

## CONSENSUAL CHARACTER OF DEMOCRATIC CONSTITUTIONAL PRINCIPLES AND HUMAN RIGHTS

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**Abstract:** *The fundamental democratic principles, among which we consider the principle of the State according to the Rule of Law as particularly significant, are being brought to life at present in the new democratic States of particularly Central Europe and in numerous developing countries. The implementation of these principles in the everyday life of society is the decisive indicator of the standard of political and legal culture which forms the framework of human rights. There is a plurality of theoretical concepts of human rights in the present day world, but the consensus in the fundamental concept of human rights is continuously increasing.*

**Keywords:** *democratic consensus, fundamental democratic principle, legitimacy of state power, majority connected with the protection of the rights of minority, pluralism, State according to the Rule of Law, specific problems of the consensuality of the State according to the Rule of Law*

### 1. INTRODUCTION

The object of our interest will be the creation of political, legal and social prerequisites as well as political, legal and cultural environment favourable for the implementation of democratic principles and human rights.

This subject ranks among central problems:

a) in developing countries which have set out recently on the way from a totalitarian system to democracy,

b) it is important also for the developing countries the constitutional system of which can be qualified, with reference to political science, for some time as democratic, but the low social and cultural standard and the lack of tradition prevents democracy from developing,

c) last but not least this problem is of extraordinary significance for the East and Central European countries finding themselves in the post-totalitarian phase of development (new democracy) which have broken for a long period (over 40 years) the continuity of their initial long-term democratic development (Czech Republic) or did not pass through such democratic development in the past at all.<sup>1</sup>

All above mentioned societies are societies in which the democratic principles and human rights are under certain pressure hindering their inner acceptance by the citizens. In the new democratic Central and East European societies political and social causes prevail, in the developing countries of both above mentioned types political, social, ethnic and cultural (incl. particularly religious) reasons intermingle.

With reference to the conditions and the environment for the implementation of human rights the new democratic society of the former communist countries will repre-

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<sup>1</sup> BALL, A., R., PETERS, B., G. *Modern Politics and Government*. New York 2000, p. 302 ff; FORSYTHE, D., P. (ed.). *Human Rights in the New Europe, Problems and Progress*. Lincoln and London, 1994, pp. VII-IX, 1-4, 241-257; LAWSON, K., RÖMMELE, A., KARASIMEONOV, G. *Cleavages, Parties and Voters*. Westport, London 1999, pp. 109-183.

sent a substantially more difficult phase of development than the new democratic society in such countries as Spain and Portugal, where the totalitarian system did not interfere significantly with market economy. However, it can be assumed that the inner acceptance of market economy will be substantially faster – with the exception of the social impacts of market economy – than the inner acceptance of democratic transformations of political, constitutional and legal character.<sup>2</sup>

Under the term of new democratic society, similarly as under the concept of society in immature phase of development of democracy in developing countries, we understand generally such a state in which the fundamental democratic transformations of the political and constitutional system, fully corresponding with the institutional organization of the political and constitutional system in stable democracies, have been executed institutionally, but where the consensual character of these transformations, i.e. their inner acceptance both in the activities of constitutional and political institutions and, above all, in the minds of the absolute majority of the population is still missing.<sup>3</sup>

It is obvious that the democratization in such fields as the non-interference of the State with the most varied spheres of public and private life, such as opening of the boundaries, abolishment of censorship, etc., were accepted in the post-totalitarian society very speedily by a broad consensus of the citizens. In other fields, however, where the totalitarian behaviour and thinking are by far not so apparent, a long term development must be envisaged and those are the fields which will require the attention of both universities and research institutes.

In this context I should like to ask the following question: Which are the principles that must be considered decisive with reference to the conditions and the environment for the implementation of individual liberty<sup>4</sup> and human rights? I am sure it would be possible to name a considerable number of such principles. However, I should like to limit their number to the most important ones which would win the consent of most of those who are concerned with human rights.

The number of principles representing the necessary prerequisites and the environment for the implementation of human and civil rights, in my opinion, includes:

1. the majority principle, connected integrally with the protection of the rights of minority,
2. the principle of democratic consensus,
3. the principle of legitimacy of state power,
4. the principle of pluralism,

<sup>2</sup> GEARTY, C. *Can Human Rights Survive?* Cambridge, New York 2006, pp. 3–16. DONNELLY, J., *Human Rights in a New Order: Implications for a New Europe*, (In FORSYTHE, D.P., op.cit., note 1), pp. 7–32.

<sup>3</sup> WIATR, J. *Four Essays on East European Democratic Transformation*. Warsaw, Scholar Agency 1992, pp. 10 ff., 76 ff., 88 ff. DONNELLY, C., M. *Delegations of Governmental Power to Private Parties*. Oxford 2009, pp. 228–232.

