

Equality under the law challenged by new reality: rethinking the principle

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1. *Aequum et bonum est lex legum*¹

The level of the development of democracy is associated with the level of freedom, which despite some differences that depend on various objective and subjective circumstances is compared with the affiliated extent of the rights, freedoms and responsibilities with ensuring presence or absence of equality under the law. This axiom defines the development of the legal system of a democratic state, which is invariably associated with the establishment of an equitable social order in a particular state. It is legally embodied in the principle of equality under the law, which is one of the most important foundations of the rule of law - the hallmarks of the legitimacy of the state and its authorities.

Though the right to equality under the law and the protection of all persons against discrimination are fundamental norms of international human rights law, the recognition and enjoyment of equal rights still remain

beyond the reach of large sections of humanity².

Thinkers, philosophers and lawyers have always noted the importance of law as a regulator of social relations. The author of this article attempts to stress on two objectives of law – on the one hand, it limits the actions of people and on the other – protects them by setting limits to the powers of government. These principal functions of law have been known since ancient times. The British always believed in the force of law, considering it as a resort at any time and as a tool to limit the actions not only of the individual but also the state. The so-called “birth certificate of the rule of law” – the Magna Carta – is widely recognized to be a pillar of liberty, a major source of the modern concept of executive accountability, and foundation of the rule of law principle in the United States, the United Kingdom, and the Commonwealth countries³. It reinforced the

¹ Justice and good are the law of the laws (lat.).

² Declaration of Principles on Equality, <http://hrlibrary.umn.edu/instate/declar_principles_equality.pdf>.

³ Magna Carta and the Rule of Law (American Bar Association, 2015), <<http://www.americanbar.org/groups/leadership/office>>

position of the rule of law putting the king in the equal position with the rest of the society. It is absolutely worth mentioning that in 2015 there was the 800 anniversary of signing the Magna Carta.

The 1628 Petition of the Rights was drafted in the same spirit: it appealed to the king requesting to follow the country's laws, which imposed on him the same restriction as on his subjects. As John Harvey fairly noted, the priority of the law involves, first of all, the distribution of state power reasonably by specific and detailed legislation (practically, a number of laws) and implies the principle of freedom and equal treatment of all citizens under the law. The primacy of the law (in other words *dominium* of law within a specific state) has deeper meaning, if discretionary power is perceived as wise and legitimate, if its possibilities and ways of action are clearly regulated and, if necessary attention is paid to the rights and freedoms of its stakeholders⁴.

“Law” is a multifaceted category and it is associated with different concepts and phenomena. In general, the law may be considered:

[_of_the_president/magnacarta/magna-carta-and-the-rule-of-law.html>](#).

⁴ Харви Дж. Примат закона / Дж. Харви, А. Л. Безер // Российский бюллетень по правам человека : [сборник] / Проект. группа по правам человека. – Москва : ИНТУ, 1994. – Вып. 7. – С. 146–147, p.11

- as a set of mandatory rules and government regulations that define public relations;

- embodiment of the highest power in society;

- a document which prescribes, abolishes or amends legal regulations. A more elaborated definition of this term is presented in the literature. In particular, the law is defined as a legal act adopted by the supreme state authority or through direct will of the people (by referendum), which usually regulates the most important public relations⁵; it is an important kind of formal sources of law, an act of law, which has the highest legal force in relation to other legal acts of the state⁶; a normative legal act is adopted by the parliament or directly by the people through a referendum, regulates the most important public relations and is obligatory⁷.

⁵ Большой юридический словарь / под ред. А. Я. Сухарева, В. Е. Крутских. – 2-е изд., перераб. и доп. – Москва : ИНФРА-М, 2003. – 704 с. (Kharvy Dzh. Prymat zakona / Dzh. Kharvy, A. L. Bezer // Rosyyskiy byulleten po pravam cheloveka : [sbornyk] / Proekt. hruppa po pravam cheloveka. – Moskva : YNTU, 1994. – Вып. 7. – С. 146–147, p.11) [J. Harvey. The primacy of law].

⁶ Конституционное право : словарь / отв. ред. В. В. Маклаков. – Москва : Юристъ, 2001. – 560 с. (Bol'shoy yurydycheskiy slovar / pod red. A. YA. Sukhareva, V. E. Krut-skykh. – 2-e yzd., pererab. y dop. – Moskva : YNFRA-M, 2003. – 704 s.) [Large legal dictionary].

