

Constitutionalism and participative democracy on electoral mass-market

Professor **Ivan PANKEVYCH**¹
Associate professor **Iryna SOFINSKA**²

Abstract

In this article, we would concentrate mostly on constitutionalism and participatory democracy, and citizenship as a legal precondition for both. The main objective of this study is to examine the role of citizenship in participative democracy. Either as possible substantial ideological baggage or a package of rights, duties, and privileges? As a full membership in a particular state based on kinship? Or as an 'everyday plebiscite' rooted in full integration and inclusiveness? Specific attention was paid to two target groups of people concerned (non-resident citizens and non-citizen residents) and their realization of the right to vote in the local elections and referendum, as well as, to stand as a candidate to the local legislature in the European Union Member States and Ukraine. A separate part of the article is dedicated to local referendum issues in Ukraine (1991-2018). In the study, we managed to apply a few mixed research methods to obtain specific scientific results (observation, surveys, secondary data analyses, etc.). The present study related to constitutionalism and participatory democracy, their vision, and outcomes should be viewed as a follow-up to the one previously published research in Ukrainian. This article might be used by bachelor and master students of law faculties, practitioners in the field of constitutional and EU law, citizenship, and migration, electoral law.

Keywords: *constitutionalism, participative democracy, citizenship, local elections and referendums, right to vote, right to be elected, Ukraine*

JEL Classification: K10, K16

1. Introduction

No need to mistrust that democracy today must permit more significant and feasible public participation in public life on the local level and a fuller awareness of social and economic realities globally (via transborder migration and cooperation, freedom of movement). Citizen's participation on the local level is a vital element of every democratic society in the world via a republican model of citizenship³.

¹ Ivan Pankevych – Doctor habilitation of Science, Professor of the Constitutional, European and International Public Law Department at the University of Zielona Góra, Poland; Professor of the Constitutional Law and Sectoral Subjects Department at the National University of Water and Environmental Engineering, Ukraine, ipankevych@gmail.com.

² Iryna Sofinska – Doctor habilitation of Science, Associate Professor of the Constitutional and International Law Department at the National University “Lviv Politechnic”, Ukraine, sofinska@gmail.com.

³ Peter Riesenberg, *Citizenship in the Western Tradition: Plato to Rousseau* (University of North Carolina Press, 1994). pp. 3-5.

By reference to the international legal standards of local self-government, we usually keep in mind the legal norms in the field of local self-government. They should be determined in international legal acts and implemented in national legislation in order to regulate the effective interaction of local self-government institutions with each other and public authorities. Among existing standards of local self-government (municipal autonomy, the principle of subsidiarity, sustainable development, good governance), the participative democracy is the most sufficient. Actual standards of local self-government concern mainly allowing, facilitating, and supporting citizen (resident) participation and initiatives on the local level, but not imposing them.

Of course, the gradual evolution of international legal standards of local self-government has fully reflected the integration of state-building processes that have taken place in Europe over the last three centuries. First democratic aspirations might be found in the framing of the US constitution in 1787⁴ and drafting of the French Declaration of the Rights of Man and of the Citizen 1789⁵. Due to the Declaration, citizenship has acquired specific importance to filter politically and legally the realization of inalienable human rights by determining a person's belonging to the state, granting the right to have the right and to exercise participatory democracy via elections and referendum⁶. Here is inscribed apparent domination of individualism, where individualism trampled pluralism, also there remained no place for alternative collective identities⁷.

However, the formal legislative consolidation of this process was made much more possible by the creation of the Council of Europe in 1949 in London (few years after the end of World War II) and its active involvement in the development of the rule of law, local and regional democracy, for more than 60 years.

The goal of international legal acts regarding local self-government is to achieve the development of local communities and to improve the well-being of their residents based on practical resolving of important issues at the level of their emergence. Such an aim can be found in the preamble to the European charter on local self-government, the Charter (1985). When the Charter was drafted in 1985 and opened to sign and ratify, the Council of Europe had only 25 member states. It was a turbulent time before the Berlin Wall came down, and the USSR collapsed, countries of Eastern, Central, and Southeast Europe became independent. But not long after that, many of them joined (partially committed in 2004, 2007, and 2013)

⁴ *Constitution of the United States, 1787* (URL: https://www.senate.gov/civics/constitution_item/constitution.htm) accessed on: 17.02.2020.

⁵ *Déclaration des droits de l'homme et du citoyen de 1789* (URL: <https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789>) accessed on: 15.02.2020.

⁶ Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, Cambridge University Press, 1992).

⁷ Jeremie Gilbert, David Keane. 'Equality versus fraternity? Rethinking France and its minorities'. *International Journal of Constitutional Law*, Volume 14, Issue 4, 1 October 2016, pp. 887-905; Norbert Rouland, 'La tradition juridique française et la diversité culturelle', 27 *Droit et société* 381 (1994).

or at least aspired to join the European Union. The Council of Europe, with its commitments to human rights and democratic local government, became a prominent international organization, and its membership increased to 47 member states, five Council observers and three Assembly observers⁸.

Particularly art. 3(2) of the Charter determines different levels and tools of participative democracy (local elections, assemblies of citizens, referendums, or any other form of direct citizen participation, which is permitted by statute, for example, town hall meeting, e-petition)⁹. A system of participative democracy is developing alongside the traditional system of representative democracy, guaranteeing human rights and securing the rule of law. Both topics reasonably might be grouped; they are separate but overlapping in some way. The common denominator is that citizens are directly involved on an individual basis in the decision-making process on the local level. Representative democracy, therefore, becomes a democracy based solely on demands and, in no way, a participative democracy.

