

DISCUSSION

MODERN DEMOCRACY AS AN ELEMENT OF CONSTITUTIONALISM
AND ITS SHIFT FROM THE PROCEDURAL TO MATERIAL ASPECTS

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Abstract: Modern Democracy (alongside with the Rule of Law and human rights) is usually considered as the part of constitutionalism. However, traditional understanding of democracy is usually focused on procedural aspects (as the form of election of people's representatives and special procedures for decision-making that ensure majority rule with the implementation of minorities' interests). The proposed paper aims to analyze modern democracy and its shift from the procedural to the material aspects.

The modern interrelation between the rule of law and democracy is analyzed (on the example of rule of law and democracy indices) and despite some exceptions (the case of Singapore), direct interrelation is found. This paper also analyzes modern democracy problems, including referendums imperfection as a form of democracy and its Ukrainian experience. The role of bodies of constitutional review (that being less formally democratic than representatives elected by people still play an essential role in restraining democracy) is analyzed. Therefore, the conclusion that modern democracy remains an element of constitutionalism but shifts to material aspects (conformity with the rule of law and human rights) is made.

Keywords: democracy, constitutionalism, constitutional democracy, constitutional review, democracy problems

I. INTRODUCTION: DEMOCRACY AS AN ELEMENT
OF CONSTITUTIONALISM

Today's understanding of constitutionalism¹ is usually examined in the context of its fundamental principles, like the rule of law, human rights, and democracy. However, there are numerous problems with modern democracy and its deficit.² Thus, we should

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¹ See more on the problems of modern constitutionalism, for example: KURTH, J. Western Civilization, Our Tradition. *The Intercollegiate Review*. Fall 2003/Spring 2004, pp. 5–13, [2019-01-12]. Available at:

<http://www.mmisi.org/ir/39_01_2/kurth.pdf>; SHEVCHUK, S. *Fundamentals of Constitutional Jurisprudence*. Kharkiv: Konsum, 2002. 296 c.; TEITEL, R. Transitional justice and the transformation of constitutionalism. In: T. Ginsburg (ed.). *Comparative Constitutional Law. Research Handbooks in Comparative Constitutional Law*. Edward Elgar Publishing Limited, 2011, pp. 57–76; SAJÓ, A. *Limiting Government. An Introduction to Constitutionalism*. Budapest, New York: CEU Press, 1999; PINHEIRO F. H. de S. J. What is subnational constitutionalism. *Sant'anna Legal Studies*. 2010, No. 7, pp. 1–10, [2019-01-12]. Available at:

<http://www.stals.sssup.it/files/stals_Pinheiro.pdf>; WALDRON, J. Constitutionalism: A Skeptical View. Philip, A. Hart Memorial Lecture 2010. Paper 4. In: *Georgetown Law* [online]. 12. 1. 2019 [2010-03-17]. Available at: <<http://scholarship.law.georgetown.edu/hartlecture/4>>; and ROSENFELD, M. The rule of law and the legitimacy of constitutional democracy. *Southern California Law Review*. 2011, Vol. 74, pp. 1307–1352, [2019-01-12]. Available at: <<https://pdfs.semanticscholar.org/5051/52a584c8e61e40ba7d958f713efcc9cc04f0.pdf>>.

² See, for example FEATHERSTONE, K. Jean Monnet and the 'Democratic Deficit' in the European Union. *Journal of Common Market Studies*. 1994, Vol. 32, No. 2, pp. 149–170.

reconsider modern democracy as the traditional basic part of constitutionalism, understand its problems and interaction with the rule of law principle and contribution to the constitutionalism values promotion. Democracy is commonly understood as a form of government, the political system in which the supreme power belongs to the people³ or “a system of government by the whole population or all the eligible members of a state, typically through elected representatives”.⁴ Therefore, common understanding of democracy is usually focused on the procedural aspects: we need a specific form of government that includes people’s participation that can be achieved by elections. It means that there is a necessity for a fair electoral process⁵ as a guarantee of democracy. We should also understand that there are different modern concepts of democracy, for example, G. Frankenberg singles out three different types of modern democracy: direct, representative and deliberative.⁶ He points out that “the representative democracy is generally identified with the liberal democracy, in spite of the fact that the term covers a plurality of different institutional designs – the parliamentary and presidential systems, the constitutional monarchies, the authoritarian-populist regimes, the centralized and federal states, the one- or two-chamber parliaments, etc – and a diversity of electoral systems”⁷. We agree with this statement since we can see different effective ways to implement democracy, such as the presidential republic⁸ (USA), the constitutional monarchy (United Kingdom) and the parliamentary republic (Germany).

³ Demokratia. In: *Dictionary of Ukrainian Language* [online]. [12. 1. 2019]. Available at: <<http://sum.in.ua/s/demokratija>>.

⁴ Democracy. In: *Oxford English Dictionary* [online]. [2019-01-12]. Available at: <<http://www.oxforddictionaries.com>>.

⁵ See, for example Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report. Adopted by the Venice Commission at its 52nd session (Venice, 18–19 October 2002). In: *Council of Europe* [online]. 30. 10. 2002 [2019-01-12]. Available at: <<https://rm.coe.int/090000168092af01>>. This Code includes international standards on the electoral process such as universal, equal, free, secret and direct suffrage, as well as frequency for elections and conditions for implementing the principles. The last includes respect for fundamental rights, regulatory levels and stability of electoral law and procedural safeguards such as organization of elections by impartial body, observation of elections, effective system of appeal, organization and operation of polling stations, funding and security. Therefore, there is a presumption that if all those principles are observed and procedural safeguards achieved, we may expect an effective democracy.

