

Case Note

THE IMPLEMENTATION OF THE PRINCIPLE OF JUDICIAL PROTECTION OF LOCAL SELF-GOVERNMENT RIGHTS IN THE NATIONAL COURTS' PRACTICE: THE UKRAINIAN EXPERIENCE

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Summary: 1. Introduction. – 2. Theoretical Principles of Judicial Protection of Local Self-Government Rights. – 3. Judicial Opinions of National Courts in Cases Concerning the Protection of Local Self-Government Rights. – 4. Conclusions.

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ABSTRACT

Background: The article is devoted to the consideration of the principle of judicial protection of local self-government rights in the practice of the Supreme Court. The authors examined the constitutional and international legal guarantees of local self-government rights and emphasised that, compared to individual European states, Ukraine received the proper legal basis for the effective guarantee and protection of local self-government as an important institution of the democratic state. Attention is paid to the analysis of the principle of judicial protection of local self-government in Ukrainian and European scientific literature. It is emphasised that guaranteeing the effectiveness of the local self-government is one of the main purposes of judicial protection of local self-government rights. The article also considers certain problems related to the proper implementation of regulatory provisions on judicial protection. In particular, it emphasises the importance of substantiating the appeal to the judicial authorities specifically for the purpose of protecting the interests of the territorial community in legal relations with state power. The authors also outline the problem of choosing a jurisdiction for the consideration of disputes in which local self-government bodies act as one party. It was determined that in terms of the right of a local self-governing body to apply to a court with a claim against another public authority in order to protect the rights and interests of the relevant territorial community, a certain practice has been formed. On the basis of the analytical research, certain categories of cases considered by Ukrainian courts in the context of the right to judicial protection of local self-government were identified and analysed. In particular, the cases of lawsuits by local self-government bodies to the Verkhovna Rada of Ukraine regarding the formation and liquidation of sub-regional administrative-territorial units were analysed; cases of claims of local self-government bodies to the Cabinet of Ministers of Ukraine regarding territorial transformations; cases of lawsuits between local self-government bodies. Special attention is paid to the practice of the prosecutor's appeal to the court in the interests of the state in the person of the local self-government body.

Methods: The authors used comparative synthesis methods and information analysis. Actual empirical data are used to argue for the conclusions.

Results and Conclusions: The authors draw conclusions about the implementation of the principle of judicial protection of local self-government rights in the practice of Ukrainian courts. Separate problems concerning the possibility of a local self-government body appealing to the courts are also analysed.

Keywords: judicial protection; local self-government rights; judicial practice; protection of local self-government rights

1 INTRODUCTION

Ukraine's achievement of independence and the development of statehood on a new basis led to the institutionalisation of local self-government in our country as one of the important institutions of civil society. According to scientists, its development is impossible without territorial communities and their self-organised structures.¹ That is, civil society cannot be

1 OV Batanov, VV Kravchenko 'Local self-government as an institution of civil society: municipal legal problems of interaction and functioning' (2018) 6 (6-7) Aspects of Public Administration 47.

built without active members of territorial communities and local self-government bodies capable of taking responsibility for solving local issues.

Along with this, the constitutionalisation of local self-government as a separate public subsystem with broad powers required the introduction of legal means guaranteeing and protecting municipal rights and freedoms and the institution of local self-government in general. One of these means is judicial protection of local self-government rights. In particular, the issue of the protection of local self-government became relevant during the implementation of the decentralisation reform in Ukraine because the reform process involved expanding the functional and competent sphere of local self-government, increasing the responsibility of this subsystem of public authorities.

At the highest constitutional level, the Ukrainian legislator provided a legal basis for judicial protection of local self-government rights. Scientists believe that the wording of Art. 145 of the Ukrainian Constitution testifies to the legislator's definition of local self-government as one of several means for solving important local issues.² Moreover, the constitutional consolidation of local self-government guarantees, in particular, the possibility of judicial protection, is rightly recognised as providing local self-government with a sustainable character.³

Ukraine also ratified the European Charter of Local Self-Government (hereinafter - the Charter), Art. 11 of which contains guarantees of local self-government legal protection, authorising the latter to use means of legal protection to ensure the free exercise of their powers and respect for the principles of local self-government.⁴ Adoption of the Law of Ukraine 'On Local Self-Government in Ukraine' also contributed to the establishment of an appropriate legal framework for the protection of local self-government rights in court. One of the principles of local self-government is the principle of local self-government judicial protection (Art. 4).

Therefore, a stable constitutional and legal basis for judicial protection of local self-government rights has been created in Ukraine. On the other hand, not all European countries with a stable democracy introduce this guarantee of local self-government. For example, the Constitution of the Netherlands does not contain any provisions on judicial protection of local self-government rights, although a separate chapter was devoted to the management of provinces and municipalities. The report of the Commission on the Implementation of Obligations by the Member States of the Council of Europe (Monitoring Commission) emphasised that in the Netherlands, there is no proper legal basis in the Constitution and legislation for local authorities to challenge the decisions of the central government in case of violation of the right to local autonomy.⁵ A similar conclusion was drawn by the Monitoring Commission regarding Hungary in 2013. According to the results of the report, the Commission recommended applying effective means of legal protection that would give local authorities the power to file complaints to protect their rights.⁶

2 VYa Tatsii et al (eds), Constitution of Ukraine. Scientific and practical commentary (2nd edn, Kharkiv 2011) 973.

3 OV Batanov, 'The system of local self-government guarantees, problematic issues of the theory' (2004) 3 Scientific Works of the Odessa National Law Academy 152.

