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# A Local Referendum in Ukraine and the Republic of Poland – A Comparative Analysis

**Abstract:** We present the institution of a local referendum from a comparative perspective on the example of legal regulations in Ukraine and Poland. The study is the result of the ongoing research of the two Authors and is of crucial importance in the current political situation – the Russian aggression against Ukraine. Hence, it is relevant both nationally, Europe-wide and internationally. The analysis includes a legal comparative analysis of institutions and an attempt to assess their effectiveness. The authors point out that there is a need for effective ‘safeguarding’ in Ukraine to prevent the referendum from being used as a political instrument (*at hoc*), against the will of the people. The analysis uses a dogmatic and comparative legal method and draws on the authors’ experience of holding local referendums. This research may be useful not only for the researchers of the local government law but also for the legislators.

**Keywords:** *local referendum, Constitution of the Republic of Ukraine, Constitution of the Republic of Poland, comparative legal analysis*

## 1. Introduction

Institutions of direct democracy in Central and Eastern Europe should be treated as an element of systemic transformation (Šramel, 2022, pp. 169–190; Pankevych, 2017, pp. 798–802; Fedorenko, 2017, pp. 844–849; Kampo, 2016, pp. 235–242). They were significantly influenced by the political changes initiated in Poland in 1989 (Biszyga, 2015, p. 425; Olechno, 2015, p. 487; Biszyga & Zientarski, 2015). Today, however, initiatives strengthen the level of citizen participation (Stępień, 2015, pp. 11–16; Stec & Mączyński,

2012; Dolnicki, 2014; Gawroński, 2015, pp. 281–284; Augustyniak, 2017) in Poland (Przywora, 2014, pp. 110–128; Barankiewicz & Przywora, 2015, pp. 11–28; Bożyk & Olechno, 2020, pp. 125–139; Olejniczak-Szałowska, 2022, pp. 80–143; Feja-Paszkiewicz, 2020, pp. 225–243; Kryszewski, 2020a; Kryszewski, 2020b, pp. 215–233; Piotrowski, 2020, pp. 240–255; Szmyt, 2019, pp. 387–395; Dudek, 2018, pp. 169–185; Rakowska-Trela, 2019; Wierzbica, 2014; Stec & Małysa-Sulińska, 2010; Uziębło, 2008; Musiał-Karg, 2008; Dauter et al., 2007; Olejniczak-Szałowska, 2002; Jabłoński, 2001; Przywora, 2016, pp. 365–380) and in Ukraine (Pohorilko & Fedorenko, 2006; Fedorenko et al., 2009, pp. 35–50; Kravchenko & Yanchuk, 2018, pp. 5–11). This article is the result of many years of cooperation between the authors and represents the development of previous comparative research on the institution of a local referendum in both countries (Ilnytskyi et al., 2020, pp. 3–15; Ilnytskyi & Pshyvora, 2017, pp. 487–495). The subject of research has not yet been addressed in the constitutional literature. However, the need for comparative legal research of local referendums in Poland and Ukraine should be acknowledged. Comparing solutions adopted in various legal systems is often a source of quick response to challenges, which is also noticeable in direct democracy. Hence, the considerations undertaken and conclusions formulated here may be interesting for Ukrainian and Polish legislators.

A referendum is understood as an instrument of direct democracy, which enables a community to express its opinion on issues concerning the whole society or a part of it (Piotrowski, 2020, p. 240). Hence the referendum, especially of a local nature, is an essential element of a modern model of public governance in local government (Mazur, 2012, pp. 19–34; Bandarzewski, pp. 58–96). It allows community residents to participate in solving current problems facing the community. In this way, the community is involved in shaping local policy and, consequently, building civil society and implementing the idea of self-governance (Sarnecki, 2013, pp. 11–27; Regulski, 2015, p. 78; Parol, 2021, pp. 37–61; Izdebski, 2011, pp. 90–94; Regulski & Kulesza, 2009; Schambeck, 2016, pp. 97–105; Castorina, 2016, pp. 145–151; Chelaru & Puran, 2016, pp. 153–162; Hermida del Llano, 2016, pp. 203–212; Policastro, 2016, pp. 295–299).