<sup>4</sup> John W. Burgess states “Individual liberty has a front and reverse, a positive and negative side. Regarded upon the negative side, it contains immunities, upon the positive, rights: i.e. viewed from the side of public law, it contains immunities, from the side of private law, rights. The whole idea is that of a domain in which the individual is referred to his own will and upon which government shall neither encroach itself, no permit encroachments from any other quarter. Let the latter part of the definition be carefully remarked. I said it is a domain into which government shall not penetrate. It is not, however, shielded from the power of the state”. BURGESS, J., W. *Political Science and Comparative Constitutional Law*. General Books LLC., Danvers 2009, p. 134; GEARTY, C., op.cit., pp. 60–80; DUFEK, P. *Úrovně spravedlnosti*. Brno 2010, pp. 175–200.

5. the principle of Rule of Law (State according to the Rule of Law, Rechtsstaat, L'Etat de droit, Stato di diritto, Estado de derecho), considered both in its Anglo-American variants and its continental European variants (which differ in certain aspects, but generally agree on principles),

6. the principle of limited government and the principle of the separation of powers with an adequate system of checks and balances.

In many new democracies of Central and Eastern Europe these principles are still in statu nascendi (excepting the principle of limited government and the principle of separation of powers).<sup>5</sup> It would be equally erroneous to believe that these principles are not functioning in the life of new democratic society at all as to believe that they are functioning fully.

In the past we in the then totalitarian States often encountered the state in which anybody speaking officially was condemning these principles in public, while some of those working on lower tiers of the State and society, acted in accordance with them. At present, in the post-totalitarian States, we are encountering the situation when everybody is eulogizing very loudly these principles in public, but does not always act in accordance with them. I am convinced that these principles deserve not decorative words, but primarily education ensuring that the given human society, however organized, should approach them as much as possible. Should we be able to measure accurately the function of these principles, we would ascertain that they are not 100 % effective in any society. Actually they are good, beneficial and moral objectives, recognized by human experience, at which society must aim to improve the standard of implementation of human and civil rights.

## 2. THE PRINCIPLE OF MAJORITY CONNECTED INTEGRALLY WITH THE PROTECTION OF THE RIGHTS OF MINORITY

Without any doubt democracy is the government of majority on the basis of free selection and freely manifested will. At the same time this basic principle of democracy, if implemented in a politically unstable time, conceals a threat to human and civil rights, lest it should be deformed into a conforming majority, indifferent to the individual who does not agree, to the opposition and the minority.<sup>6</sup> The fact that this danger is particularly acute in a post-totalitarian State need not be emphasized. In this process the totalitarian practice in the rule of the majority does not threaten by far only from the partisans of the collapsed system, but arises from the ingrown stereotypes of the totalitarian way of thin-

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<sup>5</sup> These are two principles from the field of State which are of principal significance for the implementation of human rights and freedoms. In contradistinction to various problems connected with the implementation of the afore mentioned principles the trend in the implementation of limited government principle is highly positive particularly in the post-totalitarian countries. Also the principle of functional and institutional \* separation of powers, liquidated in the totalitarian system, has been developing very positively in the post-totalitarian countries in the past cca. 20 years.

\* HERINGA, A., W., KIIVER, P. *Constitutions Compared, An Introduction to Comparative Constitutional Law*. Antwerp, Oxford, Portland 2009 pp. 21–23.

<sup>6</sup> FIERLBECK, K. *Globalizing Democracy, Power legitimacy and the interpretation of democratic ideas*. Manchester and New York, 2008 p. 201 ff. DRZENHAUS, D., *Constitutionalism in an old key: Legality and constituent power, Global Constitutionalism 1:2 (2012), Cambridge University Press, pp. 240–245.*

king which have influenced even the past and present opponents of the totalitarian system. The education aiming at a tolerant application of the rule of the majority, therefore, is a priority task.

In this context it is necessary to accentuate the need of guarantees of the rights of a non-conformist individual, the rights of the opposition and of the minority. That is the *conditio sine qua non* of the implementation of human and civil rights. In comparison with western democracies the “new democratic” society has a considerable debt to repay in this field.

### 3. THE PRINCIPLE OF DEMOCRATIC CONSENSUS AND THE PRINCIPLE OF LEGITIMACY OF STATE POWER

These are two principles indubitably most important for the creation of democratic environment for the implementation of human rights. The principle of consensus means the inner acceptance of the democratic political system of the State and its legal system by the prevailing majority of citizens. At the same time it contains inherently the answer to the question about the degree of the democratic quality of the political system, State and legal system so internally accepted by the citizens.<sup>7</sup> In the highly developed western democracies the degree of quality of this consensus is high. In numerous developing and new democratic countries however, we find great non-uniformity in the understanding of such concepts as democracy and the basic pillars of the political and constitutional organization of the democratic political and constitutional system. In these countries the number of those who would achieve democracy by obviously undemocratic methods is not small. In many cases it does not involve a subjectively bad tendency of so acting individuals or groups of citizens, but merely a low standard of political culture conducive to the application of a pragmatic, single-purpose concept of democracy, law, etc. In these countries it can be heard often that it is not necessary to look whether the present procedure is or is not democratic; the chief thing is to attain the future democracy “pure and beautiful” as quickly as possible.

