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## **VOLUNTARY AMALGAMATION AS A CONSTITUTIONAL RIGHT OF LOCAL COMMUNITIES IN UKRAINE**

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**Abstract.** *This article delineates the voluntary amalgamation of territorial communities as a fundamental constitutional guarantee for local self-governance within Ukraine. It elucidates the intrinsic characteristics of this guarantee and its pivotal role in ensuring a robust and effective institutional-functional mechanism for the execution of local self-governance. The study delves into the state of legislative provisions pertaining to the voluntary nature of merging territorial communities and identifies its associated challenges. It is observed that there exists a limitation on the voluntary essence and an intensification of administrative levers in the reformation of territorial communities. The article outlines the modalities of participation by territorial communities and local governance bodies in the drafting of a prospective plan for community territorial formulation.*

**Key Words:** *Local self-government, territorial community, voluntary amalgamation of territorial communities, prospective plan for community territorial formulation.*

**Problem Statement.** In the contemporary politico-legal conditions of Ukraine's decentralization reform implementation, the voluntary amalgamation of territorial communities has emerged as a distinct direction for modernizing the systemic-structural organization of local self-governance. Within the framework of state-legal reforms, with the adoption of the Law of Ukraine «On the Voluntary Amalgamation of Territorial Communities» dated February 5, 2015, No. 157-VIII [6], there has been a detailed regulation of the procedures for amalgamating territorial communities. While establishing the principles of a voluntary amalgamation process, subsequent legislative decisions effectively legalized the use of administrative levers in shaping amalgamated communities. Notably, on June 12, 2020, a series of government decrees were enacted determining boundaries and administrative centers of combined territorial communities. Furthermore, there is an observed unwarranted attempt to substitute the reform of the administrative-territorial structure of the state with the creation of amalgamated territorial communities, equating territorial communities with the administrative-territorial unit at the foundational level. The aforementioned accentuates the imperative to study the voluntary nature of amalgamation of territorial communities as a constitutional guarantee for local self-governance.

**Analysis of Recent Research and Publications.** Of late, the issues concerning the legal status, the process of formation, and the operations of amalgamated territorial communities have garnered scrupulous attention from scholars. Among the recent scholarly contributions, the works of M. O. Baimuratov, O. V. Batanov, S. V. Boldyriev, Y. M. Kovalchuk, P. M. Liubchenko, and O. Yu. Lialiuik, among others, deserve mention. Investigations pertaining to the guarantees of local self-government, reflected in the studies by H. H. Abasov, B. V. Kalinovskiyi, V. M. Kampo, S. H. Serohina, O. O. Frolov, and I. S. Schebetun, continue to retain their academic and practical relevance. However, research on the voluntary amalgamations of territorial communities within the context of the system of constitutional guarantees for local self-governance remains scarce in contemporary municipal law scholarship.

Consequently, **the aim of this article** is to analyze the voluntary amalgamation of territorial communities as a constitutional guarantee of local self-government in Ukraine, the challenges of its legislative provision, and its adherence during the reform of territorial power organization.

**Research findings.** The guarantee of local self-government is a dynamic constitutional category, situated within a complex system of normative unity and interdependent stipulations of Article 7 and Chapter XI of the Constitution of Ukraine. Article 7 declares: «In Ukraine, local self-government is recognized and guaranteed,» further enshrining the demand for the guarantee of local self-government as one of the pillars of the state's constitutional order [3]. This implies that not only the current legislative norms but also other provisions of the Fundamental Law must adhere to the inviolability of the constitutional principle of ensuring local self-government. The norms of Chapter XI of the Constitution of Ukraine delineate the precise constitutional model of local self-government, capturing its systemic-structural and functional-competence characteristics that ought to be guaranteed.

The prescriptive linguistic method used in Article 7 represents a form of imperative injunction directed towards the state, its bodies, and officials. This approach, by signaling the dynamic guarantee of local self-government, encompasses the process of state and governmental activities related to the functioning of an intricate system of state-legal means and institutions, designated to provide tangible opportunities for the realization of the constitutional model of local self-government. This process possesses a specific historical content and is intrinsically linked with corresponding directions of the state's municipal-legal policy. Consequently, the system of ensuring local self-government is dynamic, comprising sub-systems of general and specific guarantees.

