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## **THE BALANCE BETWEEN DEMOCRACI AND THE RULE OF LAW AS A WAY TO ESTABLISH THE LAW – GOVERNED STATE**

*This paper has dealt with incidence of the balance between democracy and the rule of law. The problem of quantitative and qualitative characteristics of democracy is one of the key issues in its theory, was covered in the writings of the representatives of elitist and collectivist concepts. Could we unequivocally state that the democratic form of government has won and there are no threatening factors? A significant number of modern countries are not ready to accept democratic principles. The cleavage between the scholars ranges from the maximum limitation of citizens' political participation and the transfer of the entire initiative exclusively to the political elite, to attempts to involve them in the decision-making process at all levels. We believe that a comprehensive and systematic study of the whole complex of the issues related to the balance of democracy and the rule of law must be considered among the most relevant and perspective directions of modern legal science. And a reliable deed in this direction can be only the notion of democracy as the rule of the majority, where the differences between interests are not depressed and ignored, but governed by law, supported by socio-political agreement on the basis of balance of interests and mutually beneficial compromises, in which provision of both the rights of minorities and natural inalienable human rights are guaranteed.*

**Keywords:** democracy: rule of law: law-governed state: democratic values: principle of a law-governed state: social structure of society.

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**Баланс между демократией и верховенством права как путь к установлению правового государства**

*Статья посвящена актуальным вопросам о балансе между демократией и верховенством права. Проблема количественных и качественных характеристик демократии является одним из ключевых вопросов в ее теории, была освещена в работах представителей элитарных и коллективистских концепций. Можем ли мы однозначно заявить, что демократическая форма правле-*

ния выиграла, и нет никаких угрожающих факторов? Значительное число современных стран не готовы к принятию демократических принципов. Расхождения между учеными варьируются от максимального ограничения политического участия граждан и передачи всей инициативы исключительно политической элите, до попыток вовлечь их в процесс принятия решений на всех уровнях. Мы считаем, что всестороннее и систематическое изучение всего комплекса вопросов, связанных с балансом демократии и верховенства права, должно рассматриваться в числе наиболее актуальных и перспективных направлений современной юридической науки. И надежным путем в этом направлении может быть только понятие демократии как правления большинства, где различия между интересами не подавляются и игнорируются, а регулируются правом, поддерживаются социально-политическим соглашением на основе баланса интересов и взаимовыгодных компромиссов, при которых гарантируются как права меньшинств, так и естественные неотъемлемые права человека.

**Ключевые слова:** демократия; верховенство права; правовое государство; демократические ценности; принцип правового государства; социальная структура общества.

**Introduction.** Democracy is the foundation of the state system of Ukraine. The history teaches us that democracy can successfully fulfill its social role only when it is transformed from an «observer society» into a «society of participation». In the theories of democracy, participation is considered to be an effective means of expanding the field of civic initiative and creativity, limiting the power of the elite and bureaucracy; an activity that promotes harmonization of social relations and, in general, human development. Democracy is incompatible both with the total involvement of the entire population in politics, and with the complete non-participation of the different strata.

**Conceptual Framework.** The problem of quantitative and qualitative characteristics of democracy is one of the key issues in its theory, was covered in the writings of the representatives of elitist and collectivist concepts, as well as the concept of participatory democracy by G. Moschi and V. Pareto, J. Schumpeter, K. Pythman, B. Barber, D. Zimmerman. Significant contribution to the development of optimal models of participation was made by R. Dal, A. Leiphart, D. Sartori, S. Huntington, F. A. von Hayek. In the post-Soviet countries such researchers as D. Goncharov, V. Gorbatenko, O. Kovler, A. Kolodiy, O. Kutsenko, A. Melvill, O. Chamshit have dealt with those issues. The study of the rule of law, its content and essence in the process of a modern legal reform have come into focus of the following investigators: V. O. Zaychuk, T. V. Bagrie, S. P. Holovaty, V. V. Kibal, M. I. Kozyubra, M. V. Kostytsky, L. G. Paraschuk, P. M. Rabinovich, O. O. Savchenko, V. M. Campo, V. F. Sirenko, Yu. M. Todika, V. M. Shapoval, S. V. Shevchuk and others.