⁷ Конституционное право : энциклопед. слов. / отв. ред. и рук. авт. колл. С. А. Авакьян. – Москва : Норма-инфра-м, 2000. – 675 с. (Konstytutsyonnoe pravo : éntsykloped. slov. / otv. red. y ruk. avt. koll. S. A. Avakyan. – Moskva : Norma-ynfra-m, 2000. – 675 s.) [Constitutional law].

2. *Salus populi suprema lex*⁸

Now we turn to the notion of a law-based state, which rests on the shoulders of law because its *imperium* and *dominium* depend on the law. The meaning of this notion, especially in certain states of the former Soviet Union, has been deformed and inappropriately understood to mean “state based on the principle of the supremacy of laws” (laws as written rules), in French “*prééminence des lois*” (i.e., not “*du droit*”). Such a formalistic interpretation of the term “*Etat de droit*” runs contrary to the essence of Rule of Law/*prééminence du droit*⁹. What is the correct meaning of the notion then? The state, public authorities and civil servants, public associations and other legal entities act with the Constitution in mind and in accordance with the established laws, ensuring the rule of law.

In this regard, Aristotel is probably the first to be mentioned. In his *Politics* Aristotle vigorously debates the matter whether political authority is better exercised through a “rule [primacy, supremacy] of law” or “a rule of men,” say of one best person, or a democratic assembly, or indeed a court. He takes his arguments to suggest the answer that in almost all the societies, on almost all occa-

⁸ The good of the people is the highest law (lat.).

⁹ The principle of the Rule of Law (Parliamentary Assembly of the Council of Europe, 2007), <<http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11593>>.

sions and issues, it is preferable that government is by or in accordance with law, since

“(i) laws are products of reason(s) not passion(s),

(ii) the sovereignty of a ruler or assembly tends to tyranny (i.e., rule in interests of a section, not common good),

(iii) equality demands that each mature person has some share in governing, and

(iv) rotation of offices and officeholders is desirable and can hardly be managed without legal regulation. So for Aristotle, the central case of practical authority is government of a *polis* by law and legally regulated rulers”¹⁰.

However, the idea of Equality under the Law is often associated with the late political philosophers of the enlightenment era. The ideas and doctrines of John Locke, Sharle Montesquieu, Thomas Jefferson, Emmanuil Kant and other famous scholars and thinkers influenced the modern concept of the rule of law. Thus, according to John Locke, the rule of law that corresponds to the natural law should dominate in a state; he also recognizes the inalienable rights and freedoms. Sharle Montesquieu, in his turn, distinguishes three types of state power - legislative, executive and judicial, stresses that to prevent abuse of power a special

¹⁰ Natural Law Theories (Stanford Encyclopedia of Philosophy, 2015), <<https://plato.stanford.edu/entries/natural-law-theories/#RulLawRemForDanHavRul>>.

procedure by which this branch would be able to limit and constrain each other must be provided¹¹.

Like the ideas of democracy, science, critical rationalism and private property, so the ideas of Equality under the Law and of the Rule of Law embody an important part of the intellectual and cultural foundation of the Occident. As the historian Phillippe Nemo explains, all these ideas are a product of the “morphogenesis of the west”, which consisted of cultural inventions of the old Greeks, the humanism of the old Romans, and the eschatological revolutions of the bible¹². To be able to understand the reasons for the emergence of the intellectual and cultural invention of Equality under the Law, we are to have a look to the political changes after 1 200 b.c. in the ancient Greece, when the Greeks experienced a crisis of sovereignty, through which political power became collectivized. As more and more decisions of the “Polis” were delegated from the central monarch to the public, a “space of publicity” emerged; within that space, the arts of rhetoric, logic, and of intellectual reasoning became increasingly important. In such a society the moral value and the universability

¹¹ Политология : учеб. пособие для вузов / под ред. М. А. Василика. – Москва : Юрист, 2001. – 592 с., 319 (Politologiya : ucheb. posobiye dlya vuzov / pod red. M. A. Vasilika. – Moskva : Yurist, 2001. – 592 s., 319) [Political Science: Textbook].