The institution of the referendum, despite the passage of several years since its introduction in the legislation, still gives rise to many doubts and provokes reflection. It applies to both countries, although it is more noticeable in Ukraine in the current political conditions. The community's right to participate in public affairs management already stems from international documents. One should mention Article 25 of the UN International Covenant on Civil and Political Rights of 1966 (Dz.U. 1977, No. 38, item 167). As well as the European Charter of Local Self-Government of 15 October 1985 (Dz.U. 1994, No. 124, item 607; Jaskiernia, 2019, pp. 180–193).

## 2. Local Referendum in Ukraine

The right to participate in the management of the state, including at the level of local self-government, derives from Article 38(1) of the Constitution of Ukraine (Konstytucja Ukrainy, 1999). It is a manifestation of the principles of direct and representative democracy. Primary importance is the activity of local government bodies (councils or assemblies whose members are elected by secret ballot based on direct, equal and universal suffrage, and their executive bodies.) Local self-government in Ukraine is defined as the right of a territorial collectivity (hromada), the inhabitants of a village or voluntarily united into a rural collectivity (hromada), the inhabitants of several villages, a settlement or a city, to independently decide on matters of local importance, within limits set by the Constitution and laws of Ukraine. Local self-government is exercised by the territorial collectivity of inhabitants under statutory norms, directly and through local self-government bodies: village, settlement and city councils and their executive bodies (Konstytucja Ukrainy, 1999, Art. 140, sentences 1 and 3). Local self-government is a legal institution that provides ample opportunity to apply forms of direct democracy, as it is closest to the local community.

In line with international standards for a democratic state, Ukrainian legislation defines local referenda and participation in elections to local government bodies. Despite the constitutional importance of the forms of direct democracy, attempts to change the electoral system, especially in local elections, can be observed in Ukraine. These regulations raise many doubts from the point of view of the principles of electoral law. Hence, they do not constitute a real tool for forming democratic bodies and participation in a local referendum.

According to Article 7 of the Law of Ukraine “On Local Self-Government in Ukraine” of 21.05.1997, the procedure for calling and holding a local referendum, as well as the list of issues to be decided exclusively by referendum, is determined by the Law on Referendums. Until 2012 it was the Law of Ukraine “On All-Ukrainian and Local Referendums” of 03.07.1991 (Vidomosti..., 1991). Adopting the Law of Ukraine “On All-Ukrainian Referendum” of 06.11.2012 effectively left local referendums outside the framework of legal regulation. Due to significant violations of the content and mode of adoption of the latter law, by the decision of the Constitutional Court of Ukraine No. 4-p / 2018 of 26.04.2018 (Visnyk Konstytutsiinoho Sudu Ukrainy, 2018, No. 3). The Law of Ukraine “On All-Ukrainian Referendum” was declared unconstitutional, but this did not automatically restore the validity of the previous legal regulation, leaving a gap in implementing one of the main forms of democracy in Ukraine – both national and local referendums. As early as 2010, experts of the Council of Europe Programme “Strengthening Local Democracy and Supporting Local Government Reforms in Ukraine”, in their report on the compliance of Ukrainian national legislation with the provisions of the European Charter of Local Self-Government, noted that Article 143 of the Constitution of Ukraine on the possibility for local communities to perform local government functions directly is purely declarative (Serednostrokovyi..., n.d.; Fedorenko, 2014, pp. 64–69).

