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Rule of law and human rights

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1. Introduction.

There are different notions of rule of law worldwide. Its content varies not only between legal traditions but also from one country to another. The focus of this paper is to identify the core features of rule of law with a focus on human rights. Thus, questions to explore include whether human right as a branch of law is an indispensable element of the rule of law concept – or even a precondition for it - or whether human rights as such have no correlation with the traditional concept of rule of law.

To better understand the connection between these two areas of law there is a need to define both rule of law and human rights. Since the content of these notions is conceived in a different way in diverse legal traditions based on cultural, political, social and legal peculiarities, this paper will attempt to provide a universal understanding of these concepts, presenting the basic characteristics that are common to all legal traditions. For ease of understanding an effort shall be made to describe the rule of law and human rights as traditionally conceived and their evolution after World War II in the age of development of human rights as a distinct field of law and the spread of State Constitutions.

Another issue to be considered is whether it is sufficient simply to observe the law and prevent arbitrariness on the part of executive at a national level in order to have a rule of law state, or whether one should look at rule of law in a material sense: that laws should be founded on human dignity, the protection of which is not only a domestic, but also an international matter. In the present world it is obvious that it is important for states to act based on legal norms that will reduce arbitrariness. But rule of law is more than that: the legal norms must also conform to fundamental human rights. Consequently, respect for rule of law demands observance not just in a technical sense but also substantively.¹

Such a material concept of rule of law will offer people protection both from executive and legislative action. But, what are the mechanisms that will make this concept work in reality? In this context, the role of constitutional courts is apparent for effective realization of the principle of rule of law in practice.² Consequently, there is need to consider whether the constitutional review is an indispensable part of rule of law for the protection of fundamental human rights as stipulated in state constitutions.

An overview of core elements of rule of law will be done through comparative law method which will include not only historical and jurisprudential comparisons of the rule of law concept and fundamental human rights but also mechanisms for their implementation in practice.

2. Historical Development of Rule of Law

The concept of law during the middle ages was considerably different than that of today. The law was predominantly customary stemming from reason and conscience in consonance of natural law theory. After the Papal Revolution, power was divided between the secular and ecclesiastical authorities. The king was not the head of church anymore but his principal functions included keeping the peace and doing justice.³ The church as well played a crucial role for doing justice. For the first time the lawmaking power of kings (based on the new conception of kingship) justified the exercise of a royal function to keep peace and do justice. A systematized and rationalized law was

¹ ALMANAC, CONSTITUTIONAL JUSTICE IN THE NEW MILLENNIUM, [Hereinafter referred to as Almanac], (15-16. X. 2004, YEREVAN) at 15

² *Id.*, at 16

³ HAROLD J. BERMAN, LAW AND REVOLUTION THE FORMATION OF THE WESTERN LEGAL TRADITION, at 405

needed to legitimate the control of kings and popes. In so doing the authorities justified their lawmaking and judging power ‘by the authority vested in them by God’.⁴ Both kings and popes exercised their legislative and adjudicative power through specialized bodies designated for these purposes. Accordingly, governmental institutions were created in order to make the legal system function effectively. The tendency of development of law as a tool for governing people was closely connected with the principle of legality.⁵ Although the ‘rule by law’ predominated at that time meant that kings should rule by law, the theory of ‘rule of law’ started to seed its roots. The later concept implied that even kings should obey the law and unlawful commands of a king could be disobeyed by his subjects.⁶

Consequently, theories were espoused to support the supremacy of law. Firstly, it was believed that the “universe itself was subject to law.”⁷ Secondly, the division of power not only between secular and ecclesiastical authorities but within secular authorities itself among royal, feudal, and urban polities engrained the conviction of supremacy of law as there was a need to regulate the relationship of such authorities.

A good illustration of the emerging rule of law concept was the Magna Carta.⁸ Evidence of this includes clauses elucidating the formal aspects of rule of law theory at that time which reads as follows:

“No man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we [the king] proceed with force against him, or send others to do so, except by lawful judgment of his equals or by the law of the land.”⁹

The idea inherent in this document is that the government is not only bound by law but its decisions concerning the citizens should be justified with reasonable grounds or be prescribed by law. As a result, a decision that is not lawful might be subject to resistance.¹⁰

The progressive development of the concept of rule of law continued until the eighteen century which could be well understood by writings of intellectuals. Initially, the question that was a topic for discussion amongst scholars was the legitimacy for governmental action. John Locke’s view that government actions are invalid if not supported by popular consent predominated.

Another question concerned the structure of government. The contribution of Montesquieu in this sphere deserves credit. He, in particular, supported the idea of a constitution as a source of legitimacy in terms of the consent of people to their government in regard to the form of governance and separation of power. He wrote:

“when the legislative and executive powers are united in the same person... there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the

⁴ *Id*

⁵ *Id*, at 536

⁶ *Id*

⁷ *Id*

⁸ See Wikipedia, **Magna Carta** (Latin for "Great Charter", literally "Great Paper"), (‘Many later attempts to draft constitutional forms of government, including the United States Constitution, trace their lineage back to this source document. The United States Supreme Court has explicitly referenced Lord Coke's analysis of Magna Carta as an antecedent of the Sixth Amendment's guarantee of a speedy trial’)

⁹ *The Legal History of The Rule of Law*[Hereinafter referred to as History], (available as of Nov. 10 2007).at 4<
http://www.mansfieldfdn.org/programs/program_pdfs/leghistory.pdf>

¹⁰ *Id*

judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.”¹¹

Finally, the fundamental rights of people found its place within the concept of rule of law. This notion meant that individuals are to be protected from the encroachments both of governments and of individuals unless supported by “a procedurally sound, and fair mechanism”¹² accompanied with reasonable grounds. This notion, presently conceived as a human right, was found in some prominent documents of the times, such as the American Declaration of independence (1776), U.S. Bill of Rights (1791) and the French Declaration of Rights of Man and Citizen.

