

The problem of ensuring the rights to represent the common interests of the territorial communities in Ukraine in the context of changes in the electoral system

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Abstract. The article explores the problems of ensuring the rights to represent the common interests of the territorial communities in Ukraine in the context of changing the electoral system in the local elections. The practical results of the 2015 local elections in Ukraine in terms of representation in the regional and district councils are analyzed. A number of problems were identified, including: lack of representation in separate districts, lack of representation of the individual communities in the district and regional councils, which is inconsistent with Article 140 of the Constitution of Ukraine, where it is determined that the local self-government bodies representing the common interests of the territorial communities of the villages, towns and cities are the district and region councils. The authors note that such an electoral system of “open lists” of the Law of Ukraine “On Local Elections” is not capable of ensuring fair and equal representation of the territorial communities in the regional and district councils. The article states that in the context of the reform of the local self-government in Ukraine, approved by the order of the Cabinet of Ministers of Ukraine “On Approval of the Concept of Reforming the Local Self-Government and Territorial Organization of Power in Ukraine” No. 333-r of April 1, 2014, the issues of proper representation of the common interests are of particular relevance to the territorial communities of villages, towns and cities in the district and regional councils. That is why it is important for the next local elections in the autumn of 2020 to solve two global tasks: to approve the new administrative-territorial structure and to change the rules of the electoral legislation in order to properly represent the common interests of the territorial communities.

In accordance with paragraph 4 of Article 140 of the Constitution of Ukraine, part 1 of Article 5 of the Law of Ukraine “On Local Self-Government in Ukraine” the local self-government bodies representing the common interests of the territorial communities of the villages, towns and cities are the district and regional councils. Part 2 of Article 2 of the Law of Ukraine “On Local Self-Government in Ukraine” specifies that the local self-government is exercised by the territorial communities of villages, towns, cities both directly and through the village, town, city councils and their executive bodies, as well as through the district and regional councils representing the common interests of the territorial communities of the villages, towns and cities. Articles 43, 44 of the Law of Ukraine “On Local Self-Government in Ukraine” defines a wide list of exclusive and delegated powers of the district and regional councils [1].

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According to paragraph 1 Article 141 of the Basic Law, the composition of a village, town, city, district, regional council consists of deputies elected by the residents of a village, town, city, district, region on the basis of universal, equal, direct suffrage by secret ballot. Such suffrage shall be exercised in accordance with the electoral law of Ukraine. At the time of the regular local elections in Ukraine in 2015 the Law “On Local Elections” was in force. This law was adopted shortly before the local elections, including with a view to changing the local elections system to ensure fair representation of the voters in the local councils, to maintain a majority system at the village and town councils level, and to introduce a proportional electoral system with open lists in the local elections on other levels. However, it was in the part of fair representation of the voters in the local councils (regional and district) that the Law did not justify itself and ultimately lapsed (except for the provisions for organizing and holding repeated, mid-term, by-elections and replacement of the deputies elected in a multi-mandate constituency, whose powers are suspended until the next regular or early elections of the deputies of the local councils), on the basis of the Electoral Code No. 396-IX of 19.12.2019.

It is worth noting that the search for a fair electoral system is devoted to the research of scientists and practitioners O. Aivazovska, R. Balaban, O. Barabash, N. Bogasheva, S. Vasylenko, V. Venger, V. Denysenko, V. Kovtunets, Y. Klyuchkovsky, O. Koshel, A. Magera, E. Poberezhny, E. Radchenko, M. Stavnyichuk, O. Chernenko and others.

The application of the new electoral system in the 2015 local elections, as a variant of the proportional one, revealed a number of problems, including lack of representation in individual constituencies, election of a deputy not a winner in the district, but a person with low voter confidence, etc. Particularly unacceptable was the non-representation of the individual communities in the district and regional councils, which should represent the common interests of the territorial communities of the villages, towns and cities, as set out in paragraph 4 Article 140 of the Constitution of Ukraine.