A study by the Laboratory (Lab) of Legislative Initiatives, conducted in 2016 on the experience of using local referendums in Ukraine in 1991–2012, shows that 92% of referendum questions submitted in Ukraine were successfully carried out, and 122 were accepted. Only 8% were rejected due to voting (12). At the same time, only 3.5% – 6 referendums – were declared invalid based on the referendum results due to lower turnout than the statutory quorum (less than 50% of registered voters). In this context, it must be concluded that the local community did not support a significant number of the referendum questions. The most frequently submitted to vote were the issues of community mergers (Laboratoriia..., 2016, p. 23). These statistics provide evidence of the need for local referendums in Ukraine. However, the problem remains at the level of ensuring an important role of the referendum as an instrument for managing local affairs. One can see a positive direction in implementing the decentralisation reform initiated in 2014. It is worth noting that the Constitutional Court of Ukraine, in its decision No. 2-пп / 2014 of 14 March 2014 (Bulletin..., 2014), stressed the importance of the right of citizens to participate in the referendum as an inalienable constitutionally guaranteed right. Thus, it is important to exercise this right under the prescribed procedure.

Although there have been several attempts to regulate the matter of local referendums, the solutions still do not provide an effective mechanism for community residents to influence local affairs. The Report of the National Institute of Strategic Studies, published in 2019 (Pavlenko et al., 2019), identifies the main problems of the functioning of the institution of a local referendum in Ukraine:

- 1) Withholding of the organisation of referendums by local governments,
- 2) Holding local referendums on issues that do not belong to the competence of local government bodies,
- 3) Use of referendums to legitimise decisions made without legal basis,
- 4) Delaying the implementation of decisions taken in the referendum.

The first of the problems addressed requires the introduction of appropriate procedural provisions concerning the initiative to hold a referendum. Polish solutions can serve as an example in this regard. It is also important to subject all actions connected with the verification of organising and conducting a local referendum to judicial control. In the current political conditions and the situation in which Ukraine finds itself, fulfilling this task is significantly hindered.

It is necessary to pay attention to the formulation used in the already quoted decision of the Constitutional Court of Ukraine No. 2-пп / 2014 of 14.03.2014, that only the issues assigned to the competence of the local self-government bodies of the relevant administrative-territorial unit may be submitted to a local referendum. A way out would be to transparently introduce norms of procedural nature in the conduct of local referendums (Laboratoriia..., 2016, p. 18).

The research showed that despite the formal importance of the referendum as an institution of direct democracy, the implementation of its settlements remains a complex issue and

difficult to explain from a legal point of view. Experts' evaluations confirm it in the scope of unrealised settlements resulting from the local referendums conducted in 1991–2012.

## **2. Local Referendum in the Republic of Poland**

In Poland, the institution of the local referendum has been thoroughly researched, so it is not justified to discuss all the regulations related to it in this piece. Rather, we will point out a few issues to compare the two institutions.

Firstly, attention should be drawn to Polish referendum traditions. At the threshold of the statehood of the Second Republic of Poland, certain forms of direct democracy could be discerned, such as the so-called plebiscites, which aim was to decide whether disputed territories belonged to Poland or Germany (the plebiscite held on July 11, 1920 in Warmia and Mazury and the plebiscite in Upper Silesia – Dudek, 2018, p. 169).

Secondly, in contemporary Poland, the basis for the local referendum derives from the Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No. 78, item 483 with further amendments; hereinafter: the Constitution). People exercise power through their representatives or directly (Article 4(2) of the Constitution – Działocha, 2016). At the same time, the members of the local government community (Skoczylas & Piątek, 2016, pp. 419–420) have the right to decide, by referendum, on matters concerning that community, including the dismissal of the directly elected local government body (Article 170 of the Constitution). It should be emphasised that the Constitution provides for a local referendum in a formula that does not constitute a simple duplication of the nationwide referendum formula (Dudek, 2018, p. 174). The right to express the will through a local referendum (Article 170 in conjunction with Article 62(1) of the Constitution) is a subjective right of a political nature. At its core is the right of every resident to participate in the direct exercise of public authority at the local level (Judgement..., 2003; Decision..., 2019). The implementation of this right is guaranteed by the Local Referendum Act, which establishes a judicial review of the activities of local government bodies (Decision..., 2019). The role of referendums is to co-shape decision-making processes in a given local government community. In contrast, the referendum result influences how a matter concerning the community is decided (Judgement..., 2017).