In the historic and legal aspects, the roots of democracy on the territory of Ukraine date back to VII<sup>th</sup> century BC. It is worth mentioning that it was exactly on the Ukrainian lands where a brilliant example of ancient democracy was created – the oath of a citizen of Chersonesos, and later the union of Eastern Slavic tribes resulted in the establishment of the original, very effective for those times social and political order with elements of democracy, the first constituents of democracy and self-government.

It should be also mentioned that in Kievan Rus' (IX<sup>th</sup>–XII<sup>th</sup> centuries) the slave system, which limited the personal freedom, never existed, although some of its features in the form of slavery were present. An ancient customary law created certain legal guarantees, reinforced the waiver of the principles of blood revenge, limited arbitrariness and regulated the everyday life of the population of Kievan Rus'. A characteristic feature of real democracy was the «ranks» – the treaties that the inhabitants concluded with their sovereigns.

Nowadays democracy, along with the traditional understanding as the principle of majority rule in a decision-making process, is also interpreted as inclusiveness, that is, involving decision-makers in the decision-making process and the ability to balance the interests of the majority and minority. The correlation of these parameters determines the set of certain models of modern democracy: 1) liberal as a result of free competition and competition of opinions, when one of them wins as a result of socio-political debates and the division of powers is based on that model; 2) consensus-based democracy implies a degree of unanimity in reaching an agreement, the coalition governments represent this model; 3) consolidated democracy implies the existence of stable value systems, embodied in decisions of the authority branches and in a satisfactory system of their adoption.

Could we unequivocally state that the democratic form of government has won and there are no threatening factors? Unfortunately the answer is 'no'. Democracy did not win a final victory and even did not approach it. Thus, in a large number of democratic countries, primarily post-communist, power is transformed into a kind of dictatorship and becomes not a means of state governance aimed at the overall wealth, but an instrument of one's own way of understanding or at least an opportunity to live better off beyond the requirements of one's position. This is a tool that allows to distribute wealth among their loyal supporters at the expense of the taxpayers, develop questionable financial schemes – in short, to steal from the people without facing any risk [1, p. 233].

A significant number of modern countries are not ready to accept democratic principles. This is due to the low level of economic development, when for the majority of the population, political freedom is not a priority issue at all, and the specific structure of the national economy, which allows the country not to worry about improving the efficiency of its own activities. The West is putting political pressure on most of these countries to accelerate their «democratization». It results in establishment of illusory democracy, which is one of the most dangerous and vicious political practices of the present. F. Zakaria calls the regimes «where electivity is mixed», «non-liberal democracies» [2, p. 89]. At the same time, non-liberal democracies possess neither political nor economic efficiency, as the ruling elites are not formed on the meritocratic principle. The basis of non-liberal democracy is whether populism (as in Russia), or strict control over political life (as in most African countries). It turns out to be possible due to the lack of a secured and independent middle class. Often, therefore, non-liberal democracy is the result of premature democratization. The main dangers of a non-liberal democratic order include, on the one hand, deep

disappointment at democracy itself that the people, who observe how the authority branches manipulate their opinions, have, and, on the other hand, understanding that the economic background does not induce economic modernization, which leads to a gradual lag in the economic sphere and generates a feeling of «despair» [2, pp. 284, 145].

Modern Ukrainian political realities are largely determined by the social structure of society. Low socio-political activity of the population, the superficial nature of political parties and the political process as a whole, the ineffectiveness of the mechanisms for designing and representing the interests of social groups and strata, the prevalence of «shadow» forms in the relations between different political forces – all of these characteristics are largely predetermined by the Social Perspectives of Democracy: past, present, future factors. All this creates a favorable environment for the rooting of such a distorted form of a political regime as semi-democracy. Democracy as the basis of governance has a greater restraining force only in those countries where exist common interest and fundamental values shared by the vast majority of their citizens. That is what makes the establishment of democratic, parliamentary government possible. The collapse of democracy occurs when the unity of values and interests collapses, when there is no more general agreement on the basic principles and objectives, when supporters of one or another party no longer want to work with the state, but they themselves want to become a state [3, p. 40].