¹² Nemo, Ph. (2004): Qu'est-ce que l'Occident?, PUF, collection Quadrige, Paris.

of the argument obtained more and more power against the social position of the person who was expressing the argument¹³.

The above ideas launched a direct impact on the development of constitutional law. The idea of law was formulated in the French Declaration of the Rights of Man of 1789, which stipulated that “a society which lacks the division of power and enjoyment of rights, has no Constitution”¹⁴. The idea of a law-based state gets its development in the late XIX century, however, it acquires its genuine meaning later, when opposed to non-democratic societies. It flourishes only in the mid-twentieth century, when autocratic regimes fell and the rule of law was introduced in many newly-created states, including Ukraine. Today, the rule of law – is an organization of political power, which sets conditions for the most complete protection of rights and freedoms, and legal restriction to the state authorities to prevent possible abuses¹⁵. That is, the rule of law is a form of organization and functioning of government,

¹³ Sprich, Christoph. Equality Before the Law and its Role for Transition to Capitalism Thoughts from Hayekian Epistemology and Social Theory (Independent Institute, 2005), <<http://www.independent.org/students/essay/essay.asp?id=1607>>.

¹⁴ Современные зарубежные конституции : сб. док. по конституц. праву зарубеж. стран / В. В. Маклаков ; отв. ред. Б. А. Страшун. – Москва : Б.в., 1996. – 285 с., p.100

¹⁵ Комаров С. А. Теория государства и права : учеб.-метод. пособие ; крат. учеб. для вузов / С. А. Комаров, А. В. Малько. – Москва : Норма-инфра-м, 2001. – 448 с., p.100

where the state itself, the society and every single individual respect the law and are treated equally thereby. In such a way law bridges the state, society and individuals.

The rule of law is based on the following basic principles:

a) the primacy and the rule of law in all spheres of public life, i.e. the law establishes the rights and obligations of all participants of public relations and provides absolute subordination of law; universality of the rights provides for its application by all citizens, organizations and institutions, including the public authorities;

b) guarantees individual rights, possibility of free development, inviolability of fundamental rights and freedoms, the reality of their exercise, their national security and defense;

c) the principle of separation of powers – the separation of state power into legislative, executive and judicial, except that the unity of their actions on the basis of the procedures are provided by the Constitution and the rule of a particular legislature; their decisions are obligatory subject to being within the legal framework;

d) mutual responsibility of the state and individual – the relationship between the state and individuals are based on the principle of reciprocity of the rights and duties and on the basis of equal responsibility for their actions under the law; the scope of the rule of law is limited to the protection of

the rights and freedoms, public order, creation of favorable legal environment for business and other activities¹⁶.

Besides, essential features of the modern rule of law are principles of the existence of effective monitoring and supervision over the implementation of the law (first of all, judiciary) and developed civil society. In fact, the birth of a law-based state is possible only through the development of civil society, which is a variety of unmediated power relations of free and equal individuals under the conditions of a democratic legal state¹⁷.

Thus, if we consider the case of Ukraine, one may trace the clear influence of Western democracies, when coining the rule of law principle in its legislation. Article 1 of the Constitution of Ukraine defines Ukraine as a democratic state¹⁸. Such key features and principles of law as the priority of human rights and civil rights, independence of the judiciary as a guarantor of the rights and freedoms, rule of law, separation of powers and other principles and notions mentioned above have been stipulated in the Basic Law of Ukraine (the Articles 3, 6, 8, 126)¹⁹. Equality under the law, as one of the most important and integral principles of law, is enshrined in the Art. 24 (1) of the

¹⁶ Ibid, pp. 320-321.

¹⁷ Ibid., p.321.

¹⁸ Конституція України // Відомості Верховної Ради України. – 1996. – № 30. – Ст. 141

¹⁹ Ibid.

Constitution of Ukraine: “Citizens have equal constitutional rights and freedoms and are equal under the law”²⁰. The same Article establishes equality under the law only for citizens of Ukraine, however, the Art. 21 of the Basic Law declares that “all men are free and equal in dignity and rights”, and the Art. 26 of the Basic Law of Ukraine stipulates that foreign nationals and stateless persons, who are staying in Ukraine on legal grounds enjoy the same rights and freedoms and have the same duties as citizens of Ukraine, with the exceptions established by the Constitution, laws or international treaties of Ukraine²¹. This provision is particularly interesting considering the recent political changes in the US, the cradle of democracy and human rights, which are studied below.