⁶ FRANKENBERG, G. Democracy. In: M. Rosenfeld – A. Sajó (eds.). *The Oxford Handbook of Comparative Constitutional Law*. Oxford University Press, 2011. pp. 250–269.

⁷ *Ibid.*, p. 253.

⁸ It is especially interesting to note that the USA remains the only effective presidential republic with the real implementation of the rule of law and democracy principles. Other states that tried to introduce a presidential republic like Latin America or Eastern Europe have a risk of becoming a “superpresidential” state with less separation of power, rule of law and democracy. See, for example, ISHIYAMA, J. T., KENNEDY, R. Superpresidentialism and Political Party Development in Russia, Ukraine, Armenia and Kyrgyzstan. *Europe-Asia Studies*. Vol. 53, No. 8, 2001, pp. 1177–1191. GOODNOW, R. R. Post-Soviet Super-Presidentialism: Explaining Constitutional Choice in Russia and Ukraine. M. A. Dissertation Presented to the Faculty of the Graduate School of The University of Texas at Austin in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy. In: *The University of Texas at Austin* [online]. 2013 [2019-01-12]. Available at: <<https://repositories.lib.utexas.edu/bitstream/handle/2152/28718/GOODNOW-DISSERTATION-2013.pdf?sequence=1&isAllowed=y>>; and FIX-FIERRO, H., SALAZAR-UGARTE, P. Presidentialism. In: M. Rosenfeld, M. – A. Sajó (eds.). *The Oxford Handbook of Comparative Constitutional Law*. Oxford University Press, 2011, pp. 628–649.

According to L. Diamond there are four basic elements of democracy: “(1) a political system of choosing and replacing the government through free and fair elections; (2) the active participation of the people, as citizens, in politics and civic life; (3) the protection of human rights of all citizens; (4) the rule of law, in which the laws and procedures apply equally to all citizens”.⁹ From this point of view, we can see that democracy includes both institutional and procedural aspects (1 and 2) as well as the protection of human rights and the rule of law. Therefore, the theory of democracy is important in the modern doctrine of constitutionalism. Democracy (both direct and representative – as government institutions are established through direct democracy with the mechanism of elections) as the most effective modern political regime is very closely intertwined with other constitutional concepts, such as the maximum guarantee of human rights and the rule of law as the foundation of modern legal thinking. Democracy and separation of powers concern the structural organization of society - and while the concept of separation of powers concerns constitutional theories of forms of government (the structure of higher state bodies, their functions, and powers together with checks and balances – horizontal separation of powers) and territorial organization (centralization or decentralization (subsidiarity) reflecting the separation of powers vertically), the democracy reflects the third aspect – the political regime. In legal theory, it is proposed the division of such regimes to democratic and anti-democratic,¹⁰ and the main features of the democratic regime include: a) equality of citizens before the law, and guarantee by the state of their rights and freedoms; b) representative bodies elected by the people; c) legally defined term of institutions being in office; d) a system of developed democratic institutions; e) the direct participation of citizens in the process of public affairs solving; f) the actual implementation of separation of powers; g) political pluralism with regard to minority interest¹¹. Here we see the connection of democracy with human rights, in particular with equality (a) and the separation of powers (f). Therefore if we divide regimes into democratic and anti-democratic it will show that democracy can be an essential part of the modern understanding of constitutionalism, despite its problems.¹²

The imperfection of democracy reveals the fact that it is probably the least obvious element of constitutionalism. It is hardly possible to dispute the importance of human rights and the rule of law – because the concept of human rights has been actively developing as a foundation in the fight against arbitrary government. So is the idea that state power can be limited through law (the classic idea of “government of laws, not men”), thus introducing the concept of the rule of law both in the formal interpretations (relating generally to due process, reflecting the idea of legality) and material (correcting the formal, cautioning against excessive formalism of law and bringing it closer to the idea of justice). However, legal systems may be effective without proper implementation of the democratic ideas that we can see on the example of Singapore.

⁹ DIAMOND, L. What is Democracy. Lecture at Hilla University for Humanistic Studies. In: *Stanford* [online]. 21. 1. 2004 [2020-03-18]. Available at: <<http://web.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm>>.

¹⁰ ZWICK, M., TKACHENKO, V., BOGACHOVA L. *General Theory of Law*. Kharkiv, Pravo, 2012.

¹¹ *Ibid.*

¹² As it was characterized by W. Churchill that “democracy is the worst form of government, except for all the others”.

II. THE DEMOCRACY AND RULE OF LAW INDICES AND THE CASE OF SINGAPORE

Thus, to illustrate this statement we will take two parameters: Democracy Index¹³ and the index of the rule of law in 2015.¹⁴ According to the first one, considering criteria such as the electoral process and pluralism, functioning of the government, political participation, political culture, and civil rights Singapore is on the 74th place in the ranking (6.1 out of 10). Instead, the index of the rule of law (which takes into account such factors as limitation of state power, lack of corruption, the openness of government, fundamental rights, order and security, justice, etc.) this state is on the high 9th place (with the index of 0.81 out of 1). This significant difference in the ranking (for example, Denmark, located on the 1st place in the rule of law index ranks 5th in the Democracy Index, Norway – the 1st place in the Democracy Index and 2nd – the rule of law) suggests that there is no compulsory correlation between democracy and the rule of law. If we are talking about democracy *stricto sensu*, then we usually mean the areas related to the political participation of the people (as the term itself means „power of the people“).