The promotion of participative democracy instruments creates an effective platform for dialogue between citizens (residents) and local communities by establishing contacts via political parties, for example. When the level of participation decreases, that is because of citizens' disaffection, lack of trust in law acts (existing legal framework), and democratic institutions on the local level. Citizens (residents) should have a voice on the local level and take an active share in public life via different participative democracy instruments¹⁰.

The main aim of participative democracy is getting citizens (residents) more close to the decision-making process on the local level¹¹. Usually, the local self-government bodies are much closer to citizens than regional and national governments, and such proximity necessarily should convert into gradual increasing citizen participation on the local level. Their activity affects a citizen's life directly; therefore, they claim exclusively to act on behalf of citizens; to play a particularly important role in the encouragement of active citizenship.

2. Citizenship as precondition for participative democracy worldwide

The legal and political background of all existing standards of the local self-government is set out in documents adopted by the UN bodies and mechanisms, the Council of Europe and its instruments, and the European Union. Since 1949 these

⁸Chris Himsworth, *European Charter of Local Self-Government: a Treaty For Local Democracy* (Edinburgh University Press, 2015)

⁹*European Charter of Local Self-Government*, Strasbourg, 15.X.1985, ETS No. 122 (URL: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a088>) accessed on: 15.02.2020.

¹⁰*Comparative Constitutionalism: Cases and Materials*, (American Casebook Series). By Norman Dorsen, et al. St. Paul, MN: Thompson West, 2003. pp. 1531, 1538.

¹¹James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press, 2009).

standards continue to evolve, and the trajectory of their evolution entirely depends on new technologies and opportunities (mainly related to citizenship requirements)¹².

Every free and democratic state should take all appropriate measures to ensure the right of its citizens to participate in political and public life on an equal basis¹³. No matter when that citizenship was acquired (at birth or after birth), neither it depends on the mode of citizenship acquisition¹⁴. The only necessary thing regarding citizenship is his/her permanent residence to enjoy participative democracy in a complete sense (exclusively right to vote and to stand for election to the office in local self-government)¹⁵. By residence, we understand habitual residence; also, a length of residence requirement may be imposed on nationals solely for local referendums, and the requisite period of residence should be reasonable. The right to vote should be accorded to citizens residing abroad (it is desirable, at least for national referendums); however, all the requirements should be determined by every state separately¹⁶.

On the electoral 'mass-market' globally, we usually mention three target groups: citizen residents, non-resident citizens, and non-citizen residents¹⁷. In this article, we explicitly have for observation two categories of people concerned: citizens who reside abroad and foreigners, long-standing residents in the country. As foreign residents, we foresee persons who are not citizens (nationals) of the particular, where they reside lawfully. They are connected with this particular state economically via residence, education, job, but not legally through citizenship as a 'genuine and effective link'¹⁸. Every state should ensure that there are no legal or other obstacles to preserve 'a genuine and effective link' with its citizens living abroad and simultaneously create it with foreigners, lawfully residing inside¹⁹. Specifically, by fostering their integration into the everyday life of the community, they live in (via participative democracy) and enabling them step-by-step to participate as fully as possible in local life and decision-making process.

¹² Etienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* / Translated by James Swenson (Princeton & Oxford: Princeton University Press, 2004).

¹³ *The Oxford Handbook of Comparative Constitutional Law* / Edited by Michel Rosenfeld and Andrés Sajó. Oxford University Press, 2012. pp. 531-536.

¹⁴ David Abraham, 'Constitutional patriotism, citizenship, and belonging' *International Journal of Constitutional Law*, Volume 6, Issue 1, January 2008, pp. 137-152.

¹⁵ Patrick Weil, 'From conditional to secured and sovereign: The new strategic link between the citizen and the nation-state in a globalized world' *International Journal of Constitutional Law*, Volume 9, Issue 3-4, October 2011, pp. 615-635.

¹⁶ Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (Routledge, 2010).

¹⁷ Bloemraad I. 'Does Citizenship Matter?' in *The Oxford Handbook of Citizenship*, A. Shachar and R. Bauböck and I. Bloemraad and M. Vink (eds), Oxford University Press, 2017. Pp 534.

¹⁸ Linda Bosniak, 'Persons and citizens in constitutional thought' *International Journal of Constitutional Law*, Volume 8, Issue 1, January 2010, pp. 9-29.

¹⁹ Anja Lansbergen, Jo Shaw, 'National membership models in a multilevel Europe' *International Journal of Constitutional Law*, Volume 8, Issue 1, January 2010, pp. 50-71.

The first case is about citizen non-residents' right to vote and to be elected in local elections. Typically, it is not allowed for citizens who reside abroad to enjoy both sides of this right (Belgium, Brazil, Croatia, Czech Republic, Finland, Germany, Hungary, Luxemburg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Ukraine, UK). But in the USA non-resident citizens enjoy their right to vote and stand as a candidate for the local elections²⁰.

In Bulgaria, it is forbidden, but not for voting for citizens with valid (effective) residence in this country or another EU Member State for at least three months before the elections. In-country voting is de facto possible for first-generation non-resident citizens as their registration does not expire. While in Canada, it differs depending upon the provincial legislation. In Cyprus, civil servants on state service, their spouses, and temporary absentees who live abroad enjoy the right to vote in local elections. A similar situation we observe in Denmark, where selected categories of people, including civil servants and posted workers, persons who intend to return within two years, students and alike, as well as their partners, are allowed both to vote in local elections and to be elected.

In Greece, each Greek citizen can run as a candidate regardless of the place of his/her permanent and lawful residence, but not vote in the local elections.

