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DEMOCRACY AND THE RULE OF LAW

In the first part of the article it is pointed how two ideas that have a long history – democracy and rule of law – in the modern European history have become a part of the Western Civilization foundations. And how it is searched for their appropriate institutionalization in political and legal systems. But, although the synthesis of the two has been persistently wished, there are also great contradictions between them. In the course of history the political will and power prevailed and treated law just as a means of commanding over subjects and obliging them to do what rulers expected of them, with little or no readiness or will on the side of rulers (with rare exceptions) to accept law as a limit of their power and to obey laws that they themselves proclaimed and codified. Judean and Western Civilizations, however, proclaimed superiority of laws over any political will or power."The Rule of Law, and not of Man", was among credos of constitutionalism as a doctrine and political movement aiming to limit every government to what is acceptable by reason of laws. One of the premises of this article is that it refers to the will of majority, i.e. to democracy, and that opens up many issues which are considered.

The second part surveys how great political and legal thinkers, have since ancient times until today, been skeptical and critical in regard to democracy if comprehended in the etymological sense as "Government of the People" or in a technical sense as a "Majority Rule". In fact, in democracies as in any other form of government, even for technical reasons, states were always ruled by minority. Therefore, even when democratic governments have very wide electoral support, it is necessary to limit the influence of ad hoc *political will and to oblige it to obey reasonable rules which are result of a wide consensus and in the form of a constitution and laws make a part of the rule of law. In such frames every branch of government would have constitutional and legal limits, which, in accordance with the thought of great legal and political thinkers should be determined by basic aims and values that governments among men are instituted for, including human rights and freedoms, as well as some principles of government organization (like separation of powers, check and balance) that secures autonomy of associations and moral autonomy of individuals. The rights of minorities are treated as a supplement to majority rule. Many examples and opinions of great thinkers are quoted, as well as their arguments that unlimited power of majority turns into tyranny of majority which could be the worse of forms of government.*

The third part deals with a number of difficulties that have to be overcome, specially in countries with the heavy burdens of authoritarian systems legacy and with present-day difficult situations and grave problems. Finally, it deals with institutional arrangements and accommodations that should be necessary to make in order to achieve a synthesis of the rule of law and in such frames the freedom, values, institutions and procedures which provide space for democratic participation and government.

Key words: *Foundations of Western Civilizations. – Political Will vs. Law. – Constitutionalism. – Tyranny of Majority. – Rights of Minorities. – Human Rights and Freedoms. – Separation of Power (Checks and Balance)*.

1. HOW COULD INTELLECT NORMS MODERATE THE RULE OF MAJORITY?

It is generally considered that the Western European civilization is one of the very few civilizations founded on the Rule of Law, although the idea itself goes a long way back. Also, it has been assumed that, perhaps the greatest and the most important invention of human kind is moral regulation, that is, sanctioned rule of behavior (contained in the meanings of Brahman' and Buddhist' *dharma* or Greek *nomos*)[1]. However, in the course of history, in a relationship between political will and law, political will was predominant, to the extent that it even used the law as a means to communicate the requirements (obligations, expectations) to its subjects. Only Hebrew and the Western European civilizations proclaimed the primacy of norms over every political will, i.e., of authorities/government. In effect, we hold this should also be applied to the will of majority, that is, democracy, but such a view launches a lot of questions. Therefore, this paper addresses several issues: 1. there is a tendency to oversimplify the assumption that democracy is "the rule of majority", and a priori good or absolutely and always the best form of regime; 2. there is an enormous importance attached to the idea of the rule of law (regulations) but not to the rule of law and not the rule of man, which represents one of the devices of constitutionalism as a doctrine and movement aiming to limit and reduce every authority/government within acceptable reasons of law; 3. therein exists an oversimplifying interpretation that the rule of law or Rechtsstaat (a state regulated by laws) consists of implementing a set of laws regardless of their contents; and 4.

1 I discussed this issue in the paper: "Улога норми и нормативних поредака у историји цивилизација"(The role of norms and normative orders in the history of civilizations), in *ГЛАС* CCCXCIV Department of Social Sciences, book 30, Belgrade SASA, 2005, pp. 139–161.

certain elements have to be developed in order to draw near the contents of the laws (regulation) and democracy itself, closer to a theoretical assumption on these issues, their meanings and forms.

Arnold Toynbee, in his well– known work *A Study of History* (1934–61), described around twenty or so civilizations[2]. So-called democratic civilization was supplemented to the number in 20th century[3]; today, the term usually assumes the Western European or North Atlantic civilization. This civilization, more than any pervious one, was founded on proclamations and efforts to establish the idea of the rule of law (in Anglo-Saxon theory and practice, and also Rechtsstaat, in German)[4]. The idea of the rule of law (regulations) and not the man was proclaimed in the Western European legal and political theory a long time before the idea of democracy came into picture. In fact, the idea of the rule of law was taken over from Old Testament, and the thought became incorporated into the Western civilization through Christianity. I have elsewhere discussed Plato, Aristotle and Cicero, as being the founders of the theory "the rule of law"[5]. Some other authors dealing with the rule of law, discussed Cicero alone, while completely omitting Plato and Aristotle. It is not clear why this was so[6]. Much later on, within the Western European

2 Arnold Toynbee, *A Study of History*, Oxford– London, Oxford University Press, 1934–61, 12 volumes.

3 Leslie Lipson, *The Democratic Civilization*, New York, Oxford University Press, 1964.

4 See: Danilo Basta (ed.), *Pravna država* – poreklo i budućnost jedne ideje (Rechtsstaat– origins and future of the idea), Belgrade, Pravni fakultet Beograd and Nemački kulturni centar, 1991; and Danilo Basta, *Neodoljiva privlačnost istorije (Irresistible attraction of the History)*, Belgrade, CUPS, 1999, especially "Šta nije pravna država"(What is NOT a Rechtsstaat) and "Slabosti demokratije"(Shortcomings of Democracy).