2.1. Formal and Substantive aspects of rule of law

As was mentioned earlier, academic opinion is not unanimous on the meaning of the rule of law. The proponents of a formal conception of rule of law argue that this notion refers only to formal aspects of law incorporating such attributes of law as rules should be clear, stable, published and general.¹³ For them the rule of law is limited to procedural and institutional aspects, for instance, the process of adoption and promulgation of laws.¹⁴ Indeed, the only concern for them is that laws should meet those formal procedural requirements but not ‘whether the law is good law or bad law’.¹⁵ The proponents of formal conception associate the rule of law with the principle of legality, which requires that governmental authorities be obliged to observe procedural requirements and that laws must be clear, stable and general.¹⁶ Thus, those who support this approach are concerned with external qualities of laws such as procedural aspects including also clear language and general nature of laws leaving aside the substantive justice.

In contrast, scholars supporting the substantive idea of rule of law maintain that it is more than including such formal elements. Moreover, they argue that rule of law without moral rights and natural justice is incomplete. Thus, advocates of this approach qualify laws as ‘good’ or ‘bad’ - an inherent element of a rule of law system meaning that individuals are entitled to certain fundamental rights which cannot be derogated by the state.¹⁷ Hayek associated rule of law with the ‘essential conditions of liberty under the law’.¹⁸ Professor Dworkin, supporting the substantive nature of rule of law, describes ‘good law’ as such that incorporates individuals’ ‘moral rights and duties’ which should be recognized in positive law’ so that courts could enforce those rights. According to Dworkin political rights of citizen also form an important part of a rule of law state.¹⁹ T.R.S. Allan reached the same conclusion, stating that rule of law ‘encompass traditional ideas about individual liberty and natural justice and fairness in relations between governors and governed’.²⁰ According to Allan ‘equal dignity between citizens is the ultimate meaning of the rule of law’.²¹

¹¹ *Id*

¹² *Id*, at 5

¹³ Augusto Zimmermann, *The rule of Law as a Culture of Legality: Legal and Extra-legal Elements for the Realization of the Rule of Law in Society*[Hereinafter referred to as Culture of legality], (available as of Nov. 10 2007).at 10 <https://elaw.murdoch.edu.au/issues/2007/1/eLaw_rule_law_culture_legality.pdf>

¹⁴ *Id*, at 13

¹⁵ *Id*

¹⁶ *Id*

¹⁷ *Id*

¹⁸ *Id*, at 14

¹⁹ *Id*

²⁰ *Id*

²¹ *Id*

Indeed, the proponents of this liberal approach ‘laid down the basis for constitutionalism and the protection of human rights against the exercise of arbitrary power’.²² As a consequence, public authority is subordinated to the constitution - meaning that their actions are valid and legal in so far as they are consistent with the constitution. Thus, for advocates of a substantive conception the ‘enforceable bill of rights’ is an indispensable component of rule of law.²³ The argument that judges might undermine rule of law through their interpretation of this general or abstract notions of human rights adjusting to their personal perception does not disserve credit because the rules of interpretation designed especially for this purposes in most legal systems regulate these kinds of issues.

However, there is no disagreement between the proponents of both conceptions that rule of law should serve as a tool against arbitrariness.²⁴ The distinction between formal and substantive conceptions presently has lost its significance especially since ‘bills of rights’ have been incorporated into national constitutions. When substantive human rights became a part of positive law it means that violations of the rule of law are dishonored both formally and substantially.²⁵ Consequently, there is no need to dwell at length on the differences of the two approaches, as it is more than obvious today that substantive human rights constitute a core of any legal system.

2.1.1 Social aspect of the rule of law: Legal Failure

At this point it is relevant to explore why the law must be good and what are the consequences of bad law or its failure. Sometimes it could be connected with insufficiently clear law e.g. failing to state powers and duties or procedure of an administrative body for its conduct with citizens.²⁶ Another reason for failure of law according to Galligan is when the law is not well drafted enough or it is ‘motivated by ulterior purposes’.²⁷ The lack of proper institutions to implement the law could be another reason for legal failure (laws conferring rights would be a sham without institutions to implement them).²⁸ However, even the best institutions are not a solution to the failure of law if there is no general attitude of respect towards law either on the part of officials or citizens.²⁹

Another important issue connected with ‘legal failure’ is the correlation of social norms with the law. The competition of the law and social norms as a rule results in legal ineffectiveness since very often the social norms win in this competition. The reasons for the failure of law are particularly associated with the idea that laws either do not serve social needs or the legal content substantially conflicts with social norms.³⁰ Social norms here mean rules that are formed by social practice but not formed through law or other governmental action.³¹ Social norms usually emerge based on either governmental inaction to regulate the issue or the issues are inadequately regulated by government to the extent that those regulations are at least ‘unacceptable to those affected’.³² Since social norms reflect the values and beliefs of the society which emerges from ‘day-to-day practices’ then it is easy to understand that laws will be conceived ‘as an external and alien force competing

²² *Id*

²³ *Id*

²⁴ *Id*

²⁵ *Id*, at 17

²⁶ DENIS J. GALLIGAN AND MARINA KURKCHIYAN, *LAW AND INFORMAL PRACTICES*, at 9

²⁷ *Id*, (‘Frederique Dahan argues that in Russia a detailed bankruptcy code failed because the government used it to further its own purposes rather than to serve economic concerns’)