These differences in the case of Singapore are explained by K.P. Tan¹⁵ who indicates the fact that in Singapore executive power has more authority than legislative and elections show that People's Action Party remains in office. He also points out that despite the lack of democracy the focus of the government is on the economy that can be explained by the Asian culture and pragmatic objectives. We agree with this explanation and may ask ourselves one question – what if democracy slows down economic growth?¹⁶

However, it should be noted that Singapore's position in the index of the rule of law is quite different. Thus for the criterion of „constraints on governmental power“ this state is at the 22nd place with 0.76, the absence of corruption – the 3rd (0.96), open government – the 25th (0.63), the protection of fundamental rights – the 28th (0.72), order and security – the 4th (0.91), regulatory enforcement – the 1st (0.86), civil justice – 3rd (0.84), criminal justice – the 3rd (0.82). From this, we can draw the following conclusions. Introducing the Rule of Law, Singapore has placed emphasis on those aspects as the absence of corruption (that is essential for making decisions in accordance with the law), introducing legislation that

¹³ Democracy in an age of anxiety. Democracy Index 2015 by regime type. In: *The Economist Intelligence Unit* [online]. [2019-01-12]. Available at:

<<http://www.eiu.com/index.php/latest-press-releases/item/2127-democracy-in-an-age-of-anxiety>>.

¹⁴ World Justice Project Rule of Law Index 2015. In: *World Justice Project* [online]. [2019-01-12]. Available at: <http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf>.

¹⁵ See TAN, K. P. The Ideology of Pragmatism: Neo-liberal Globalisation and Political Authoritarianism in Singapore. *Journal of Contemporary Asia*. 2012, Vol. 42, No. 1, pp. 67–92; and TAN, K. P. Singapore's National Day Rally speech: A site of Ideological Negotiation. *Journal of Contemporary Asia*. 2007, Vol. 37, No. 3, pp. 292–308.

¹⁶ It is not a secret that the democratic decision-making procedure is more complicated than when these are carried out by only one center; however, this procedure is a safeguard against abuse, helping to ensure the interests of the minority. In fact in the „Eastern“ culture we can see the origins of this type of regimes as minority interests are not necessarily deemed to be secured. But to the big extent because of this type of political organization and power it was possible the so-called “Singapore economic miracle”, which is one example of successful reforms that led to the development of the country. See more: KING, R. *The Singapore Miracle, Myth and Reality*. Insight Press, 2006.

is effectively applied (with this indicator Singapore is in the first place), and effective judiciary. At the same time, issues such as human rights and open government, along with constraints on state power are not in the first place. In this regard, it is worth asking the question – can we talk about constitutionalism without democracy? The answer is this – rather no than yes. If we talk about the theory of constitutionalism as the limitation of power, the traditional view of it is a liberal model. However, in the example of Singapore we can see that although it does not have so high ranking figures in “constraints on government power”, it still remains at a decent level, although with the absence of a very democratic regime. This is conditioned in our view with the strong position of the judiciary and the absence of corruption. Although as previously indicated, the legislative branch of government is quite weak and inferior to the executive but it is the judiciary that aims to strike a balance in society, including the rule of law perspective, thus limiting the other branches of government. The lack of corruption helps to get rid of the phenomenon of „political corruption“ that can mask all the achievements of formal democracy (that does not work properly to achieve its objectives). Clearly, the rule of law for this approach is focused more on formal aspects than material, realizing mostly legality concept, by introducing effective legislation and its enforcement (index of order and security as well as civil and criminal justice systems). But at the same, despite adequate level of openness of government and human rights (according to index), sufficient risks remain, and it is understood that the experience of Singapore is unique because of its well evolved political will, the small size of the state (which simplifies the possibility of reforming public institutions in comparison with “big” states), and eastern culture with collective values without emphasis on human rights for an individual. In addition, undemocratic system, as history shows, is rather shaky – that is why the post-soviet states of “unstable” young democracy have undergone significant risks of authoritarianism (as we noted above about “superpresidential” republics), where the consequence was not only a reduction of democracy but also of human rights and the rule of law. Therefore, despite the possible exceptions (as we can see on the example of Singapore that has unique conditions) between the level of democracy and the rule of law (eventually – constitutionalism), we can establish a direct correlation rather than the inverse.

III. THE PROBLEMS AND CRITICISM OF MODERN DEMOCRACY

Another important factor is the following: democracy in spite of a significant number of benefits has its risks for constitutionalism. For example, D. Tormsen identifies ten problems of modern democracy and its institutions, including Gerrymandering,¹⁷ Defective Democracies, Nonvoters, Democracy deficit in Europe and others.¹⁸ Even in de-

¹⁷ Gerrymandering (named after Elbridge Gerry, former Massachusetts Governor) is the process of division of geographic area into voting districts in a way that gives one party an unfair advantage in elections. See Gerrymander. In: *The Free Dictionary by Farlex* [online]. [2019-01-12]. Available at: <<http://www.thefreedictionary.com/gerrymander>>.