5 See more in the paper "Preteče ideje o vladavini prava: Platon – Aristotel – Ciceron" (The pioneer ideas on the rule of law: Plato, Aristotle, Cicero), *Arhiv za pravne i društvene nauke*, 1986, 3–4.

6 Influential authors, experts in the field of the German and Anglo– Saxon traditions and understandings of the rule of law and democracy, never research the idea fully, omitting thus Plato, Aristotle and "Five books" of Moses. Thus: Franz Neumann, *The Rule of Law*: *Political Theory and Legal System in Modern Society,* Heidelberg, Dover, 1986 (translated into Serbian language by: Slobodan Divjak: *Vladavina prava*, Beograd, Filip Višnjić, 2002); and Friedrich A. von Hayek, *The Constitution of Liberty* [1960], University of Chicago Press, Gateway Edition, 1972; translated into Serbian language with a foreword by Ilija Vujačić (Novi Sad, Global Book, 1998). Hayek makes a distinction between liberal and totalitarian democracy, we add that the idea of totalitarian democracy did not occur the first time after WW II (J. L. Talmon, *The Origins of Totalitarian Democracy*, London, 1952) but in 1930's ((H. O. Ziegler, *Autoritärer oder totaler Staat*, Tübingen, 1932),therefore, in spite of the great contribution of Hannah Arendt, her work on totalitarianism was overstated (Hannah Arendt, *The Burden of Our*

civilization, democracy was advocated for. This idea and its institutions have a long history, therefore its early development in Ancient Greece could not be omitted. When we want to apply the idea of democracy, we must pose the question: what would be the institutions that correspond to it? Today, this issue has to be seen in the light of the idea of the rule of the law, which is presumably more important than democracy for social development and human wellbeing in a society, although democracy, as a means to attain the same goals, is also very important.

Nowadays, democracy appears to be very popular, although that was not the case in the past. The popularity of democracy started to increase just before WWII, during and after the war; however, the understandings of what democracy really is diverged more and more, as the number of countries wanting to present their own regime as democratic increases[7]. Among the ideas that became much popularized, though mutually antagonistic, are the ideas of "western" and "eastern" democracies (see more in D. W. Brogan), classical pluralistic (multi-parties) and "people's" one-party, as well as procedural opposing the one with fundamental nature (aiming to achieve certain goals, corresponding since the 19th century, with economic, social and finally socialistic, and somewhere industrial democracy). On the other hand, the role of the U.S.A. has increased in European and world matters since the "Atlantic Charter" (1941) and WWII, resulting in omnipresent "American democracy" in literature.

It should be noted, though, that even in the U.S.A. democracy took on different forms than today. For example, in 1787, in Philadelphia, at American Constitutional Convention, an opening statement was given by Governor of Virginia, Edmund Randolph, who argued against democratic elements in constitutions of the American states. The Convention was made of 13 states (not every state had its representative though), and besides George Washington, one of the most influential deputes was Randolph. Even before the Revolution and the war for independence, there were, in North America, voices arguing for and advocating de-

Time, 1951; later editions of the work contain a different title: *The Origins of Totalitarianism*, New York, Harcourt and Brace) by claiming her pioneer role in claiming the term totalitarianism. In the paper F.A. Hayek, *Law, Legislation and Liberty*, A New Statement of the Liberal Principles of Justice and Political Economy; translated into Serbian by Branimir Gligorić: Beograd – Podgorica, Službeni list SRJ– CID, 2002; epilogue written by Ljubomir Madžar).

7 Many differences in the understanding of the term democracy have become even more profound after WW II, as a result of the cold war. The character and degree of the differences in the understandings of democracy is evident, see *Democracy in a World of Tensions*, ed. by R. McKeon, Chicago, 1951. Still, the problem of the meanings of the term remains, as well as conditions, environmental influences, institutional organization and the presence of democracy alone in practice.

mocracy (such as Thomas Jefferson, Thomas Paine, James Wilson). Later on, the president of the U.S.A. Andrew Jackson continued down this road. However, some influential intellectuals, such as Benjamin Franklin in Pennsylvania and John Adams in Massachusetts, were utterly critical toward democratic ideas, although both of them had signed "Declaration on Independence"; the declaration contained a proclamation of man's basic individual natural rights as well as a statement on "government by consent", with the right of the governed to rule out or cast off a government and establish one that would provide safety and happiness. It could be argued that this assumed democracy, but Franklin had, before the Revolution, considered it inappropriate to give the right to vote to those without any property. In addition, John Adams, while on his service in London as an ambassador, at the time the Constitution was comprised, wrote his 3-volume work *A Defense of the Constitution of Government of the United States of America,* where he fiercely argued against the idea that majority should control all three branches of government[8]. The "Father" of the American constitution, James Madison (1751–1836), a leader in the constitution founding and amendments that guaranteed human rights, wrote in *Federalist Paper*[9] on dangers of tyranny of the majority and thus revived disputes on a subject discussed by Aristotle. After Madison, the discussion was continued by Alexis de Tocqueville (1805–1859), John Stewart Mill (1806–1873) and many others[10]. Benjamin Constant, a liberal thinker, was also skeptical toward the rule of majority, assuming that it is equally difficult for a man to live under one tyrant, or under the tyranny of the social majority, the masses, the latter even being worse than the tyranny of one man.