²⁸ *Id*

²⁹ *Id*, at 4

³⁰ *Id*, p5

³¹ *Id*

³² *Id*, at 6

with the real values'.³³ However, sometimes it may happen to be quite the contrary when social norms might be 'a distortion of values' meaning that social norms do not represent the values of the society but 'they are the results of the need to survive and function within a social environment'.³⁴

As a rule laws are created to perform some functions to achieve certain social goals. In the case of failure of law logically those functions will not be performed. As apposed to other social mechanisms, law is conceived to have such qualities that 'enable it to perform those functions more completely and effectively'.³⁵ Indeed, there is agreement among scholars for a need of law that should be 'created and enforced by state authorities for the proper functioning of society'.³⁶ Since laws are the product of the lawmaker (be it a democratic parliament or a 'modern despot'), to achieve certain goals it should not necessarily reflect the values of the society. However, without doubting the reliability of this argument, laws are created through social and political processes and therefore they will somehow reflect the values of the society. 'Laws emerge from the political and social conflict, reflecting the ends and interests of some to the detriment of others'.³⁷ Laws can be used either for bad purposes (to 'repress') or good purposes ('to respond and guide the currents of the society').³⁸

In this context, if laws are used as just tools for government, there can be no limits on those uses.³⁹ This is not to say that positive law should reflect social norms. The laws could be created even to transform social norms. The point here is that the laws should not necessarily reflect the social norms but rather laws should be 'detached from them'.⁴⁰ Friederich von Savigny states that:

'There may be a place for positive state law, but it should originate in the 'spirit, feelings, needs' of the people; the lawgiver must stand not apart from the nation, but at its centre 'so that we have to regard him as the true representative of the spirit of the people'.⁴¹

However, Galligan argues that the main function of law should be facilitating but not directing society towards certain goals. The laws should be 'neutral to the interests and values' of individuals and groups.⁴² According to Durkheim the law must be 'restitutive' instead of 'repressive' in the sense that people will have a 'common expectation' in their everyday life about their relationship rather than one group dominating over another in terms of imposing its values on the other group. Furthermore, both Durkheim and Weber agree that 'the rules must have content' but that should not be directed 'to advance a set of social goals' rather than used for 'compromise and accommodation'.⁴³ Hence, the law should have certain qualities for it to work and be accepted by the society which in turn will promote the rule of law. Kathryn Hendley's view of law as a means of social coordination is:

'To summarize, a number of necessary characteristics of a law that matters reciprocally have been identified. Principal among these are a general societal trust in the basic fairness of the law, both in its substance and its application; a remedial structure that addresses the needs of citizens; a judiciary with sufficient political capital to stand up to legislative and executive

³³ *Id*

³⁴ *Id*, at 7

³⁵ *Id*, at 8

³⁶ *Id*, at 9

³⁷ *Id*, at 11

³⁸ *Id*

³⁹ *Id*

⁴⁰ *Id*

⁴¹ *Id*, at 12

⁴² *Id*, at 17

⁴³ *Id*, at 18

power; and conceptualization of law as an interactive process in which both state and society participate on a more or less equal basis'.⁴⁴

Thus, to create and uphold the expectations of people the law should have at least those qualities identified above. Consequently, if the law fails 'to create and uphold' expectations, then the law's vision of effective means of social coordination becomes mere illusion.⁴⁵

2.2. The rule of law in constitutional states

After the Second World War the rule of law concept in one form or another made its way into the constitutions of the most progressive states. Human rights became an enforceable concept in courts as it was incorporated in the basic legal documents of states. The contemporary dimension of rule of law is particularly affected by these developments.

In German tradition because of failure of the revolution of 1849 "*Rechtsstaat*", was limited to formal aspects of rule of law notwithstanding its original association with protection of individual autonomy. This was in part associated with the decline of fundamental rights as a 'result of rise of legal positivism'.⁴⁶ At the end of the nineteenth century *Rechtsstaat* simply resembled a principle of legality and was not concerned with the 'purpose and content of the state but with the method and character of their realization'.⁴⁷ However, after the Second World War the formal aspects of rule of law were accompanied by substantive principles limiting state interference with individual liberty. In addition to formal procedural aspects the German constitution distinguishes itself by encompassing a very broad scope of substantive elements as 'the protection of individual dignity is recognized as the supreme value of the constitutional order'.⁴⁸

Human rights were even more extended by German courts in the second half of twentieth century. 'Free development of a personality' stipulated by Article 2 of the basic law was interpreted to act as a 'catch-all guarantee' for all human activity that is not covered by any provision of the constitution. The constitutional court even went further in one of its landmark decisions declaring that provisions of the constitution relating to fundamental rights are not just of a subjective but also an objective nature - meaning that all governmental branches should take fundamental rights of basic law into account while creating, interpreting or applying the ordinary law.⁴⁹ This obligation includes not only the application of criminal or administrative law (mostly concerned with state interference) but also to the interpretation of private law (e.g. provisions of civil code dealing with equity clauses).⁵⁰

The concept "*Etat de droit*" in the French tradition was the counterpart of "*Rechtsstaat*" in German tradition and was introduced by the 1789 revolution 'to protect rights and liberties of citizen'.⁵¹ Nevertheless, the French constitution was a far cry from its German counterpart as it

⁴⁴ *Id.*, at 19

⁴⁵ *Id.*

⁴⁶ RAINER GROTE, RULE OF LAW: THE GERMAN CONTRIBUTIONS TO THE FIFTH WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW, [Hereinafter referred to as Rainer Grote], (BADEN-BADEN 1999), at 281

⁴⁷ *Id.*

⁴⁸ *Id.*, at 286

⁴⁹ *Id.*, at 289

⁵⁰ *Id.*, (Certainly private autonomy continues to be the guiding principle of civil law but fundamental rights will be decisive when one of parties for example to contract is economically and legally weak)