In France, in-country and proxy voting for non-resident citizens is permissible; expatriates who pay taxes in the municipality (such as the local council tax) are entitled to register and hence to run as candidates for the local legislature²¹. In Ireland, generally, non-resident citizens can not vote except for diplomats and their spouses. Such citizens can be candidates to be elected to the local legislature; however, they must declare the registration authority that they would be in-country residents for their official duties after being elected. In Italy, non-resident citizens can vote in-country only and stay for the local elections. In Malta, it is generally disenfranchised if a person has not spent 6 out of the last 18 months in the country; however, public servants and members of 'disciplined forces' posted abroad are counted as residents and retain voting rights.

In Estonia, voting for first-generation non-resident citizens is de facto possible as the registration does not expire; meanwhile, the right to be a candidate to the local legislature for such people is allowed. In Latvia, it is also forbidden for non-resident citizens to vote and stand for the local elections, unless such a person owns immovable property in the territory of the local government concerned. In Lithuania, an exception is made for civil servants at diplomatic missions and their families, as well as at EU and international institutions, and the military personnel, who are considered to be temporarily abroad and qualify as in-country residents (they can vote and stand for the local elections).

In another EFTA country, Switzerland non-resident citizens cannot vote in the local elections and referendum except for elections in the canton of Ticino where

²⁰ *Conditions for Electoral Rights 2019*. Globalcit Database. URL: <http://globalcit.eu/conditions-for-electoral-rights/> accessed on: 14.02.2020

²¹ Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, Cambridge University Press, 1992).

non-resident citizens who were born in this canton are generally enfranchised and can vote upon returning to their constituency.

Currently, we observe an emerging tendency to grant local political rights (to vote on local elections and referendum, to stand for local election) to foreigners, long-standing residents, following the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level²². It is recommended that the right to vote in local elections should be granted after a certain period of residence: five years of lawful and habitual residence in the state concerned preceding the elections (art. 6). Residence requirements regarding its length should be long enough to become familiar with the local community and its political situation and issues, but not longer than that normally required for the acquisition of full citizenship after birth via naturalization²³. The only exception (restriction of participative democracy of foreign residents) is related to the time of war or another public emergency (art. 9) and based on the model of Article 15(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)²⁴.

	Citizen residents (in-country)	Non-citizen residents ²⁵	
		Another EU Member State citizen	Third-country nationals ²⁶
Austria	84.7%	7.5%	7.8%
Belgium	88.1%	7.8%	4.1%
Bulgaria	98.8%	0.2%	1.0%
Croatia	98.8%	0.4%	0.2%
Cyprus	82.7%	12.9%	4.4%
Czech Republic	95.2%	2.0%	2.9%
Denmark	91.6%	3.5%	4.9%
Estonia	85.1%	1.3%	13.7%
Finland	95.6%	1.8%	2.7%
France	93.1%	2.4%	4.6%
Germany	88.8%	4.8%	6.3%
Greece	92.5%	1.9%	5.6%

²² *Convention on the Participation of Foreigners in Public Life at Local Level*, ETS No.144, 05/02/1992 (URL: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144>) accessed on 14.02.2020.

²³ *Explanatory Report to the Convention on the Participation of Foreigners in Public Life at Local Level*, Strasbourg, 5.II.1992, P.8 (URL: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5e1>) accessed on 14.02.2020.

²⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 04.11.1950 (URL: https://www.echr.coe.int/Documents/Convention_ENG.pdf) accessed on 14.02.2020.

²⁵ *Non-EU citizens: 4.4 % of the EU population in 2018* (URL: <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20190315-1?inheritRedirect=true>).

²⁶ Regarding EFTA countries (Iceland, Liechtenstein, Norway and Switzerland) citizens of the other EFTA countries are usually included in the TCN column, more details here: <https://www.efta.int/Statistics/news/Free-movement-European-migration-and-EFTA-States-514851>.

	Citizen residents (in-country)	Non-citizen residents ²⁵	
		Another EU Member State citizen	Third-country nationals ²⁶
Hungary	98.5%	0.8%	0.7%
Iceland	91.1%	7.4%	1.5%
Ireland	88.2%	8.9%	2.9%
Italy	91.7%	2.5%	5.8%
Latvia	85.7%	0.3%	14.0%
Lithuania	99.3%	0.2%	0.5%
Liechtenstein	66.2 %	33.8 %	
Luxemburg	52.3%	40.7%	7.0%
Malta	88.2%	6.6%	5.2%
Netherlands	94.3%	2.9%	2.8%
Norway	89.4%	6.6%	4.0%
Poland	99.4%	0.1%	0.5%
Portugal	96.1%	1.1%	2.7%
Romania	99.4%	0.3%	0.3%
Slovakia	98.7%	1.0%	0.3%
Slovenia	94.5%	0.9%	4.6%
Spain	90.5%	4.2%	5.3%
Sweden	91.5%	3.1%	5.4%
Switzerland	75.0%	16.4%	8.5%
United Kingdom	90.7%	5.5%	3.7%

3. Citizenship vs. in-country permanent residence: participative democracy & freedom of movement in Europe

The second case is about non-citizen residents' right to vote in the local elections and referendum, as well as stand as a candidate to the local legislature²⁷. On the one hand, there are countries where it is allowed (Denmark); on the other hand, there is the list of countries where it is forbidden (for example, in Canada); however, almost every state has specific preconditions to enjoy this right²⁸.

For example, in Australia, it is not allowed except for subjects of the British Crown who were enrolled before 26.01.1984 and have remained on roll continuously ever since. In Argentina, non-citizen residents may vote in local elections held in all provinces under certain legal conditions set by provincial law, except in the province of Formosa.