8 John Adams, *A Defense of the Constitutions of Government of the United States of America* [first published in London, 1787–1788], reprint New York, Da Capo Press, 1971, vol. I-III. Adams considered that the consequence could be catastrophic and overestimated what could the majority do if allowed all the power. "General" right to vote for mature white men was introduced in the U.S.A. only before the civil war, in 1860.

9 See, Hamilton, Madison J, *Federal Notes* (1787–8), Belgrade Radnička štampa, 1981, translation and notes by Vojislav Kostunica; Foreword: О карактеру и политичким идејама *Федералистичких списа*" (pg. 7–189) (On character and political ideas of *Federal Notes*), by Vojislav Stanovcic.

10 See: Kosta Čavoški, *Mogućnosti slobode u demokratiji*, (A Possibility of Freedom in Democracy) Beograd, 1981; Војислав Коштуница, *Угрожена слобода (Endangered Freedom)*, Београд, Институт за филозофију и друштвену треорију and Филип Вишњић, 2002. In Democracy in America (vol I, 1835; vol. II, 1840) Tocqueville discussed the possibilities of freedom in democracy. J. Stuart Mill developed the idea further, discussing the differences between right and wrong democracy. Tocqueville stated that driving forces behind the American democracy are "equal conditions", corresponding to both freedom and restrictions. Out of these, a "mass society" developed, along with mediocrity under the pressure of the public opinion. These issues influenced Mill to search for possible solutions, see *О слободи* (1859) (On Liberty) и *Размотрања о представничкој влади* (*Considerations on Representative Government*) (1861).

Constitutional and liberal democracy, developed in political theory under the critical influence of Madison, Tocqueville and others, was not understood as an unlimited power either by itself or the majority. Within this kind of democracy, minority rights, even rights of political and ideological opposition and foes, are in fact, important means of correction of laws and the rule of majority (Madison already pointed to this). This kind of democracy is exercised in correspondence with fixed rules (constitutional) and serves to the interests of all, and not just to the ones who share and exercise the power. If these two requirements are not fulfilled, then this kind of rule of majority is called in pejorative terms– even before Tocqueville, great thinkers such as Aristotle and Hegel used the terms ochlocracy or mobocracy. Jefferson argued that this kind of system is in fact "elected despotism".

Bertrand Russell truthfully claimed that democracy became an important political force only after the American Revolution[11]. At the beginning of the American undertakings to establish a new form of government, there was a discussion on a form of government limited by constitution, usually termed "free government", and more frequently "republican government" (Roman res publica), meaning elected, representative, and Woodrow Wilson himself called it "Congress Government".

Today, forms labeled democratic appear very popular and are advocated for everywhere, especially after the U.S.A. has accepted the idea of democracy and after WWII. This question, however, should be discussed in relation to antagonistic tendencies between authoritarian form and democracy, and modern political movements and ideologies.

In fact, democracy was not as popular as it is today in the course of the foundation of the U.S.A.; from 1930's till WWII, other solutions were sought after to explain the character and nature of the American government. Roberta Dahl[12] states that before 1950 the democratic theory was not in the interest focus of political science worldwide and that the notion "democratic theory" did not exist. In addition, before WWII, there was no consensus and clear understanding on what it is that the democratic doctrine includes[13]; besides, some elements of social welfare, responsibility, and even control and wellbeing were accentuated and

11 B. Rasl, *Istorija zapadne filozofije (History of the Western Philosophy)*, Beograd, Kosmos, 1962, pg. 475 and 737.

12 Robert A. Dahl, *Democracy and Its Critics*, New Haven and London, Yale University Press, 1989.

13 Michael Oakeshott (*The Social and Political Doctrines of Contemporary Europe*, Cambridge University Press, 1939, see pg. . XV and 3) emphasized a doctrine of representative democracy, and claimed that many would question why democracy was included. He stated he was unfamiliar with works that provide a systematic teachings on democracy as a form of governing.

accepted as a goal of even liberal democracy. The conception of "Welfare State"[14] was first presented (Barbra Wooton) as opposition to fascist and national-socialis, as well as Stalin's glorification of the power state (Machtsstaat), and the understanding that one of the main goals of the state is to increase its own power.

In discussion on significance, conditions, assumptions, possibilities, ways, institutional forms, as well as difficulties and obstacles in establishing democracy, that is, the rule of law and democracy, a great importance should be attributed to some general principles and statements of classical and modern political and legal theories and philosophy. These are especially related to the attitudes and analyses on the nature and forms of political authority/power and among them, of democracy, relation between power/authority and citizens, character and real achievement of certain political, constitutional, legal and also social and economic and other institutions, as well as discussions on (pre)conditions for establishing and turning citizens' legal rights and freedoms[15] into reality and prosperous society. But, even more frequently, there is an emphasis on ideological rationalization or apology of a given government. As Klaus von Beyme argued, there is a strong tendency to treat democracy as a synonym for "good, beautiful and truthful in a society"[16]. Indeed, it looks though "democracy" is being called by everyone as everything one wants to support as a system of political values and institutions. This attitude often tends to omit or overlook some of those elements considered today by political or legal institutions as condition sine qua non of democracy. There exists no conference of political or legal institutions that could automatically provide "democracy" or "democratic government" in reality.