⁵¹ *Id.*, at 293

did not try to codify the specific elements of the rule of law in the constitution. There is no special section in the French constitution devoted to human rights, but it speaks of fundamental rights contained in the preamble of the 1946 constitution which refers to the 1789 Declaration of the rights of Man and Citizen. These rights were also silent on 'fair trial' procedures.⁵² However these documents, along with natural justice, were the main sources for the *Conceil d'Etat*⁵³ to extract general principles of law to deal with situation that legislation failed to cope. In particular, it was not restricted to procedural issues but substantive fundamental rights as well.⁵⁴ These general principles served as a significant 'safeguard for individual liberties' even though they were not binding on parliament.⁵⁵

The rule of law in Britain is in some way different either from the French or German concept. This is due to the fact that in Britain there is no written constitution to define governmental structure or put limits on governmental authority. Since 1688 the protection of individual liberties has become the task of parliament and the courts of universal jurisdiction. The former would enact laws preserving individual liberties and the later would interpret the laws 'to allow the greatest freedom possible'.⁵⁶ Rule of law was concerned with formal aspects of the law, such as certainty and predictability.⁵⁷ The courts judicial review of public body actions are to ensure that due process is observed and are not concerned with the substance of executive decisions. However, 'occasionally British judges would interfere with executive decisions on substantive grounds' in particular to make sure that the administrative action has not gone beyond the purpose of law. In English tradition the parliamentary legislation was not subject to judicial review until the 20th century, due to the peculiar position that Parliament was not seen as a threat to rule of law. However the courts would exercise their power to review legislation when fundamental rights were at stake. Additionally, they will construe statutes in line with fundamental human rights.⁵⁸

American legal thinking is similar to English constitutional theory in the sense that has not 'developed a concept of state as distinct entity' relying in particular on the notion that everybody is equal before law regardless his rank or condition.⁵⁹ The rule of law in the USA embodies two principles—the separation of power among the branches of government horizontally and vertically between the federal government and the states. Secondly, the protection of individual rights is the cornerstone of the American Constitution. It not only protects due process or formal procedural guarantees but utilizes fundamental rights as a mechanism 'to implement substantial ideas of liberty and justice'.⁶⁰ The Supreme Court in *Lochner v New York* extended initial concept of due process as a procedural guarantee to connote substantive due process protecting economic and property rights of people in case of deprivation of life, liberty and property without due process.⁶¹ The substantive guarantees even extended further after World War II.⁶² However, the Supreme Court of US differs markedly from Federal Constitutional court in Germany as it 'lacks a concept of fundamental rights as an

⁵² MARY ANN GLENDON, MICHAEL WALLACE GORDON CHRISTOPHER OSAKWE, COMPARATIVE LEGAL TRADITIONS TEXT, MATERIALS, AND CASES, [Hereinafter referred to as Comparative legal traditions], at 71, (2nd ed. 1994)

⁵³ *Id*

⁵⁴ *Id*, at 292

⁵⁵ *Id*, at 293

⁵⁶ Rainer Grote, at 297

⁵⁷ *Id*

⁵⁸ *Id*, at 298

⁵⁹ *Id*, at 301

⁶⁰ *Id*, at 302

⁶¹ *Id*

⁶² *Id*, at 303

objective order of values'.⁶³

2.3. The terminology of rule of law

As illustrated above the rule of law is expressed by different linguistic terms such as “*Rechtsstaat*” in the German legal tradition and as “*Etat de droit*” in the French tradition. Thus, to better understand the formulation of rule of law and its implications as well as to find some common ground it is necessary to go into some depth regarding the terminology of the rule of law. Continental European languages—German, French, Spanish—use a single term for enacted or legislated law. For example, Germans call it *Gesetz*, French *loi* etc. In addition, there are also alternative terms for law in these languages which would be *Recht* in German, *Droit* in French and *derecho* in Spanish. These words, however, are to signify the higher notion of law as a matter of principle the translation of which into English would be ‘Right’.⁶⁴

These alternative words for law *Rechts*, *droits*, *derechos* if used in plural connote individual rights such as right to life, liberty, dignity etc.⁶⁵ Thus, human rights in these languages implies the notion of rule of law in its higher sense.⁶⁶ Consequently, the concept of rule of law in Germany is associated with “*Rechtsstaat*” but not “*Gesetzesstaat*.” This later term would simply mean that ‘the government is bound by rules fixed and announced beforehand’ whereas the former adopts the view of a ‘state based on ideal law’.⁶⁷ The same is true for the term “*Etat de droit*” in France. Thus, Europeans would compare the rule of law with the ‘term for law in the higher sense’ while the Americans referring to law ‘in higher sense’ would associate it with their constitution which ‘should rule the affairs of the nation by the consent of the governed’.⁶⁸

3. From natural rights to human rights: an introduction to human rights

After exploring some basic correlations of the rule of law with human rights there is a need to explore the historical and contemporary notion of human rights in more detail. There was no expression ‘human rights’ as such before World War two. Historically human rights were associated with ‘natural rights’.⁶⁹ The transition from natural rights to human rights was inherent in the idea that natural rights belonged to human beings.⁷⁰ However, it was not as early as 17th and 18th centuries when ‘the modernist conception of natural law’ gave a comprehensive meaning to natural rights.⁷¹ The theory of natural rights was invoked to challenge political rule when the natural rights of citizens were not observed.⁷²

The distinguished proponents of the natural law theory at those times were John Locke, Montesquieu, and Jean-Jacques Rousseau. Particularly, John Locke argued that individuals are entitled to such rights as right to life, liberty and property ‘because they existed in state of nature’ and they ‘surrendered to state only the right to enforce these natural rights, not the rights themselves’.⁷³ However, natural law philosophy faced strong opposition from those who