4 European Charter of Local Self-Government. Strasbourg, 15 October 1985, official translation. <https://zakon.rada.gov.ua/laws/show/994_036#Text> accessed 8 September 2022.

5 Monitoring of the application of the European Charter of Local Self-Government in the Netherlands / Committee on the Honoring of Obligations and Commitments by Member States of the European Charter of Local Self-Government (Monitoring Committee). Report CG(2021)41-05 prov 22 September 2021 54 <<https://vng.nl/sites/default/files/2021-11/rapport-congres-lokale-en-regionale-overheden-rve-over-nederland.pdf>> accessed 8 September 2022

6 Local and regional democracy in Hungary / Monitoring Committee. 25th SESSION Strasbourg, 29-31 October 2013 <<https://rm.coe.int/168071910d>> accessed 8 September 2022

2 THEORETICAL PRINCIPLES OF JUDICIAL PROTECTION OF LOCAL SELF-GOVERNMENT RIGHTS

In the scientific literature, the institution of judicial protection of territorial communities is comprehensively considered a specific right, a type of social management, etc.⁷ The goal of legal protection is the restoration of the violated or contested right of local self-government and their unimpeded implementation.⁸ The principle of judicial self-defence of local self-government bodies is also recognised as a legal opportunity for these legal entities to appeal to the court for the protection of their independence.⁹ It is worth emphasising that self-defence is essential, that is, the ability of local self-government bodies to be defenders of the interests of the corresponding administrative-territorial unit's population. The problem of the need for proper judicial protection of local self-government rights is also considered in the context of delegated powers. Thus, scientists especially emphasise the need for local self-government bodies to be able to defend their rights in a court of law in the event of the state's improper performance of its obligations regarding the financial support of delegated powers.¹⁰

We see the main purpose of judicial protection of the rights of local self-government to consist of guaranteeing the effectiveness and reality of the institution of local self-government in a democratic state, in which the activity of public authorities is based on the principle of the rule of law. Note that when considering the problems of the proper implementation of the principle of the rule of law, scientists understand this principle in accordance with the substantive concept of the rule of law. This concept emphasises that the rule of law should include guarantees of human rights and freedoms in compliance with general principles of law. The existence of the institution of judicial protection of local self-government rights also contributes to guaranteeing the constitutional right to local self-government, bringing the activities of public authorities into the regime of constitutional legality.

The judicial protection of local self-government rights judicial protection is also recognised as a way of ensuring the constitutional right of citizens to local self-government.¹¹ In the conditions of the actual impossibility of the territorial community independently resolving issues of local importance (the implementation of the right to a local referendum has been blocked for several years due to the lack of special legislation and the state of war in the country also blocks other forms of local democracy), local self-government bodies should not only be expressions of the territorial community will but also act as subjects that can effectively protect the rights of the community in court.

In support of this, we can cite the legal position of the Constitutional Court of Ukraine expressed in case No. 1-9/2002 (on the protection of the labour rights of local council deputies). In this case, the court noted that with the adoption of the Constitution of Ukraine, the political and legal nature of local councils was fundamentally changed. They became representative bodies of local self-government, through which the right of territorial

7 YuS Pedko, 'Judicial protection of the rights and interests of local self-government' in VV Kravchenko et al (eds), *Actual problems of the establishment and development of local self-government in Ukraine*: monograph (Kyiv. 2007) 125.

8 Constitution of Ukraine (n 5) 1017.

9 J Jagoda 'Rechtsschutz der kommunalen Selbstverwaltung im polnischen Rechtssystem' (2010) 2 *Silesian Journal of Legal Studies* 81.

10 S Serohina, I Bodrova, A Novak, 'Delegation of State Powers to Local Self-Government Bodies: Foreign Experience and Ukrainian Realities' (2019) 9 (3) (28) *Baltic Journal of European Studies* 278.

11 Constitution of Ukraine (n 5) 1017.

communities to independently resolve issues of local importance is exercised.¹² In view of this, we find it appropriate to consider the right to judicial protection of the rights of local self-government not only as a guarantee and a tool for protecting the rights of local self-government (the task of municipal bodies) but also as an obligation to protect the interests of the relevant community.¹³

The right of local self-government bodies to apply to the court for the protection of the territorial community interests, in particular, protection from the state and its bodies, is generally not denied in the literature.¹⁴ At the same time, the realisation of the right to appeal to the court requires the fulfilment of an important duty – to justify that such an appeal protects the interests of the territorial community in legal relations with representatives of state power.¹⁵

Also, the practice of the prosecutor's appeal to the court in the interests of the state in the person of the local self-government body is interesting and debatable. In this category of cases, the initiative for the implementation of the principle of judicial protection of local self-government rights is taken by the prosecutor's office.

We would like to draw attention to the fact that in accordance with the Decision of the Constitutional Court of Ukraine dated 8 April 1999 No. 1-1/99, the prosecutor's office does not have the authority to represent the interests of local self-government bodies. However, we note that according to Art. 23 of the Law of Ukraine 'On the Prosecutor's Office', the prosecutor represents the legal interests of the state in the event of a violation or threat of violation of the state's interests if the protection of these interests is not carried out or is improperly carried out by a body of state power or a body of local self-government, as well as in the absence of such a body. Also, the relevant powers of the prosecutor are provided for by procedural norms, in particular, Art. 53 of the Code of Administrative Procedure of Ukraine,¹⁶ Art. 54 of the Civil Procedure Code of Ukraine,¹⁷ and Art. 54 of the Commercial Procedure Code of Ukraine.¹⁸