One of the main contradictions of the democratization processes is the contradiction between mass involvement and competence. Generally, the more complicated the question is, the smaller the number of the people who are able to deal with it is. At the same time, the narrower the range of experts influencing decision-making processes is present, the lower degree of mass involvement is, and, therefore, the less democratic nature of governance. Many theoreticians have worked on solving this contradiction, but it remains unsolved. The theories in which the opposite views are presented can be divided into two groups: elitist and participative models of democracy.

Representatives of the first group believe that broad participation in local and state policy contradicts the natural division of labor in the society. It reduces the efficiency of management, generates irresponsibility and lack of initiative of officials, hindering from optimal solutions. General public due to their lack of competence, indifference to politics, unbalanced excessive emotionality, etc. cannot be a constructive factor in a policy-making process. To ensure the stability and efficiency of government, their functions should be limited to the control of the politicians, parties and bureaucracy that is exercised through elections. Professional politicians, the elite, are those who are to govern the state. These people receive specific training, they have necessary knowledge and possess relevant mental and psychological qualities.

The ideas of the elite democratic theories were introduced by V. Pareto, G. Moschi and R. Michels, who investigated the phenomenon of the elite coming to power. This area of focus in the sociology of Italy dominated at the beginning of the twen-

tieth century and was called «Machiavellianism» (the theory of seizing power by the ruling elite). His essence was analyzed in detail by J. Baudouin [4]. At the initial stages of creating the elite theory the rule of the elite was seen as an alternative to the rule of the people: the professionally trained minority opposed the ill-educated and incompetent majority. Hence the very essence of Western democracy as a reign of the people was distorted. The concepts of «democratic elitism» and «pluralism of the elites» (J. Schumpeter, G. Lasule, R. Dahl, R. Aron) to a certain extent eliminated this contradiction. According to this concepts the ruling elite is not considered to be a closed caste – it is open for rotation. Moreover, representatives of the ruling elite not only have the necessary qualities to carry out administrative functions, but they are also ready to preserve and protect democratic values.

In the theory of participatory democracy particular importance is attained to the participation phenomenon (participatory democracy). Participatory democracy is a system of government in which ordinary citizens are more likely to manage themselves, rather than through the election of representatives who would rule on their behalf. The essence of this form of democracy was successfully formulated by B. Barber (he called it «a strong democracy»): «... it is rather self-government of citizens than representative government in the name of citizens. In such a democracy, active citizens directly govern themselves, although not necessarily at every level and every moment, but quite often, especially when the main political issues are to be solved and when significant forces are acting» [5, p. 258]. According to the scientist, the community is formed on the basis of participation in political life and at the same time enables this participation; civic activity accustomes individuals to civic thinking, citizens provide the public life with a necessary sense of publicity and justice.

J. James Zimmerman, the theorist of participatory democracy, stated that participation of citizens should be permanent and it must begin at the stage of planning a new program (or project) and continue after its implementation to ensure its effectiveness. In his opinion, «all citizens should have as many as possible equal opportunities for participation, they should be given an opportunity to speak, provided with complete and full information and access to the mass media, etc.» [6, p. 264]. The undeniable advantage of this form of democracy is the mass involvement of the population in the political process and public administration, overcoming social apathy and nihilism, provision of knowledge on citizenship and high political culture, contribution to renewal of elites and democratization of social relations. Proponents of participatory democracy believe that the irrationality and passivity of the people in the political sphere is a result of their lack of education and the lack of equal opportunities for participation in the country's political life. Therefore, the society should create favorable conditions for effective political socialization of individuals. In order to achieve this purpose, the very first thing to do is to ensure the maximum degree of citizens' participation in the political processes.

Consequently, we can conclude that in modern theories of democracy there are quite contradictory assessments regarding the level of political participation of

citizens in a democratic society. The cleavage between the scholars ranges from the maximum limitation of citizens' political participation and the transfer of the entire initiative exclusively to the political elite, to attempts to involve them in the decision-making process at all levels.