¹⁸ TORMSEN, D. 10 Problems With Modern Democracies And Their Institutions. In: *Listverse* [online]. 28. 7. 2015 [2019-01-12]. Available at: <<http://listverse.com/2015/07/28/10-problems-with-modern-democracies-and-their-institutions/>>.

veloped democracies, there are serious problems and challenges for democracy. For example, in the context of a US election a system that could be called “the winner takes it all” is criticized that led to the election of 2000 US President where George W. Bush, who received 50,456,002 real votes was elected instead of A. Gore, who received 50,999,897.¹⁹ The same problem appeared 16 years later with D. Trump getting 62,984,825 of votes and being elected instead of H. Clinton with 65,853,516.²⁰ These results and American voting systems in some way are not consistent with the general understanding of democracy. Besides this obvious problem, which contradicts to some extent with the idea of democracy (as majority rule), there are other problems. Thus, for example, the abovementioned D. Tormsen indicates that “In such a situation, even if a third party statistically has support in the low double-digits percentage across the country, they are not going to win representation anywhere. It’s better to join one of the two main parties or withdraw... there are psychological barriers to voting for a third party, as most voters assume it’s a wasted vote, and indeed, third parties tend to be organized around a single individual and are unlikely to gain widespread support from the electorate... The result is that the self-proclaimed greatest democracy in the world still boils down to a choice between A and B”.²¹ But the biggest problem from D. Tormsen’s view is the elite theory, saying that “Mosca believed that a political elite making up a tiny minority would always be able to outmaneuver the mass of the population and seize control of power” and “Pareto argued that, while in the perfect world, the elites would be made up of the most deserving, in reality, the existing elites use force, persuasion, and inherited wealth to maintain their position”.²²

Therefore, we may ask ourselves whether democracy is real democracy and we see a real “people’s power” or just the power of a narrow range of people hidden within democratic procedures, which is the minority, not the majority? The idea of democracy is very simple – the need to ensure such society organization according to which the power will be realized in a way that the majority support but with the obligatory account of minority interests, while minority should be able to control the majority, and be ready to become the majority. And the problems of democracy applies to the system that has the external features consistent with the concept of democracy, but favoring certain categories of persons that are a minority. It is connected with this theory of elites like most other problems (already referred to the US two-party system that contributes to the existence of the Democratic Party and the Republicans and gives no real opportunities for alternative; usage of gerrymandering by people or parties in power and having the opportunity to take advantage of the upcoming elections) – thus, these problems lead to strengthening the position of current authorities and reduce opportunities for fair competition.

¹⁹ See 2000 presidential popular vote summary for all candidates listed on at least one state ballot. In: *Federal Election Commission* [online]. 2001 [2019-01-12]. Available at: <<https://transition.fec.gov/pubrec/fe2000/prespop.htm>>.

²⁰ See LEIP, D. 2016 Presidential Election Results. In: *Dave Leip’s Atlas of U.S. Presidential Elections* [online]. [2019-01-12]. Available at: <<http://uselectionatlas.org/RESULTS/national.php?year=2016&f=0&off=0&elect=0>>.

²¹ TORMSEN, D. *10 Problems With Modern Democracies And Their Institutions*.

²² *Ibid.*

Generally, there are many critiques for democracy, including economic, sociological, political, philosophical, administrative and psychological.²³ As we can see, the criticism applies to many aspects of democracy, although they are often interrelated. Political criticism, for example, largely is intertwined with the economy as unstable democracy cannot effectively develop the economic system, as it is in today's world dependent on private business, which is very sensitive to sudden changes in the political vector. Actually this argument underlies the Singapore model of governance that we analyzed, which is much less democratic at the same time with a high level of the rule of law – as stable policies and appropriate legal institutions guarantee favorable investment and business environment.

IV. THE PROBLEMS WITH DEMOCRACY: UKRAINE'S EXPERIENCE AND CRITICISM OF REFERENDUM DEMOCRACY

Many aspects of democracy criticism can be observed in the example of Ukrainian society. This applies both to economic arguments (which mainly deal with and are covered by terms such as “populism”²⁴ – a significant spread of such tendencies in unstable democracies (which include the post-Soviet states, including Ukraine) just confirms the economic critique of democracy, including irrational voters, who often cannot objectively evaluate the short- and long-term consequences of certain political programs. Especially it is related to “unpopular reforms”²⁵ that are needed to be changed in the country and instead voting for the political forces that promise quick gains, which may, however, adversely affect the country's fate in the future, slowing economic growth; this can explain little success of many key economic reforms in Ukraine in the period of independence). We can also see political criticism (particularly here it is worth noting the political instability, as often the rating of political parties or leaders in a short period can vary very significantly)²⁶,

²³ See, for example BENOIST, A. *The Problem of Democracy*. Arktos Media, 2011; FRANKENBERG, G. *Democracy*.

²⁴ As it is stated in Encyclopedia “Britannica” by this term is usually meant “political program or movement that champions the common person, usually by favorable contrast with an elite” and “depending on one's view of populism, a populist economic program can therefore signify either a platform that promotes the interest of common citizens and the country as a whole or a platform that seeks to redistribute wealth to gain popularity, without regard to the consequences for the country such as inflation or debt”. See MUNRO, A. Populism. Political program or movement. In: *Encyclopedia Britannica* [online]. [2019-01-12]. Available at: <<http://www.britannica.com/topic/populism>>.