⁶³ *Id*

⁶⁴ Legal history, at 8

⁶⁵ *Id*,

⁶⁶ *Id*

⁶⁷ *Id*

⁶⁸ *Id*, at 9

⁶⁹ HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT LAW POLITICS MORALS, [Hereinafter referred to as Law and politics], at 324, (2nd ed. 2000)

⁷⁰ *Id*, at 328

⁷¹ *Id*, at 324

⁷² *Id*, at 327

⁷³ *Id*, at 325

believed that this theory of natural rights will ‘lead to social upheaval’.⁷⁴ Among those was liberal Jeremy Bentham who wrote that:

“Rights is the child of law; from real law come real rights; but from imaginary laws, from “law of nature”, come imaginary rights.”⁷⁵

This opposition to natural law doctrine starting from late 18th century culminated in the 19th and the beginning of early 20th century. They argued, in part, that rights vary in different communities due to their ‘cultural and environmental’ peculiarities.⁷⁶ Moreover, some of the opponents, such as John Austin, argued that ‘the only law is the command of the sovereign’.⁷⁷

Nevertheless, the assertion of e.g. natural right to life and liberty was not concerned with health care or the self-realization of individuals but with the rule of law - the very idea of which was to prevent unlawful actions of governmental authorities in terms of arbitrary killing and imprisonment.⁷⁸ Natural rights were believed to belong to human beings based on their ‘capacity to exercise rational choice as autonomous being’, which implied that those rights mostly protect individuals from ‘the invasion of his domain of selfhood or privacy rather than the freedom of individual or group to achieve its purposes or ideas.’⁷⁹ Hence, the theory of human rights is significantly different than that of natural rights which include a list of economic and social rights, or in other words positive rights.

Even though natural rights were not accepted unanimously human rights paved its way through the 19th century, a vivid example of which was abolition of slavery.⁸⁰ However, as opposed to natural rights the human rights theory has an international dimension.⁸¹ The idea of natural rights was asserted to protect individuals ‘from arbitrary incursion by the state’.⁸² While natural rights were concerned with ‘principle of legitimacy within particular national state’, the contemporary human rights have a standard setting role at an international level. The acknowledgment of the principle of human rights after WWII, however, did not necessarily mean that there is unanimous agreement about the definition of human rights or its ‘substantive scope’.⁸³

3.1 The theory of human rights

Among those matters that are of special interest is whether human rights are ‘moral or legal entitlements’ which are topics of ongoing debate in academic circles. Although in practice people do not enjoy all their human rights and individuals are not treated equally in different parts of the world, all people have the same human rights just because they are human beings.⁸⁴ Indeed, some scholars consider human rights as moral rights by attaching them special value.⁸⁵ Jack Donnelly argues that ‘we have human rights not to what we need for health but to what we need for a life of dignity’.⁸⁶ He views human rights from the perspective of social and political guarantees which are crucial to protect ‘human dignity posed by the modern state and modern

⁷⁴ *Id*

⁷⁵ *Id*, at 326

⁷⁶ *Id*

⁷⁷ *Id*

⁷⁸ *Id*, at 328

⁷⁹ *Id*

⁸⁰ *Id*, at 326

⁸¹ *Id*, at 327

⁸² *Id*, at 328

⁸³ *Id*, at 326

⁸⁴ JACK DONNELLY, THEORIES OF HUMAN RIGHTS, at 18 (2nd ed. 1997)

⁸⁵ *Id*, at 19

⁸⁶ *Id*, at 20

markets’.⁸⁷

Another theory justifying human rights is that it is given by God. Albeit there is no unanimous agreement among scholars concerning theoretical aspects of human rights there are a set of human rights that enjoy political consensus as embodied in UDHR, ICCPR, etc. It is worthy to consider the theoretical aspects of human rights from the perspective of ‘political realism’ or *realpolitik*. The theory of *realpolitik* was founded in the early sixteenth century from proponents like Nicolo Machiavelli.⁸⁸ Advocates of this theory argue that a government’s ‘primary obligation is to the interests of the national society it represents... its military security, the integrity of its political life and the well-being of its people’. ‘The process of government... is a practical exercise and not a moral one’.⁸⁹

The ‘realist’ theory is often supported by ‘relativist’ arguments saying that moral values are not universal at all but they represent specific culture.⁹⁰ Indeed, no one can deny cultural relativity. Social values vary from country to country. But as Jack Donnelly argues ‘contemporary international human rights norms have near universal applicability, requiring only relatively modest adjustments in the name of cultural diversity’.⁹¹ Human rights norms embodied in international bill of rights provide the minimum necessary guarantees against ‘modern states’ that ‘threaten human dignity in all countries’.⁹² Today, hardly one can doubt such universally accepted rights as the right to life, liberty, security of the person, freedom from torture, etc. These rights are least but not last which would also include some basic economic and social rights. However, ‘justifiable modifications’ are indispensable if required by specific culture but only so far as they are consistent with internationally recognized fundamental human rights.⁹³ Jack Donnelly’s argument is strong enough when he states that ‘human rights do not require cultural homogenization. If women choose to vote as their husbands do or choose a private family life instead of public life... human rights require that such choices be respected’.⁹⁴

The rights stipulated in many international instruments protect not only personal autonomy and security but also political rights. In particular, personal security and equality are major tools to restrain the ‘functionaries of modern states’.⁹⁵ However the rights stipulated in these instruments do not benefit from the same level protection for political or religious reasons. For example, Asian states would oppose the principle of equality on the basis of sex declaring those norms ‘incompatible with Asian values’.⁹⁶ Whereas American commentators will give priority to civil and political rights arguing in part that social and economic rights such as provision of food, health care, education etc. are not on the same footing with rights such as due process, freedom of speech, etc.⁹⁷ This approach is supported by the notion that it is not as difficult to implement political and civil rights in practice as it is to implement economic and social rights which are dependent on the economic situation of states.⁹⁸