«Guarantee» (from French, *garantie*) – translated as «pledge, assurance, attestation» – is a commonly utilized legal term denoting the conditions and means enhancing the reliability of the realization and embodiment of certain socially significant and beneficial phenomena [15, p.128]. Constitutional guarantees for local self-

governance receive legal codification at the highest legislative echelon as requisite conditions and a specialized institutional-functional mechanism for the unobstructed, complete, and effective exercise of local self-governance. Stemming from this, there are sufficient and compelling grounds to define the voluntary amalgamation of territorial communities as one of the constitutional guarantees of local self-governance in Ukraine.

Pursuant to Article 140 of the Constitution of Ukraine, local self-governance is the right of a territorial community – residents of a village or a voluntary union into a rural community of several villages, townships, and cities – to independently address issues of local significance within the confines of the Constitution and laws of Ukraine (Part 1); Local self-governance is executed by the territorial community in a manner prescribed by law, both directly and through local self-governance bodies: rural, township, and city councils, and their executive entities (Part 3).

In Ukraine, the primary subject of local self-governance is recognized as the territorial community, whose definition and types are established at the constitutional level. As noted in the rationale of the Decision of the Constitutional Court of Ukraine No. 12-rp/2002 dated 18.06.2002, the provisions of the first part of Article 140 of the Constitution of Ukraine designated local self-governance as the right of the territorial community, the primary entity of local self-governance, the principal bearer of its functions and powers, to resolve matters of local importance within the boundaries of the Constitution and the laws of Ukraine. It further defined the territorial community as the residents of a village, town, city, or a voluntary union of residents of several villages into a rural community [10].

The system of local self-governance in Ukraine, introduced by constitutional norms and further detailed in municipal legislation, attributes a pivotal role to the territorial community. This approach aligns seamlessly with other principles of the constitutional order. As stipulated in the Decision of the Constitutional Court of Ukraine No. 6-rp/2005 dated October 5, 2005, the provisions of the Fundamental Law of Ukraine that «the bearer of sovereignty... is the people» establishes the principle of popular sovereignty. According

to this principle, the power of the Ukrainian people is primary, unified, and inalienable, meaning that the state authorities and local self-governance bodies exercise power in Ukraine derived from the people [13]. Based on these constitutional provisions and in systematic connection with the provisions of Article 6 of the Constitution of Ukraine, which states that state power in Ukraine is exercised on the principles of its division into legislative, executive, and judicial branches, the Constitutional Court of Ukraine in its Decision No. 6-рп/2002 dated March 26, 2002, determined the politico-legal nature of local self-governance bodies. These bodies are not state authorities but representative entities through which the territorial community exercises its right to independently address matters of local significance, mainly concerning the activities of the territorial communities [12]. In the Decision of the Constitutional Court of Ukraine No. 7-рп/2009 dated April 16, 2009, it is indicated that the state-guaranteed local self-governance is implemented by the territorial community through rural, township, and city councils and their executive bodies. This encapsulates, *inter alia*, legal and organizational autonomy; local self-governance bodies independently exercise authority and address matters of local significance entrusted to them by law [14].

In this context, it is evident that the territorial community is recognized not as a nominal entity, but as a genuine subject of local self-governance, endowed with legal capacity and capability. Consolidating the rights and capacities stipulated by the constitutional and municipal legislation, the territorial community is institutionalized as the primary collective subject of local self-governance. It possesses the right and actual ability for autonomy through the realization of conferred competencies for independently addressing local matters based on its own material-financial foundation. Moreover, it can self-organize through both direct and representative democracy forms and self-regulate by adopting municipal-legal acts within the bounds of the Constitution and laws of Ukraine [4, p.143]. Fundamental concepts for implementing such a status of territorial communities include, *inter alia*, the principles of popular sovereignty, legality, legal, organizational, and financial independence within the competencies

defined by laws, as well as state support and guarantees of local self-governance, as stipulated in Article 4 of the Law of Ukraine «On Local Self-Government in Ukraine» [8].