2. POLITICAL THEORY ON SOME SHORTCOMINGS OF DEMOCRACY

From the very beginning in the considerations on virtues and shortcomings of democracy as a political form[17], there were serious ob-

14 See.: Vojislav Stanovčić, "Izvori teorija o 'državi blagostanja'", (Theoretical sources on prosperity state) Beograd, Radnička štampa, 1975.

15 Коста Чавошки, *Право као умеће слободе*)(Law as the arts of freedom)(Оглед о владавини права), Београд, 1994 (and 2005).

16 Klaus von Beyme, *Suvremene političke teorije(Modern Political Theories)* (1972), Stvarnost, Zagreb, 1977, стр. 199.

17 For example *Херодотова Историја (Herodotus History)*, book. 3,. 80–82 (Матица српска, Нови Сад, 1959, pg.. 185–187).

jections to it. Some objections assumed that the decisive point in democracy is number, not quality[18]. Numerical relationship of majority-minority was treated as quantative, while the relationships made by decisions of the majority concern qualitative side of the relationship between parts that make one totality[19]. Plato harshly criticized democracy, but still considered that democracy could take a legal and violent form; he argued that democracy weakens the government by dispersion, therefore, democracy is capable neither of the good nor of the evil deeds[20]. Aristotle analyzed several forms of democracy, arguing that it could have a right or wrong form. In the first case, it is a free state (politeia) and in the second, ochlocracy, or as called afterwards, moboctacy. One of the basic criteria that distinguish right from wrong is whether a government aims to achieve common interests of all or serves to the particular interests of those in power, which is wrong even if they make the majority. The other criterion is existence or non-existence of some basic principles and rules which enjoy general consent to be valid, and the government obeys them (in short, it could be called the rule of reasonable and widely accepted laws), which is exactly the main topic of this paper. Aristotle writes about five forms of democracy, where one form is particularly labeled as wrong. That is the one where the rule of law does not exists, and masses force their own, immediate ad hoc will.

Aristotle was the first one to draw attention to a problem, later known as 'the problem of tyranny of the majority", which has already been mentioned due to its significance to our topic. Also, he laid out another idea, very similar to much more modern perspectives of Schumpeter, Lipset, Dahl, Aron and others that came to see democracy as a possibility for humans to choose between alternative elites, that is, minorities competent to govern.

Aristotle considered masses of people as neither wealthy nor educated, therefore should not be given power to rule. Still, he argued, it would be a potentially dangerous to totally exclude masses from the power, so he came up with a middle solution: masses should be allowed to elect representatives from a smaller group, capable of governing in a competent and responsible way. It is important to note that the Ancient Greek philosophers already recognized that it is the wrong form of government if a

18 The most respected Ancient Greek philosophers, such as Socrates, Plato and Aristotle, critically discussed democracy, especially since its advantage towards numbers, that is, quantity, and not quality.

19 This is also pointed out by Georg Jellinek discussing the rights of minorities ("before, it was measured, now we number") Ђорђе Јелинек, *Право мањина (Minority right)*, Београд, Državna štamparija Kraljevine Srbije, 1902).

20 Plato, *Statesman*, 303a. Compare with *The Republic*, Book VIII, x..

majority follows only its own interests (and, thus, excluding the interests of the remaining minority). It was Aristotle's postulate that democracies should be valued on how much they respect general rule, that is, the law. If they diverge from the law, they become ochlocracy[21].

Humanism in the Renaissance period was saturated with the elements of former Ancient Greek ideal, supported by poets and philosophers, even some statesmen, in order to facilitate a man's return to his true human political home[22]. Almost at the same time, "power states" were established and their apologies commenced (theories on "state reason", absolute sovereignty, fatherly or divine origin and unlimited power of kings). All tried to use the law, that is, legal regulations, as an efficient instrument to command and control punishable, desirable and allowable behaviors. This form reached its peak in totalitarian states in the 20th century. The rule of the law is exactly the opposite: it obligates state bodies and officials to act within the framework of the law and not against it, while respecting individual, that is, subjective human rights as parts of modern legal orders. This was not respected by totalitarian regimes, on the contrary: totalitarian and authoritarian regimes could be considered as regimes with "unjust laws" as Gustav Radbruh[23] termed it, even if such regimes had, in formal sense, laws which were adopted in a formal legislative procedure.

Great theoreticians of modern democracy, such as John Locke (1632–1704) and Jean–Jacques Rousseau (1712–1778), although arguing from very different standpoints (Locke was a liberal while Rousseau was more for a radical democracy), advocated a principle of the rule of majority. "When any number of Men – writes Locke – have so *consented to make one Community* or Government, they are thereby presently incorporated, and make one *Body Politck*, wherein the *Majority* have a Right to act and conclude the rest. For when any number of Men have, by the consent of every individual, made a *Community*, they have thereby made that *Community* one Body, with a Power to act as one Body, which is only by the will and determination of the *majority."*[24] Locke con-

21 Aristotle, *Politics,* 1292a. Aristotle critically treats "fifth kind of democracy", where the top power belongs to the masses and not to the law; this, he argues, is caused by demagogy, while this kind of democracy is the same as tyranny is to monarchy; thus, the main objection to this kind of democracy is that it is not a state arrangement.