According to the Law of Ukraine “On Local Elections” in force at that time, the local elections were held simultaneously under three electoral systems: majority system of the relative majority - for the election of deputies of the village, town councils, seniors, village, town, city mayors (for the cities with the number of voters up to 90 thousand); according to the majority system of the absolute majority - for the election of the mayors for cities with the number of voters over 90 thousand. And one of the variants of the proportional electoral system is for the election of the deputies of regional, district, city, district in city councils [2]. And it was the proportional electoral systems that did not live up to the hope of fair representation in the distribution of mandates. The distribution of mandates was carried out in accordance with the provisions of Article 86 of the Law of Ukraine “On Local Elections” that stated that the right to participate in the distribution of the deputies’ seats in the elections of the deputies was held by the local organizations of parties, which supported at least 5% of valid votes, but in any - in no case less than the electoral quota. This quota was determined by dividing the total number of votes cast for the local party organizations that received five percent or more of the vote by the number of the deputies in this multi-member constituency. Subsequently, in accordance with the “Clarification on the Establishment of the Results of Elections of the Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, Region, District, City, District in the City of the Council in the Multi-Member Electoral District”, approved by the CEC resolution of September 21, 2015 No. 356, the result of the election of the deputies in the

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multi-member election constituency was the determination in order of priority of the candidates for deputies from the local party organizations of persons elected by the deputies from the local party organizations in the number of deputy mandates in received by the local party organizations. In doing so, the first deputy mandates received the first candidates for deputies included in the electoral lists of the local organizations of parties, after which - candidates for deputies assigned to the territorial constituencies [3].

Thus, the “mathematical formula” of the distribution of mandates, that formed the basis of the electoral system, became a major problem and caused the inability to reflect the real results of the will of the citizens: under this electoral system it was often not the candidates supported by the majority of the voters in the district, but those who voted in the constituency and those who received fewer votes and, in some places, with critically low levels of electoral support.

Tab. 1 Analysis of the regional council representation violations in the results of the 2015 local elections

Region	Number of districts (total)	Districts where the deputy is not elected		Districts where 2-3 deputies are elected simultaneously		Districts where a person is recognized as the 1st party list number	
		number	%	number	%	number	%
Vinnitsya	84	20	23,8	13	15,5	7	8,3
Volyn	64	11	17,2	7	10,9	7	10,9
Dnipropetrovsk	120	16	13,3	17	14,2	5	4,2
Donetsk							
Zhytomyr	64	20	31,3	14	21,9	6	9,4
Zakarpattia	64	11	17,2	7	10,9	6	9,4
Zaporizhzhya	84	20	23,8	12	14,3	6	7,1
Ivano-Frankivsk	84	22	26,2	12	14,3	6	7,1
Kyiv	84	26	31,0	16	19,0	8	9,5
Kirovohrad	64	21	32,8	11	17,2	5	7,8
Luhansk							
Lviv	84	22	26,2	12	14,3	9	10,7
Mykolaiv	64	16	25,0	12	18,8	4	6,3
Odesa	84	14	16,7	14	16,7	2	2,4
Poltava	84	27	32,1	16	19,0	9	10,7
Rivne	64	17	26,6	11	17,2	6	9,4
Sumy	64	18	28,1	12	18,8	6	9,4
Ternopil	64	17	26,6	9	14,1	8	12,5
Kharkiv	120	28	23,3	24	20,0	3	2,5
Kherson	64	20	31,3	12	18,8	6	9,4
Khmelnytsky	84	23	27,4	14	16,7	7	8,3
Cherkasy	84	16	19,0	14	16,7	7	8,3
Chernivtsi	64	21	32,8	11	17,2	10	15,6
Chernihiv	64	23	35,9	17	26,6	6	9,4
total	1700	429	25,2	287	16,9	139	8,2

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Therefore, in the regional councils, according to the results of the 2015 local elections, no deputies were elected at all in more than 25% of constituencies. Thus, in Chernihiv regional council almost 36% of “empty” districts, and in Chernivtsi, Kirovohrad, Poltava - about 32% of such districts. In some constituencies 2-3 deputies were elected at one time. Thus, in the regional councils almost 17% of districts have 2-3 deputies in one district. There is another injustice for the voter: the law stipulates that the first list number from a party becomes a deputy automatically if the party passes the passable barrier. For example, in the regional councils more than 8% of the mandates received the following “appointees”:



Fig. 1 Representation anomalies in the regional councils following the 2015 local elections (%)