²⁵ Particularly successful example is the reforms that have been carried out in Poland by L. Balcerowicz and called “shock therapy”; However, the effects of reforms in the political aspect show that the reformist government often is exposed to considerable political risk, so there is a dilemma – to conduct reform or preserve political rating, which is also not favorable to democracy because it is dependent on the current electoral process and political forces that promote reforms risk being associated with the period during which the results of the reforms are not felt, but the negative aspects of the reforms on their early stage lead to short-term economic downturn. On the other hand, politically it can draw forces which will replace the reformers, thus obtaining political gains at the expense of reforms carried out by their predecessors. See more on reforms in Poland, for example: LEHMANN, H. The Polish Growth Miracle: Outcome of Persistent Reform Efforts. Iza Policy Paper, No. 40. In: *IZA* [online]. 2012 [2019-01-12]. Available at: <<http://ftp.iza.org/pp40.pdf>>.

²⁶ Political stability is one of the reasons why the two-party system is so popular in developed countries such as USA, UK. Despite the criticism, which we mentioned earlier (the choice between A and B without any alternatives, as indicated by D. Tormsen), this system promotes democratic certainty, while limiting democracy to some extent in the “ideal” sense, but providing a rough idea of the possible variations of policy and politics.

especially such factors as political corruption. Ukrainian society in its history illustrates the theory of elites as a threat to democracy as well.

Another problem of modern democracy is the manipulation with referendums, which were described by Margaret Thatcher as a “device of dictators and demagogues”.²⁷ Indeed, the idea of a referendum is a very attractive one that people exercise power directly, thus theoretically referendum serves probably as the best implementation of the concept of national sovereignty. The conventional idea is that a referendum is required to address the most important social issues, such as changing the Constitution (or particular, fundamental parts of it) and others. However, despite the veneer of democracy, referenda can be a tool to implement the will of the people as well as of formal legitimization of decisions in unstable democracies or authoritarian or close to these modes.

L. Morel indicates that referenda are less democratic than representative democracy because “elected officials would be better at producing policies that accurately reflect the will of the majority, because they can aggregate preferences, while the referendum, as a device of semi-direct democracy, does not allow the collective elaboration of policies by the people”, therefore “legislation approved by referendum, unless it comes from the parliament, would almost inevitably reflect minority views (those of its proponents)”.²⁸ Another argument that he stresses is that “referendums do not reflect the will of the majority on the question asked because of abstention, which is higher than at elections, and dramatically increases when their use becomes frequent”. Therefore “they just follow party lines, or are easily manipulated by minorities with more intense views and organizational or financial superiority”.²⁹ He also indicates the classical argument that “the referendum would lead to majority tyranny against minorities, because “it knows nothing about a compromise” as it gives only a choice between “yes” and “no”.³⁰ Indeed, an important issue of the referendum is that it is reduced mainly to a choice between several alternatives, between A and B, while the political debate allows making adjustments in most stages of solutions development. Finally, L. Morel says about “lack of expertise for ordinary people to legislate” and “bias against change, people being naturally conservative or tending to be so when they do not have firm preferences – which is often the case at referendums since most issues are complex”³¹.

As we can see, the arguments against the referendum as a democratic tool are quite significant and easily traced in the history of many countries. An interesting idea is that referenda are less democratic than representative democracy. Although the general perception is that decisions taken by referendum have a higher degree of legitimacy (it appears that some of the decisions can be taken only by a referendum; another aspect is that the

²⁷ See THATCHER, M. HC S [EEC Membership (Referendum)]. In: *Margaret Thatcher Foundation* [online]. 11. 3. 1975 [2019-01-12]. Available at: <<http://www.margaretthatcher.org/document/102649>>.

²⁸ MOREL, L. Referendum. In: M. Rosenfeld – A. Sajó (eds.). *The Oxford Handbook of Comparative Constitutional Law*. Oxford University Press, 2011, pp. 501–528.

²⁹ *Ibid.*, p. 205.

³⁰ *Ibid.*, p. 205.

³¹ *Ibid.*, p. 206.

laws passed by referendum generally have higher legal force and their abolition is also possible only by referendum), we cannot establish the necessary correlation between “more legitimate = more democratic.” However, on an intuitive level this relationship exists which the referendum supporters enjoy, showing it as the greatest expression of democracy. Still, we must remember that the idea of democracy is that it is the most effectively to give governance to the majority, while taking into account the interests of the minority (but as we see one of the arguments against the referendum is that it can lead to a tyranny of the majority).³² A very big problem is the lack of proper knowledge to make decisions - in cases where referenda concern, for example, the choice of policy or fundamental issues of a state (as it relates the states with accession to the European Union or Ukraine to confirm the Act of Independence of it) there usage is more appropriate. However, those of them that are designed to pass laws or approve them are more likely to use the manipulative techniques as the average citizen hardly reads and analyzes massive text of the legal acts.³³ Therefore, as the abovementioned L. Morel indicates that (following Schumpeter and Sartori) “the essence of the democracy lies in the right to elect representatives, not to influence policies, for which citizens are both unwilling (time constraint) and incompetent” and “for the time being, the prevailing orientation among democratic theorists is not very referendum-oriented... proposals for a greater involvement of interests (especially so-called “excluded” or “mute” interests), or the democratization of supranational bodies and the establishment of a transnational democracy, hardly mention the referendum”.³⁴

World practice of referendums usage is different – from Switzerland, which is the “motherland of referenda” and where this instrument is used widely to countries with the more limited practice of them. In Ukraine, for example, there have been only two referendums, among them already mentioned above confirmation of the Declaration of Independence of Ukraine, held December 1, 1991 and which was attended by 84.18% of the population,

³² Generally, we can divide democracy problems into two main areas, which can develop risks for it – a tyranny of the majority as minority interest is neglected, and the possibility of real control by the minority that is represented by the theory of elites, where referendum democracy is manifested in the initiation of it, as the wording of the questions submitted to referendums are mostly formulated by the minority.