In the European Union Member States, the exception is usually regarded other EU Member State citizens who live in a particular municipality where the local elections are held (for example, in Croatia, Cyprus, France, Hungary, Ireland, Italy,

²⁷ Cristina M. Rodríguez, 'Noncitizen voting and the extraconstitutional construction of the polity' *International Journal of Constitutional Law*, Volume 8, Issue 1, January 2010, pp. 30-49.

²⁸ *Conditions for Electoral Rights 2019*. Globalcit Database. URL: <http://globalcit.eu/conditions-for-electoral-rights/>. accessed on: 14.02.2020.

Latvia, Netherlands, Poland, Portugal, Sweden). Nevertheless, additional preconditions might be set by every state individually²⁹.

In Austria, generally, it is forbidden except for EU citizens residing in the Austrian municipality where the election is held (except in the city of Vienna, which is both a province and a municipality and where EU citizen residents can only vote in urban district elections).

In Belgium, it is not allowed for non-citizen residents to vote in the local elections and referendum except for EU citizens residing in the Belgian municipality where the election is held. Third-country citizens (TCN's) who have lived in Belgium without interruption for at least five years and who have submitted a written declaration swearing to respect the Belgian Constitution, Belgian laws, and the ECHR.

In Bulgaria, an exception is valid for the EU citizens who have resided in a Bulgarian municipality for at least six months before election day. In the Czech Republic and Slovakia, an exception is related to the EU citizens who hold the permanent residence, which usually requires at least five years of continuous residence in the Czech Republic.

In Estonia, non-citizen residents can vote in the local elections: 1) EU citizens who reside in Estonia and who actively registered in the electoral registry at least 30 before election day; 2) third-country nationals or stateless persons who hold a long term residence permit or permanent residence right in Estonia, which is usually granted after five years of continuous and lawful residence. In Lithuania, besides the EU citizens residing in the municipality where the election is held, the third-country nationals and stateless persons who hold a permanent residence permit, usually granted after five years of continuous and lawful residence in Lithuania, can vote in the local elections and referendum.

In Finland, EU citizens residing in the municipality on the 51st day before the local election is held; third-country nationals who have lived in Finland for at least two years on the 51st day before the election is held. The two-year residence requirement is waived for Norwegian and Icelandic citizens (Nordic EFTA countries, but not the EU Member State), who can vote under the same conditions as EU and Finish citizens, as a result of the Nordic Passport Union. In Sweden, the continuous residence requirement for non-citizen residents is at least three years; however, it is waived for Norwegian and Icelandic citizens, who can vote under the same conditions as EU and Swedish citizens³⁰.

In Germany, non-citizen residents cannot vote in the local elections and referendum except for EU citizens residing in the municipality where the election is held in all Lander but Bavaria, Saarland, and the city-states of Hamburg, Berlin, and Bremen.

²⁹ Ірина Софінська, *Філософсько-правова візія доктрини громадянства* (Львів: Каменяр, 2018) С. 194-210. [Iryna Sofinska, *Philosophical and Legal Vision of the Doctrine of Citizenship* (Lviv: Kamenyar, 2018) pp. 194-210].

³⁰ *Ibid.*

In Greece, an exception is related to EU citizens residing in-country who can demonstrate 'elementary' knowledge of the Greek language (although this particular precondition is, in practice, not systematically evaluated by relevant local authorities).

In Hungary and Slovenia, the EU citizens residing in the municipality where the election is held can vote in the local elections and referendum, stand as a candidate to the local legislature. Third-country nationals living in the municipality where the election is held and who hold a permanent residence permit, the acquisition of which requires at least five years of continuous and lawful residence in Hungary and Slovenia respectively, can only vote in the local elections and referendum.

In Luxemburg, both categories of non-citizen residents (EU citizens and third-country nationals) who have resided in-country for at least five years before election day can enjoy the right to vote in the local elections and stand as a candidate to the local legislature. The same situation prevails in the Netherlands; however, those third-country nationals (except members of diplomatic or consular missions posted in the Netherlands and their families) must document at least five years of continuous and lawful permanent residence in-country before the election day.

In Malta, an exception is valid for EU citizens who have resided in-country for at least six months over the 18 months immediately preceding election day.

In Portugal, additional exception is related 1) to Brazilian citizens who have lived in Portugal for at least three years; 2) Cape-Verde citizens who have resided in Portugal for at least four years; 3) citizens of Argentina, Chile, Iceland, Norway, Peru, Uruguay and Venezuela who have lived in Portugal for at least five years (based on reciprocity agreements between Portugal and countries mentioned above). A similar situation is in Spain. Citizens of Norway, Bolivia, Cape Verde, Chile, Colombia, Ecuador, Iceland, New Zealand, Paraguay, and Peru who can confirm five years of lawful residence in-country (3 years exclusively for Norwegian citizens) may vote in the local elections. But they cannot stand as a candidate to the local legislature because this is secured for EU citizens residing in-country only.

In Romania, the residential precondition for EU citizens who live in-country and want to vote in the local elections and referendum is at least three months³¹.

In Switzerland, residential time requirements for non-citizen residents to vote in the local elections and referendum, as well as stand as a candidate to the local legislature, differ from canton to canton: in Fribourg after five years of the permanent residence in the canton and C-permit), in Geneva (after eight years of habitual residence in-country), in Jura (after ten years of the permanent residence in-country and one year in the canton), etc.

Here, we demonstrate how differs the legal status of non-resident citizens from non-citizen residents concerning their enjoyment of participative democracy in practice in the European Union Member States (plus Switzerland, UK, and Ukraine)³².