Thirdly, the Constitution has ceded to the legislator to establish the principles and procedure of holding a local referendum (Article 170, second sentence of the Constitution). About the local referendum, the jurisprudence of the Constitutional Tribunal is important. The judgement of the Court of 26 February 2003 (K 30/02) states that the legislator must define in law the principles and procedure for holding a referendum, as well as refrain from legislative measures that would infringe the essence of the right to express the will by way of a referendum by every authorised member of the self-governing community. Important are the organs of local self-government whose tasks it is to ensure, in organisational and legal terms, that a referendum is held and to take measures to guarantee the exercise of the right of members of the self-governing community to express themselves using a referendum, as well

as to support the political initiatives of the inhabitants in this sphere (K 30/02; Naleziński, 2019, pp. 517–518; Banaszak, 2012, pp. 856–857). For example, a municipal council may not refuse to allow residents to hold a referendum on the division of a municipality, even if it believes that this will have a negative impact on the municipality (Decision..., 2013). However, it should be stressed that a referendum “cannot be a substitute for the permanent and uninterrupted functioning of the legislative and executive bodies, even when the members of these bodies wish to cede the political responsibility incumbent on them to the residents themselves, or when the residents, on their initiative, wish to deprive them of the right and duty to decide how to perform public tasks” (K 30/02). It means that the self-governing community can express its will directly on matters of fundamental importance to that self-government, but cannot be a “permanent, repetitive, day-to-day performance of tasks” (K 30/02). The concept of fundamental matters of given self-government, within the meaning of Article 170 of the Constitution, should be understood as “matters important for this community to the extent that they concern social, economic and cultural bonds connecting its inhabitants, and thus its identity and future. In sum, the residents have the right to express their will through a referendum on all matters essential to that community” (K 30/02).

Fourthly, further development of Article 170 of the Constitution is the Act of 15 September 2000 on the local referendum (Dz.U. 2019, item 741; hereinafter: Local Referendum Act). Article 2 of the Local Referendum Act follows the right of the members of the self-governing community to express their will by way of voting: 1) on the dismissal of the governing body of that unit; 2) as to the manner of resolving a matter concerning that community, falling within the scope of tasks and competences of the bodies of that unit; 3) on other important matters concerning social, economic or cultural ties linking that community. The referendum’s subject-matter scope also includes the matter of the recall of a head of commune (mayor, town mayor) and the self-taxation of the inhabitants for public purposes that fall within the scope of the tasks and competencies of the commune authorities. The legislator has also introduced certain limitations to activating the referendum procedure. It is conducted on the initiative of the decision-making body of the given local government unit or the motion of at least: 1) 10% of the inhabitants of the commune or district who are entitled to vote; 2) 5% of the inhabitants of the province who are entitled to vote (Article 4 of the law on u.r.l.). On the other hand, an initiative to hold a referendum on the request of the inhabitants of a local government unit may be submitted by:

- 1) a group of at least 15 citizens (who have the right to be elected to the decision-making body of the given local self-government unit, and concerning the municipal referendum – also five citizens who have the right to be elected to the municipal council);
- 2) a statutory field structure of a political party (operating in a given local government unit);
- 3) a social organisation (having legal personality, the statutory field of whose activity is at least the area of the given local government unit – Decision..., 2020).

Only a group of at least 15 citizens who have the right to elect to the commune council may submit an initiative for a referendum to be held at the request of the inhabitants of a commune on the establishment, merger, division and abolition of a commune and on the determination of commune boundaries (Article 11 of the u.r.l.). In matters concerning the dismissal of the local government body before the expiry of its term of office, a decision is taken only by a referendum held at the request of the inhabitants (Article 5.1 of the u.r.l.). It would be worth considering giving the local government bodies the power to correct obvious ambiguities and errors in the content of the referendum question and answer options. It is also worth considering whether this verification (also concerning the admissibility of the referendum subject itself) should not take place even before the stage of collecting signatures in support of the referendum initiative. If that stage is conducted, the problem arises as to whether the signatures collected under a different question's wording can be regarded as fulfilling the statutory requirement (Rulka, 2018, p. 130). For example, a referendum was held on 25.05.2014 in Krakow on the organisation of the 2022 Winter Olympic Games (Rulka, 2015, pp. 55–56).