Political science and the theory of comparative constitutional law has elaborated the concept of consensual society which is highly important for these countries at present.<sup>8</sup> In this respect I should like to emphasize the differentiation of general consensus on the contents – the so-called substantive agreement, i.e. what the State power is authorized to do, i.e. in what respects it is authorized to interfere with public life, and the consensus on the methods the State power is authorized to use in doing so, i.e. the so-called procedural agreement.<sup>9</sup> Both types of consensus are of enormous significance in the period of the generation of a democratic political system. While the “substantive agreement” limits the State power in its interference with the rights of man and citizen, the “procedural agreement” concerns directly the problems of democratic methods used by the State power.

<sup>7</sup> HELD, D. *Models of Democracy*. Stanford University Press. Stanford 1987, pp. 196 ff.; BLAHOŽ, J. *Sjednocující se Evropa a lidská a občanská práva*. Praha 2005, p. 100 ff.

<sup>8</sup> Cf DEUTSCH, K., W. *The German Federal Republic*. In: MACRIDIS, R. C., and WARD, R. E. (eds.). *Modern Political Systems: Europe*. Englewood Cliffs 1972, pp. 10–11; BLAHOŽ, J., op.cit., note 7., pp. 100–104; FIERLBECK, K. *Globalizing Democracy, Power, legitimacy and the interpretation of democratic ideas*. Manchester and New York 2008, pp. 199 ff.

<sup>9</sup> DEUTSCH, K., W. *Politics and Government. How People Decide their Fate*. Boston 1980, p. 13 ff.

With reference to the generation of an internally acceptable democratic consensual society in the post-totalitarian societies and in many developing countries the focal point lies today primarily in the field of procedural agreement. At the same time it must be borne in mind that the creation of a democratic consensual society is always a long-term process. Historical development has confirmed fully that the highest standard of democratic consensus has been attained in such countries as the U.S.A., Great Britain or the Scandinavian countries, where the development was evolutionary, free of frequent revolutionary upheavals and deviations from democratic organization.<sup>10</sup>

The Principle of Legitimacy of State Power<sup>11</sup> is very closely connected with the principle of consensus and means the inner acceptance of State power by citizens.<sup>12</sup> The degree of this acceptance, i.e. the standard of legitimacy, simultaneously determines the means used by State power for the assertion of its aims. Legitimacy is closely connected with social consensuality in the field of procedural agreement. If both are in equilibrium, it means that the democratic principles are applied by State power in a natural and selfevident process.<sup>13</sup> This creates a favourable environment in the State for the implementation of human and civil rights. In the development of post-totalitarian countries a much speedier creation of consensus in the field of substantive agreement than in the field of procedural agreement may be expected.

#### 4. THE PRINCIPLE OF PLURALISM

While the principles of consensus and legitimacy express the psychological quality of democracy and its understanding by citizens, the principle of pluralism expresses its fundamental political and social quality. Pluralism is an inherent quality of democracy.<sup>14</sup> It remains an open question, whether some manners of pluralism, though deformed, are not inherent also in the totalitarian form of government, whether namely any political power is at all possible without pluralism, although it rejects it by its very concept.<sup>15</sup>

<sup>10</sup> RUIJN, O. Sweden: The New Constitution and the Tradition of Consensual Politics. In: BOGDANOR, V., (ed.). *Constitutions in Democratic Politics*. Aldershot, Gower 1988, p. 318 ff.

<sup>11</sup> "Legitimacy is a set of beliefs about the propriety, acceptability or naturalness of an action, an actor / role or a political order. These beliefs are influenced – but not determined – by legal rules and moral norms". BROOKS, S.G., WOHLFORTH, W.C. *World Out of Balance*. Princeton 2008, p. 173.

<sup>12</sup> Cf FRIEDRICH, C., J. *Limited Government. A Comparison*. Englewood Cliffs 1974, p. 18.

<sup>13</sup> For the theory of democratic process cf. SCHUMPETER, J. *Capitalism, Socialism and Democratic Theory*. Cambridge, Mass., 1970, p. 4.

<sup>14</sup> Cf BLAHOŽ, J., op. cit. note 7, pp. 57–71; HELD, D., op. cit. 7, pp. 186 ff; DUVERGER, M. *The Study of Politics*. Sunbury on Thames 1976, pp. 82–83; LAWSON, K. *The Human Polity, A Comparative Introduction to Political Science*. Boston 1993, pp. 262–263.