Violation of civil and political rights which are also referred to as ‘negative’ rights is

⁸⁷ *Id.*, at 22

⁸⁸ *Id.*, at 30

⁸⁹ *Id.*

⁹⁰ *Id.*, at 32

⁹¹ *Id.*, at 33

⁹² *Id.*, at 34

⁹³ *Id.*

⁹⁴ *Id.*, at 35

⁹⁵ *Id.*, at 23

⁹⁶ *Id.*, at 24

⁹⁷ *Id.*

⁹⁸ *Id.*

considered ‘actively causing harm, a sin of commission’. Whereas economic and social rights, also called positive rights, require from states affirmative action or ‘active support,’ the violation of which is mostly inaction or failure to provide support. However, to have effective implementation of human rights both positive and negative obligations of states are necessary because there is no clear-cut demarcation line between civil and political and social and economic rights with regard to their positive or negative nature. Nevertheless, some rights are considerably negative while the others require mostly positive action.⁹⁹

The distinction between positive and negative obligations should be considered also from a moral perspective. For example, what is the difference when someone is killed by a state official or such officials neglect or inaction? Consequently, the preference of positive or negative obligations is not a good idea. The same is true for giving priority to civil and political or economic and social rights. They are interrelated and in most situations an effective result can be achieved if they act simultaneously but not in competition (e.g. those who underestimate economic and social rights weaken the importance of their arguments when they claim that the right to property is mostly an economic right).¹⁰⁰

3.2. Human rights after World War II

Human rights violations before World War II were not a matter of concern for the international community of states. The United States, the Soviet Union, Britain, France and most states systematically violated human rights in one form or another. This was not considered a monumental issue in international relations because human rights were seen as a purely domestic matter based on the doctrine of sovereignty of states. Consequently, and as a corollary to the doctrine of sovereignty, no state could intervene into the domestic affairs of another sovereign state due to the human rights violations of that country.¹⁰¹

The horrors of World War II, however, made the states think seriously about human rights. It was the first time that human rights became a ‘standard subject of international relations ... in the United Nations’.¹⁰² Both the preamble and Article 1 of the Charter of the United Nations affirms the significance of fundamental human rights as new standards for international relations. Since human rights developments in most states were reflected by international law and institutions, the study of human rights of a certain country would be insufficient without considering legal and political processes in international arena.¹⁰³ Additionally, to better understand the human rights movement, a general understanding of international law is essential.

A number of international human rights instruments were adopted under the auspices of the UN. In 1948 the UN General Assembly adopted the Universal Declaration of Human Rights which covered not only civil and political but also economic and social rights ‘within the prevailing concepts of human rights at that time’.¹⁰⁴ Although the UDHR is not legally binding per se, it provides the most authoritative statements of international human rights norms’.¹⁰⁵ Deliberations in the United Nations on human rights continued and gained new momentum in 1976 when most norms contained in UDHR were expanded upon in the International Covenant

⁹⁹ *Id.*, at 25

¹⁰⁰ *Id.*, at 26

¹⁰¹ JACK DONNELLY, HUMAN RIGHTS AS AN ISSUE IN WORLD POLITICS, [Hereinafter referred to as Human Rights], at 3

¹⁰² *Id.*, at 5

¹⁰³ Law and politics, at 57

¹⁰⁴ *Id.*, at 39

¹⁰⁵ Human Rights, at 5

on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. Thus, these treaties gave binding force to ‘minimum social and political guarantees recognized by international community as necessary for a life of dignity in the contemporary world’.¹⁰⁶

Although the standard setting role of the UN was successful, the same cannot be said about its monitoring authority during the first years of its operation. Having set such human rights standards did not necessarily mean that states would obey their international obligations. Therefore, there was need to watch closely the implementation of those norms by states. In the late 1960s and 1970s the Commission on Human Rights was authorized by the Economic and Social Council to investigate complaints of ‘a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms’ in certain countries.¹⁰⁷ Indeed, the effect of those investigations was far from being effective, it created precedent ‘for stronger action’ to supervise the states’ implementation of human rights standards.¹⁰⁸

However, it should be born in mind that the authority of UN is limited in this aspect. As an intergovernmental organization, it can act within the limits authorized by states, which are the main violators of human rights.¹⁰⁹ In this context, the role of nongovernmental organizations for the protection of human rights is paramount. As independent organizations, normally they are not biased and constrained by states. They do not have to consider foreign policy objectives of states with balancing to human rights protection. Nevertheless, the main activity of NGO’s is lobbying and persuasion as states are not bound by their decisions but quite the contrary sometimes they themselves become target for persecution for their human rights activities.

The 1980s marked the culmination of human rights movement. Human rights became the cornerstone for external relationship of Council of Europe and European Community.¹¹⁰ In 1990s the concern for human rights protection in bilateral relations became even stronger as a matter of foreign policy.¹¹¹

4. Correlations of rule of law and human rights

Having discussed the theoretical aspects of the rule of law and human rights and their interconnection it is necessary to consider the practical steps for their effective implementation in reality. Primarily, to have a rule of law state means putting some limits on governmental authority which should be ‘clearly defined’.¹¹² ‘That limit is man’s inalienable rights’.¹¹³ To achieve this objective the following minimum conditions are:

- ⇒ ‘The recognition and respect of human dignity, the guarantee of man’s fundamental rights and freedoms, and the guarantee of the rule of law,
- ⇒ The separation of powers, the implementation of checks and balances, and the decentralization of political, economic and administrative power
- ⇒ The election of authority and control over the latter
- ⇒ The presence of an independent judiciary

¹⁰⁶ *Id.*, at 9

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*, at 10

¹¹⁰ *Id.*, at 12

¹¹¹ *Id.*

¹¹² Almanac, at 34

¹¹³ *Id.*

⇒ The guarantee of the supremacy and the stability of the constitution'.¹¹⁴

All of these conditions are complementary to each other. Therefore, the failure to secure even one of these conditions will eventually bring to the failure of the whole conception of the rule of law.¹¹⁵ However, the focus of this paper is on human rights and therefore the related features of the rule of law will be considered in so far as they are crucial for implementation of human rights.