In general, in a similar practice, the court determines in each case whether the prosecutor's arguments regarding his/her right to appeal to the court in order to protect the interests of the state (territorial community) are justified or unfounded. Case No. 903/129/18¹⁹ is interesting in this regard. The prosecutor's office appealed to the court in the interests of the

- 12 Decision of the Constitutional Court of Ukraine in the case on the constitutional submission of the Ministry of Internal Affairs of Ukraine regarding the official interpretation of the provisions of the second part of Article 28 of the Law of Ukraine 'On the Status of Members of Local Councils of People's Deputies' (case on protection of labour rights of members of local councils) dated 26 March 2002 No 6-rp /2002. <<https://zakon.rada.gov.ua/laws/show/v006p710-02#Text>> accessed 8 September 2022.
- 13 Ya Bernaziuk, 'Appealing to the administrative court for the purpose of protecting the interests of the territorial community is an inalienable right of the local self-government body' (15 January 2020) Judicial and Legal Newspaper <<http://bit.ly/2FOzLrG>> accessed 8 September 2022.
- 14 R Kuybida, T Ruda, G Lysko, A Shkolyk, 'What local self-government employees need to know about courts: A practical guide for heads of local self-government bodies and legal services. The Swiss-Ukrainian project "Supporting decentralization in Ukraine"' (DESPRO K.: Sofia-A LLC 2012) 7.
- 15 The Law of Ukraine No 1697-VII 'On the Prosecutor's Office' of 14 October 2014 <<https://zakon.rada.gov.ua/laws/card/1697-18>> accessed 8 September 2022.
- 16 Code of Administrative Procedure of Ukraine No 2747-IV (7 July 2005) <<https://zakon.rada.gov.ua/laws/show/2747-15/card2#Card>> accessed 8 September 2022.
- 17 Civil Procedure Code of Ukraine No 1618-IV (18 March 2004) <<https://zakon.rada.gov.ua/laws/card/1618-15>> accessed 8 September 2022.
- 18 Commercial Procedure Code of Ukraine No 1798-XII of 6 November 1991 . Vol. 2. Iss. 49. pp. 170-173. оли становленим, закономних прав на справедливий судовий розгляд, зокрема права на доступ до суду <<https://zakon.rada.gov.ua/laws/show/1798-12#top>> accessed 8 September 2022.
- 19 Judgment of the Grand Chamber of the Supreme Court of 15 October 2019 No 903/129/18 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/85174593>> accessed 8 September 2022

state in the person of the village council and asked the defendant to return the land plot from the lease to the territorial community. Two instances supported the plaintiff and obliged the defendant (tenant) to return the land plot to the village council.

In this case, we pay specific attention to the possibility of the prosecutor's office protecting the interests of the territorial community. The village council noted that it could not go to court because it did not have the funds to pay the court fee. The Supreme Court notes that the lack of funds to pay the court fee does not deprive the council of the opportunity to protect the interests of the territorial community. The very fact that the village council did not go to court speaks to the improper performance of its powers. And in his case, the Supreme Court emphasised the validity of the participation of the prosecutor's office in the protection of territorial community rights. As a result, the court confirmed the right of the prosecutor's office to appeal for the protection of territorial community rights.

In the literature, the problem of choosing the jurisdiction of disputes in which local self-government bodies act as one party is often raised.²⁰ At the same time, insufficient attention is paid to the analysis of the judicial practice of resolving disputes with the local self-government bodies' participation in the interests of the territorial community members. The practice of judicial review of these categories of cases in the context of the implementation of the principle of judicial protection of local self-government rights especially needs to be analysed. After all, a serious problem of both doctrinal and applied significance is the definition of the limits of this principle and the establishment of real opportunities for municipal institutions to challenge the decisions, actions, and inactions of state authorities, in particular, the high-level bodies. There is also the issue of determining disputes involving the participation of local self-government bodies that are not subject to consideration in the order of administrative proceedings or cannot be resolved in court at all.

3 JUDICIAL OPINIONS OF NATIONAL COURTS IN CASES CONCERNING THE PROTECTION OF LOCAL SELF-GOVERNMENT RIGHTS

Over the past several years, the judgments of national courts, especially the Supreme Court, have become a topic of scientific research and analysis. Undoubtedly, there are several thoughts, statements, and conclusions concerning municipal theory and practice, including the legal protection of local self-government rights, in judicial practice.

Moreover, it should be emphasised that certain practices have been formed concerning a local self-government body's rights to bring lawsuits against another local self-government body or body of state authority. Such claims concern decisions, actions, or inactions of public authorities in order to protect the rights and lawful interests of a territorial community. For instance, the right of local councils as representative bodies of local self-government to protect violated rights of territorial communities by means of a complaint against a body of state authority²¹ or local self-government bodies²² is recognised.

20 YaO Bernazyuk, 'Separate issues of demarcation of the subject jurisdiction of courts in cases involving local self-government bodies' (2018) 2 (49) Scientific Bulletin of the Uzhhorod National University; Series: Law 170.

21 Judgement of the Administrative Court of Cassation of 21 November 2018 No 504/4148/16-a (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/78165785>> accessed 8 September 2022

22 Judgement of the Administrative Court of Cassation of 13 February 2018 No 666/8779/14-a (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/72287938>> accessed 8 September 2022

This research focuses on the practice of applying the principle of judicial protection of local self-government rights and highlights national court decisions. As a result, the authors suggest the following review of court cases.