22 See: Михаило Ђурић, *Хуманизам као политички идеал*: Оглед о грчкој култури (Humanism as Political Ideal), Београд, СКЗ, 1968, стр. 180–204.

23 Gustav Radbruh, *Filozofija prava* (Philosophy of Law) (1932), Beograd, Nolit, 1980; translated by Dušica Guteša; foreword in "Radbruhovo filozofskopravno stanovište" by Stevan Vračar, see especially "Додатак"(Addendum) (1945–1949).

24 John Locke, *Two Treatises of Government*, Cambridge University Press, 1960 (ed. by Peter Laslett). Translated by Коста Чавошки, adding "Letters on Toleration" and

sidered that "Whosoever therefore out of a state if Nature unite into a *Community*, must be understood to give up all the power, necessary to the ends for which they unite into Society, to the *majority* of the Community, unless they expressly agreed in any number greater than the majority."[25]

Lock held that a majority can legitimately decide or establish a government when there is a proportion of 50 percent plus one. He accepted this "thin" majority assuming that a society may breakdown, left with a possibility of not reaching a decision at all. Lock's comprehension of the law places a limitation on government; furthermore, he was aware of the importance of institutional guaranties in division of power/authorities. Lock he was surely inspired by his older contemporaries Harrington, who influenced Montesquieu (1689–1755) also[26].

Etymologically, the meaning of democracy is the government of the people. However, among "people", there could be different even confronting viewpoints and interests, therefore, democracy is usually defined as a "majority rule". Today, as it has always been the case, it is difficult, almost impossible, to include all people in the governing process, if because of nothing else, than for the technical reasons alone. That is the reason why, even in democracies, the largest number of tasks and decisions related to power exercise are managed through elected representatives and posted or chosen individuals. In effect, this mean that the actual ruling is always done by a minority; this ruling minority was once called oligarchy, without negative connotation. Based on historical and contemporary experiences, it is known that democracy could be oligarchy.

In present day countries with democracy, people participate in elections of representatives, that is, power-holders, and some state, through referendum and other similar declarative forms, decides on important issues. If a collective entity is to decide (people, assembly, congress, parliament, government, committee, etc.) but there is no consensus (for example, differences in approach, election of several different in-

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Robert Filmer's *Patriarcha: on the Natural power of Kings*. In the *Second Treatise*, paragr. 95 and 96 (Chapter VIII)

25 *Ibid.,* p. 99.

26 Montesquieu was aware of the difficulties of establishing and preserving freedoms, as well of necessities to provide freedoms with a particular political system in order to enable an efficient government functioning. Furthermore, he considered that "le pouvoir arrete le pouvoir", one power is limiting the other, thus all three branches of power (law, executive and courtly) should be posted in a way to limit one another, control and restrain. See *De l'Esprit des Lois*, livre XI, ch. iv (p. 169 editions: Paris, Ernest Flammarion, s.a., a text from the 1758 edition); in Serbian: Monteskje, *O duhu zakona*, I-II, Beograd, Filip Višnjić, 1989; translated by Aljoša Mimica; foreword "Monteskjeov *Duh zakona*" written by Aljoša Mimica and Veljko Vujačić).

dividuals, possibilities, decisions, options and alternatives) then the decision is reached by voting, that is, by majority of votes, if not anticipated differently by regulations. This is called democratic decision-making, and democracy is sometimes defined as the rule of the majority, whose decisions become obligatory for all.

Nevertheless, considering only one element of democracy, that is, the rule of the majority, as a synonym of modern democracy represents an overly oversimplifying. The 18th century brought about an understanding that democracy as the rule of majority should incorporate a necessity that the majority is obliged to guarantee some important rights to minorities. In further development of the Locke's idea on limitations of political power and consented government, and following declarations on rights by the U.S.A. and the French Revolutions at the end of 18th century, the rule of majority came to be regarded, more and more, with respect to guaranteed freedoms and rights of man and citizens. All these elements (the rule of law, minority protection, individual rights and freedoms), along with an emphasis on constitutional and institutional assumptions, foundations and guarantees, have caused the definition of democracy to be extended. Also, all these reflected upon the relationships of majority–minority. These relationships are much more complex than they could be given through a simple arithmetical relationship. Because of this, it is often required from "majority" to fulfill certain conditions, features, satisfy particular "qualifications" (so-called quorum and other forms of so-called qualified majority), but also, it is required that some minorities, if they fulfill certain special conditions, be determined by certain privileges, that is, responsibilities and as such, by a general structure of the relationship or to be protected by exceptional norms. If a decision has to be made on an important issue relating the character or even deciding on a fate of a given state, then such a decision has to be reached by a qualified majority, usually two-thirds or a majority made up of considerable majorities of all constitutional parts. After the first couple of years of the French Revolution, Rousseau's theory prevailed, although it did not assume elaborated institutional impediments and balance, nor corresponding actions. That was the radical Jacobin's conception of democracy, with deeper foundations in the teachings of Rousseau, which, some contemporary 20th century writers considered as totalitarian democracy[27]. I think that those who so radically interpreted and applied the conception, 'the disciples of immortal Rousseau" (the term Robespierre used to designate himself and his followers) actually brought the revolution to the dead-end; instead, they should have made constitutional the