First and foremost states are responsible for human rights violations as those violations take place within the states. Therefore, effective protective mechanisms against the abuses by state authorities should be created within the states. However, the international protection system plays a crucial role either by means of pressure or persuasion which obliges states to comply with their international obligations.¹¹⁶ State constitutions are the primary legal basis for human rights protection by incorporating specific provisions on human rights regime. Secondly, the 'international system of norms' promotes human rights through international organizations either universally (e.g. UN) or regionally (Council of Europe).¹¹⁷ In particular, the constitutions reflecting liberal traditions limit the governmental power by distribution of power among the branches of government.

This scheme of checks and balances provides people more protection from governmental abuses through an independent judiciary. The independence of the judiciary is one of the core elements of the rule of law state as it 'becomes the essential guardian of the rule of law' which exercising its power of judicial review secures the legality and legitimacy of the actions of other branches of government in sense that they 'must act within established legal frameworks and according to established processes'.¹¹⁸ However, even an ideal constitution does not make any sense if the government is used to breach norms stipulated therein and people neither understand their rights and nor have confidence that those rights shall be protected. Consequently, a set of conditions are necessary to have a real rule of law state which incorporates civil society with all institutional guarantees.

Additionally, constitutions can serve as a guide but are not tools capable of transforming political and social reality. Indeed, constitutions reflect legal principles and institutions; division and transfer of political power in certain societies.¹¹⁹ However, in practice it is not always the case that constitution-making corresponds to the desire of governments to renovate the system of governance. The reason to create a constitution embodying liberal and democratic ideas is first of all to legitimize their government either at the national or international level and attract foreign aid and investment.¹²⁰ As one commentator states:

'Constitution making, may, thus, constitute a form of political deception, helping cynical and manipulative regimes to pursue policies which are the reverse, or merely a parody, of the principles enshrined in the constitution (this is at least partially the case in Slovakia, Romania and in some of the post-Soviet states)'.¹²¹

4.1. Categories of human rights obligations

¹¹⁴ *Id*

¹¹⁵ *Id*

¹¹⁶ Law and Politics, at 987

¹¹⁷ *Id*, at 988

¹¹⁸ *Id*, at 990

¹¹⁹ *Id*, at 995

¹²⁰ *Id*, at 997

¹²¹ *Id*

The human rights obligations of states can be divided into three categories according to international treaties and state constitutions. Those obligations specifically are: duty to respect, duty to protect and duty to fulfill. Duty to respect is considered to be a negative obligation that means not to actively violate a right. Examples of such obligations include prohibition of torture, no punishment without law, right to life, etc. Conversely, duty to protect and duty to fulfill are positive obligations. The duty to protect incorporates both preventive and remedial functions. The former implies that the state should intervene to prevent violations against the rights of individuals by other private individuals while the latter function connotes that even if a state was unable to intervene for any reason, such as lack of knowledge and ability, it nonetheless should provide remedies after the violations.¹²²

The necessary conditions for fulfillment of this obligation (to prevent) can be achieved, however, through effective implementation of the enacted laws and ‘operational measures’ such as investigation and police protection. The duty to fulfill is basically a social and economic obligation that means to provide certain services or goods to individuals. This obligation also includes adoption of corresponding legislation and creation of institutions for the protection of individual rights. However, this obligation (duty to fulfill) depends significantly on the availability of economic resources of states.

4.2. International human rights treaties

Alongside with state constitutions international human rights treaties constitute an important part of human rights protection regime in the present day world. But, one should consider as to how these instruments affect the national legal systems; in particular, whether they automatically form part of national legal system or they become active only by means of implementing legislation. International law answers these questions as to how and when international treaties become binding and create legal obligations vis-à-vis other member states to the treaties. However, the efficacy of these treaty norms depend mostly on the national legal systems which determine ‘the status and force of law’ of these norms for judges and administrative agencies within the national state when deciding a case at issue.¹²³

Individuals of a member state that ratified the treaty enjoy the rights stipulated in it. Consequently, the judges and governmental authorities should apply those norms and enhance ‘the more limited enforcement system of international law’.¹²⁴ The international legal system, however, enforces these norms ‘indirectly’ as international law requires states to comply with their treaty obligations and thereby harmonize national legislation with ‘their validly contracted international commitments’.¹²⁵ Although a lack of commitment will raise the issue of state responsibility it will do little to change the situation as judges will still apply the national law.¹²⁶

States where the constitution allows for the treaty to automatically become part of legal system of the state upon ratification are called monist systems, whereas the countries that require the norms of the treaty to be enacted into national legislation to become a national law are referred to as dualist systems. However, in the states of automatic incorporation of treaty norms some treaty provisions will not be applied by the courts unless implemented by legislature because

¹²² Case, ECHR, *Osman v. UK*,

¹²³ *Law and Politics*, at 1000

¹²⁴ *Id*

¹²⁵ *Id*

¹²⁶ *Id*

those provisions are not ‘self-executing’.¹²⁷ Indeed, international law does not require states to adopt either of the methods of giving effect to treaty norms. Nevertheless, often the failure of the international community to enforce the treaties based on scarce resources or insufficient mechanisms is to be restored by national judges and administration the effective application of which basically depends on the incorporation of treaty norms in national law.¹²⁸