³³ As an example we can give the referendum that was held in the Netherland on 6 of April, 2016 concerning approval of the Association Agreement between the European Union and Ukraine. The referendum question was: “Are you for or against the Approval Act of the Association Agreement between the European Union and Ukraine (see Report: Het referendum over de associatie-overeenkomst met Oekraïne, Slotpeiling I&O Research, 31 maart 2016 [Report: The referendum on the association agreement with Ukraine, Slotpeiling I&O Research, 31 March 2016]. In: *I&O Research* [online]. 31. 3. 2016 [2019-01-12]. Available at: <<https://ioresearch.nl/Portals/0/Rapport%20Oekraïne-referendum%20eind%20maart%202016.pdf>>. We need to remember that Association Agreement is a text of 2135 pages (See Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, 2014. In: *Delegation of the European Union to Ukraine* [online]. [2019-01-12]. Available at: <http://eeas.europa.eu/ukraine/docs/association_agreement_ukraine_2014_en.pdf>). Therefore it is obvious that the people are guided by the opinion formed not on the basis of their own analysis, but depending on what the advantages and disadvantages of this document are submitted by certain political forces and the media. Although the referendum is advisory, not mandatory, it can have significant political implications (See more MAAN, B., ZAREMBO, C. The referendum in the Netherlands: scenarios and implications for Ukraine and the EU. In: *Eurointegration* [online]. [2019-01-12]. Available at: <<http://www.eurointegration.com.ua/articles/2016/01/19/7043572/>>). As they point out “results of the referendum will have implications not only for the Association Agreement, but also a tool of the referendum itself – and maybe not only in the Netherlands but also in other member states”.

³⁴ MOREL, L. *Referendum*. pp. 506–507.

of which 92.3% voted “for”.³⁵ However, It should be remembered that Soviet Union referendum was held on March 17, 1991, with the following question: “Do you consider necessary the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics in which the rights and freedom of an individual of any nationality will be fully guaranteed?” and in which the 70.2% of Ukrainian SSR population answered “yes” to this question, and only 28.0% “no”.³⁶ As we see, in a very short time were shown completely different results (of course, their effects were largely caused by the events that resulted in the Act of Independence of Ukraine of 24 August 1991). However, if we look at the question that was put to a referendum on March 17, 1991, we can see the use of manipulative techniques of the question wording because “renewed federation”, “equal sovereign republics”, and “where the rights and freedom of an individual of any nationality will be fully guaranteed” looks quite attractive for the average citizen, while these formulations are nothing more than a mask for key issues imposed at a referendum – “preservation of the Union of Soviet Socialist Republics”. Another example of such manipulation is the referendum held in Pakistan in 1984 with the question “Whether the people of Pakistan endorse the process initiated by General Muhammad Zia-ul-Haq, the President of Pakistan, for bringing the laws of Pakistan in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (PBUH) and for the preservation of the Islamic ideology of Pakistan, for the continuation and consolidation of that process, and for the smooth and orderly transfer of power to the elected representatives of the people.”³⁷ This wording directly combined two questions, not allowing the Muslim population to vote against. Also, there are some issues that are not allowed for being considered at a referendum – in Ukraine they include tax, budget and amnesty (article 74 of the Constitution of Ukraine,³⁸ Part 1. Article 20 of the Law “On All-Ukrainian referendum”).

So referenda as any other expression of democracy can be a tool for implementing the power of the people, thus corresponding to the fundamental idea of democracy, and a mechanism for abuses and creation of the illusion of democracy when under the “mask of referendum” lies unreasonable, often imposed will of the majority or minority.

In our view, the main problems of democracy in today’s world are the following: 1) the transformation of democracy in the “dictatorship of the majority” (majority rule) – when minority interests are neglected. Most obviously it shows the presence of fragile majority when the votes are divided about equally, and only slightly more than 50% are not so legitimate if the passed decision seriously contradicts the minority; or on the contrary, a real

³⁵ See more Information on the results of the all-Ukrainian referendum on December 1, 1991. In: *State Archival Service of Ukraine Portal* [online]. [2019-01-12]. Available at: <https://archives.gov.ua/Sections/15r-V_Ref/index.php?11>.

³⁶ Referendum in the Soviet Union. A Compendium of Reports on the March 17, 1991 Referendum on the U.S.S.R. In: *Commission on Security and Cooperation in Europe* [online]. 1991 [2019-01-12]. Available at: <<https://www.csce.gov/sites/helsinkicommission.house.gov/files/Referendum%20in%20the%20Soviet%20Union.pdf>>.

³⁷ See Referendum 1984 in Pakistan. In: *Story of Pakistan* [online]. [2019-01-12]. Available at: <<http://storyofpakistan.com/referendum-1984>>.

³⁸ Constitution of Ukraine of 28 June, 1996. In: *Council of Europe* [online]. [2019-01-12]. Available at: <http://www.coe.int/t/dghl/cooperation/ccpe/profiles/ukraineConstitution_en.asp>.

rule of the minority under the guise of democratic instruments; 2) problem with the feasibility of a majority decision - whether always decisions made democratically are needed in society and do not contradict the requirements of the law? Therefore, as we have noted earlier, democracy is not an obvious element of constitutionalism.