The Polish legislator has introduced so-called “turnout thresholds” in the referendum. A referendum is valid if at least 30% of those eligible to vote take part in it. The exception is the referendum on dismissing a territorial self-government unit organ originating from direct elections. It is valid if no less than  $\frac{3}{5}$  of the number of those participating in the election of the recalled organ took part in it (Article 55 of the Law on ...). The analysis of the literature in Poland shows that there is no specific position as to the level of the threshold, the crossing of which results in the validity of the referendum. Considering the civic activity in Poland and the average participation in voting, it can be concluded that the 30% barrier is difficult to cross, especially in larger communes, districts, or provinces. On the other hand, there have also been postulates that restrictions on the turnout threshold rationalise social behaviour (Przywora, 2014, pp. 121–124). As an example of an effective referendum, the municipal referendum on the recall of the Municipal Council in Bałtów before the end of its term of office was ordered on November 24, 2019 (Dziennik Urzędowy..., 2019). In the election on October 21, 2018, the recalled authority, the number of persons who participated in the vote (number of valid cards) was 2055. Therefore,  $\frac{3}{5}$  of the number participating in the election of the recalled authority, in this case, is 1233. The number of persons entitled to vote was 3017, and the number of persons who participated in the vote (number of valid cards) was 1277 (turnout was 42.33%). After the count, the number of valid votes was 1251, and the number of votes for the recall of the authority (positive “Yes”) was 1208. Therefore, the Referendum Commission concludes that the referendum is valid, as not less than  $\frac{3}{5}$  of the number of those taking part in the election of the recalled authority participated in it. The Bałtów Municipal Council was dismissed as more than half of the votes validly cast were cast in favour of the dismissal (Przywora, 2014, pp. 121–124).

The high turnout requirement strongly favours the holders of revoked bodies, who can call for voter absenteeism. Even if they are recalled, they have the opportunity to be re-elected



(Rulka, 2014, p. 158). Therefore, the proposal to resign from determining the turnout should be considered. On the other hand, the threshold of support for a motion to recall the executive body should be raised, and periods should be introduced during which it will be forbidden to launch recall initiatives (e.g., not earlier than after 12 or 18 months from the date of election and 12 months before the end of the term of office). Such solutions are to be a protective mechanism against the abuse of the referendum as a political instrument leading to the destabilisation of the municipality (Przywora, 2014, pp. 126–127; Rulka, 2014, pp. 157–160). The last decade of the functioning of the institution of local referendum raises the question about the rationality of the functioning of the turnout thresholds, on the attainment of which the legal effectiveness of the referendum result depends. In particular, the norms concerning the referendum on the recall of a local government unit's authority coming from direct elections require a deeper analysis. The current solution does not constitute an effective instrument for the inhabitants to influence community matters. It raises doubts as to whether, under current arrangements, the institution of local referendum serves to realise the efficiency of public institutions (Judgement..., 2007).

#### **4. Conclusions**

The systemic transformation initiated in Poland in 1989, and the experience of several decades confirm the legitimacy of the choice of the direction of assumptions and reforms, including the decentralisation processes of public authority and development of local self-governance (Bisztyga, 2015, p. 432). Ukraine has benefited greatly from this experience, gradually adapting legislation to its social and economic conditions. In both countries, the Council of Europe standards (arising from the European Charter of Local Self-Government) on the formation of local government legislation is noticeable. In Poland, the legislation of the European Union is of additional importance.

The Constitutions of both Ukraine and the Republic of Poland provide the basis for shaping instruments of direct democracy, including the local referendum. The adopted solutions only indicate the direction to strengthen social participation. In our opinion, it is important to fully implement international standards and skilfully draw on the experience of western countries in the area of referendums. Hence, further steps towards strengthening self-governance are desirable.