27 J. L. Talmon, *The Origins of Totalitarian Democracy*, London, 1952.

great social turn-over that started in 1789[28]. Instead of establishing the rule of law, and especially "the rule of liberty" as Montesquieu called it, as well as a corresponding constitution, the French Revolution soon diverted in a direction that included political radicalism, emphasized exercise of political will and above all, justifications of the orientation. A number of constitutions, frequently following one another, contained legislations that made these constitutions very difficult to change and almost forever enduring, and each was changed "over night", subsequently following a prevalence of a different political will. This kind of development characterized also a majority of succeeding revolutions, including, especially the ones occurring in the 20th century, whose anatomy reveals a "blue-print" of the French Revolution[29]. In addition, a radicalization of an idea of peoples' sovereignty had enough attraction, force and power to provoke a number of alterations of political wills and playing around with constitutions in processes within which "revolution ate its own children".

In the course of the 19th century, democracy provoked certain warnings motivated by a fear from exceptionally egalitarian implications of the radical democracy. Tocqueville, in *Democracy in America*, warns against serious consequences of equalization (which is, perhaps, worth paying for the sake of freedom) and to a new possibility of "tyranny of majority". He wrote: "The very essence of democratic government consists of the absolute sovereignty of the majority; for there is nothing in

28 A very few of the 20th century revolutions managed to establish and make permanent some of their proclaimed aims, ideals and programs; see more in V. Stanovicic "'Конституционализација' револуција"(Constitutionalization of Revolutions), *Зборник Матице српске за друштвене науке*, бр. 96, 1994; стр. 41–72. One theoretician places the roots and foundations of the Western law tradition and political institutions in the framework of "right" and "revolution" (B. Harold J. Berman, *Law and Revolution*, The Formation of the Western Legal Tradition, Cambridge (Mass.) – London, Harvard University Press [1983], 10th edition 1999). The success of revolution depends on an ability to establish stable political and law institutions which maintain a relatively liberal conditions where people would be free to exercise the potentials, respecting at the same time, the rights of others to do the same. On how the ideas of Montesquieu and Rousseau affected the directions of the French Revolution and its participants see V. Stanovicic "Montesquieu, Rousseau i Francuska revolucija", u Eugen Pusić (ed.), *Francuska revolucija* – Ljudska prava i politička demokracija nakon dvjesto godina, Zagreb, JAZU – Globus, 1991, pg. 35 – 67.

29 Crane Brinton, *The Anatomy of Revolution* (1938, extended edition: New York, 1965); Theda Skocpol, *States & Social Revolutions* (1979, 6th edition: Cambridge University Press, 1984); and Hannah Arendt (1906–1975), *On Revolution* [New York, Viking, 1963], Penguin Books, 1965 (translated into Serbian: Hana Arent, *O revoluciji*, Odbrana javne slobode, Beograd, Filip Višnjić, 1991; epilogue "Hana Arent ili revolucija kao sloboda" written by Vojislav Koštunica).

democratic states that is capable of resisting it."[30] In his argument, he left out that democratic theory already pointed out to certain elements restricting the majority: the rule of law instead of solely majority, corpus of rights and freedoms of citizens independent from every government, including the democratic one, minority rights, pluralism (economic, political, religious, ideological etc.) and some procedural guarantees.

John Stewart Mill was also preoccupied with the problem of how to establish democracy that would not bring to a rule of mediocrity, but instead provide an especial place for knowledge and determined established interests. His main fear was related to leveled consequences of a radical democracy and problems related to tyranny of public opinion, forcing conformism and thus threatening a freedom of thinking. He considered that decisions brought by a majority do not have to be the wisest, and on the other hand, such decisions could also hurt interests (or feelings, identity) of a minority.

At the end of the 19th and beginning of the 20th century, several radical fractions, especially those left oriented, insisted that the absolute importance should be given to the principles of the rule of majority, since it is a basic criterion of democracy. This idea, following Jacobin's tradition, relates also to the concentration of power in political representation, and later on, to narrow-minded representative entity unless there is a nationally heterogeneous or federally structured state.

During the 20th century and resistance against fascism and cold war, democracy became a password and an important criteria for recognition, while today it serves as a synonym for the right direction and desirable political transformation. Again, some of the shortcomings of democracy are being overlooked, as well as necessary preconditions in order to make one potentially democratic institution a fruitful one.

3. SYNTHESIS OF THE RULE OF LAW AND DEMOCRACY

Whether the commands of one political will that are endorsed with enough force could be considered as the law, regardless the content of the

30 Alexis de Tocqueville, *De la Democratie en Amerique* (1835 i 1840); see. Alexis de Tocqueville, *Democracy in America*, New York, Alfred A. Knopf, Vintage Books, 1945 (vol. I-II); This was published in Belgrade: Алексис Токвиљ, *Демократија у Америци*, Београд, Државна штампарија, I (1872) и II (1874). There are contemporary editions today. The quotation is taken from the Vol. 1, p. 264 (Ch. XV – "Unlimited power of the majority in the United States, and its consequences"), Vintage Books, 1945 edition.

said commands, has been a disputed issue both among ancient and contemporary political and legal theoreticians. One of the simplified interpretations of the nature of the Rechtsstaat and the Rule of Law reads that the state of law stipulates the implementation of the valid laws, regardless the content. In fact, there are contradictory opinions about the character of the Rule of Law and about other categories that can be associated herewith.

