

UDC 342.84

INSTRUMENTS OF PARTICIPATORY DEMOCRACY IN UKRAINE AND COUNTRIES OF THE EUROPEAN UNION

Olena CHERNEZHENKO,

Candidate of Law Sciences,

Researcher of the Department of Scientific Research
National Academy of Internal Affairs of Ukraine

SUMMARY

The article provides a theoretical research of traditional instruments of participatory democracy at the local level. It analyses the instruments of citizen participation in Ukraine which are regulated by the legislation. It defines referendum as a form of public control that is an important form of implementation of democracy and a means for citizens' involvement in governing society and the state. The article gives a short comparative analysis of the legislation of member states of the European Union on local referenda.

Key words: instruments, participatory democracy, local level, initiative, referendum, democracy.

ІНСТРУМЕНТИ ПАРТИСИПАТИВНОЇ ДЕМОКРАТІЇ В УКРАЇНІ ТА КРАЇНАХ ЄВРОПЕЙСЬКОГО СОЮЗУ

Олена ЧЕРНЕЖЕНКО,

кандидат юридичних наук,

науковий співробітник відділу організації науково-дослідної роботи
Національної академії внутрішніх справ України

АНОТАЦІЯ

У статті проводиться теоретичне дослідження інструментів партисипативної демократії на місцевому рівні. Здійснюється аналіз інструментів участі громадян в Україні, які регулюються законодавством. Референдум визначається як форма громадського контролю, яка є важливою формою імплементації демократії та засобом залучення громадян до управління суспільством та державою. Стаття дає короткий порівняльний аналіз законодавства країн-членів Європейського Союзу щодо місцевих референдумів.

Ключові слова: інструменти, партисипативна демократія, місцевий рівень, ініціатива, референдум, демократія.

Statement of the problem. One of the main values of developing an informed-society in terms of a practical policy is to facilitate the establishment of an open democratic society that will guarantee the observance of constitutional rights of citizens regarding their participation in public life, taking respective decisions by the state authorities and bodies of local self-governance [1, p. 5–6]. Yet, a problem with the current informed-society exists and consists of a discrepancy between the capacity of traditional models of representative democracy and the scale of social and economic transformations. According to J. Nesbit, one of the basic trends inherent in the period of transformation of the industrial society into the information one is the transformation of representative democracy into participatory democracy [5, p. 8–9]. This concept was introduced in the American political discourse of XX century in the works of such scientists as B. Barber, P. Bachrach, N. Bobbio, A. Gare, C. Gould, T. Cronin and others.

The relevance of the research topic. The value of the participatory-democracy model consists in providing the necessary conditions and overall encouragement of direct participation of citizens in defining the content of state policy and its further implementation by the authorities. An ideal participatory society would be characterized by the direct involvement of citizens in governing key political and social institutions without the need for mediation, such as political parties, non-governmental organizations, movements and interest-groups. The topic is relevant not only in Ukraine but also in the foreign European countries.

Status of research. The topic is explored and carried out by some Ukrainian scientists such as M. Bajmuratov, O. Batanov, B. Kalynovskyi, M. Pukhtynskyi, A. Selivanov, V. Seryogin, S. Seryogina, O. Skrypnyuk, V. Fedorenko, V. Shapoval and others.

The object and purpose of the article is a theoretical research of traditional instruments of participatory democracy at the local level. It is intended to give a short comparative analysis of the legislation of member states of the European Union on local referenda.

Presentation of the main material. Traditional instruments of participatory democracy which are most efficient at the local level are the main mechanisms of direct people's power: local referendum, initiative, revocation, public hearings, and city assemblies.

In Ukraine, the following are the instruments of citizen participation which are regulated by the legislation:

– Local referendum (a possibility to hold a local referendum is prescribed in the Constitution of Ukraine and the Law of Ukraine on “Local Self-Government in Ukraine”, however, this tool is not available due to the absence of a special law on local referendum).

– Public information request (The Laws of Ukraine “On Access to Public Information”, “On Information”, the Decree of the President of Ukraine and the Ordinance of the Cabinet of Ministers of Ukraine).

– Applications (requests) of Citizens (The Law of Ukraine “On Applications of Citizens” and the Ordinance of the Cabinet of Ministers of Ukraine).

– Reception of citizens (The Law of Ukraine “On Applications of Citizens”, the Decree of the President of Ukraine).

– E-petitions (The Law of Ukraine “On Applications of Citizens”, the Decree of the President of Ukraine).

– Local initiative (Law of Ukraine “On Local Self-Government in Ukraine”, procedures for local initiative to be set out in the statutes of territorial communities regulate, and / or the regulations adopted by a local council).