3.1. Legal cases on suits of local self-government bodies to the Verkhovna Rada of Ukraine (hereinafter – the VRU) regarding the appeal of the Resolution of the VRU dated 17 July 2020 No. 807-IX 'About the formation and liquidation of districts' (hereinafter – Resolution No. 807-IX)

To start with, it should be mentioned that the adoption of this resolution resonated not only with researchers but with practicing lawyers due to the absence of special law on the regulation of administrative-territorial structures. This law should regulate the procedure of territorial transformations at the local and subregional levels. This determined the formation of court practice regarding the appeal.

Thus, in case No. 9901/276/20,²³ the city council emphasised the non-observance of the principle of proportionality and balance between adverse consequences for rights and interests and the aims of the act. Moreover, it was stressed that Resolution No. 807-IX was adopted without taking into account the interest of the plaintiff's community, in violation of regional policy principles.

However, the Cassation Administrative Court closed the case, arguing that the city council appealed the Resolution of the VRU on the grounds of its inconsistency with the Constitution of Ukraine and the regulatory procedure for its adoption (legislative procedure). The Court noted that the powers of the VRU regarding the organisation of the territorial system of Ukraine, including the formation and liquidation of districts, are not a form of implementation relevant to this body of administrative functions; therefore, it cannot be controlled by an administrative court. Thus, the Supreme Court actually determined for the city council that the dispute, in this case, is the object of judicial constitutional control and should be decided by the Constitutional Court of Ukraine.

This case is remarkable for the opinion of the judge,²⁴ who points out that the city council did not ask the court to determine whether the Resolution of the VRU complied with the Constitution of Ukraine or not. The city council applied to the court for recognition of Resolution No. 807-IX as illegal and invalid, specifically in the part that concerns the interests of the territorial community that it represented. In addition, the city council drew attention to the fact that the VRU resolved the territorial organisation of Ukraine issue by adopting a resolution rather than a law, violating procedure. We agree with this remark since the issues of the administrative-territorial structure of the country should be addressed by the law.

Also, the judge emphasised that a breach of the procedure of consideration and adoption of the act may lead to a violation of the rights and interests of those persons whose rights, freedoms and interests are affected by this normative legal act, and it affects the legality of such an act. According to the judge, the dispute was a public legal one, and the court in its decision did not take into account the arguments of the city council, nor did it investigate the issue of compliance with the procedure for registration, submission, review, and adoption of Resolution No. 807-IX.

23 Judgment of the Grand Chamber of the Supreme Court of 16 December 2020 No 9901/276/20 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/94194614>> accessed 8 September 2022

24 Separate opinion of 16 December 2020 No 9901/276/20 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/94525437>> accessed 8 September 2022

In case No. 9901/202/20,²⁵ the proceedings on the claim of the village council to the VRU on invalidation of Resolution No. 807-IX and on the claim of the district council on the recognition of illegal actions of the parliament in the part of district formation in the region were combined.

Reference to international legal standards in the field of local self-government is indicative in this case. The plaintiffs emphasised that Resolution No. 807-IX led to a change in the territorial boundaries of local self-government without taking into account the opinion of territorial communities, violating the requirements of Art. 5 of the European Charter of Local Self-Government. The Cassation Administrative Court, as a part of the Supreme Court, closed the proceedings in the case on the basis of Clause 1, Part 1, Art. 238 of the Code of Administrative Procedure of Ukraine because the review of Resolution No. 807-IX could not be carried out according to administrative proceedings.

As in the case mentioned above, the Supreme Court supported the views expressed in previous instances – the constitutional process of organising the territorial system of Ukraine, in particular, the formation and liquidation of districts, and the participation of the VRU in this process is not a form of implementation of the *body's administrative functions*. Therefore, it cannot be subject to the control of the administrative court jurisdiction. In fact, the VRU's arguments regarding the absence of a dispute between it and the plaintiffs regarding the implementation of their competence in the field of management, including delegated powers, were supported. At the same time, we consider that the court did not provide arguments as to why the exercise of authority and the adoption of a normative rather than an individual act aimed at changing the administrative-territorial structure of the country at the subregional level is not a form of exercising managerial functions. Also, in this case, the concept of 'a dispute that is not subject to consideration in the order of administrative proceedings to a wide extent' was applied. Therefore, in the opinion of the court, such disputes do not fall under the jurisdiction of administrative courts and are not subject to court examination at all. At the same time, the arguments presented in the judges' separate opinions are interesting and can be reduced to the following points.

Firstly, the plaintiffs, as local self-government bodies, are deprived of the opportunity to apply to the Constitutional Court of Ukraine with a constitutional complaint. This deprives them of the opportunity for judicial protection of local self-government rights and is a violation of Art. 55, Part 3 of Art. 125 of the Constitution of Ukraine (the right to challenge in court any decisions, actions, or inactions of state authorities, local self-government bodies, and officials). Secondly, the argument was expressed that the plaintiffs did not ask for recognition of the contested Resolution No. 807-IX as inconsistent with the Constitution of Ukraine, despite the reference in the statement of claim to the non-compliance of actions of the subject of power with the Constitution of Ukraine. Thirdly, the possibility of resolutions of the VRU being subject to judicial constitutional review does not automatically mean that these resolutions are excluded from judicial review in administrative proceedings.