³¹ *Conditions for Electoral Rights 2019*. Globalcit Database. URL: <http://globalcit.eu/conditions-for-electoral-rights/>, accessed on: 14.02.2020

³² *Ibid.*

	non-resident citizen			non-citizen resident		
	<i>Voting</i>	<i>candidacy</i>	<i>local referendum</i>	<i>voting</i>	<i>candidacy</i>	<i>local referendum</i>
Austria	no records		no but	no but		
Belgium	no			yes but	no but	yes but
Bulgaria	no but	no	no but	no but		No
Croatia	no			no but		
Cyprus	no but			no but		
Czech Republic	no			no but		
Denmark	no but			Yes		
Estonia	no but	yes	-	yes	no but	-
Finland	no			Yes		
France	no but			no but		
Germany	no			no but		
Greece	No	yes	-	no but		-
Hungary	no			yes	no but	Yes
Ireland	no but	yes but	-	yes		-
Italy	no but	yes	no but	no but		No
Latvia	no but		-	no but		-
Lithuania	no but			yes		Yes
Luxemburg	no		-	yes		-
Malta	no but	no	-	no but		-
Netherlands	no			yes		Varies
Poland	no			no but		No
Portugal	no			no but		
Romania	no			no but		
Slovakia	no			Yes		
Slovenia	no			yes	no but	Yes
Spain	no			no but		No
Sweden	no			Yes		
Switzerland	no but	no	no but			Varies
Ukraine	no		-	no		-
United Kingdom	no			no but ³³		

As we see, if anybody wants to vote in the local referendum, a citizenship (nationality) requirement may apply; however, it would be advisable for foreigners to be allowed to vote in local referendums after a certain period of lawful and habitual residence (usually, five years)³⁴. Level of their (non-citizen residents)

³³ Before-BREXIT information (31.01.2020).

³⁴ *Guidelines on the Referendums, adopted by the Council for Democratic Elections* at its 18th meeting (Venice, 12 October 2006) and the Venice Commission at its 68th plenary session (Venice, 13-14

inclusiveness, integration in the host society, pure and not biased vision of community development is high enough in comparison with those citizens who reside abroad and retain 'an effective link' with the home country only via citizenship. The distance between the ordinary citizen, who resides temporarily or permanently abroad (non-residents), and non-citizen in-country residents as the voters in the local elections and referendum, as well as standing as candidates to the local legislature varies towards latter³⁵.

4. Constitutional framework of participative democracy in Ukraine: legality of local referendum in contention

On the national level (for example, in Ukraine), there is a specific legal toolkit ready to use effectively³⁶. Not all internationally recognized standards of local self-government are sufficiently implemented into Ukrainian legislation; however, we are moving gradually enough to succeed. We try to elaborate on them not only in the relevant legal framework but also in city charters³⁷. Also, few legislative initiatives (draft laws) have been proposed and registered in the parliament (the Verkhovna Rada) since 2015.

According to existing legal provisions of the Constitution of Ukraine (1996)³⁸ citizens (residents) may participate in public affairs on the local level:

- Art. 38: the right to participate in public affairs on the local level via referendums, to freely elect and to be elected to the local self-government bodies;
- Art. 69: freedom of expression via elections, referendum and other forms of direct democracy;
- Art. 70(1): set up full legal age for citizens of Ukraine (18 years, age of majority) to vote in local elections and referendum
- Art. 140(6): upon the initiative of citizens (residents) to establish a house, street, block, or other bodies of popular self-organization, and assign them a part of their competence, finances, or property³⁹.

Now we try to analyze one of the most valuable instruments of participative democracy more in detail: legality of local referendum in Ukraine.

Do you know that the local referendum in Ukraine for the first time (Soviet

October 2006), P. 6 (URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)008rev-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-e)) accessed on 17.02.2020.

³⁵ Gráinne de Búrca, 'Nominal democracy? A reply to Robert Keohane' *International Journal of Constitutional Law*, Volume 14, Issue 4, 1 October 2016, pp. 925–929.

³⁶ Іван Панкевич, *Традиція виборності влади в Україні* (Львів : Львів. нац. ун-т ім. Івана Франка, 2015) [Ivan Pankevych, *The Tradition of Electoral Power in Ukraine* (Lviv: Ivan Franko National University of Lviv, 2015)].

³⁷ Ivan Pankevych, 'Referendum na Ukrainie: teoria i praktyka; (w:) *Studia wyborcze*. Tom VII, Centrum Studiów Wyborczych, Łódź, 2009. S. 73-89.

³⁸ Constitution of Ukraine, June 28, 1996. Law of Ukraine № 254k/96-VR, Bulletin of the Verkhovna Rada of Ukraine of July 23, 1996 - 1996, № 30.

³⁹*Ibid.*

Union collapse in progress) was held in Odesa on 16 December 1990 on issues related to the formation of a free economic zone?

The referendum issue generally was regulated by the Law of Ukraine "On All-Ukrainian and Local Referendums" adopted by the parliament (the *Verkhovna Rada*) on 3rd July 1991⁴⁰. The core issue of this law was a differentiation of referendum types: all-Ukrainian on the national level (art. 3, 5), regional - in the Autonomous Republic of Crimea (art. 3.1, amended in 1992) and local - on the local level (art. 4, 6). The object of the referendum in the Autonomous Republic of Crimea might be adoption, modification, or cancellation of decisions on issues related to the jurisdiction of the Autonomous Republic of Crimea (art. 3.1).