Similar conclusions were also drawn from the results of a study supported by the OSCE Project in Ukraine by experts [4]. The most problematic was the Kyiv region, where even such large communities of the cities as Pereyaslav-Khmelnytsky, Bucha, Vasytkov were not represented in the regional council. As noted, this is a violation of the Article 140 of the Constitution of Ukraine, according to which “the local self-government bodies representing the common interests of the territorial communities of the villages, towns and cities are district and regional councils” [1]. According to the researchers, “this is most often the case when one district, which appeared to be unrepresented in the council, belongs to the respective administrative-territorial unit. But there are also widespread cases where several districts within one administrative-territorial unit are not simultaneously represented in the respective regional council, which also results in the non-representation of the relevant community (or communities) as a whole” [4; p.1]. It is worth noting that the lack of representation in the regional or district councils is also a problem for the large communities: for example, in Chernihiv none of the 12 constituencies has elected a deputy to the Chernihiv regional council. Thus, the city-regional center is not represented in the regional council at all.

According to the researcher Yevhen Poberezhny, “more serious consequences of “under-representation” have for the districts, since in practice it means complete non-representation of a part of the communities of the respective district in the region council

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(for example, out of 3 districts of Sharhorod district in Vinnytsia region only one in the region is represented in the district, for the rest of the districts means that the territorial community of the city of Sharhorod, as well as 20 rural territorial communities of the Sharhorod district are unrepresented)” [4; p.2]. In view of the following conclusions, a sample analysis of the representation in the district councils was made (the composition of one district council in all regions of the country was analyzed):

Tab. 2 A sample analysis of the violations of representation in the district councils by the results of the 2015 local elections

Region	District	Number of councils in the district	Territorial communities with no representative in the district council		Territorial communities partially represented in the district council	
			number	%	number	%
Vinnytsia	Barsky	30	4	13,3	2	6,7
Volyn	Horokhivsky	40	15	37,5		
Dnipropetrovsk	Krinichansky	21	3	14,3	3	14,3
Donetsk	Oleksandrivsky	16	1	6,3	2	12,5
Zhytomyr	Narodytsky	1				
Zakarpattia	Vinogradivsky	32	7	21,9		0,0
Zaporizhzhya	Velykobilozersky	5			4	80,0
Ivano-Frankivsk	Rohatynsky	45	16	35,6		0,0
Kyiv	Vasylkivsky	43	12	27,9		0,0
Kirovohrad	Novhorodkivsky	11	4	36,4	3	27,3
Luhansk	Svativsky	16	7	43,8		0,0
Lviv	Drohobytzky	47	11	23,4		0,0
Mykolaiv	Ochakivsky	11			5	45,5
Odesa	Mykolayvsky	13	1	7,7	4	30,8
Poltava	Chutivsky	15	2	13,3	3	20,0
Rivne	Ostrozky	20	9	45,0	1	5,0
Sumy	Lededynsky	23	6	26,1	1	4,3
Ternopil	Zalischitsky	37	10	27,0		0,0

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Kharkiv	Vovchansky	27	5	18,5	1	3,7
Kherson	Vysokopilsky	12	1	8,3	4	33,3
Khmelnysky	Yarmolynetsky	30	2	6,7	1	3,3
Cherkasy	Umasky	50	9	18,0		0,0
Chernivtsi	Kelmenetsky	25	1	4,0	1	4,0
Chernihiv	Kozeletsky	35	10	28,6		0,0
total:		605	136	22,5	35	5,8

According to such a study, it was found that on average more than 22% of the territorial communities are not represented at all in the district council, and about 6% of the territorial communities are partially represented.

Therefore, the functioning of all mechanisms in a comprehensive system must be aimed at compliance with the goals and objectives, their coherence and the relationship between themselves and their individual structural elements. Therefore, the public administration entities should constantly monitor the internal and external factors, identify the problems in a timely manner, make administration decisions based on a systematic approach, use a set of scientific and specific methods, taking into account the changes in the internal and external environment [5; p. 154].



Fig. 2 Representation anomalies in the district councils following the 2015 local elections: sample analysis (%)

According to the scientist Serhiy Vasylychenko, “because of the large unevenness of the number of inhabitants in the settlements, it is practically impossible to realize the proportional representation of the settlements in the councils by the UTC in such a way that each settlement is represented by at least one deputy in the council of the UTC. Particularly acute is the problem with the UTC that combines a large number of settlements with a

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small number of voters. In this case, the number of the elected deputies and, accordingly, of the constituencies is small and their number is smaller than the number of settlements in the UTC” [6; p.1].