It should be noted that local councils' arguments regarding the non-compliance of the Resolution No. 807-IX with the requirements of Art. 5 of the European Charter of Local Self-Government were not considered by the court at all. Ukrainian legislation lacks clarity in the mechanism for territorial communities' involvement in solving certain issues of the administrative-territorial system and protecting the territorial boundaries of local self-government. The need to take into account public opinion, particularly when changing borders and naming communities, was emphasised by the experts of the

25 Judgment of the Grand Chamber of the Supreme Court of 14 April 2021 No 9901/202/20 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/96669456>> accessed 8 September 2022

European Commission for Democracy through Law in 2015 when considering the draft amendments to the Constitution of Ukraine. The latter, in the Commission's opinion, should have been supplemented with a reference norm to the legislative provisions regulating the procedure for taking into account public opinion in the case of changes in an administrative-territorial system.²⁶

In case No. 9901/411/19,²⁷ the plaintiff, the city council, contested the resolution of the VRU on changes in the administrative-territorial structure of the region and demarcation of the district. In particular, the plaintiff emphasised the procedural violations during the adoption of the resolution, as well as the failure to consider the needs of the region and its residents. At the same time, the Supreme Court, when considering the case, did not consider the interests of territorial communities but focused only on the problem of disputes that were not subject to consideration in the order of administrative proceedings or were not subject to consideration at all. The court emphasised that subjects of power have the right to apply to the administrative court only in cases specified by the Constitution and Laws of Ukraine. Moreover, in the opinion of the court, such lawsuits can relate exclusively to disputes between authorities over the exercise of their competence in the field of public administration, in particular, delegated powers. Since Ukrainian legislation does not directly provide the possibility of appeals by local self-government bodies to resolutions of the VRU, the Supreme Court recognised the contested resolution as such that it cannot be considered by an administrative court at the request of a local self-government body. Furthermore, as in previous decisions, the court applied the concept of disputes that do not fall under the jurisdiction of administrative courts and that are not subject to judicial review at all.

In a separate opinion²⁸ to this decision, an important aspect was emphasised – local self-government bodies are representative bodies which are to exercise the right of the territorial community to independently resolve issues of local importance. A violation of a territorial community's rights means a violation of the members of these communities' rights, and the interests of members of territorial communities determine the content and direction of the activities of local self-government bodies. Therefore, the main task of the local self-government body is to protect the interests of members of territorial communities, in particular, by applying to the court. In this case, the right to appeal to the court becomes the responsibility of the local self-government body, without which the rights of local self-government become defenceless. Depriving local self-government bodies of the right to appeal to an administrative court in the interests of the territorial community distorts the nature and task of an administrative court. Also, according to the judge, any subject of public law has the right to bring a suit against any subject of authority to ensure the protection of the rights, freedoms, and interests of a man and citizen and other subjects in the field of public law relations. The only limitation is direct conflict with the law. We agree that the lack of alternative means of judicial protection of the territorial community's rights in this situation deprived the latter of the guarantees established by Art. 145 of the Constitution of Ukraine, Art. 11 of the European Charter of Local Self-Government, and provisions of national legislation.

26 Opinion on the amendments to the Constitution of Ukraine regarding the territorial structure and local administration as proposed by the working group of the Constitutional Commission in June 2015 endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015). Strasbourg, 26 October 2015, Opinion No 803/2015 5 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)028-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)028-e)> accessed 8 September 2022

27 Judgment of the Cassation Administrative Court of 24 December 2019 No 9901/411/19 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/86595152>> accessed 8 September 2022

28 Separate opinion of 9 January 2020 No 9901/411/19 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/86828275>> accessed 8 September 2022

This opinion is especially important in the context of the problem mentioned above – local self-government bodies are not the subjects of an appeal to the Constitutional Court of Ukraine with a constitutional complaint in accordance with Art. 52 of the Law of Ukraine 'On the Constitutional Court of Ukraine' dated 13 July 2017, No. 2136-VIII. At the same time, there are attempts to protect the rights of local self-government by other subjects of appeal. For example, in case No. 1-29/2020(475/20),²⁹ 50 People's Deputies of Ukraine tried to challenge the constitutionality of the provisions of the Law of Ukraine 'On Local Self-Government in Ukraine' and the orders of the Cabinet of Ministers of Ukraine, which approved the prospective plan for the formation of territories in the region and determined the administrative centres and the boundaries of territorial communities. The reasons for the refusal were formal and related to the insufficient justification of the non-compliance of the provisions of the contested acts with the provisions of the Basic Law of Ukraine. At the same time, the appearance of this constitutional submission indicates that local self-governments are searching for ways to protect their violated rights, as well as ways to exercise the right to judicial protection of the rights of local self-government in conditions of inefficient judicial administration.

3.2. Legal cases of suits of local self-government bodies to the Cabinet of Ministers of Ukraine (hereinafter – the CMU) regarding territorial transformations

In the context of the changes in the territorial structure of Ukraine that took place in 2020, there is a category of cases in which the acts of the CMU regarding the approval of prospective plans for the formation of communities' territories are challenged. Thus, in case No. 640/24207/20,³⁰ the village council appealed to the court and asked it to recognise it as illegal and cancel the order of the MU on the approval of the prospective plan for the formation of territories in the region. The village council considered that its community was included in the united community illegally and in violation of the principles of legality and voluntariness. The plaintiff stated that the order of the CMU was adopted in violation of the Law of Ukraine 'On the Voluntary Unification of Territorial Communities' and emphasised the disregard for the community's opinion and the lack of consultation, as the plaintiff's community wanted to be part of a different united community than was provided for by the order of the CMU.

The court noted that the principles of voluntariness, transparency, and openness of the citizens' association are ensured, *inter alia*, by holding consultations with territorial communities. Thus, the evidence in the case did not confirm compliance with the principle of voluntariness, transparency, and openness of the citizens' association. Therefore, the court established their violation during the formation of the territory of the united community. The interests of the plaintiff's community were not respected. As a result, the court repealed the order of the CMU regarding the inclusion of the plaintiff's community in the united community.