Article 140 of the Constitution of Ukraine, while defining the notion of the territorial community, also delineates its main types. As noted in the Decision of the Constitutional Court of Ukraine No. 12-rp/2002 dated 18.06.2002, the constitutional norms did not establish a procedure for the amalgamation or disjunction of territorial communities [10].

According to the legal stance of the Constitutional Court of Ukraine, articulated in the motivational part of Decision No. 3-rp/2002 dated 12 February 2002, «The Constitution of Ukraine, as the primary source of the national legal system, also serves as the foundation of current legislation. It provides opportunities for regulating specific societal relations at the level of laws, which specify provisions enshrined in the Fundamental Law» [11].

By establishing the primary principles of the functioning of local self-governance, its institutions, material, and financial foundations, etc., the Constitution of Ukraine deferred the resolution of the remaining issues pertaining to the organization of local self-governance to legislative definition (Article 146 of the Constitution of Ukraine). Thus, at the constitutional level, the creation of legal conditions for further legislative regulation of societal relations in the realm of local self-governance has been envisaged.

Consequently, the Constitutional Court of Ukraine indicated that the resolution of matters concerning the amalgamation or disjunction of territorial communities, which are not defined by the provisions of the Constitution of Ukraine, must be executed in a legislative manner. These issues, based on the constitutional definition of «territorial community», should be resolved considering the respective expression of will by members of these territorial communities, which is carried out in accordance with the law (Decision No. 12-rp/2002 dated 18.06.2002).

As per the valid edition at that time of Article 6 of the Law of Ukraine «On Local Self-Government in Ukraine», the procedure for the voluntary amalgamation of territorial communities

of neighboring villages into a single rural community, with the creation of unified local self-governance bodies and the election of a single village head, was established. Voluntary amalgamation of territorial communities into a rural community and secession from it was to take place based on the decisions of local referendums.

Within the context of the contemporary decentralization reform, the voluntary amalgamation of territorial communities has acquired significance as a distinct direction for modernizing the local self-governance system. With the enactment of the Law of Ukraine «On Voluntary Amalgamation of Territorial Communities» dated 05.02.2015, No. 157-VIII, there was detailed regulation regarding the procedure for amalgamating territorial communities, as well as a significant expansion in the list of subjects eligible for voluntary amalgamation. This essentially led to an unwarranted enlargement of the constitutionally defined list of types of territorial communities, specifically, those amalgamated.

However, regardless of the specific historical conditions that may have emphasized one aspect or another of local self-governance reform, what remains unchanging are the constitutionally defined requirements of the supremacy of law and the Constitution, legality, democracy, and the autonomy of local self-governance. Consequently, the constitutionally defined requirement of the voluntary nature of the amalgamation of territorial communities remains constant.

In this regard, the voluntary nature of amalgamation, as stipulated in Article 140 of the Constitution of Ukraine, assumes the role and significance of a constitutional guarantee for the formation of amalgamated territorial communities. As such, this guarantee is characterized by features inherent to guarantees of local self-governance [1, pp.73–77], namely:

Purposefulness – it is aimed at ensuring independent decision-making on local matters to enhance the capability of territorial communities.

Normativity – it extends to an unlimited circle of relevant subjects and operates across space and time. Voluntariness cannot be applied only to a limited set of subjects, as this would lead not only to a violation of the principle of equality of the community status but

also to the state's dominance over local self-governance in other territorial communities.

Systemicity – as such, the constitutionally guaranteed voluntariness of amalgamation of territorial communities necessitates the establishment of appropriate normative requirements, rules, and procedures for its provision and implementation at both legislative and sub-legislative levels.

Combination of Materiality and Procedurality – while being enshrined in normative acts and implemented in law enforcement acts, the guarantee of voluntariness of amalgamation of territorial communities is determined by the actual activities of the territorial communities, relevant authorized subjects – state authorities, local self-government bodies, and their officials within a particular stage of the state's municipal policy.