Therefore, the law in Ukraine establishes legal equality not only for citizens but also foreign nationals and stateless persons, who are equal under the law, regardless of their origin, social or economic status, race, nationality, sex, language, religion, occupation and other circumstances.

Thus, the rights of foreign nationals and stateless persons in Ukraine correspond generally accepted norms of international law, in particular, the Art. 7 of the Universal Declaration of Human Rights, which states that all people are equal under the law and are entitled without any discrimination, to equal

protection of the law against any discrimination and against any incitement to such discrimination²², the Art. 26 of the International Covenant on Civil and Political Rights, which stipulates that all persons are equal under the law and are entitled without any discrimination to equal protection of the law²³.

Therefore, the rule of law is a form of organization and activities of the government, where the rule of law is ensured, the rights and freedoms of a man and citizen are guaranteed, there is a separation of state power and legitimacy, and all people are equal under the law and justice²⁴.

In certain national and regional legal systems, equality legislation has evolved in the last few decades. It contains legal concepts, definitions, approaches and jurisprudence, some of which have taken the protection against discrimination and the realization of the right to equality to a higher level. However, the disparity between international human rights law and national law as well as regional approaches to equality hinders progress. Therefore, a major effort is required to modernize and integrate legal standards relat-

²⁰ Ibid.

²¹ Ibid.

²² Права людини. Міжнародні договори України, декларації, документи / упоряд. Ю. К. Качуренко. – Київ : Наук. думка, 1992. – 199 с.

²³ Ibid.

²⁴ Тодыка Ю. Н. Основы конституционного строя Украины : учеб. пособие / Ю. Н. Тодыка. – Харьков : Факт, 1999. – 320 с., p.36

ed to the protection against discrimination and the promotion of equality²⁵.

The best gift to any democratic society that can be offered to its citizens is the democratic rule of law. A democratic rule of law is a system of mutually agreed rules and regulations that must be based on reasons, common sense principles, ethical standards, democratic values and ideology²⁶.

The following features stand beyond the democracy of laws:

- express the will of the multinational people of the state;
- govern the interests of the majority members of society;
- extend their legal authority to all members of society.

Unlike democratic laws undemocratic laws do not simply poorly reflect the interests of the population, but often completely contradict them. One of its clear features is serving the interests of the political elite without so to say thinking about the future generations and the interests of the society as a whole. Such laws are ‘short-term’, they may even be harming for the society (a vivid example are the ‘Draconian laws of Ukraine’, which meant to restrict the freedom of

assembly and other freedoms in Ukraine²⁷). Besides, laws in many cases are the result of lobbying, the essence of which lies in the financing and provision of various services by the business groups and criminal organizations by certain representatives of state power and administration, defending the interests of these structures through the adoption of certain laws and regulations, political administrative and other official decisions. Quality characteristics of lobbying are that the promotion of specific interests at the expense of limiting the legitimate interests of other actors (various groups, organizations, society and the state as a whole). Here the equality under the law, of course, is not necessary, since the adoption of that law is the embodiment of privilege of some groups over others.

Approaching the great puzzle of modern democratic societies, it is also worth mentioning the issue of justice and injustice of the laws. For example, sometimes the possibility to interpret laws differently, which implies giving them different meaning, brings about the possibility to make use out of certain laws, when it can serve both the good, equality and justice, and serve selfish interests

²⁵ Declaration of Principles on Equality, supra note 4.

²⁶ Maskanian, Bahram, *The Democratic Rule of Law* (The Venus Project Foundation, 2017), <http://venusproject.org/keywords/the-democratic-rule-of-law.html>

²⁷ The under-pressure adoption of laws by the Verkhovna Rada with a view to limit the freedom of expression and a number of fundamental human rights, abolish the freedom of assembly, and impede the work of non-governmental organizations in violation of procedures, known as the Dictatorship Laws of January 16, 2014, which were orchestrated by Yanukovych and his allies

at the same time²⁸. However, one may talk about the embodiment of equity in legislation only when the whole legal system serves the interest of the whole society. One may rely on the maxim that *'dura lex sed lex'*, which means that it is harsh, but it is the law, and bring about understanding that even if at first glance the law may be strict for an ordinary citizen, it still may aim at doing good in the result. As laws are not only about benefits, rights and freedoms for people, they also imply legal duties and responsibilities. The same goes for influential and power players – politicians – who should obey the laws no matter whether they like them or not, especially when they are elected by the people. They are not supposed to 'rewrite the laws'.