However, the appeal court overturned the above-mentioned decision and pointed out that the Law of Ukraine 'On the Voluntary Unification of Territorial Communities' does not contain provisions regarding the mandatory obtaining of the consent of territorial communities to determine a certain configuration of capable territorial communities. In addition, the appeal instance noted that the CMU is not authorised to verify whether or

29 Judgment of the Grand Chamber of the Constitutional Court of Ukraine of 22 December 2020 No.1-29/2020(475/20) (Unified State Register of Court Decisions) <<https://zakon.rada.gov.ua/laws/show/v096u710-20#Text>: > accessed 8 September 2022

30 Judgment of the Sixth Administrative Court of Appeal of 09 November 2021 No 640/24207/20 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/101006416>> accessed 8 September 2022

not there was an agreement of territorial community representatives with the proposed configuration of territorial communities. Therefore, the village council remained part of that united community.

Case No. 640/12597/20³¹ is similar in terms of the subject matter and outcome of the review. In this dispute, the village council was also contesting the order of the CMU to approve a prospective plan for the formation of territories in the region. However, it is necessary to pay attention to the argumentation expressed in the case.

The first instance also satisfied the demands of the plaintiff. Moreover, it pointed out the failure to take into account in the decree of the CMU the comments of national associations of local self-government bodies, which directly related to the rights of the plaintiff. The court also noted the absence of any evidence of the participation of local self-government body representatives during the development of the prospective plan for the formation of territories in the region.

The court found that the plaintiff had previously decided not to accept the proposal for unification with territorial communities, as provided for in the prospective plan. The court separately considered the lack of explanations from the representatives of the CMU regarding the neglect of the plaintiff's opinion. As a result, the court concluded that the principles of voluntariness, openness, and transparency were violated in the formation of a prospective plan for the formation of territories. In the opinion of the court, the decree of the CMU violated the rights of the territorial community (the plaintiff), as a result of which the court decided to exclude the plaintiff's community from the composition of the united community, as stipulated by the decree of the CMU.

The appeal instance overturned the decision since the order of the CMU did not directly affect and did not violate the rights of the territorial community. The appellate court pointed out that since the territorial communities in the process of unification are not bound by the provisions of the corresponding prospective plan and are not obliged to unite in accordance with the administrative-territorial configuration provided for by such a plan, the contested order did not create, change, and terminate the rights and obligations of the plaintiff in the field of public legal relations.

This motivational part of the judgment is subject to multiple interpretations. In his judgment, it was established that perspective plans are not mandatory for territorial communities, although they are approved by the decree of the CMU. At the same time, there was a decision of the local council to unite with another community, which was not provided for in the prospective plan. The question arises as to why the community should unite according to the approved plan, against its own interests, if a prospective plan is not mandatory. Moreover, there is also the question of how the community can protect itself and its interests in the process of consolidating the basic level of the administrative-territorial system.

In relation to this topic, there are several cases where the appellate instance was on the side of local councils, for example, case No. 640/15962/20.³² This case is similar to the two mentioned above, but the position of the village council was also supported by the appellate

31 Judgment of the Sixth Administrative Court of Appeal of 7 April 2021 No 640/12597/20 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/96111221>> accessed 8 September 2022

32 Judgment of the Sixth Administrative Court of Appeal of 27 May 2021 No 640/15962/20 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/104506126>> accessed 8 September 2022

instance. The same situations appear in cases No. 640/13456/20³³ and No. 640/12763/20³⁴ – after the district administrative court's refusal, the appellate instance supported the side of local councils. Considering these cases, courts emphasised the need to observe the sequence of all stages of unification provided for by the Law of Ukraine 'On the Voluntary Unification of Territorial Communities'.

Courts also recognised the role of prospective unification plans as a 'primary basis for starting the procedure of such a voluntary unification'. The appeal courts in these cases also drew attention to the fact that Clause 13 of the Methodology for the Formation of Capable Territorial Communities (approved by the Resolution of the Cabinet of Ministers of Ukraine dated 8 April 2015 No. 214) provided consultations with authorised representatives of local self-government bodies and their associations, as well as business entities and their public associations during the formation of a prospective plan. Such consultations are a requirement of the 'principle of voluntariness, transparency and openness, and are therefore mandatory'. It should also be noted that the court emphasised the absence of a legal mechanism for the protection of territorial communities' violated rights 'if they consider their inclusion in the composition of a capable territorial community groundless'.

Attention also should be drawn to another important argument of the appeal courts in these cases. The CMU questioned the council's status as a participant in disputed legal relations and pointed out that the council lacked the right to appeal to the court. However, the appeal court did not agree with this statement, noting that the dispute is not competency-based,³⁵ and therefore the provision of Art. 18¹ of the Law of Ukraine 'On Local Self-Government in Ukraine' should not be applied. In this case, the local self-government body applied as a representative of the territorial community, acting in its interests to implement the functions assigned to it. Therefore, filing an administrative lawsuit was not a form of exercising the competence of a local self-government body that could not act as a subject of power and whose appeal to an administrative court is predicated on clear conditions. In this case, the local self-government body acted as a representative body of the territorial community to protect its violated rights.

In all three cases, there are still no decisions from the Court of Cassation. However, in August 2022, the Court of Cassation opened proceedings in case No. 640/15962/20, and in May and August, the deadlines for cassation appeals in cases No. 640/13456/20 and No. 640/12763/20 were renewed. Future judgments should serve as a basis for research into this category of cases.