<sup>15</sup> In the opinion of the present author pluralism is an inherent feature of action of any group of people. It arises from the differences in behaviour of individual people, and although various totalitarian system have exerted utmost effort to suppress pluralism, it did manifest itself, though in a highly deformed and ineffective (with reference to democracy) form. Cf. e.g. the historical development of the Communist Party of Soviet Union and the inner rivalry of individual fractions; analogously of the development in the Nazi NSDAP, the rivalry between Gestapo and Abwehr in Nazi Germany. All that can be qualified, in our opinion, as the manifestations of deformed – but not democratic or near-democratic pluralism in totalitarian States which, however, did contribute to the collapse of totalitarian power.

Political pluralism, once again, is the necessary prerequisite for the transformation of the post-totalitarian society into the democratic society in the field of implementation of human and civil rights. At the same time it is necessary to fully understand the barriers encountered by the implementation of the ideas of political pluralism even in the advanced western democracies.<sup>16</sup> These barriers will be particularly big and dangerous in a post-totalitarian State.

In the new democratic states the implementation of political pluralism was inseparably connected with the transformation of the State-controlled economy into market economy. The mutual relations of the two do not require any specific proofs.

There is a substantial difference between the implementation of the principle of pluralism and the principles of consensus and legitimacy particularly in respect of time. While the pluralist system in conformity with the speedy transformation of economy can be implemented very speedily, the creation of democratic consensual society is a substantially longer process. At the same time there is a mutual relation between the quality of pluralist society and the consensual democratic society. While it is possible to say that in the new democratic states political pluralism already exists in a developed form, we cannot say that the democratic consensual society exists there also. This, naturally, disqualifies to a considerable extent the quality of political pluralism, as the political rivalry is sharp, not very cultured and qualified. With regard to the prerequisites and environment for the implementation of human rights it is not an ideal situation.

## 5. THE PRINCIPLE OF THE STATE ACCORDING TO THE RULE OF LAW<sup>17</sup>

### 5.1. On the Development of the Concept of the State according to the Rule of Law

We can start with the statement, probably acceptable for all schools of law united by the endeavour to achieve the democratic and not totalitarian organization of society, that the principle of the Rule of Law or State according to Law (in all of its variants, whether entirely identical with or approaching this concept, such as the principle of Social State according to law, the principle of Rule of Law or the principle of the Due Process of Law) is one of the basic principles of a stabilized, evolutionarily formed democratic State.<sup>18</sup> In this respect the premise of consensuality holds, in my opinion,

<sup>16</sup> The fundamental barrier of the full implementation of the principle of pluralism is the fact that it always remains – even in an advanced consensual democratic society – an ideal target which the society approaches through the rivalry of political parties and interest groups in which, naturally, the decisive role is played by the managing elites and not the membership base. The pluralism implemented in this way by political practice was called polyarchy by Robert Dahl; analogous was the standpoint of the German politologist, Thomas Ellwein; cf. DAHL, R. *Pluralist Democracy in the United States: Conflict and Consent*. Chicago 1967, pp. 24, 188–189; DAHL, R. *Democracy in the United States: Promise and Performance*. Chicago 1973, pp. 35 ff, 48 ff, 57 ff, 86 ff; ELLWEIN, T. *Das Regierungssystem der Bundesrepublik Deutschland*. Opladen 1977, pp. 450–456, 465 ff; BALL, A., R. and PETERS, B., G., op.cit., note 1, pp. 39–41, p. 127.

<sup>17</sup> The principle Rule of Law was translated by prof. BREWER-CARIAS, well – known theoretician from the field of comparative constitutional law as State according to the Rule of Law. BREWER-CARIAS, A., R. *Judicial Review in Comparative Law*. Cambridge 1989, pp. 7–9.

<sup>18</sup> HELD, D., op.cit., note 7, p. 248 ff.; BREWER-CARIAS, A., R., op.cit., note 17, p. 5 ff.; KOMMERS, D., P. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham and London 1997, pp. 36–37.

according to which the longer the democratic evolutionary development, uninterrupted by revolutionary upheavals, the given society organized in the State has passed, the more the State according to the Rule of Law becomes an institution internally accepted by its citizens, i.e. an institution based on a high standard of social legitimacy and consensus. This consideration reveals that the principle of the State according to the Rule of Law, whether from the viewpoint of doctrine or from that of sociology, cannot be conceived separately from further basic constitutional principles of the democratic State. In saying so I do not by far mean only those afore mentioned principles of legitimacy and consensus, but also the principles of the sovereignty of the people, limited government, separation of powers and pluralism.

