The formation of bodies of self-organization of the population is also optional.

According to the current legislation, self-organized bodies of population belong to the system of local self-government. At the current stage in Ukraine, there are two definitions of the concept of “self-organized bodies of population”.

Historically, the definition contained in the Law “On Local Self-Government in Ukraine” appeared first. According to its provisions, « self-organized bodies of population are representative bodies created by a part of residents who temporarily or permanently live in the relevant territory within the boundaries of a village, town, or city”. This definition dates back to 1997.

A few years later, another definition of the concept of « self-organized bodies of population » appeared in the legislation of Ukraine – in the Law of the same name. According to the Law “On Bodies of Self-Organization of the Population” (Article 2), these are “representative bodies created by residents who legally reside in the territory of a village, town, city or their parts, to solve the tasks provided for by this Law”.

## 5. Conclusions

It would seem that the textual analysis of these two definitions provides grounds for asserting that self-organized bodies of population should be taken into account in the further improvement of the provisions of the institution of representative democracy. After all, they are recognized as “representative bodies” (despite the adjectives in the name of the analyzed institute of constitutional law and the analyzed group of bodies). But they probably have a public nature – because they are an element of the system of local self-government in Ukraine.

However, such a statement would be premature and rather superficial. Far from all normative definitions are clear, concise, and fully characterize the phenomena, etc., that they define. Normative definitions may become obsolete. Normative definitions are not without flaws, and quite often these flaws are substantial – sometimes these flaws are substantive, sometimes formal. It is enough to turn to any fundamental work of a specialist in one or another field of law – and it is unlikely that criticism of one or more normative definitions will not be found in it.

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