Thus, we posit that the voluntary amalgamation of territorial communities possesses the character and significance of a constitutional guarantee of local self-governance. Ensuring this is referred to the legislative level of regulation. Indeed, according to the legal stance articulated in Decision No. 12-пн/2002 dated 18.06.2002 by the Constitutional Court of Ukraine, «questions regarding the organization of local self-governance, which are not regulated by the Constitution of Ukraine, including the conditions and procedures for amalgamation or separation of territorial communities of villages, towns, and cities, are to be defined by law (Article 146 of the Constitution of Ukraine).» Therefore, we infer that the primary conditions for the voluntary amalgamation of territorial communities are established by the Law of Ukraine «On Voluntary Amalgamation of Territorial Communities.»

According to Part 1, Article 4 of the aforementioned Law, the voluntary amalgamation of territorial communities of villages, towns, and cities is carried out in compliance with a series of conditions, among which – «the amalgamation of territorial communities is carried out in accordance with the prospective plans for the formation of community territories of the Autonomous Republic of Crimea and the regions» (Paragraph 5, Part 1, Article 4 of the Law). A logic-semantic analysis of the aforementioned provision indicates that the voluntary amalgamation of territorial communities must

unequivocally be executed in accordance with the prospective plans for the formation of community territories.

The list of conditions for voluntary amalgamation set forth by the Law is imperative in nature. Failing to adhere to it either in its entirety or in individual conditions precludes the Council of Ministers of the Autonomous Republic of Crimea and the regional state administration from providing a positive conclusion regarding the compliance of the draft decision on the voluntary amalgamation of territorial communities with the Constitution and laws of Ukraine (Parts 3 and 4, Article 7 of the Law). Such non-compliance results in the return of the draft for further revision in the manner established by the Law (Part 6, Article 7 of the Law).

The introduction of the condition necessitating the alignment of the voluntary amalgamation of territorial communities with the prospective plans for community territories formation presently indicates the application of administrative levers in the formation of amalgamated communities. Herein, the pivotal role is not played by the intrinsic vision of institutional development and the will expression of territorial communities but by state-authoritative calculations of the socio-economic benefits of such amalgamations. This is especially evident when it pertains to the actual exclusion of local self-governance representative bodies from the formulation of the said prospective plans, which ensued from the amendments introduced by the Law of Ukraine No. 348-IX dated 05.12.2019 to Article 11 of the Law of Ukraine «On Voluntary Amalgamation of Territorial Communities» [5].

Indeed, whereas previously the legislatively established procedure mandated that the prospective plan was to be approved respectively by the Supreme Council of the Autonomous Republic of Crimea and the regional council upon submission by the Council of Ministers of the Autonomous Republic of Crimea or the respective regional state administration, and subsequently ratified by the Cabinet of Ministers of Ukraine, the current version of the Law stipulates: the prospective plan for the formation of community territories in the Autonomous Republic of Crimea and the region is approved by the Cabinet of Ministers of Ukraine upon the submission of the Council

of Ministers of the Autonomous Republic of Crimea or the respective regional state administration (Part 3, Article 11 of the Law). In this context, it is pertinent to note that the prospective plan for community territories formation constitutes a sub-legislative act. Thus, one of the conditions for the voluntary amalgamation of territorial communities is substantively regulated not by the law but by a sub-legislative act.

Despite the fact that the authority to directly adopt decisions on the voluntary amalgamation of territorial communities remains with local councils (Part 5, Article 7 of the Law of Ukraine «On Voluntary Amalgamation of Territorial Communities»), and the introduced mandatory condition of aligning amalgamation with prospective plans for community territories formation, as outlined in the explanatory note to the bill dated 30.09.2019 No. 2189 [9], was intended solely to prevent the formation of non-viable territorial communities with grant-based budgets, thereby facilitating the genuine attainment of decentralization goals in Ukraine, the conditions and mechanisms for amalgamating territorial communities set by the Law substantially limit the voluntary nature of such amalgamation.