V. MODERN SHIFT OF CONSTITUTIONAL DEMOCRACY TO THE MATERIAL ASPECTS AND THE ROLE OF BODIES OF CONSTITUTIONAL REVIEW

It should be understood that a) democracy despite its imperfection carries the least risk to constitutionalism – we regard it primarily as a form of power exercising which a decision shall be taken involving people either directly or through representatives; tools of democracy, largely representative – elections that promote political competition, held periodically and are free and equal – promote periodic turnover of power, which is an important safeguard against abuse – as history shows that a significant period of governance of any person or political force carries risks for abuse of power. Therefore, democracy is considered as the form that most effectively limits the power; b) democracy as such should be limited. Unlimited democracy also carries significant risks, which may manifest itself as an instrument for abuse via referendums, as we pointed out, and the formalization of participatory democracy when under the screen of formally democratic elections is hidden undemocratic essence of the policy aimed at the preservation of the political system. That is why we must understand that democracy itself is not a constitutional value - that is only *limited democracy*.

Hence we have the idea of constitutional democracy in which the power of the majority is most limited by legal and institutional means in such a way that the rights of individuals and minorities are observed.³⁹ As for the essential characteristics and principles of constitutional democracy, it is stated that it is the antithesis of arbitrary rule and has the following components: (1) popular sovereignty; (2) majority rule and minority rights; (3) limited government; (4) institutional and procedural limitations on powers that include (a) separated and shared powers; (b) checks and balances; (c) due process of law; (d) leadership succession through elections.⁴⁰

Of course, elections that are conducted properly in accordance with the law in compliance with legal procedures are the foundation of modern democracy. However, there are risks that bodies or officials (even democratically elected) can take essentially undemocratic decisions. Actually that's why it is necessary and appropriate to have the distribution of power with an institutional organization and effective system of checks and balances. The main role in modern constitutional states belongs to the Constitutional Court (or its equivalent), which is designed primarily to carry out the legal protection of the constitution as a social contract. In the present system of separation of powers organs of constitutional justice serve primarily as counterbalance to Parliament (which

³⁹ Constitutional Democracy. Part One: Essential Elements, Part Two: Indices. In: *Center for Civic Education* [online]. [2019-01-12]. Available at: <<http://www.civiced.org/resources/publications/resource-materials/390-constitutional-democr>>.

⁴⁰ Ibid.

is usually the most democratic body that represents the will of the people) but sometimes can take (because of the excessive politicization) decisions that contradict the Constitution and the rule of law as principles and elements of constitutionalism. Hence we have another conclusion - despite the fact that usually democracy and the rule of law serve as interrelated items (usually States effectively implement democracy and have developed rule of law and vice versa, as evidenced by our previously mentioned indices), but sometimes democratically passed decisions may be contrary to the rule of law (at least in its material aspect).

The conventional idea of *democracy as the procedure* (which is shown as the method of government formation through elections and the manner of decision making) formalizes this concept somewhat, reducing the understanding of democracy to the formal perception of the rule of law with a focus primarily on legality. However, the current understanding of the latter principle is much wider, as clearly manifested in the activities of constitutional justice, which must verify acts not only against the procedure but also in its content. This is an extremely complex process, as constitutional courts should be independent and professional bodies to avoid the politicization of their activities.⁴¹

The main powers of the constitutional courts have always been to ensure the constitutionality of laws. At first glance, their work can be summarized in some cases as denial of democracy and the principle of popular sovereignty, if the legislature, which traditionally is the body that has the highest degree of legitimacy in connection with the representation of the entire population adopt some laws (at least theoretically, in terms of “ideal” of democracy) that reflect the will of the people, their “denial” by constitutional courts to some extent can be interpreted as the denial of democracy. This intuitive argument is sometimes used successfully by political parties for criticism of constitutional justice. Therefore, according to V. F. Commela even if constitutional review may be justified on instrumental grounds (to the extent, for example, that constitutional principles may be better protected), it is still necessary to enhance its democratic legitimacy. To this effect, judges in charge of constitutional review should be selected through procedures that are particularly democratic (such as parliamentary procedures), and their tenure should not be too long.⁴² Indeed, the democratic procedures of the body of constitutional control formation can provide adequate legitimacy. However, in the example of Ukraine, we can see certain disadvantages. The question remains open whether it is democratic the formation of 1/3 of the Constitutional Court of Ukraine by one person (the President)? If the

⁴¹ As the Justice of the Constitutional Court of Ukraine S. Shevchuk mentions in one of his opinions “my constitutional duty is, therefore, to clearly and consistently uphold the values and principles of constitutional democracy, even in a situation of urgent political needs, which is accompanied by external pressure on the Constitutional Court of Ukraine”. See Separate opinion of Judge of the Constitutional Court Ukraine Shevchuk S. V. for the opinion of the Constitutional Court of Ukraine 2- /2016. In: *Constitutional Court of Ukraine* [online]. [2019-01-12]. Available at: <<http://www.ccu.gov.ua/doccatalog/document?id=299918>>. This opinion is well illustrated by the idea of the constitutional court as a defender of democracy that transforms ordinary understanding of democracy as majority rule into a limited, constitutional and ensures its existence.