The substantive law principle of the Rule of Law which can be identified, with a certain generalization, with the State according to the Rule of Law principle, has been crystallizing in England in the course of the 18th and the 19th centuries. This is the case parallelly also of the United States of America since the second half of the 18th century. The doctrine of the Rule of Law was defined pregnantly by one of the greatest British constitutionalist of the 19th century, A.V. Dicey. According to Dicey this doctrine includes in principle three basic aspects:

1. “ ... No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land ... ”<sup>19</sup>

2. “ ... No man is ... above the law; ... every man ... is subject to the ordinary law of the realm. ”<sup>20</sup>

3. “ ... the absolute supremacy or predominance of regular law as opposed to the influence of the arbitrary power ... ”<sup>21</sup>

R.J. Tresolini states: “The clearest expression of the Rule of Law in United States history is found in Article XXX of the Massachusetts Constitution of 1780, which established the separation - of - powers doctrine to the end that it may be a government of laws and not of men.”<sup>22</sup>

With the ever more extensively understood rules given sub 2. and 3. above the doctrine of the Rule of Law approached ever more distinctly the principle of the State according to the Rule of Law in which concept it has practically culminated in modern times.

In continental Europe the concept of the State according to the Rule of Law originated in the first half of the 19th century. Stahl, one of the originators of the German democratic concept of constitutionalism, defined the State according to the Rule of Law (Rechtsstaat) with the following words: “The fact that the State is administered on the basis of law represents the general trend of modern development. The State must be accurately defined by means of law, its legal system must contain guarantees against the violation of law, the extent, ways and limits of the activity of the State as well as the sphere of freedom of the citizens and it must assert moral ideas for themselves. That is the correct concept of the

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<sup>19</sup> DICEY, A., V. *An Introduction to the Study of the Law of the Constitution*. 10<sup>th</sup> edn., London 1973, p. 188.

<sup>20</sup> *Ibid.*, p. 193.

<sup>21</sup> *Ibid.*, p. 202.

<sup>22</sup> TRESOLINI, R., J. *American Constitutional Law*. New York 1959, p. 11.

State according to law, and not that which defines it by saying that the functions of the State are implemented on the basis of legal rules.”<sup>23</sup>

In Italy, where the democratic concept of the State according to the Rule of Law struck roots only at the turn of the century, the concept of the State according to the Rule of Law was defined pregnantly by O. Ranneletti: “The State, which is also the subject of law itself and guarantees its application to every man by adequate means, is a State according to the Rule of Law.”<sup>24</sup>

At the very beginning of the endeavour to define scientifically the concept of the State according to the Rule of Law and analogous categories in the Anglo-American legal culture we can encounter a certain conclusion, viz. that these definitions form a still valid basis of the concept of the State according to the Rule of Law and analogous categories in their further development until the present day. The determining factor is the fact that the primary and explicit meaning of the various categories of the State according to the Rule of Law (Rechtsstaat, Etat de droit, Stato di diritto, Estado de derecho, social legal State, Legitimacy, the principle of the Rule of Law as well as the principle of the Due Process of Law) is to characterize the relation of the individual, the citizen, and the State. The State according to the Rule of Law and analogous categories, consequently, have been from their very origin to the present day an integral part of democracy in the field of State. Their perfection or imperfection is simultaneously directly proportionate with the perfection or imperfection of democracy. In this context it should be “factored out” that also the State according to the Rule of Law is subject to the same shortcomings as democracy. The State according to the Rule of Law does not by far involve only legality in the meaning of observance of legal rules by all citizens, organizations and State authorities; its actual purpose is to express the freedom of the citizen. In the State according to the Rule of Law the citizen is permitted everything that is not forbidden by law; in this context law in respect of basic rights and freedoms of the citizen means explicitly law as stated in the Constitution, International treaties and statutes, and not in any legal rules of substatutory force.<sup>25</sup> A. Brewer-Carias says: “This concept of the State according to the Rule of Law is based on the principle that not only must all power of the public bodies forming the state stem from the law, or be established by law, but that this power is limited by law. According to this concept, the law becomes, as far as the state is concerned, not only the instrument whereby attributions of its bodies and officials are established, but also the instrument limiting the exercise of those functions. Consequently, the état de droit, or State according to the Rule of Law, is essentially a state with limited powers and subject to some form of judicial control. This, obviously, has numerous connotations in the evolution of the modern State and also presents characteristics peculiar to each of the major contemporary legal systems”.<sup>26</sup> From the viewpoint of sociology of international relations the State according to the Rule of Law is that State which forms part of the democratic community of States of the contemporary world. Consequently, it is not only the State which is fully bound by its own

<sup>23</sup> STAHL, R. *Die Staatslehre und die Prinzipien des Staatsrechts*. Berlin 1856, p. 137.

<sup>24</sup> RANNELETTI, O. *Principii di Diritto Administrativo*. Roma 1912, p. 142.

<sup>25</sup> BLAHOŽ, J., op.cit., note 7, pp. 94–100. Dyzenhaus, D., op. cit., note 6, pp. 45–56.

<sup>26</sup> BREWER-CARIAS, A., R., op.cit., note 17, p. 7.



Constitution and statutes, but also by the generally obligatory rules (norms) of international law, those of the norms of international law it has itself recognized as well as the generally recognized democratic principles of law.