However, in Autumn 2012, the parliament passed a highly controversial law, which did not amend but change the existing referendum background in Ukraine. How can you ask? Simply. With the adoption of the Law of Ukraine "On All-Ukrainian Referendum" on 6th November 2012⁴¹ "local referendum" disappeared. Although this issue ("local referendum") remains in the Constitution of Ukraine 1996.

After 2012 no issue might be solved on the local level just because "local referendum" does not exist in the legal sense anymore. That is why the question of the legality of the so-called 'Crimean referendum' in March 2014, which was local by the way, was contested, and the outcomes should not be recognized on the international level.

The Constitution of Ukraine 1996 establishes that

- 1) the sovereignty of Ukraine extends throughout its entire territory;
- 2) the essential components of the state sovereignty are indivisibility and inviolability of the territory of Ukraine within its present borders;
- 3) the protection of sovereignty and territorial indivisibility of Ukraine are the essential functions of the state, a matter of concern for all the Ukrainian people (Articles 2, 17.1 of the Constitution of Ukraine).

The constitutional status of the Autonomous Republic of Crimea corresponds to the European Charter of Local Self-Government (paragraphs 1, 2 of Article 4)⁴². According to the Constitution of Ukraine 1996, the competence of the Autonomous Republic of Crimea comprises organization and conducting local referendums (Article 138.1.2) in the course, determined by the law of Ukraine

⁴⁰ About all-Ukrainian and local referendums. Law of Ukraine № 1286-XII of July 3, 1991. Information of the Verkhovna Rada of the USSR 13.08.1991 - 1991, № 33, Article 443 (terminated in 2012).

⁴¹ About the all-Ukrainian referendum. Law of Ukraine № 5475-VI of 06.11.2012. Official Gazette of Ukraine dated 10.12.2012 - 2012, № 92, p. 7, Article 3729, (declared unconstitutional in 2018).

⁴² *European Charter of Local Self-Government*, Strasbourg, 15.X.1985, ETS No. 122. (URL: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a088>) accessed: 15.02.2020.

(Article 92.1.20)⁴³. The Constitutional Court of Ukraine, in its decision, stressed that "narrowing the present borders of Ukraine, withdrawal or alteration of territory through conducting a local referendum contravene the abovementioned constitutional principles (sovereignty)"⁴⁴.

According to the Constitution of Ukraine, "Alterations to the territory of Ukraine are resolved exclusively by the All-Ukrainian referendum" (art. 73)⁴⁵. This article was duplicated later on in article 3(3)(2) of the abovementioned law 2012⁴⁶. Based on the constitutional provisions, Article 3 of the law 2012 exclusively establishes four kinds of national referendums: constitutional, ratification (on territorial issues), legislative and general (on issues other than those provided explicitly in the Constitution of Ukraine 1996).

According to the constitutional provisions, the All-Ukrainian referendum might be called by the parliament (*Verkhovna Rada*) or by the President of Ukraine, following their powers determined by the Constitution of Ukraine 1996 (art. 72). Also, the All-Ukrainian referendum can be held on the initiative of citizens of Ukraine (so-called on 'popular initiative'). But a three-step procedure is foreseen to initiate such an All-Ukrainian referendum: firstly, the number of claimants must be at least three million citizens of Ukraine (eligible to vote). Secondly, this number of willing persons should sign the claim in favor of the referendum in at least two-thirds of the oblasts (regions of Ukraine). It means in 16 regions of Ukraine, with at least 100,000 signatures gathered in each oblast. Third step: after detailed (even meticulous) verification of signatories, such a referendum shall be called by the President of Ukraine, according to Article 106(6) of the Constitution of Ukraine 1996. The wording of constitutional provisions (Article 72) implies that the parliament (*Verkhovna Rada*) and the President of Ukraine can only call the referendum in cases explicitly stipulated in the Constitution of Ukraine 1996. Firstly, the parliament (*Verkhovna Rada*) can call the All-Ukrainian referendum on territorial changes and, secondly, the President on constitutional amendments referred to in Article 156 and implement a popular initiative. Up to claim to call for the All-Ukrainian referendum on territorial issues, the procedure was not met.

Up to the Constitutional Court of Ukraine, there were no legal grounds for holding a referendum in the Autonomous Republic of Crimea and the city of

⁴³ Constitution of Ukraine, June 28, 1996. Law of Ukraine № 254k/96-VR, Bulletin of the Verkhovna Rada of Ukraine of July 23, 1996, № 30.

⁴⁴ Decision of the Constitutional Court of Ukraine № 2-rp / 20 14 of 14 March 2014 in case № 1-13 / 2014 on constitutional petitions of the Acting President of Ukraine, the Chairman of the Verkhovna Rada of Ukraine and the Commissioner for Human Rights of the Verkhovna Rada of Ukraine on compliance with the Constitution of Ukraine (constitutionality) Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea "On holding an all-Crimean referendum" (case on holding a local referendum in the Autonomous Republic of Crimea) (URL: <http://ccu.gov.ua/docs/671>) accessed on 15.01.2020.

⁴⁵ *Constitution of Ukraine*, 28 June 1996 (URL: http://www.servat.unibe.ch/icl/up00000_.html) accessed on 17.02.2020.

⁴⁶ About the all-Ukrainian referendum. Law of Ukraine № 5475-VI of 06.11.2012. Official Gazette of Ukraine dated 10.12.2012 - 2012, № 92, p. 7, Article 3729, (declared unconstitutional in 2018).

Sevastopol on March 16, 2014, and its results cannot be considered as the basis for the “self-determination of the Autonomous Republic of Crimea and the city of Sevastopol”⁴⁷. Furthermore, the Constitutional Court of Ukraine in the abovementioned decision recognized as non-conforming to the Constitution of Ukraine (unconstitutional) the Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea "On conducting all-Crimean referendum" dated March 6, 2014 No.1702-6/14. Also, it held to terminate the activities of the Commission of the Autonomous Republic of Crimea on conducting an all-Crimean referendum, territorial and district committees, established to conduct that particular referendum⁴⁸.