Only under the democratic rule people have the opportunity to express their involvement in governmental processes. Democracy offers citizens and the state the basis for mutual correction and joint search of the law interpretation in the implementation of the actual state policy. Broad participation in the democratic process gives the cultural minorities greater opportunities to contribute to dialogue and decision-making processes. Finally, the process of democratic decision-making in the society enables a consensus on organizational problems to be achieved. Thus there is a social basis for the necessary social decisions.

Democracy and the rule of law require a public contribution, which in turn should be stimulated by the state. It is vitally important that citizens have the opportunity to take an active part in social processes by creating their own organizations. Education should enable young people to make their own contribution to the development of social processes, which involves paying attention to history and political science at the state level.

In the modern world, the rule of law is seen as one of the highest democratic values [7, p. 9]. It has long been the most important part of the international legal acts, especially on the rights and freedoms of an individual and a citizen.

This principle is one of the key issues in our Basic Law. In accordance with Article 8 of the Constitution, the rule of law is recognized and in force in Ukraine. Everyone should be able to use the rule of law to defend their rights. It is the Constitution of Ukraine which has the highest legal force in the country. However, the Basic Law of the State should be applied in the context of European values and established practice. The question of the correlation of constitutional principles with international law is largely in the plane of understanding the legal nature of sovereignty, which is expressed in the universally accepted principle of the *par super parem potestatem non habet* (equal to equal power). However, generally accepted principles and norms of international law are applied in the national law, and therefore, they become its integral part.

The principle of the rule of law is defined as the fundamental principle of a law-governed state, which is based on the leading ideas of legal theory and practice and defines the grounds for the maintenance and realization of the basic rights and freedoms of citizens, their legal status in the social development of the state.

Modern interpretation of the rule-of-law principle is the result of the convergence of Anglo-American and continental law. There is no literal translation of the notion of rule of law into Slavic languages, therefore, the Czech and Slovak doctrines often use the doctrine of the rule of law or simply use the term rule of law without translation. In Polish and Croatian literature there is a close meaning to the term «rule of law», which was proposed by Sergiy Golovatiy.

Despite being a global ideal and one of the highest democratic values, the notion of the rule of law, according to many Western lawyers, up to this time remains «essentially controversial» [8]. For example, the judge of the European Court of Human Rights LG Lukeides reveals the content of the rule of law, relying on the practice of the European Court. In his opinion, at present the principle of the rule of law has at least five independent values: 1) the functioning of the state, which is bound by the requirements of law; 2) observance of the principle of equality of citizens before the law; 3) establishment of law and order in society; 4) the existence of effective and predictable justice; 5) protection of human rights. At the same time, it is emphasized that all these values are included in the concept of the rule of law «in response to various needs that arose from the requirements of justice» [9, p. 28].

That is, the rule of law in the society and the state is an important moment in the implementation of the protection of human rights and freedoms. Law gives us confidence about a bright future, regulates the equality of all citizens before the law, regardless of social status, race, religion, religious preferences, marital status, sex, etc. It also sets certain goals to achieve the definite objective, namely, the existence of effective justice that will work for the benefit of the people and will be the main way to protect their interests, and not a horrific body of state coercion.

The English expert in constitutional and administrative law, W. Wade singles out five distinct but interrelated features of the rule-of-law principle.

First, the principle of the rule of law means that all actions of the state must be committed in accordance with the law in the sense that all the actions concerning the rights and freedoms of individuals are authorized by the executive. Secondly, the activity of executive power is carried out in accordance with the norms and principles that restrict its discretionary power and make it impossible to abuse it. Third, all disputes concerning the legality of acts of administrative bodies are decided by courts that are independent of the executive branch. Fourthly, the law is the only one for the state and the person in the sense that the government, unless specifically provided for, may not have privileges and exclusive powers to refuse to apply certain provisions of the law. Fifthly, outside the sphere of state administration, the rule of law means that no one can be punished for crimes, which are not defined by law; the same applies to administrative offenses [10, art. 25].

According to the two documents of the Venice Commission – the Rule of Law Report from March 25-26, 2011 and the Checklist of Rule of Law of March 12, 2016 – the structure of the rule of law is the following: 1) legality; 2) legal certainty; 3) independence and impartiality of the court; 4) respect for human rights; 5) the prohibition of high-handedness 6) equality and prohibition of discrimination.