In respect of the generally obligatory norms of international law and the norms of international law the State has recognized itself, the situation is relatively clear and not encumbered by other problems but those of constitutionally technical character which, however, may acquire conceptual character. The only correct legally technical solution is the adoption of the principle of superiority of international law to national law, complete with the constitutional law. Any other technical solution, based on various methods of transformation of the norms of international law into national law, must be considered problematic with regard to the principle of the State according to the Rule of Law. At the same time it should be noted that with reference to its relation to international law the standard of quality of the State according to the Rule of Law is determined also by the extent of the State-recognized norms of international law which do not form part of the generally recognized democratic principles of international law.<sup>27</sup>

Generally unproblematic for the State according to the Rule of Law with a tradition of democratic development of long standing is the compliance with the requirement of respecting the generally recognized democratic legal principles forming the basis of the democratic legal culture, which are slightly different in every State because of the historical traditions and specific features of development of every State, although they generally agree in common features. In the State which have set out on the way to the State according to the Rule of Law after a long period of totalitarian rule, however, the respect to this requirement presents a certain problem, as the very content of the concept of the generally recognized democratic, political and legal principles is only in the process of formation and the citizens, although subjectively endeavouring to create the State according to the Rule of Law, are willing to apply quite naturally for this purpose entirely undemocratic methods to which they have become accustomed in the preceding totalitarian period. In this situation the repeatedly proven premise comes to the fore, viz. that even the most moral and democratic goal, when pursued by undemocratic methods, changes into a mere facade of democracy and its content is entirely deformed. Proportionately it also holds that the less democratic the means applied, the less democratic and distorted the goal becomes. The so-called Great Revolutions of the past, which were based on bloodshed and violence or, in more accurate terms, used violence without being forced to do so, only prove this premise.<sup>28</sup>

It is undisputable that e.g. the French Declaration of the Rights of Man and Citizen of 1789, which has influenced so enormously the natural law concept of human rights, remained merely on paper not only at the end of the 18<sup>th</sup> century, but also for long decades of the 19<sup>th</sup> century because of the unstable situation in France of that time. State according

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<sup>27</sup> For a particularly clear overview of the development of the idea of the State according to the Rule of Law (Rechtsstaat) see Donald P. Kommers "According to the Federal Constitutional Court constitutional order is a value – oriented legal order. In short, the Basic Law not only subjects law to the concept of justice, it also creates a fundamental system of values in terms of which all legislation or other official acts must be assessed". KOMMERS, D., P., op.cit., note 18, pp. 36–37.

<sup>28</sup> NELSON, D., N. *Communism and the Politics of Inequalities*. Lexington 1983, pp. 1–3.

to the Rule of Law includes also following aspects: all laws should be prospective, open and clear; laws should be relatively stable: the making of particular laws should be guided by open, stable, clear and general rules; the independence of the judiciary must be guaranteed; the principles of natural justice must be observed; the courts have review powers over the implementation of those principles; the courts should be easily accessible; and the discretion of the crime prevention agencies should not be allowed to hinder the law.<sup>29</sup>

The relation of the State and the citizen which, in contradistinction to the concept of legality, is inherent in the concept of the State according to the Rule of Law, does not by far express – in the bilateral State / citizen relation – only the fact that the citizen is permitted everything not forbidden by the State in the Constitution and the statutes. An extraordinarily important component of this relation consists in the very things which the State forbids the citizen to do and / or for what and how the State apprehends the citizen, when he violates this prohibition. In this respect the State has the dual face of the Roman god Janus. One of the faces says that it is possible to interfere with the rights and freedoms of citizens in legally justified cases only on the basis of law formulated in the Constitution and the statutes, while the other says that this legal interference will be limited in accordance with the principle of adequacy<sup>30</sup> in order that it would not violate the very content of these rights and freedoms without which they would become merely an unfunctional stage property.

In justified interference of the State with the rights and freedoms of citizens the very principle of adequacy of this interference must be accentuated. In this respect very serious problems arise which we have known very well in the not so distant period of totalitarian rule. Great assistance in this context is afforded by the introduction of the interpretation doctrines of the Supreme Court of the U.S.A. which have been followed, particularly since the fifties of the past century, by the Constitutional Courts of the foremost West European countries. They include the so-called “preferred position doctrine”<sup>31</sup> preferring on principle human rights in conflicts with State power, and the doctrine of “clear and present danger”<sup>32</sup> enabling immediate action of State authorities against those who violate the security of the State, the lives and property of their fellow citizens and / or other values by the implementation of their own rights.

## 5.2. Specific Problems of the Consensuality of the State according to the Rule of Law

The requirement of adequacy of State interference and legal sanctions against citizens is closely connected with another attribute of the State according to the Rule of Law, i.e. the adequacy of legal control in general. If the principal aim of the State according to the Rule of Law is the solution of the protection of the citizen against the State and through the State, then the solution of the preference of man, citizen and civic society to the State must form its integral part in all aspects, i.e. not only juridical, but also philosophical and

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<sup>29</sup> BREWER-CARIAS, A., R., op.cit., note 17, p. 41.