– Public expertise (The Ordinance of the Cabinet of Ministers of Ukraine).

– General meetings of population at place of residence (The Law of Ukraine on “Local Self-Government in Ukraine”, the Resolution of the Verkhovna Rada of Ukraine, statutes of territorial communities, regulations adopted by local councils).

– Bodies of self-organization of territorial community members (The Law of Ukraine on “Local Self-Government in Ukraine”, the Law of Ukraine “On Bodies of Self-Organization of Population”).

– Public hearings (The law of Ukraine on “Local Self-Government in Ukraine”, procedures and organization of public hearings are to be regulated by the statutes of territorial communities regulate, and / or regulations adopted by a local council).

– Participatory budget (at the stage of introduction / piloting in several dozen cities across the country, introduced by the regulations adopted by local councils), no clear legislative framework seems to exist in this respect.

Public control is vital for the implementation of democracy and a means for citizens’ involvement in governance. According to Article 38 of the Constitution of Ukraine, “citizens are entitled to participation in governing state issues, in All-Ukrainian and local referenda”. This norm of the Constitution envisages both in theory and in practice, a public control over state authorities and bodies of local self-governance.

Referendum (Latin referendum – items to be referred) is one of the basic institutions of direct power of people, which is expressed by the will of citizens of the entire country or part thereof with a view to resolving vital issues of state and public life. Decisions adopted by the referendum, as a rule, are deemed to be supreme. They have the power of the law, and on occasion even a greater power because it is generally considered that the results of the referendum cannot and should not be changed by the ordinary law of parliament. Acts of the referendum are the decision of the people themselves – not their representatives [2, p. 151].

A Referendum as a means of direct democracy was used in the Roman Empire whereby decisions were adopted during the Plebeian Council, which were obligatory for this group of society (this is where the term “plebiscite” originates which means “decision of the people”). With time, referendum was spread all over Europe and took on different forms: “public assemblies”, “veche” and so on. Switzerland is traditionally considered as the Motherland of the Referendum [3, p. 212].

The task of the referendum is to resolve important issues. It can be the adoption, amendment or cancellation of laws, a means to resolve the problem of territorial-division within state borders, the formation of public authority bodies, in particular, the Parliament and the President and so on.

A Referendum is a multifaceted phenomenon; this is why there are several criteria for its classification. Depending on the subject matter, a referendum can be conducted at local level and at state level; it can be obligatory or optional, by force of law, it can be imperative or consultative; it can be constitutional, legislative, territorial and so on [3, p. 214].

Although a referendum gives citizens the opportunity to directly express their will, for a referendum to become a legitimate and effective mechanism of public-power, certain conditions should be observed. Foremost, the issue to be considered and submitted for the referendum, must be completely clear and transparent so as to be understood by voters. This condition is one of most importance because the decision adopted by the referendum is, as a rule, an issue of essential political nature and becomes law. Apart from this, before the referendum takes place, its content should be comprehensively explained to the electorate via mass-media pointing out its relative desirable and undesirable consequences. Such an explanation requires an unbiased and objective way of representing the disparate inter-

pretations. For its results to be legitimate, it is necessary to facilitate public awareness, along with a respective level of legal insight. Otherwise, a referendum can be illegitimate by nature and have an unfavorable outcome for its people [2, p. 217].

The question of legislative embodiment of referenda is extremely important, because they affect real influence on state processes and political, social, cultural policy in the state and questions of regional importance.

Constitutional and legal grounds of the referendum in Ukraine are, first of all, embodied in the Constitution. The Main Law gives citizens the opportunity to participate in All-Ukrainian and local referenda (Article 38); people’s will is expressed via a referendum (Article 69), exceptional and Main Law regulates the organization and order of holding referenda (Article 92) [4]. Apart from this, a very important part of legislative regulation of referenda is the Law of Ukraine “On All-Ukrainian Referendum”, Law of Ukraine “On Local Self-Governance in Ukraine”. Referendum in Ukraine was legally regulated by Law of Ukraine “On All-Ukrainian and Local Referendum” until 28 November 2012, when Law of Ukraine “On All-Ukrainian Referendum” was adopted and the previous Law was repealed [7].

Thus, a referendum as one of the forms of direct democracy is an effective means of legitimizing public power, which should have a clearer legal regulation in the legislation of Ukraine. Apart from this, the Institute of Referenda cannot be an ordinary means of resolving political and legal issues; it should be considered as a form of control, as a part of method of solution of important constitutional and legal conflicts. Current certain crisis of implementation of the legislation on referendum prompts to provide due legislative embodiment of institute of referendum in Ukraine, remove discrepancies and loop-holes in the legal regulation of this institute.