3. *Primus inter pares*²⁹

It seems that we are entering a period, when the so-called ordinary citizens (i.e. usually conservative, mostly without higher education) have decided that liberal democratic political system that has developed over the past 20-30 years (along with its established political class), obviously ignore their interests. They are convinced that their democratic and law-based states are 'not in the place they meant to be', that political leaders and other executives are busy with

'wrong issues'; that economic benefits and fruits of their everyday work are redistributed for the benefit of those who do not deserve these goods and their interest have not been on the tops of the list for quite a long time already³⁰.

The problem arises and it can be seen from politics, where newly elected leaders challenge existing legal frameworks by posing the question whether the law is perceived as equity and serves the nation as a whole as well as each particular individual.

It is the right time, when one should indeed revisit the concept of not mere declaring the rights and freedoms, but also ensuring the possibility to exercise the rights, to benefit from them by most of the society as the 'drafters' of such liberal democracy 'suffer' from their own scenarios. There is a need to break the pattern of their being solely declarative for many nations. The key question today is whether we are all truly equal under the law and justice or are there some 'more equal' than others?

Equality under the law and the court is not only a fundamental principle of the rights and freedoms in a democratic state of law, but also the foundation of the entire democratic political and legal system. But in a complicated transformation period for

²⁸ Теория государства и права : курс лекций / под ред. Н. И. Матузова, А. В. Малько. – Москва : Юрист, 1999. – 672 с., с.490-491

²⁹ The first among equal (lat.).

³⁰ Горбулін, Володимир. Європа і "заперечення": реалізм проти Бодлера (Дзеркало тижня, 10 березня 2017), <<http://gazeta.dt.ua/internal/evropa-i-zaperechennya-realizm-proti-bodlera-.html>>

statehood of many societies, *including developed ones*, unfortunately, it is often considered only as a declaration. Ensuring the implementation of the principle of equality of all persons under the court and the law as an integral component element of law involves improving the existing legislation to provide opportunities for effective application in practice of modern international norms guaranteeing legal equality and the prohibition of any discrimination³¹ as well as the optimization of the existing judicial system, expanding the independence of judges and increase confidence in the court of the population³².

As one of the leading political scientists Francis Fukuyama puts it: “Today, the greatest challenge to liberal democracy comes not so much from overtly authoritarian powers such as China, as from within. In the US, Britain, Europe, and a host of other countries, the democratic part of the political system is rising up against the liberal part, and threatening to use its apparent legitimacy to rip apart the rules that have heretofore constrained behaviour, anchoring an open and tolerant

³¹ Летнянчин Л. І. Конституційні обов’язки людини і громадянина в Україні: проблеми теорії і практики : автореф. дис. на здобуття наук. ступеня канд. юрид. наук : спец. 12.00.02 «Конституційне право» / Л. І. Летнянчин ; Нац. юрид. акад. України ім. Я. Мудрого. – Харків, 2002. – 22 с., р.170

³² Полховська І. К. Конституційний принцип рівності людини і громадянина в Україні: дис ... канд. юрид. наук : 12.00.02 / Полховська Інна Костянтинівна ; Нац. юрид. акад. України ім. Я. Мудрого. – Харків, 2006. – 191 с.

world. The liberal elites that have created the system need to listen to the angry voices outside the gates and think about social equality and identity as top-drawer issues they must address”³³.

What else? Women protested around the world on Wednesday for equal rights and in the United States against President Donald Trump, with many Americans skipping work or boycotting stores to demand economic fairness on International Women's Day³⁴. In addition, changes in the concept of security narrow the space for the rights and values-based foreign policy, and as such may have a restrictive effect on its implementation. Trump’s apparent lack of respect for democratic principles and to some extent for human rights shakes the foundations for much of what are the underlying arguments behind a foreign policy designed to secure women’s rights and participation in important issues³⁵.