<sup>30</sup> HOLLÄNDER, P. *Ústavněprávní argumentace*. Praha 2003, p. 21 ff.

<sup>31</sup> Thomas v. Collins, 323 U.S. 516 (1944).

<sup>32</sup> Schenck v. United States, 149 U.S. 47 (1919).

sociologico-legal aspects.<sup>33</sup> And here we arrive, primarily from the viewpoint of the sociology of law, at the close relation of the principle of the State according to the Rule of Law and the principle of limited government.

It follows integrally from the principle of limited government, which is of enormous practical significance particularly for the application of the principle of the State according to the Rule of Law in practice, that the State power is humanely, civically and constitutionally authorized to exercise its regulatory interference only there and then, when in the end the quality of democracy, in the first place the rights and freedoms of man and citizen, would be threatened. This is the only way we should understand one of the more than two centuries old premise of the State according to the Rule of Law which deserves sociological research by means of such sociological indicators as show that the State is the rule of law and not the rule of men.

In this respect it must be borne in mind that this premise merely expresses an ideal state and not the Holmesian and Poundian Law in Action, i.e. in the actions of men. Sociologically it must be understood that man, how ever much we would accentuate the natural character of law, i.e. support the concept of fundamental legal principles superior to the Constitution and the statutes, enters the life of law at least twice and often more than twice, always in the process of law-making and jurisdiction (law application).

The multiplicity of entry of the human factor in the life of law is apparent in the application of law. In this field we can differentiate the entrance of man, for instance, on the basis that he makes decisions on the basis of law and then implements these decisions. The relation to law of him who decides about the rights of another is different, as a rule, from the relation to law of him about whose rights the decision is being made. The same differentiation takes place in the next phase of law application, when one enforces the decision and the other executes the decision, either voluntarily or under certain force. In an ideal State according to the Rule of Law the body adopting a legal norm should be always in full accordance with the principles of the State according to the Rule of Law in the same way as the body or authority applying the law and the subject behaving according to law. All these cases, however, involve human activities, i.e. are merely certain elements of the rule of men intermingled with the ideal, i.e. the rule of law.

The State according to the Rule of Law in action, consequently, is not and even cannot be a pure Rule of Law, but is always partly also Rule of Men, although on the basis of law (adopted, however, once again by men). Thus we arrive at an analogous situation with the investigation of democratic pluralism as an abstract notion and the pluralism of political activities – see particularly the highly realistic concept of polyarchy by Robert Dahl.

An exceedingly complex situation arises after the fall of a totalitarian system, i.e. a system of the government of one party and one ideology, when the real possibility of existence of the State according to law is only emerging. It should be noted that it is not decisive for the real existence of the State according to the Rule of Law, whether the totalitarian system has been more liberal or not. In the system of government of one party and one ideology the existence of the State according to the Rule of Law is excluded. Moreover the process of liberalization of a totalitarian system may be of short-term or long-term character, and it

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<sup>33</sup> BURGESS, J., W., *op.cit.*, note 4, pp. 134 ff., 143 ff.

should be noted that the endeavour to create the State according to the Rule of Law in a liberalized totalitarian system is by far not negligible. The very concept of the State according to the Rule of Law, although it cannot be implemented in a totalitarian system, becomes one of the ideological and, finally, also the concrete political and legal means for the dismantling of the totalitarian system in general. Therefore even today, after the elapse of some time, it must be stated that the criticism of the endeavour to create a State according to the Rule of Law in the still totalitarian system of the rule of one party, how ever justified from the viewpoints of sociology and theory of law, were very short-sighted from the viewpoint of the target solution, i.e. the removal of the totalitarian system. Every social science, and the more so the science of politics and State, should necessarily follow not only the quest for scientific truth, but also the strategy and tactics of political thought.

In this way we arrive at yet another dimension of the State according to the Rule of Law. The State according to the Rule of Law is indubitably based on moral ideas. The ideas of law, State according to the Rule of Law and the moral ideas on which the activities of the State should be based are actually identical. At the same time the author is at a loss and hesitates to state that the State according to the Rule of Law is a moral State. Relatively it is so, absolutely it is not.

From the sociological point of view once again Dahl's comparison of the ideal pluralist democracy and the concept of polyarchy coined by himself for the really discovered functioning of plurality in political life come to mind. The relation of morals and politics is similar. Real State policy should be guided by moral ideas and should approach them as much as possible. However the absolute identification of "my" and "our" State policy with morals usually strikes a false note.<sup>34</sup> Worst of all is moralizing about politics and State while using immoral practices.