It is quite a widely-spread thought that the rule of law principle is new for Ukraine. But we completely disagree with this statement, because in the process of research, the scientists came to the conclusion that «the rule of the nature over the written right of the state has been known since ancient times» [11, p. 83], and signs of the rule of law principle began to appear in Kievan' Rus. Thus, in the «Church Statute» by St. Volodymyr one can see the first signs of manifestation of the rule of

law. The Statute reflected the recognition of the church jurisdiction, not the secular one, over a certain circle of subjects, as well as in the content of the regulations that contain strict prohibitions on interference in the affairs of the church courts («neither to my children, nor to the grandchild, nor to all my kind to the ages») [12, p. 40]. Another important work is the «Word of Law and Grace» by Ilarion of Kyiv in 1051, in which researchers still find ideas that have contributed to the development of spiritual culture, law, and so on.

The position of most scholars is that «the development of doctrinal ideas about the content of the rule of law must be considered in close connection with the peculiarities of the development of national legal systems», as well as taking into account the European integration and globalization aspects of «understanding the concept and the rule of law principle». It is in this way that «modern understanding of the rule of law in European legal thought» is formed [13, pp. 47, 51, 53].

An interesting idea regarding the level of understanding of the rule of law is expressed by MI Kozyubra, which notices that in the notion of the rule of law, legal and political, cultural and ethical motives, internal and international, national, civilized and universal aspects, scientific truth and values of good and justice, the achievement of legal theory and practical legal experience, legal ideas and common sense are closely interrelated. All this makes this category quite dynamic, which prevents it from squeezing it into the framework of any legal definition [14, p. 7]. The foregoing indicates that the principle of the rule of law in its content is characterized by universality and diversity, it has a complex nature, therefore, these properties contribute to its implementation in all social relations. It is erroneous to identify the rule of law with such notions as «the rule of the constitution» and «the rule of legal system».

There is also a problem of correlation between the decisions of the Constitutional Court of Ukraine and the European Court of Human Rights, which clarifies the content of the rule of law principle. On this occasion, P.M. Rabinovich argues that the European Court, unlike the Constitutional Court of Ukraine, «constantly emphasizes the situational nature of the meaningful interpretation of the concept of law (and hence the notion of the rule of law), traditionally avoiding such an extremely abstract definition of the general concept of law that could be extended to all without exception concrete-historical and concrete-subjective life cases «[15, pp. 45–46]. That is, the European Court, each time in the proceedings, fills the content of the rule of law with all the new properties and requirements that are reflected in the decisions of the Court. Thus, for example, in the judgment of Ponomariov v. Ukraine of April 3, 2008, the Court noted that one of the fundamental aspects of the rule of law is the principle of legal certainty, which implies respect for the principle of *res judicata* – the final judgment of the court [16].

We believe that Ukraine's borrowing of European experience in implementing the rule of law principle into reality is a necessary aspect for the transformation of the current Ukrainian legislation, since the number of complaints to the European Court of Human Rights is constantly increasing year by year, which suggests that

Ukraine's current legislation is not fully capable of ensuring the rights of their citizens to be completely exercised.

In Ukraine, elections are relatively free from manipulation, which have a competitive character and act as a mechanism for the transfer of power. In this case, the opposition has the opportunity to freely criticize the authorities. At the same time, the current political situation in our country clearly demonstrates the fragility and vulnerability of young democracy, and sometimes, defenselessness to the challenges of totalitarianism and authoritarianism.

In particular, the development of democracy in Ukraine is hampered by such major problems as strengthening the confrontation of power institutions and conflict in the political system of the state; the separation of state authorities and their officials from voters, as a result of which there is a significant separation from the urgent needs of state and social development; the destruction of the traditional type of communication between voters and elected to the Verkhovna Rada of Ukraine and local councils deputies; withdrawal of political parties, whose representatives took seats in state authorities, from the provisions of their election programs; opacity of the processes of preparation and decision-making by elective bodies of state power; lack of mechanisms of political responsibility of council deputies of different levels to their voters; reduction of trust towards elected bodies and public apathy, etc.