In referendum-related issues globally, a clear distinction must be made at the local level between mandatory referendums, referendums called by an authority and referendums at the request of part of the electorate. Up to Venice Commission (2001), "One area in which there is generally provision for mandatory referendums is that of geographical boundary changes" (B.183)⁴⁹. This idea was confirmed in the separate Opinion of the Venice Commission (2013) regarded exclusively the abovementioned Ukrainian law 2012 and based on comments made by members of this commission: P. Paczolay (Hungary), A. Sanchez Navarro (Spain), and K. Tuori (Finland)⁵⁰.

In this particular situation of the so-called 'Crimean referendum,' holding a local referendum on territorial changes was unlawful, and therefore the outcome is void. The case was not similar to Scotland (2014) or Catalonia (2017) independence referendums.

Afterward, the abovementioned law 2012 was recognized to be unconstitutional due to the decision of the Constitutional Court of Ukraine in 2018⁵¹. Fifty-seven deputies (Members of Ukrainian Parliament) applied with a constitutional petition to the Constitutional Court of Ukraine regarding the conformity of the Law “On All-Ukrainian Referendum” 2012 to the Constitution of Ukraine 1996 (filed petition on unconstitutionality based on the violation of procedure during the law decision process).

The Constitutional Court of Ukraine recognized the Law "On All-Ukrainian Referendum" 2012 as such that does not conform to the Constitution of Ukraine 1996

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Opinion of the Venice Commission on guidelines for constitutional referendums at national level* adopted by the Venice Commission at its 47th Plenary Meeting (Venice, 6-7 July 2001) (URL: <https://rm.coe.int/0900001680926ab4>).

⁵⁰ *Opinion on the law on national referendum of Ukraine, adopted by the Council for Democratic Elections* at its 45th meeting (Venice, 13 June 2013) and by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013) (URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)017-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)017-e)).

⁵¹ Decision of the Grand Chamber of the Constitutional Court of Ukraine № 4-r / 2018 of 27.04.2018 in case № 1-1/2018 on the constitutional petition of 57 people's deputies of Ukraine on compliance of the Constitution of Ukraine (constitutionality) with the Law of Ukraine “On All-Ukrainian Referendum” (URL: http://ccu.gov.ua/sites/default/files/docs/4_r_2018.pdf) accessed on 18.02.2020.

and therefore declared it unconstitutional, which shall be ineffective from the date of adoption of this decision by the Constitutional Court of Ukraine (26th April 2018). However, several Judges of the Constitutional Court of Ukraine (M. Hultai, V. Kolisnyk, O. Lytvynov, M. Melnyk, S. Sas, and I. Slidenko) delivered dissenting opinions to the decision of the Court.

So, 'local referendum' as an effective instrument of participative democracy remains only in the text of the Constitution of Ukraine (1996), but there is no legal provision to make it useful.

5. Conclusions

Over the last thirty years, there has been a visible transformation of participatory democracy, where citizenship played a significant role⁵². Over the last thirty years, there has been a visible transformation of participatory democracy, where citizenship played a significant role. The outcome of this transformation is related to the enlargement of the target group. Before, it was determined by laws that only citizen residents enjoy thoroughly the right to vote in the local elections and referendum, to stand as a candidate to the local legislature. The value of citizenship was very high, by losing it, you lose the right to vote and to be elected. Previously, you could lose citizenship just because you moved. Now, you have the right to move and reside freely, therefore, in some countries, you can enjoy the right to vote and to be elected on the local level, to demonstrate how deep you are involved and included into the host society and state affairs, integrated into the local community life.

After researching on influence of citizenship (nationality) on realization of participative democracy (right to vote in the local elections and referendum, and to stand as a candidate to be elected to local legislature) we would like to sum it up:

1. Citizenship remains to be substantial ideological baggage, but its vision as a package of human rights, duties, and privileges increased much. When American lawyers say that citizenship is a right to have rights, British politicians answer that citizenship is not a right anymore, but the privilege. The privilege to use acquired and possessed rights, notwithstanding where do you live.

2. It is still based on kinship (German concept of citizenship). But, the French idea of citizenship as an 'everyday plebiscite' additionally demonstrates the level of integration and inclusiveness of naturalized foreigners residing in-country. Every country adopts its regulations on the possibility of non-resident citizens (can be lost in future) and non-citizen residents (can receive full citizenship in the future) to vote in the local elections and referendum, and to be elected to the local legislature. States use push & pull practices to succeed.

⁵² Ирина Софінська, 'Реалізація стандартів місцевого самоврядування у контексті європейської інтеграції' in a book: *Регіоналізм та інтеграція*. Науковий щорічник. Вип. II. Чернівці: Букрек, 2016. С. 82–93 [Iryna Sofinska, 'Implementation of local government standards in the context of European integration' in a book: *Regionalism and integration. Scientific yearbook*. Vip. II. Chernivtsi: Bookrek, 2016. pp. 82-93].

3. The local referendum is a specific instrument for citizens residing in-country to demonstrate what, how, and why they want to change on the local level to feel safer and satisfied. Our research shows that non-resident citizens have no right to vote in the local referendum. In this situation, citizenship as a "real genuine and effective link" is between a person and a particular state, but not the local community. On the contrary, as an essential principle, here must be used a lawful and habitual residence. That is why few European countries (Denmark, Finland, Hungary, Lithuania, Slovenia, Sweden) allowed non-citizen residents to vote in the local referendums.