The formation of constituencies with unequal number of voters also caused the misrepresentation. It is worth noting that Article 17 of the Law of Ukraine “On Local Elections” stipulates that the formation of the constituencies is carried out by the respective territorial election commission in the amount determined by the CEC. The number of voters in the constituencies should be approximately equal and “as close as possible to the average number of voters in the territorial constituency of the respective multi-mandate district” [7]. For example, the largest gap in the number of constituency voters is the election districts of the Lviv regional council in 2015: an average of 37191 voters are in the Lviv constituency, and only 3821 are voters in the Morshyn town. However, according to paragraph 15 of the Venice Commission recommendations set out in the Code of Good Practice in Electoral Matters of 2002, the difference in the number of voters by district is only permissible within 10% (in exceptional circumstances - up to 15%).

Therefore, in the context of the local self-government reform in Ukraine, approved by the decree of the Cabinet of Ministers of Ukraine “On Approval of the Concept of Reforming the Local Self-Government and Territorial Organization of Power in Ukraine” No. 333-r of April 1, 2014, issues of representation of the common interests of the territorial communities of the villages, towns and cities are of particular relevance, and there are district and regional councils. That is why it is important for the next local elections to solve two global tasks: to approve the new administrative-territorial structure and to change the “electoral rules” in order to properly represent the common interests of the territorial communities.

The Electoral Code of Ukraine came into force on January 1, 2020, and the above-mentioned Law of Ukraine “On Local Elections” became accordingly invalid. This Code provides for changes to the electoral system, including for the local elections, which, according to the Constitution of Ukraine, will take place on the last Sunday of 2020. In these local elections four different electoral systems will be applied, depending on the type of the election and the size of the administrative-territorial units. For the elections of deputies: majority system of a relative majority with voting in multi-mandate constituencies (in the cities with the number of voters up to 90 thousand people, for the elections of the deputies of the village, town, city and district in city councils, as well as district councils) and proportional system with open party lists (in the cities with a voter population of 90 thousand or more, for the election of the deputies of the regional, city councils, as well as the Verkhovna Rada of the Autonomous Republic of Crimea). Two different electoral systems will also be used in the elections of the village, town and city mayors, depending on the size of the administrative-territorial units: majority voting system in a single-mandate constituency (for election of village, towns, city mayor, and seniors) and majority voting system for the election of mayor in the cities with voters of 90 thousand or more. The procedure for establishing the results of the elections of the deputies of the regional and district councils is defined in accordance with the norms of Articles 259-260, 268 of the Election Code of Ukraine [8].

However, in the development of the Concept for Improvement of the Local Election Legislation in 2019 in connection with the reform of the local self-government and territorial governance the relevant working group suggested, among other things, to address the main issues in selecting the optimal electoral systems for the election of the district and

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regional councils: providing community representation directly; guaranteed representation of each community in the district council; guaranteed representation of each community (or group of small communities united in a district) in the regional council. The working party proposed two options for addressing these challenges. The first is a majority system with multi-member constituencies within the community. The right to nominate candidates has the regional (district) organizations of the political parties, voters through self-nomination. The second is that the electoral system introduced in 2015 has been significantly improved: the number of seats per district is increased by at least twice; the right to nominate nominees to relevant regional or district organizations of the political parties with the nomination of the candidates for constituencies (but also to ensure the right of self-nomination); the district voter votes for one candidate; the votes cast for party candidates are also counted as the party list, and the rest of the seats are distributed between the party lists. Most importantly, the candidates (one or more) who received the highest number of votes in the constituency receive mandates regardless of the method of nomination (the order of candidates on the list should be determined according to the percentage of votes obtained by the candidate in the constituency, and the mandate obtained by the candidate from the party in the constituency should be excluded from distribution by the party list) [9]. However, both variants of the concept were not reflected in the Electoral Code of Ukraine. Therefore, it does not fully respond to the public's requests for the provision of inappropriate representation in the local councils and requires further examination of the compliance of certain provisions of Article 140 of the Constitution of Ukraine with regard to the proper provision of the common interests of the territorial communities of villages, towns and cities. There is also a clear inconsistency with the provisions of the Law of paragraph 15 of the Venice Commission Recommendations, enshrined in the Code of Good Practice in Electoral Matters of 2002, with regard to constituency formation. In further improving the electoral legislation it is important to ensure representation in all constituencies, equal rights of voters, observe the right to represent communities in the councils representing their common interests, and protect the passive right of a candidate-winner in the district to be elected deputy.

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