As a result, Donald Trump was not welcomed to address Parliament on his state visit to the UK because of its opposition to

³³ Fukuyama, Francis, US against the world? Trump’s America and the new global order (Financial Times, 11 Nov. 2016), <<https://www.ft.com/content/6a43cf54-a75d-11e6-8b69-02899e8bd9d1>>.

³⁴ Ax, Joseph and Fernandez, Lisa Women worldwide rally for equality, and against Trump in U.S. (Reuters, 9 Mar. 2017), <<http://www.reuters.com/article/us-womens-day-usa-idUSKBN16F19D>>.

³⁵ Lorentzen, Jenny, Why Trump Is Bad News for Gender Equality in Foreign Policy (PRIO blogs, 18 Nov. 2016), <https://blogs.prio.org/2016/11/why-trump-is-bad-news-for-gender-equality-in-foreign-policy/>

racism (as known, President Trump has introduced the immigration ban) and to sexism (President Trump is known to be intolerant to different minorities)³⁶.

4. *Lex uno ore omnes alloquitur*³⁷

And still the problem is much broader than the election results in the US. This is only one of the fronts of the problem faced by the entire Western world: there are different colliding challenges and problems, which the Western leaders (large-scale migration, decline of the economy, local military conflicts and civil wars and so forth) solve today, appear to be a litmus test for them – the response of the public, which is entitled to speak, decide and take actions (as it is mentioned above, the law-based state creates equal opportunities for all the members of the society), its reaction to these challenges and the way the political elite tackles them.

Hence, the other side of the coin labeled ‘democracy’ is popping up of populists on political and legal arena. They play on the sentiment of the society and offer ‘simple’ solutions to major problems, as mentioned above, serving primarily their personal goals. They offer to solve the problem of immigrants who also are entitled to particular rights by

³⁶ Stone, Jon. Donald Trump will not be allowed to address Parliament on UK state visit, says Speaker John Bercow (The Independent, 6 Feb. 2017), <<http://www.independent.co.uk/news/uk/politics/donald-trump-uk-state-visit-speaker-address-parliament-a7565651.html>>.

³⁷ The law speaks the same language with everyone (lat.).

expelling them or building walls not to let them in; build roads, to show an active position in developing countries, be friend with influential international partners to seek deals etc. The public does not think about the consequences of such ‘solutions’ and their ineffectiveness as ‘plain people’ are interested in having a hope.

We believe that the only thing that still can stop such ‘new leaders’ of the so-called civilized world is the law and the principle of equality under the law. This law (in the broadest interpretation) is under the greatest pressure of this confrontation. Will the individuals ‘survive’ voluntarism of specific leaders? Can one man completely shift the course of the state, or is the latter ‘traditional’ and ‘rational’ not subject to radical changes along with the impossibility to consolidate all power in one hand? And this is where the international community will see how far the citizens of democratic states are willing to go to defend their values. Will they take to streets or will the law be strong enough to make the leaders humble?

5. Conclusions

The level of the development of democracy is associated with the level of freedom, which despite some differences that depend on various objective and subjective circumstances is assessed against the background of the affiliated extent of the rights, freedoms and responsibilities with ensuring presence or absence of equality

under the law. With “law” being a multifaceted category it has already been in the heart of every law-based state for several centuries. The Western thinkers influenced the constitutional law of today and triggered the mechanism of exercising the rights in democratic societies. Ironically, the West, which is the cradle of democracy, is one to prove how devoted to democracy it is today.

Thus, today it is the right time, when one should indeed revisit the concept of not mere declaring the rights and freedoms of a man and citizen, but also ensuring the possibility to exercise them, to benefit from them by most of the society as the ‘drafters’ of such liberal democracy ‘suffer’ from their own scenarios. There is a need to break the pattern of their being solely declarative for many nations. The key question today is whether we are all truly equal under the law and justice or some are ‘more equal’ than others.

Hence, the other side of the coin labeled ‘democracy’ is popping up of populists on political and legal arena, who challenge liberal democracy values and foundations. They play on the sentiment of the society and offer ‘simple’ solutions to major problems, serving primarily their personal goals. The law and the principle of equality under the law should have its position today and withstand possible shifts in political courses of specific countries.