Even though the political will is an important and indispensable element in the conception of law, it should not be ignored that the element that makes the law the foundation and the pillar of the civilization is far more important for the fundamental nature of the law. And the law becomes that by the level of the rationality in regulating inner-personal relations, as well as by "rightness" in its creation and execution. Finally, the rapport towards the law will not depend on the prescribed penalties but on the degree it allows for interpersonal relations and the circulation of people, goods, services and ideas to be conducted as liberally and under the most humane conditions. In order to be rational, the law has to become a framework large enough to accommodate the "legal circulation", which is just an expression of other forms of circulation i.e. trade among people.

John Locke is rightly considered the founder of the modern theory of democracy. The idea and the government, conceived as the rule by the consent of those over whom government rules, and that government has to be limited in its power – J. Locke closely linked with the notion of human natural and positive laws and with the idea of the Rule of Law. He presented the theory that the power and the governance are not the aims per se, but are in service of protection of human rights and creative potentials, and whose exercise human mind can accept and justify. Inspired by teachings of the school of natural law, he arrived to the conclusion that humans, gifted with reason, are capable to secure peace and tolerance only if they respect natural (i.e. reasonable and equal for all) rights on life, body, freedom and labor-acquired property. According to Locke, these natural rights belong to man by the mere fact that he is human and the peaceful enjoyment of these rights is the aim, raison d'être and the basis for establishing the government. Positive laws that are being introduced have to serve to the same cause and the government that adopts them can count on legitimacy and obedience. Locke assumed that the aims delegated by intelligent individuals would limit every government and that no body, no person and no assembly could attain unlimited power. This also limits the content of the laws; laws can not impose all that the government would wish for. The same conclusion was reached by Alcibiades and his protégée Pericles, as characters in the

dialog given by Xenophon in "Memories on Socrates"[31]. Later on, Rousseau considered it the opposite, in relation to the "general will"("*volonté general*"), that is conceived as absolutely independent and can decide on everything. It is true that throughout history the will of those powerful enough often prevailed. Whatever was desired could have been put into law.[32] In the name of human rights Locke had the thesis about freedom within the legal framework, but with intelligent laws whose characteristics he described in *Second discussion on government*: "The objective of the law is not to abolish or limit but to keep and augment freedom(...) where there is no law there is no freedom"[33]. According to him, positive laws have to fulfill certain conditions if to be considered as laws in the true sense. Locke mentions some very important characteristics of the sensible laws and the Rule of Law.[34]

The Rule of Law should not have a narrow interpretation, as being the implementation of the law (regulation) passed by one government. This misconception is deeply rooted not only among power-holders, who create the "law" they rule by, but also among those ruled by that law. Each government tends to present as "law" its orders (norms, regulations) that are deriving from its will and force. The implementation of such "law" is considered as establishment of the "legal state" (*Rechtsstaat*) or the Rule of Law. Still, from the point of view of legal philosophy, it can not be accepted that the law is any set of norms supported by the monopoly of the state force, even when it is done as a part of common proceedings. A critical distance towards the content of the positive law has to be taken. Only after examining the content of the law and norms and its aptness to be brought universal i.e. if the said law can be generalized (the law that becomes compulsory for all that are in the situations envisaged in broader terms by the mentioned law), it is possible to evaluate that it is the law in the sense of legal philosophy. Cicero and Aurelius Augustin and later on a number of jurists, including Gustav Radbruh, considered that some laws deserve to be called such to the same extent as rules of a band of criminals.

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31 Ksenofont, Memories on Socrates, Belgrade, BIGZ 1980,Milos N. Djuric translated from the original, "Introduction: Xenophon and the main sources of knowing the historically realistic Socrates", and wrote remarks and explanations.

32 Roman jurist Ulpianus concluded for the period of prinicpates in Rome that **"**Quidquid principi placuit legis habet vigorem". In France there was a saying "if the king wants it, the law will include it" the absolute King of France, Luis XIV is remembered by the saying "State, that is I". In XX century there was a phenomenon of the leader (duce, furer, caudillio, wise leader) who gained absolute power through non-constitutional factors, and each could say state or party is myself.

33 Locke, *Two Treatises of Government, Second Treatise*, ch. VI, p. 57.

34 Ditto, ch. XI, p. 135–142.

Emmanuel Kant, guided by a golden rule – not to do to the others what we don't want to be done to us, with his categorical imperative gave an important guiding principle to all lawmakers: to pass the laws that can be applied universally, which are reasonable and which will not be seriously objected to. This means that the passed regulation should be universally applicable and equal for all. Nevertheless, we often witness the situations when adopted rules can hardly be justified or the situations where one side or group is not willing to grant the same rights they enjoy to the other group and vice versa. It is contrary to the notion of the Rule of Law principle. The Rule of Law, among other, signifies the equal rights and obligations for all, which further means equal legal opportunities for all.

The Rule of Law and democracy can be considered as complementary. In most cases they are developed in parallel but if one has to choose, some great political theorists would advise that it is more important to establish the Rule of Law. It is due to the fact that the democracy without the Rule of Law, i.e. when not founded on constitutional limitations, becomes the mere expression of the will of majority or of those who can easily manipulate with the same[35]. Theory on the Rule of Law assumes that each power has to be limited, even the power of people. That is the essence of the Rule of Law. Also, the important thinkers stressed the great significance of the Rule of Law for economic and social prosperity, while democracy was not put on the same level of importance. David Hume for example considered that the democracy is not necessary for the successful market economy but that the Rule of Law is absolutely vital for it.