In the modern history of Ukraine, full of factors of direct external military aggression, an unambiguous and correct solution to the issue of the subject of a local referendum is, in our opinion, fundamental in developing the appropriate procedure. Ukraine has a bitter experience under the guise of a local referendum of making decisions that are deliberately illegal and threatening to the state: in 2002 in Kharkiv and 2006 in the Autonomous Republic of Crimea, “local referendums” on granting official status to the Russian language, and in 2014 “All-Crimean referendum” on the de facto annexation of the Crimean Peninsula by the Russian Federation, as well as the creation of quasi-state terrorist people's republics. Today,



Russia is trying to repeat the scenario in the southern regions of Ukraine, legitimising its aggressive achievements “by the people’s will under the barrel of a Russian tank”.

From Ukraine’s standpoint, the all-Ukrainian referendum mechanism has been proposed as an element of the division of political responsibility between public authorities and the people of Ukraine over the terms of a potential peace agreement to end hostilities.

We fully agree with the position expressed in the Laboratory of Legislative Initiatives report that, as practice shows, holding a local referendum is possible in the absence of a mechanism and in the absence of legal grounds. Given that the referendum is a universal mechanism for legitimising decisions, even the establishment of illegal government, under certain political conditions, the lack of a legal mechanism will not prevent such an action (Laboratoriia..., 2016, p. 18). What is more, the fundamental foundations of democracy and constitutional guarantees of the right of citizens to participate in the management of public affairs through the referendum mechanism are a favourable ground for unauthorised implementation of relevant initiatives without state support by fulfilling positive obligations to create an appropriate mechanism for exercising such rights.

Therefore, the recent history of Ukraine envisages the need for effective “safeguards” to prevent the use of the referendum to destroy the state’s social order. First of all, Art. 20 of the Law of Ukraine “On All-Ukrainian Referendum” of January 26, 2021 (Ofitsiynyi visnyk Ukrainy, 2021, p. 11) defines the prohibition of its appointment (proclamation) and holding in the conditions of martial law or state of emergency on the territory of Ukraine or in particular regions, as democracy is not compatible with hostilities, defining the scope and procedure for formulating and submitting issues to a referendum according to its status; a referendum that cannot be politically dependent and audited by any subsequent body of the state, contrary to the expressed will of the people.

In Poland, the institution of the local referendum is not used very often and even less often is it binding. That is why it is necessary to introduce solutions that will increase the level of participation of the local community. In Poland, it would be desirable to introduce changes in legislation in the scope of decreasing the turnout thresholds and facilitations related to their initiation and carrying out. The need to introduce changes in the regulations on the local referendum on recall is particularly noticeable.

The state, but also – to a large extent – non-governmental organisations face the challenge of including the young generation in social undertakings and shaping civic attitudes in caring for efficient management of small local authorities and taking joint responsibility for the level of tasks performed (Sarnecki, 2013, p. 26).

In practice, those with the initiative must exercise prudence and restraint in organising it rather than pursuing *ad hoc* interests. However, greater citizen involvement in the management of public affairs could help build an effective local governance system in a spirit of cooperation, mutual trust, and synergies (Gintowt-Jankowicz, 2018, p. 133).

Some first signs of implementing the decentralisation reform initiated in 2014 should be seen in Ukraine. Still, these changes are insufficient. There is a need to ensure the important

role of the referendum as an instrument in managing local affairs. The problems of functioning of the local referendum institution in Ukraine identified in the report by the National Institute for Strategic Studies, published in 2019, remain topical.

In particular, this concerns the withholding of the organisation of referendums by the local authorities. To a certain extent, introducing detailed procedural norms concerning the initiative to hold a referendum was a remedy, and Polish regulations can serve as an example. It is also necessary to subject all actions related to the verification of organising and conducting a local referendum to judicial control. Moreover, Ukraine has a problem with using referendums to legitimise decisions made without a legal basis. On the other hand, there is a delay in implementing decisions made in referendums.

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