The main reasons for these trends are the lack of a modern state elite whose representatives would have a common vision of Ukraine's national interests, as well as the main tasks and perspectives of its political development; a low level of democratic political culture and public civic consciousness; underdeveloped mechanisms of access of citizens to the processes of preparation and decision-making by state authorities and local self-government, as well as public control over their implementation; the lack of effective socio-economic reforms.

The modern stage of democratic transformation in Ukraine requires the strengthening of mechanisms for the direct participation of citizens in socio-political processes, since the ineffectiveness of the main institutions of the political system is largely due to the lack of public control over their activities in the inter-election period and the limitation of citizens' political participation only by electoral processes. The further development of forms of direct democracy in Ukraine, first of all, requires the improvement of the constitutional principles for the implementation of mechanisms for the direct participation of citizens in the management of public affairs.

Such a task fully corresponds to the basic principles of a democratic state system, which, in particular, involves the exercise of power by the people, both through the election of representative bodies, and by their direct participation. Representative and direct participation are different forms of democracy and complement each other in the process of ensuring the effective development of the political system. In particular, the implementation of the mechanisms of direct democracy promotes the implementation of the principle of national sovereignty, which is the key to building a democratic state; increase of public participation in the adoption of important

socio-political decisions, control over their implementation; the legitimization of power in general, the state system, the activities of individual bodies of state power and local self-government, as well as certain socio-political decisions; ensuring constant communication between the authorities and society; creating effective levers of citizens' influence on politics.

It is also important to spread in various social circles the request for democratic procedures in order to influence the political parties and their leaders, the bodies of representative and executive power in order to establish an equal and mutually beneficial dialogue between the authorities and society. Such a strategy for strengthening the system of public relations will allow each public institution to strengthen its own ability to defend the interests of the relevant social group. A special place in the process of popularizing the demand for democracy in the society is taken by mass media. They should take on the mission of an honest and non-interlaced partner of public structures. Mass media, like no other, have an impact on public consciousness; therefore, they must be worthy partners of the society. Democratic power is the key to their own independent existence.

**Conclusion.** Thus, we believe that a comprehensive and systematic study of the whole complex of the issues related to the balance of democracy and the rule of law must be considered among the most relevant and perspective directions of modern legal science. And a reliable deed in this direction can be only the notion of democracy as the rule of the majority, where the differences between interests are not depressed and ignored, but governed by law, supported by socio-political agreement on the basis of balance of interests and mutually beneficial compromises, in which provision of both the rights of minorities and natural inalienable human rights are guaranteed. We must achieve a fair balance between the protection of a democratic society, on the one hand, and the protection of individual rights, on the other. This procedure should be developed and carried out only with the help of legal means in accordance with the Constitution and taking into account European standards in the field of rule of law and protection of human rights. If these demands are met, then the balance can be regarded as achieved in a democratic state based on the rule of law.

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#### **Баланс між демократією і верховенством права як шлях до встановлення правової держави**

*Статтю присвячено актуальним питанням про баланс між демократією і верховенством права. Проблема кількісних і якісних характеристик демократії, як один із ключових питань у теорії, була висвітлена в роботах представників елітарних і колективістських концепцій. Чи можемо ми однозначно заявити, що демократична форма правління виграла, і немає жодних загрозових чинників? Чимало сучасних країн не готові до прийняття демократичних принципів. Розбіжності між ученими варіюються від максимального обмеження політичної участі громадян і передачі всієї ініціативи виключно політичній еліті, до спроб залучити їх до процесу прийняття рішень на всіх рівнях. Ми вважаємо, що всебічне й систематичне вивчення всього комплексу питань, пов'язаних з балансом демократії і верховенства права, має розглядатися серед найбільш актуальних і перспективних напрямків сучасної юридичної науки. І надійним шляхом у цьому напрямку може бути тільки поняття демократії як правління більшості, де відмінності між його інтересами не придушуються й ігноруються, а регулюються правом, підтримуються соціально-політичною угодою на основі балансу інтересів і взаємовигідних компромісів, при яких гарантуються як права меншин, так і природні невід'ємні права людини.*

**Ключові слова:** демократія; верховенство права; правова держава; демократичні цінності; принцип правової держави; соціальна структура суспільства.

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