Indeed, the Methodology for the formation of viable territorial communities is developed by the central executive body responsible for shaping and implementing state policy in the realm of territorial organization of power, administrative-territorial structure, and the development of local self-governance, and is approved by the Cabinet of Ministers of Ukraine (Part 2, Article 11 of the Law of Ukraine «On Voluntary Amalgamation of Territorial Communities»). Based on this Methodology, the Council of Ministers of the Autonomous Republic of Crimea and regional state administrations develop respective prospective plans for community territories formation (Part 1, Article 11 of the aforementioned Law). Subsequently, upon the submission of these bodies, the prospective plans for the formation of community territories in the Autonomous Republic of Crimea and regions are ratified by the Cabinet of Ministers of Ukraine (Part 3, Article 11 of the aforementioned Law). Consequently, both the Methodology for the formation of viable territorial communities and the territory planning

based on it possess an exclusively state-centric nature and are executed within the confines of the executive branch of power.

In essence, the Prospective Plan represents the state's vision of an efficient territorial organization at the basic level within a given region [2, p.19]. As of today, there is an observable and perilous tendency, concerning democratic principles of territorial power organization, to replace the reform of the administrative-territorial structure of the state with the creation of amalgamated territorial communities. This trend attempts to equate, contrary to the constitutional provisions of Part 1, Article 133 of the Basic Law, a territorial community with an administrative-territorial unit. Consequently, an approach is adopted where an unreformed system of local self-government entities is constructed according to the reformed administrative-territorial structure of the state, and vice versa – the administrative-territorial organization is made contingent upon the formation of amalgamated territorial communities.

Furthermore, it is essential to acknowledge the narrowing forms of participation of territorial communities and local self-government bodies in preparing the prospective plan for forming territories of communities in the Autonomous Republic of Crimea and regions. The Methodology for the Formation of Viable Territorial Communities, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 214 dated 08.04.2015 (with subsequent changes), stipulates that the Council of Ministers of the Autonomous Republic of Crimea and regional state administrations, considering the amalgamated territorial communities formed according to the Law «On Voluntary Amalgamation of Territorial Communities,» develop a prospective plan for forming community territories in accordance with this Methodology, involving representatives of local self-government bodies, bodies of public self-organization, and the public of respective administrative-territorial units (Paragraph 4) [7]. To ensure openness and transparency in the development of the prospective plan, a working group is established, which includes representatives from regional state administrations, relevant local self-government bodies, bodies of public self-organization, and the general public (Paragraph 12).

To ensure the consideration of the interests of territorial communities during the development of the prospective plan, it is envisaged that officials authorized by the regional state administrations conduct consultations with authorized representatives of local self-government bodies and their associations, as well as business entities and their public associations. Following the consultations, a protocol is drawn up.

Consultations are held during the identification of the list of territorial communities that may become part of a viable territorial community; determination of the list of territorial communities whose territories are not covered by the accessibility zones of potential administrative centers; and definition of the boundaries of viable territorial communities.

Consultations are primarily conducted with representatives of territorial communities whose territories fall within the accessibility zones of multiple potential administrative centers. Based on the results of the consultations and the decisions of local self-government bodies, the potential administrative center of a viable territorial community is determined (Paragraph 13).

If, during the development of the prospective plan, after conducting consultations, there arises a need to make changes to it, additional consultations are conducted (Paragraph 14).

Consequently, the regulation of specialized forms of participation by territorial communities and local self-government bodies in the development of the prospective plan has been relegated to the sub-legal level. The established procedure involves not the entities of local self-government but individual representatives thereof, and these forms predominantly have a consultative-advisory nature.

Alongside this, it should be noted that the Law of Ukraine «On Voluntary Amalgamation of Territorial Communities» and the aforementioned sub-legal normative acts based on it serve as specialized acts in the legal regulation process of forming amalgamated territorial communities. This does not exclude the potential applicability of other general-purpose acts, such as the Laws of Ukraine «On Local Self-Government in Ukraine», «On the Status of Deputies of Local Councils», «On Associations of Local Self-

Government Bodies», «On Citizens' Appeals», and others. Accordingly, they provide for forms of participation by territorial communities and local self-government bodies in the formulation of municipal and state-legal decisions.