Within the category of cases regarding the appeal of voluntary association processes, decision No. 120/2799/20-a³⁶ is notable. In this case, the village council appealed the actions

33 Judgment of the Sixth Administrative Court of Appeal of 30 December 2021 No 640/13456/20 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/102390840>> accessed 8 September 2022

34 Judgment of the Sixth Administrative Court of Appeal of 30 December 2021 No 640/12763/20 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/97532055>> accessed 8 September 2022

35 Part 1 of Art. 19 of the Code of Administrative Procedure stipulates that competence disputes are disputes between subjects of authority regarding the implementation of their competence in the field of public administration. In such cases, the court decides whether the competence of the defendant has been properly implemented and whether the competence of the plaintiff has been violated during the exercise of the powers of the defendant. In this case, the court noted that the dispute is not competency-based, since the local self-government body does not apply as a subject of authority, but as a representative of the territorial community.

36 Judgment of the Administrative Court of Cassation of 03 June 2021 No 120/2799/20-a (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/97393365>> accessed 8 September 2022

of a regional state administration regarding the inclusion of the plaintiff in the united community. This dispute again concerned the disagreement of one territorial community to be a part of another one, as provided for by the prospective plan. The prospective plan was drawn up by the regional state administration and was exactly what the village council was appealing. The case was considered in three instances, and the plaintiff's demands were met. The position of the courts was based on such provisions.

The courts established that the village council voluntarily united with certain territorial communities in 2016. In 2020, according to a prospective plan, the plaintiff's community was included in another united community. Therefore, the expression of the plaintiff's territorial community was not taken into consideration. The prospective plan envisaged a united community, contrary to the will of the residents of the communities that had united in 2016. The court also established procedural violations of the legislation on voluntary association.

The court noted that in this dispute, the village council (local self-government body) did not exercise management powers since, in such a legal relationship, the village council is subordinate to the defendant (state authority). In this case, the court, as in the two decisions mentioned above, indicated that under such conditions, the village council cannot exercise its powers but acts as a representative body of the territorial community, i.e., it protects its interests. The appeal to the court itself was not due to the requirement of the law but to disagreement with the actions of the state authority, which violated the interests of the territorial community.

Such judicial decisions assuredly add weight to the principle of judicial protection of local self-government rights. In this case, the courts unanimously protected the rights of the territorial community. In addition to violating the principle of voluntariness of the unification procedure, the court once again emphasised the ability of a local self-government body to protect the rights of a territorial community and ensured that right.

At the same time, in case No. 640/4296/20,³⁷ the local authority was given the opportunity to challenge the actions of the state authority only during the cassation appeal. It was the Supreme Court that provided an opportunity for the protection of the territorial community and applied the principle of judicial protection of local self-government rights. In this dispute, the local self-government body appealed to the court in order to challenge the control measures of the state body in the field of urban planning. However, the first and appellate instances refused to open proceedings. The courts noted that this dispute was not competency-based, and the law did not clearly define the right of the plaintiff to go to law. Therefore, the appeal of the local self-government body to the court was groundless.

However, the Supreme Court did not agree with this statement. The cassation instance noted the legal basis of the local self-government body's appeal to the court. It emphasised a number of judgments of the Supreme Court that had already expressed a stance regarding the right of a local self-government authority to appeal to an administrative court with a claim against another local self-government authority or state authority for the purpose of protecting the rights and interests of the relevant territorial community or the proper performance of its functions. It should be mentioned that the Supreme Court bases its position on the provisions of Arts. 3, 4, 11 of the European Charter of Local Self-Government. As a result, under the circumstances of this dispute, the Supreme Court came to the conclusion that the plaintiff's demands were met and, accordingly, there was the opportunity to protect the

³⁷ Judgment of the Administrative Court of Cassation of 30 November 2020 No 640/4296/20 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/93217092>> accessed 8 September 2022

territorial community's rights in court. The Supreme Court expressed a similar position in case No. 640/11699/19.³⁸

3.3. Disputes between local self-government bodies

In the context of the implementation of the right to protect local self-government, case No. 187/687/16-a (2-a/0187/7/16)³⁹ is remarkable. Residents of the territorial community appealed to the court to challenge the decision of their village council. The disputed decision concerned the unification of the plaintiffs' community with other territorial communities. The plaintiffs emphasised the absence of a procedure for public discussions on consent to the voluntary unification of territorial communities. The defendants, in turn, did not provide sufficient evidence of holding public discussions.

The case went through three instances, and the position of the plaintiffs (members of the territorial community) was supported. Courts noted, first of all, that the decision to unify a territorial community must be approved by the residents of the territorial communities that are to be united. Further, all the residents of those territorial communities must be informed about the public discussion. Informing the residents of territorial communities can be done in various ways (for example, through mass media such as television or radio; by sending personal letters by mail; using e-mail, etc.). Moreover, the Supreme Court expanded this guarantee that they would consider the interests of territorial communities during the unification process: it recognised that unification is possible only after a discussion and if the majority of the community expressed a desire for unification. Only under these conditions is it possible to make further decisions about unification.

The Supreme Court noted that if the rights of a territorial community are violated, any member of such a community has the right to appeal the relevant action or decision of an authority in court. Violation of the rights of local self-government leads to violation of the rights of every resident of the respective municipality. At the same time, the determining factor in such disputes is the plaintiffs' belonging to the relevant territorial community. It should be mentioned that in other categories of cases, for example, in the case of appeals against local council decisions on local tax benefits (Supreme Court Resolution dated 20 February 2019 in case No. 522/3665/17),⁴⁰ the issue of representation of a territorial community by one of its members emerged. At the same time, this representation is not always considered in favour of the plaintiff.