Currently, it is important to find an effective democratic model of governance in Ukraine. At the same time, special attention should be given to restoration of democracy at a local level as a ground for wide participation of citizens in public affairs, school and basis for democracy within the country. Consequently, Ukrainian society and the state are facing the task to provide an overall development and improvement not only of the forms of direct will of the Ukrainian nation concerning resolution of issues across Ukraine, in particular, All-Ukrainian referendum, elections of MPs and the President; but also forms of local democracy, namely, expression of will of citizens who are members of a certain administrative and territorial unit regarding issues of local importance [4, p. 135].

A Local referendum is the primary form of local democracy at a municipal level. Local referendum was introduced to a social and political life of Ukraine not so long ago, but it already became widespread and received an important place in the system of forms of direct democracy. The involvement of citizens to resolve issues of local importance gives them the opportunity to influence the decision-making processes which minimizes room for conflict, confrontation between members of the territorial community and its representative-bodies and officials. However, direct will of territorial community at the referendum requires proper legislative regulation of the respective institute. It will give an opportunity to avoid any doubts regarding legitimacy of the decisions of local referendum [2, p. 101–102].

The right of citizens to participate in local referendum is provided in Articles 38, 69, and 70 of the Constitution of Ukraine. However, currently the implementation of this constitutional right does not have a proper legislative provision. On 6th of November 2012, the Verkhovna Rada adopted the Law “On Ukrainian Referendum”. When this Law was adopted, the Law of Ukraine “On Ukrainian and local Referendum” ceased to be effective on 3rd of July 1991.

A vacuum appeared in the legal field of Ukraine regarding local referenda. Lack of legal regulation for local referenda brings legal nihilism and attempts to use this mechanism provocatively. An example of an unconstitutional and illegal so-called “referendum” occurred in The Crimea which is not recognized by the international community; and speculations of separatist provocateurs regarding similar “referenda” in other regions of Ukraine.

A new law, against the Constitution, establishes a possibility to amend the Constitution without participation of the Parliament and the Constitutional Court, and it also secures the possibility to adopt a new Constitution by a referendum without regulating the order for its preparation, discussion, and preliminary agreement on the new draft Constitution. Apart from this, the new law deprives citizens of their constitutional right to participate in local referendum, which directly contradicts the provisions of the Constitution of Ukraine according to which citizens are entitled to participate in local referenda (Article 38) [1]. Thus, the adoption of the Law “On All-Ukrainian Referendum” cannot be regarded as having an optimal legal basis of the Institute of Referenda in Ukraine.

Despite a high possibility of the adoption of populist decisions and shifting of responsibility onto the members of communities for unpopular decisions, the Institute of Local Referenda is a direct and more general mechanism of direct democracy. It facilitates social activity and forms among the members of the community a culture of being engaged in the process of decision-making at a local level. The Institute of Local Referendum facilitates the formation of public opinion on participation of members of territorial community in the decision-making process. Also, a local referendum is an ideal opportunity to analyze in general and discuss the most important issues of the community and sometimes – the only way to legitimately resolve lasting conflicts at a local level.

According to Article 5 of Draft Law of Ukraine “On Local Referendum”, the subject of a local referendum can be:

1) reorganization or elimination of current communal pre-school facilities, and also pre-school facilities, created by former agricultural collective and state enterprises;

2) a local consultative referendum can include issues, provided by part 1 of this Article, apart from issues of early termination of powers of village, town, city district councils, village, town, city heads and issues, which must be resolved especially by local referendum, according to the law. At the same time, issues of local importance can be submitted in the form of:

– a draft decision of the local referendum – to an imperative local referendum;

– issues with a view to hearing the opinion on the proposal to resolve the issue of local importance – to a consultative local referendum [3].

As it was mentioned above, the subject of a local referendum are the vital issues of local importance, with the exception of those that do not belong to the scope of competence of local self-governance. This is why the subject of a local referendum should be considered, first of all, in the context of “adopting decisions on issues which are submitted to a referendum”. Decisions of local referenda constitute a local legal act by the direct will of the community. They should be adopted by a territorial community, and their effect should be binding only to the members of this community.

However, the draft law has a range of substantial drawbacks: firstly, the draft law contains obsolete provisions from the current law on putting forward an initiative group at the general public assembly, the procedure should be provided in the statute of the city or village. Second, the draft partially mentions requirements for holding a respective assembly, which can significantly complicate the procedure for initiating a local referendum. Third, only one initiative group on one is-

sue can be registered, and this group has a right to open a fund of local referendum to collect money for its holding.