Finally, citizenship as a fundamental part of constitutionalism must remain to be the essential requirement for everybody to participate in the local elections and referendum; however, we should look forward to developing new pathways to integrate and to include non-citizen residents into the local life.

Bibliography

1. Anja Lansbergen, Jo Shaw, 'National membership models in a multilevel Europe' *International Journal of Constitutional Law*, Volume 8, Issue 1, January 2010, pp. 50-71.
2. Bloemraad I. 'Does Citizenship Matter?' in *The Oxford Handbook of Citizenship*, A. Shachar and R. Bauböck and I. Bloemraad and M. Vink (eds), Oxford University Press 2017.
3. Chris Himsworth, *European Charter of Local Self-Government: a Treaty For Local Democracy*, (Edinburgh University Press, 2015).
4. *Comparative Constitutionalism: Cases and Materials*, (American Casebook Series). By Norman Dorsen, et al. St. Paul, MN: Thompson West, 2003. pp. 1531, 1538.
5. *Constitution of the United States*, 1787 (URL: https://www.senate.gov/civics/constitution_item/constitution.htm) accessed on: 17.02.2020.
6. *Constitution of Ukraine*, 28 June 1996 (URL: http://www.servat.unibe.ch/icl/up00000_.html) accessed on 17.02.2020.
7. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 04.11.1950 (URL: https://www.echr.coe.int/Documents/Convention_ENG.pdf) accessed on 14.02.2020.
8. *Convention on the Participation of Foreigners in Public Life at Local Level*, ETS No.144, 05/02/1992 (URL: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144>) accessed on 14.02.2020.
9. Cristina M. Rodríguez. 'Noncitizen voting and the extraconstitutional construction of the polity' *International Journal of Constitutional Law*, Volume 8, Issue 1, January 2010, pp. 30-49.
10. David Abraham, 'Constitutional patriotism, citizenship, and belonging' *International Journal of Constitutional Law*, Volume 6, Issue 1, January 2008, pp. 137-152.
11. *Déclaration des droits de l'homme et du citoyen de 1789* (URL: <https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789>) accessed on: 15.02.2020.
12. Etienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* / Translated by James Swenson (Princeton & Oxford: Princeton University Press, 2004).
13. *European Charter of Local Self-Government*, Strasbourg, 15.X.1985, ETS No. 122. (URL: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a088>) accessed: 15.02.2020.

14. *Explanatory Report to the Convention on the Participation of Foreigners in Public Life at Local Level*, Strasbourg, 5.II.1992, P.8 (URL: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5e1>) accessed on 14.02.2020.
15. Fishkin J.S. *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press, 2009).
16. Gráinne de Búrca. 'Nominal democracy? A reply to Robert Keohane' *International Journal of Constitutional Law*, Volume 14, Issue 4, 1 October 2016, pp. 925-929.
17. Guidelines on the Referendums, adopted by the Council for Democratic Elections at its 18th meeting (Venice, 12 October 2006) and the Venice Commission at its 68th plenary session (Venice, 13-14 October 2006), P. 6 (URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)008rev-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-e)) accessed on 17.02.2020.
18. Irina Sofinska, *Philosophical and legal vision of the doctrine of citizenship* (Lviv: Kamenyar, 2018).
19. Ivan Pankevych, 'Referendum na Ukrainie: teoria i praktyka' (w:) *Studia wyborcze*. Tom VII, Centrum Studiów Wyborczych, Łódź, 2009. S. 73-89.
20. Ivan Pankevych, *The tradition of electing power in Ukraine*. (Lviv: Lviv National University named after Ivan Franko, 2015).
21. Jeremie Gilbert, David Keane, 'Equality versus fraternity? Rethinking France and its minorities' *International Journal of Constitutional Law*, Volume 14, Issue 4, 1 October 2016, pp. 887-905.
22. Linda Bosniak. 'Persons and citizens in constitutional thought' *International Journal of Constitutional Law*, Volume 8, Issue 1, January 2010, pp. 9-29.
23. Michel Rosenfeld, András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012. pp. 531-536.
24. Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (Routledge, 2010).
25. Norbert Rouland, 'La tradition juridique française et la diversité culturelle' *27 Droit et société* 381 (1994).
26. *Opinion of the Venice Commission on guidelines for constitutional referendums at national level* adopted by the Venice Commission at its 47th Plenary Meeting (Venice, 6-7 July 2001) (URL: <https://rm.coe.int/0900001680926ab4>).
27. *Opinion on the law on national referendum of Ukraine, adopted by the Council for Democratic Elections* at its 45th meeting (Venice, 13 June 2013) and by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013) (URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)017-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)017-e)).
28. Patrick Weil, 'From conditional to secured and sovereign: The new strategic link between the citizen and the nation-state in a globalized world' *International Journal of Constitutional Law*, Volume 9, Issue 3-4, October 2011, pp. 615-635.
29. Peter Riesenber, *Citizenship in the Western Tradition: Plato to Rousseau* (University of North Carolina Press, 1994).
30. Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, Cambridge University Press, 1992).
31. Ирина Софінська, 'Реалізація стандартів місцевого самоврядування у контексті європейської інтеграції' in a book: *Регіоналізм та інтеграція*. Науковий щорічник. Вип. II. Чернівці: Букрек, 2016. С. 82-93 [Iryna Sofinska, 'Implementation of local government standards in the context of European integration' in a book: *Regionalism and integration*. Scientific yearbook. Vol. II. Chernivtsi: Bookrek, 2016. pp. 82-93].