Undoubtedly, such a decision exposes the legal possibilities of protecting the rights of local self-government. Such conclusions provide real legal tools for residents of a community to protect local self-government directly. To a certain extent, such provisions of the court supplement and expand the protective rights of local self-government, which are provided for in Art. 11 of the European Charter of Local Self-Government and Art. 145 of the Constitution of Ukraine. It is significant that only local self-government bodies are listed as subjects of protection in the European Charter of Local Self-Government.

38 Judgment of the Administrative Court of Cassation of 09 December 2020 No 640/11699/19 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/93404743>> accessed 8 September 2022

39 Judgment of the Administrative Court of Cassation of 11 August 2020 No 87/687/16-a (2-a/0187/7/16) (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/90898940>> accessed 8 September 2022

40 Judgment of the of the Administrative Court of Cassation of 20 February 2019 No 522/3665/17 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/80167902>> accessed 8 September 2022

When analysing the principle of judicial protection of local self-government, attention should be paid to the dispute between two local self-government bodies (case No. 0440/6742/18).⁴¹ The city council appealed to the executive body of local self-government, which was accountable to and under the control of the corresponding council. The essence of the dispute concerned the granting of advertising permits. The first and second courts refused to satisfy the claims of the city council on the grounds that there were no signs of illegality in the executive body's actions. The Supreme Court cancelled the court judgments in the previous instances and closed the proceedings.

The position of the cassation court was based on the assertion that one body of state power cannot file a lawsuit against another body because this constitutes a lawsuit by the state against itself. The court also added that the city council (plaintiff) did not prove a violation of the rights of the territorial community by the executive body. The reason for closing the proceedings was a violation of the rules of jurisdiction because the case did not belong to that jurisdiction according to the rules of administrative proceedings.

In the context of analysing the principle of judicial protection of local self-government, the following opinion in this case⁴² is worth studying. It states that the court deprived the local self-government body of its constitutional right to appeal to the court for the protection of its rights when it closed the proceedings. It is emphasised that the Supreme Court did not provide a legal assessment of the previous decision regarding the presence or lack of a violated right of the local self-government body, taking into account the right to judicial protection of local self-government. This is why the issue of implementing the right of the local self-government body to apply to the court for the purpose of protecting the interests of the territorial community remains unresolved.

4 CONCLUSIONS

We consider it expedient to summarise the points we have mentioned above. We defined the first category of cases as lawsuits by local self-government bodies to the VRU. And here, it is worth emphasising that there are almost no precedents for local self-government bodies contesting acts of the VRU. The cases presented in this article are exceptions rather than standard practice. In this context, on the one hand, the possibility of a local self-government body appealing an act of the VRU appears to be positive, but on the other hand, based on the relevant judicial practice, the consequences of an appeal are usually negative. In the context of the VRU's approval of the new state administrative system, the position that it is not a public administration body and therefore not subject to appeal in an administrative court is not fully understood. In its Act, the VRU approves the new borders of the communities, thereby managing the territories. These decisions may affect the interests of community members. And the impossibility of appealing such a decision in court leads to the impossibility of full use of judicial protection of local self-government. In this way, the application of the principle remains open when challenging acts of the VRU that concern the interests of local self-government.

Regarding the challenge of the communities' and lawsuits' voluntary association with the Cabinet of Ministers of Ukraine, despite the established ideas and legislative norms of the

41 Judgment of the Administrative Court of Cassation of 26 October 2021 No 0440/6742/18 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/100593163>> accessed 8 September 2022

42 Separate opinion of 28 October 2021 No 0440/6742/18 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/100679811>> accessed 8 September 2022

communities' voluntary association, in practice, the process took place from top to bottom. The final map of capable, united communities was formed at the level of the Cabinet of Ministers of the Regional State Administration Ministry. We cannot unequivocally talk about both the direct participation of territorial communities and the consideration of their opinion in the process of forming long-term plans and then the approval of such plans by order of the Cabinet of Ministers. In fact, this was the cause of pending lawsuits against the Cabinet of Ministers. And here, the court practice was quite interesting. Sometimes, the courts proceeded from a formal point of view, established the absence of the unification procedure violation, and pointed to the legality of the Cabinet of Ministers' order. However, there are a number of decisions that established the illegality of the Cabinet of Ministers' order and the prospective plans of the Regional State Administration. As a rule, the violations related to the disregard for the community's opinion, the principle of voluntariness, and the absence of consultations. Unfortunately, the current legislation lacks a legal mechanism to protect the violated rights of territorial communities if they consider their inclusion in the composition of a capable territorial community to be unfounded.

Practice shows that it is mainly local councils that go to court to protect the rights of territorial communities. At the same time, a case where the interests of the community were defended in court by the relevant members of that community stands out as a cornerstone. And most importantly, the Supreme Court recognised their right and ensured the principle of judicial protection. In disputes involving local self-government bodies, a certain selectivity is observed in some places, especially when courts do not open proceedings in cases where municipal bodies appeal to the state. We can assume that in such cases, the courts do not fully consider the principle of judicial protection of local self-government and the need to ensure it.

However, if we examine the general picture of judicial practice, starting with administrative justice, then local self-government bodies, we see that thanks to the possibility of judicial appeal of the actions of the state, members of territorial communities received real methods of deterrence and protection. Cases in which the court tries to understand and provide an assessment in disputes regarding the formation of districts and communities demonstrate elements of positive practice. And in this way, territorial community rights are provided with judicial protection. When the court provides an opportunity for the local self-government bodies to sue the state bodies even via a formal approach, this seems like tangible progress.

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