⁴² COMELLA, V. F. The Rise of Specialized Constitutional Courts. In: T. Ginsburg (ed.). *Comparative Constitutional Law. Research Handbooks in Comparative Constitutional Law*. Edward Elgar Publishing Limited, 2011, p. 270.

election of six judges from the parliament and the Congress of Judges are no doubt at least in their formal democratic legitimacy, the appointment of them by one person contains significant risks. Such risks are manifested in the politicization of the Court because if the court is formed by political bodies (and 2/3 of the Ukrainian Constitutional Court is formed in this manner), in such unstable democratic conditions demonstrative democracy can actually put judges under the dependence of policy of bodies or persons that appointed them.

Debatable is also the issue of the term of office – although similar judges in foreign countries have a limited period of time in office (as in France, Italy, Portugal, and Spain - 9 years, and Germany – 12 years),⁴³ which aims to provide democratic legitimacy, for example in the US, where constitutional review is conducted by Supreme Court and where judges are appointed for a lifetime, we see a different model. As we know in theory a lifetime appointment of judges is one of the elements of judicial independence, which allows to significantly reduce any form of pressure, including political (especially important in the context of issues that are the subject of consideration by the constitutional review). However, limited term does not contribute enough independence since because of political expediency some judges can make decisions under pressure due to their future career at the end of the term of office. Instead, the US Supreme Court during the period of its activity (being the ancestor of constitutional review)⁴⁴ itself demonstrated the effectiveness of constitutional system of separation of powers. We think that because the bodies of constitutional review are essential for the constitutional democracy implementation because they can adhere to fundamental constitutional principles and the Constitution itself as a social contract and fundamental law, so their (formal) democratic legitimacy is not the main factor that should be considered in their formation. We believe that (as in most other legal issues) we need to maintain a proper balance between the democratic character of its formation and its subsequent independence and ability to professionally carry out constitutional review since it is a body that aims to some extent “fight” with democracy and imposes on it certain frames and limitations.

A.S. Sweet points out that “[s]ince the Second World War, rights and review have been crucial to nearly all successful transitions from the authoritarian regimes to the constitutional democracy... it appears that the more successful any transition has been, the more likely one is to find an effective constitutional or the supreme court at the heart of it (Japan may be the most important exception)... [a] precept of the new constitutionalism is that the regimes are not democratically legitimate if they do not constrain the majority rule through rights and review.⁴⁵ He also indicates (citing Scheppele) that “[constitutional courts] can be more democratic than elected officials. At times, constitutional

⁴³ Ibid., p. 270.

⁴⁴ And *Marbury v. Madison*, 5 U.S. 137 (1803). In: *Legal Information Institute. Cornell Law School* [online]. [2019-01-12]. Available at: <<https://www.law.cornell.edu/supremecourt/text/5/137>>. The decision itself was a consequence of political situation.

⁴⁵ SWEET, A. S. Constitutional Courts. In: M. Rosenfeld – A. Sajó (eds.). *The Oxford Handbook of Comparative Constitutional Law*. Oxford University Press, 2011, pp. 826–829.

judges are more responsive to citizens' concerns than politicians and they may cajole officials to be more democratic than they would otherwise be".⁴⁶ This leads us to a very interesting conclusion – if we consider democracy as the will of the people, where there is a real democracy? Modern democracy is largely confined to the procedure, hence we have the well-developed institutions of elections and their idealization as a form of democracy. However, despite the importance of the procedural aspect of democracy, we must remember about the material - which is intended to ensure the content of such decisions, which would reflect the will of the people. So even less formal democratic authorities through its activities can provide a guarantee of fundamental rights, thereby taking into consideration the public interest. This is particularly evident in countries that have adopted the American model of constitutional justice where the ordinary courts along with the consideration of cases may raise the issue of the constitutionality of legal acts, as well as those that have adopted the constitutional complaint as a way of individual access to constitutional justice.⁴⁷

VI. CONCLUSIONS

Thus, the question of democracy is quite difficult. Democracy itself arises from the idea of popular sovereignty when people adopt certain decisions directly (direct democracy) or delegate their authority to the elected representatives. Modern democracy mainly focuses on the procedural aspects (the method of decision-making), while the material aspect remains to some extent in the background. Regarding the allocation of democracy as an element of modern constitutionalism we should note that democracy is a product of Western civilization outlook, based on individualism, and despite some criticism and shortcomings remains the most effective modern political regime that helps to provide values such as human rights, separation of powers and the rule of law, which are also important elements of constitutionalism. This is confirmed by the indices of democracy and the rule of law, the comparative analysis of which demonstrates their correlation – a high rating in one of them usually means the same in another. At the same time, we can see the differences – the striking example is Singapore, where in spite of not very developed democracy index we see extremely high rates of the rule of law. Also, we have to remember that the rule of law and democracy can “step” together as well as confront each other – when the rule of law “restrains” democracy, placing it in a framework and transforming ordinary democracy into a constitutional. There are various mechanisms for this, among them, systematic elements of constitutionalism - human rights, separation of powers and the rule of law show their influence on each other and flexibility. The bodies of constitutional review are particularly important that help to restore democracy in one direction with the rule of law and human rights, and sometimes (as the results of recent research

⁴⁶ Ibid., p. 829.

⁴⁷ See more on individual access to Constitutional Justice: Study on Individual Access to Constitutional Justice. Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17–18 December 2010). In: *Council of Europe* [online]. [2019-01-12]. Available at: <[http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e)>.

show) they can be even more democratic than the directly elected bodies by the people. Thus we can see *a shift* in emphasis on modern democracy *from the procedural to the material*. Therefore, it is a constitutional democracy that does not only formally help to ensure the ideals of constitutionalism but also in its content and thereby can be recognized as a part of constitutionalism.