The development of the modern theory of democracy accentuated the thoughts that the principles of the Rule of Law include certain humanistic values, institutional setup and procedural guaranties, which eliminates absolutism and partiality as well as provide limited power, independent judiciary, appropriate status of individual within the system and especially towards governing bodies and courts. In addition, rights of

35 This situation is well illustrated in several papers presented on the conference held in the Serbian Academy of Science and Art (SASA) in 1996, with the topic *Establishing the modern democratic legal state in Serbia*. The conditions of constitutional and legal system were strongly criticized, and its lack of pre-conditions for creation of the legal state and the Rule of Law (although this principle was included in the Constitution from 1990). Presented papers were published: Miodrag Jovicic (editor) *Establishing the modern democratic legal state in Serbia,* Belgrade SASA. The publication accentuates in a well substantiated manner the importance and the need that the idea of the legal state is materialized as well as the great difficulties and obstacles on this road, both those related to authoritarian character of the existing constitutional solutions at the time as well as difficult situation caused by a lawless elements on a large scale, within the state.

minorities (political, religious, ideological and more recently ethnic) and the rights of individuals as humans and citizens, from XVII and XVIII cent. have gradually become a corrective measure for the rule of majority or a criteria for "good governance" and that dimension has to be secured by the Rule of Law, equally for all. Freedom of expression (for which the freedom of the press has later become almost as a synonym) and freedom to create associations complemented these conditions and became part of the modern conception of democracy. Majorization can be mentioned as a possible negative side of the principle of majority rule, if this principle is taken as exclusive, absolute and without limits.

It is possible that a group which is opposed to majorization in the wider community exercises the same on the local level. For that reason certain constitutional and legal solutions and limitations can be of a great importance. At any rate, it confirms the thought that the constitutional democracy is by definition such a democracy that does not give absolute power to majority[36].

During the development of post communist societies lots of old questions re-emerge, in regards to fundamental values, institutions, acts. In these societies there is a tendency to interpret democracy as a wide-spread support without taking into consideration the institutional framework and procedures. With this tendency the democracy is seen only as (unlimited) rule of majority, whose unacceptable character we already dealt with.

There is an important dilemma, dating from the ancient times, about the possible contradiction between what is reasonable and suitable to provide certain values and which have to be included in principles and structure of the system on one hand; and on the other hand what has a support from majority and thus becomes predominant, influential and the basis of power, which has to be limited, civilized and directed by the Rule of Law.

Constitutionalism restricts the government and regulates the relations between the citizens and the government by tying the functions of the latter to the consent of the former. It also regulates the institutional options and modalities the government is voted for, conducted and replaced. Valid (legitimate) title (titulus) acquired on elections is one element, and the other, more important is the lawful and rational exercise or use of power. As already mentioned, nowadays support by the majority is only compulsory but not a sufficient condition for one government to be legitimate and for its regulations to be considered laws in juro-philosophical sense.

36 Carl J. Friedrich, *Constitutional Government and Democracy* (1937), Waltham – London, Blaisdell, 1968. On Serbian: Podgorica, CID, 2005.

The Rule of Law placed the legal principle before "state interests" and we tend to interpret it before the state as a whole, under certain, normal circumstances. It also assumes the durability of rights and obligations, the idea of continuity and the respect of the acquired rights. The word democracy is often used these days in order to stress the model of a good government, although is does not correspond to the proper meaning of the word (demos and kratein-people and to rule). It would be more appropriate to use the term "constitutional democracy" or "constitutional government", which is in its nature a poliarchy, i.e. it is characterized by a certain dispersion of power in society (not only based on the division of power but also on mutual limitations deriving hereto and control mechanisms with participants outside of the governmental structures, like political parties, non governmental organizations, church, unions, professional and economic associations, important economic organizations etc), and also by division of power and distribution of authority within the government structure.

Writers like Carl Friedrich, who use terms "constitutional government" and "constitutional democracy" or Robert Dahl, who created the term "poliarchy" and deals especially with issues of procedural democracy, then Giovanni Sartori who analytically studies the role of parties in the democracy, Arend Lijphart, who more then any other author develops the ideas of so-called con-social democracy apt for multinational communities, Norberto Bobio, and the others show commitment to democracy while questioning different classical postulates.

Their ideas are very encouraging in every work on building democratic legal state, or as we prefer to call it –the Rule of Law– as well as on overcoming the obstacles, primarily of the political nature. This is the task of utmost importance in the long run and requires considerable period of time and great efforts to be invested.

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The Rule of Law and the rule of majority have to exist jointly, and the governing of people has to be limited and regulated by rules, constitutionalism, division of power and independent judiciary (especially by the role of the Constitutional Court).

The Rule of Law has to keep the rule of majority in the frame of civilized and regulated behavior, in line with regulations that are accepted by a general consent in the society. The rule of majority which governs by pure will or power, without foundations laid by the Rule of Law, would be a defective type of government.

At the same time, government that rules by the most rational regulations, but forced upon the majority, without its participation and

consent, could only be considered as "educated despotism", and could not be called democracy. Therefore, for one legitimate government the majority support, i.e. the power of majority is necessary but not a sufficient condition. The rule of majority, even in the interest of that majority, has to be moderate and encompassing the regulations which can endure critical theoretical analysis and practical verification**.**