**Conclusions.** The voluntary amalgamation of territorial communities embodies the nature and significance of the constitutional guarantee of local self-government. Its assurance is attributed to the legislative level of regulation. Analysis of the current state indicates a narrowing of the democratic principles of community amalgamation, a limitation of its voluntary nature, and an intensification of administrative levers for reforming territorial communities. Concurrently, with the introduction of changes to Article 11 of the Law of Ukraine «On Voluntary Amalgamation of Territorial Communities» by the Law of Ukraine No. 348-IX dated 05.12.2019, which removed representative bodies of local self-government from the formation of prospective community territory plans, the specialized forms of participation of territorial communities and local self-government bodies in the development of a prospective plan have been limited both in substantive and formal-legal aspects. These factors necessitate the harmonization of the legislative and sub-legal foundations for the formation of voluntary amalgamations of territorial communities in alignment with the constitutional guarantees of local self-government.

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### І. І. Бодрова

#### Право на добровільне об'єднання як конституційне право територіальних громад в Україні

***Анотація.** У статті визначено та охарактеризовано добровільне об'єднання територіальних громад як одну з конституційних гарантій місцевого самоврядування в Україні, розкрито її особливості та роль у забезпеченні інституційно-функціонального механізму повного та ефективного здійснення місцевого самоврядування. Досліджено стан законодавчого забезпечення добровільного об'єднання територіальних громад та визначено його проблеми. Проаналізовано форми участі територіальних громад та органів місцевого самоврядування у підготовці перспективного плану формування територій громад.*

*Розглянуто гарантії місцевого самоврядування як динамічну конституційну категорію, що перебуває у складній системі нормативної єдності та взаємозалежності конституційних положень. Ця категорія охоплює процес державно-владної діяльності, пов'язаний з функціонуванням складної системи державно-правових засобів та інститутів, покликаних забезпечити реальні можливості для реалізації конституційної моделі місцевого самоврядування. Цей процес має конкретно-історичний зміст і нерозривно пов'язаний з відповідними напрямками муніципально-правової політики держави.*

*Визначено, що добровільність набуває ролі та значення конституційної гарантії формування об'єднаних територіальних громад. Як така,*

ця гарантія характеризується ознаками, притаманними гарантіям місцевого самоврядування – цілеспрямованістю, нормативністю, системністю, поєднанням матеріальності та процесуальності.

Забезпечення гарантії добровільності територіальних громад віднесено до законодавчого рівня регулювання. Аналіз сучасного стану останнього засвідчив обмеження демократичних засад об'єднання громад, обмеження їх добровільності, посилення адміністративних важелів реформування територіальних громад, де ключову роль відіграє не бачення інституційного розвитку та волевиявлення територіальних громад, а державно-владні розрахунки соціально-економічних вигод від такого об'єднання.

Крім того, наразі тенденція підміни реформи адміністративно-територіального устрою держави створенням об'єднаних територіальних громад спробами ототожнення територіальної громади та адміністративно-територіальної одиниці всупереч конституційним положенням ч. 1 ст. 133 Основного Закону є небезпечною для демократичних засад територіальної організації влади. Тому використовується підхід, коли не оновлена система суб'єктів місцевого самоврядування вибудовується під реформований адміністративно-територіальний устрій держави, а навпаки – адміністративно-територіальний устрій ставиться в залежність від формування об'єднаних територіальних громад.

Закон України № 348-ІХ від 05.12.2019, яким внесено зміни до статті 11 Закону України «Про добровільне об'єднання територіальних громад», усунув представницькі органи місцевого самоврядування від процесу формування перспективних планів формування територій громад, а регулювання спеціальних форм участі територіальних громад у формуванні перспективного плану було зведено на підзаконний рівень. Встановлений порядок передбачав залучення до цього процесу не органів, а окремих представників, а самі форми отримали переважно консультативно-дорадчий характер.

Зазначені фактори зумовлюють необхідність приведення законодавчої та підзаконної бази формування добровільних об'єднань територіальних громад у відповідність до конституційних гарантій місцевого самоврядування.

**Ключові слова:** місцеве самоврядування, територіальна громада, добровільне об'єднання територіальних громад, перспективний план формування територій громад.