One can criticize the Law dated 1991: that it is obsolete and does not meet democratic standards, and in fact makes impossible to hold a referendum without the consent of local authorities, but for now, it is impossible even to initiate a local referendum. A substantial step forward in the mechanism of implementation of the state-guaranteed-right of citizens to participate in a local referendum, could be the adoption of a new Law, which could flawlessly regulate the procedure of holding a local referendum. This form of local democracy could become an efficient means of consolidating a civil society.

Taking into account a high level of social sensitivity issues that concern complicated administrative and territorial units, to find ways for their solutions one should initiate as soon as possible the consideration and adoption of a new Law on local referendum. It is necessary to initiate a public discussion of the current drafts, works and considerations with the involvement of bodies of self-governance, the public, Ukrainian and international NGOs, scientists, academics and experts in respective fields.

A comparative analysis of the legislation of member states of the European Union on local/regional referenda, demonstrates that a proposal in the project model of cohabitation at the same level of “imperative” and consultative local referenda, without dividing their subject, is not consistent with the current trends of development of the legislation on referenda. In the majority of EU states, with reference to their respective legal systems, local referendum can be either only imperative according to legal consequences (Poland, Slovenia, Hungary, Croatia for example.) or exceptionally consultative (Belgium, Denmark, the Netherlands, Finland, Sweden for example.) The possibility to conduct both types of referenda at a local/regional level is provided only by the legislation of few countries of the world (Slovakia, Czech Republic, Switzerland). At the same time, in the last example, as a rule, they either separate the subject of referenda according to the legal consequences; or they submit them to different levels of administrative and territorial institutes [7].

In recent years, experts of the European Commission formed basic principles to hold local referenda, based on the experience of the European countries, where the mechanism of citizens’ participation in all-state and local referenda proved its efficiency. As such, in internationally, a local referendum is the usual form of direct democracy. Public decision, adopted during a local referendum is obliged to be implementation. In the hierarchy of public participation, a referendum takes precedent, and is an example of real public governance and a mechanism of implementation of the competence of a territorial community.

Conclusions. To crown it all off, the elements of participatory democracy can effectively function in modern democratic states only if they concur with the traditional mechanisms in representation of citizens’ interests in the bodies of state authorities and self-governance; and the political fight for power or influence over civil society at the stage of an electoral race is complemented by open competition of civic ideas, opinions and initiatives to influence the authorities in the period between elections. Apart from this, lack of regulation in the legal field of the main mechanisms of political participation at state level and at local level deprives the public of real influence on state authorities and self-governance and does not facilitate their interest in exercising their constitutional right to direct participation in governing public affairs.

References:

1. Інформаційне суспільство в Україні: глобальні виклики та національні можливості: аналіз. доп. / Д. В. Дубов, О. А. Ожеван, С. Л. Гнатюк. К.: НІСД, 2010. 64 с.

2. Ковальчук В. Всенародний референдум як одна з форм легітиматії державної влади: зарубіжний та вітчизняний досвід. Право України. № 12. 2009. 273 с.

3. Конституційне право України. Академічний курс: підручник / за заг. ред. Ю. С. Шемшученка. К. Юрид. думка, 2008. 800 с.

4. Конституційно-правові форми безпосередньої демократії в Україні: проблеми теорії і практики. К.: Ін-т держави і права ім. В. М. Корецького НАН України, 2001. 272 с.

5. Конституція України: прийнята на п'ятій сесії Верховної Ради України 28 червня 1996 р. № 254к/96-ВР. URL: <http://zakon4.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/print1389887169549036>

6. Обрывкова Н. О. Электронная демократия в современном постиндустриальном обществе: дис. ... канд. полит. наук: 23.00.02. СПб., 2006. 185 с.

7. Пиняк С. І. Предмет місцевого референдуму в Україні: теоретичні та нормо проектні аспекти. Право. 2009. № 1. С. 101–106.

8. Про всеукраїнський референдум: Закон України від 3 лип. 1991 р. № 1286-ХІІ. Голос України від 28 листопа-

да 2012 р. № 226. URL: <http://zakon2.rada.gov.ua/laws/show/1286-12>

9. Про місцевий референдум: Проект Закон України від 3 верес. 2010 р. № 7082. URL: http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=38447

INFORMATION ABOUT THE AUTHOR

Chernezhenko Olena Mykolaivna – Candidate of Law Sciences, Researcher of the Department of Scientific Research of National Academy of Internal Affairs

ІНФОРМАЦІЯ ПРО АВТОРА

Чернеженко Олена Миколаївна – кандидат юридичних наук, науковий співробітник відділу організації науково-дослідної роботи Національної академії внутрішніх справ

lenok.ch1111@gmail.com