Particularly difficult situation arises after the fall of an immoral totalitarian system. It is a situation in which the democratizing State, endeavouring to become a State according to the Rule of Law and to dissociate itself from what it has been, literally grows angel's wings. All that takes place in the situation when the prevailing majority of citizens who had been living for long decades in a totalitarian system and, how ever much they have opposed it, have acquired the totalitarian patterns of behaviour deeply encoded in their way of thinking, behaviour and decision-making. The process of creating the State according to the Rule of Law in such society necessarily will be a long-term process, because from the sociological point of view the State according to the Rule of Law "in action" exists only in a society in which its principles and institutions have been internally accepted by general consensus by the prevailing majority of its citizens as a necessity of social life.<sup>35</sup> Therefore, in the transition from a totalitarian system to democracy the creation of the State according to the Rule of Law does not by far terminate by the constitutional and statutory fixation of the institutional model solution of the State according to the Rule of Law, but will be completed only by the real implementation – the "life" – of all these institutional solutions in society and their adoption by the minds of the people as the rules of the political game, without the observance of which democratic life is impossible.

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<sup>34</sup> FIERLBECK, K., *op.cit.*, note 6, pp. 227–244.

<sup>35</sup> BALL, A., R. and PETERS, B., G. *op.cit.*, note 1, pp. 88 ff.

The process of formation of the State according to the Rule of Law, consequently, will be a matter of evolution. If we look at the problem of the State according to the Rule of Law in the individual countries of the present day, a detailed investigation will reveal differences in the institutional solution of the State according to the Rule of Law, the degree of its implementation in society, social and individual consensus corresponding also with the degree of political and legal culture.<sup>36</sup> At the same time it is necessary, in my opinion, to accentuate that how ever different content and, in the end, term we assign the State according to the Rule of Law, the fundamental characteristics of the State according to the Rule of Law we have been considering must be identical both in respect of their institutional application and functional aspects and from the aspects of the political and legal culture and the democratic environment in society.

The new democratic countries should afford attention to investigations which would determine the function of the guarantees of the State according to the Rule of Law and human rights, in the first place the function of judicial guarantees.

Investigations should endeavour to ascertain the independence of courts,<sup>37</sup> the problems of the real influence of the court on the whole process of primarily penal (criminal) proceedings which decides about serious questions of restriction of personal freedom and property. In respect of independence of courts the research should be concerned with such problems as the possibility of the politization of courts (and not only with the possibility of the judges being members of some political party), but also with the problems of the democratic character of social environment, whether – for all formal preservation of non-political character of the judiciary – it cannot be influenced politically via facti (or, in other words, the investigation of indicators of democratic environment, such as democratic pluralism and, consequently, the non-existence of the political monopoly of power). Another important indicator consists also in the function of the courts, i.e. the investigations of the duration and effectiveness of judicial proceedings, the frequency of appeals, the results of appeal procedure, the function of extraordinary remedies, etc.

## 6. CONCLUSION

The fundamental democratic principles, among which we consider the principle of the State according to the Rule of Law as particularly significant, the implementation of which creates the necessary prerequisite as well as the environment for the application of human rights,<sup>38</sup> are being brought to life at present in the new democratic States of particularly Central Europe and in numerous developing countries. The degree of their implementation is an important indicator of the extent to which these States have become democratic.

The implementation of these principles in the everyday life of society is the decisive indicator of the standard of political and legal culture which forms the framework of human

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<sup>36</sup> Ibid, p. 89.

<sup>37</sup> KÜHN, Z. Judicial Independence in Central – Eastern Europe: The Experience of the 1990s and 2000s. *The Lawyer Quarterly* (supplement to Journal Právník No. 6/2011). Vol I., No. 1, pp. 31–42.

<sup>38</sup> Wiener, A., Lang, A., F., Tully, S., Maduro, M. P., Kumm, M., *Global Constitutionalism: human Rights, Democracy and the Rule of Law, Global Constitutionalism, 1:1* (2012), *Cambridge University Press*, 2012, pp. 1–15.

and civil rights and freedoms. We must bear in mind that democracy with reference to almost all of its basic principles, which are a matter of course in the advanced democratic States, is very fragile still in many new democracies. Essential prerequisite for the cultivation of democracy and the favourable environment for the implementation of human rights is the influence legal culture of advanced democratic countries of the world on the new democratic Central and East European countries, manifested by the most varied non-governmental activities aimed at the promotion of the inner civic acceptance of the democratic principles and human rights. There is a plurality of theoretical concepts of human rights in the present-day world, but the consensus in the fundamental concept of human rights is continuously increasing. Therefore, I believe that the focal point of our attention should shift with ever growing intensity to the field of implementation of human and civil rights as well as the democratic prerequisites and democratic environment<sup>39</sup> created for this implementation.

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<sup>39</sup> Crouch, C. *Post-Democracy*, Cambridge, Malden 2005, pp. 118–120.