4.3. European Convention on Human Rights

European Convention on Human Rights (hereinafter referred to as ECHR) is designed to promote the principle of the rule of law in its member states.¹²⁹ The European Court of Human Rights (hereinafter referred to as the Strasbourg Court) was created as a mechanism to implement the convention norms and has stated frequently that: ‘its activity is based on the principle of the rule of law as one of the main principles of democratic society, which is mentioned in the Preamble of the Convention’.¹³⁰ The court in its judgments clearly stated that in civil cases requirements such as access to courts and the enforcement of court decisions are necessary preconditions for the rule of law state.¹³¹ Additionally, effective judicial review of the actions of the executive branch which may intervene in the individuals’ rights and the principle of legal certainty, constitute an indivisible part of the rule of law. The principle of legal certainty assumes not only concreteness of law provisions but also predictability of its consequences. However, legal certainty implies that both laws and court decisions and other law implementing bodies’ acts should conform to these requirements.¹³²

4.3.1 The right to fair trial: The right of access to a court

The right to fair trial is one of the most important rights guaranteed by the Article 6 of ECHR. The Strasbourg Court interpreted Article 6(1) in its famous ruling *Golder v. UK* to guarantee the right of access to a court. In the court’s view ‘any other interpretation would contradict a universally recognized principle of law’.¹³³ The right of access to a court was held to be the key aspect for determining civil rights and obligations. Cases here include not only private but also public matters, such as challenging executive decisions.¹³⁴ The mere existence of law guaranteeing access to courts will not satisfy the requirement of article 6(1). The applicant should be able de facto to exercise their right of access to courts. Even ‘partial and temporary hindrance’ will violate the right of access to court.¹³⁵ The right of access is also violated if it is not effective, e.g. if an indigent applicant is not provided legal aid. The court indicated that even the right of access to court in civil cases in terms of providing legal aid is not the same as in all criminal cases where ‘the interests of justice so require’.¹³⁶

Nonetheless, for the right of access to court to be effective, legal aid is required in those civil cases where the individual is unable to ‘plead his case effectively or where the law makes legal representation compulsory’.¹³⁷ This is not related to such civil cases which lack ‘reasonable

¹²⁷ *Id*

¹²⁸ *Id*

¹²⁹ Almanac, at 105

¹³⁰ *Id*, at 106, see also case *Golder v. UK*

¹³¹ *Id*, at 106

¹³² *Id*

¹³³ DAVID JOHN HARRIS, MICHAEL O’BOYLE, COLIN WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, LONDON/DUBLIN/EDINBURGH 1995, [Hereinafter referred to as Harris], at 196

¹³⁴ *Id*, at 197

¹³⁵ *Id*

¹³⁶ *Id*, at 198

¹³⁷ *Id*

prospect of successes'.¹³⁸ The effective access to the court also presupposes 'personal and reasonable' notice of administrative decision to the person that wishes to challenge it in court. This would be the case when the person cannot challenge the decision interfering in his rights in the court based on expiry of a time for appeal because he was not informed of the decision.

However, the right of access to court can be restricted by states because the right of access 'by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals'.¹³⁹ But the restriction should not impair the object and purpose of this right. In *Asingdane v. UK* the court stressed that the restrictions must pursue 'legitimate aim' in light of the principle of proportionality in terms of 'the means employed and the aim to be achieved'.¹⁴⁰ Indeed, the restriction is allowed both in criminal and non-criminal cases. A person's convicted for a minor criminal offence without a court hearing will not constitute a violation of the right of access to court if the person could have had such hearing if requested.¹⁴¹ Additionally, there will not be a violation where the parties to a contract prefer arbitration and waive their right of access to court.¹⁴²

4.3.2. The right to independent and impartial tribunal established by law

a) *Independent tribunal*. Article 6(1) of ECHR on fair trial presupposes also that cases should be heard by an 'independent and impartial tribunal established by law', which applies to both criminal and civil cases.¹⁴³ 'Independent' within the scope of article 6 means 'independent of the executive and also of the parties'.¹⁴⁴ In this context, the court held that where the national court adopts a Foreign Office's (ministry of foreign affairs) advice on the meaning of a certain treaty norm and applies it as such then it loses its independence as it 'surrendered its judicial function to the executive'.¹⁴⁵ The court in *Cambell and Fell v. UK* clearly stressed the preconditions for independence of a body exercising its judicial function:

'In determining whether a body can be considered to be 'independent'—notably of the executive and of the parties to the case—the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'.¹⁴⁶

Concerning 'the manner of appointment' it is normal when the judges are appointed by the executive.¹⁴⁷ In order to challenge the independence of judiciary with regard to its 'manner of appointment' one should show that it 'as a whole is unsatisfactory' or that 'at least the establishment of the particular court deciding the case was influenced by improper motives' which would be decisive for the outcome of the case.¹⁴⁸ As far as administrative or disciplinary tribunals are concerned 'the duration of their term of office' could be very short.¹⁴⁹ With regard to 'guarantees against outside pressures', judges should be afforded protection either by law or in

¹³⁸ *Id*

¹³⁹ *Colder v. UK* A 93 para 57(1985)

¹⁴⁰ *Asingdane v. UK* A 93 para 57 (1985)

¹⁴¹ *Id*, at 201

¹⁴² *Deweere v. Belgium*

¹⁴³ *Harris*, at 230

¹⁴⁴ *Ringeisen v. Austria* A 13 para 95 (1971)

¹⁴⁵ *Beeumartin v. France* A 96-B para 38 (1994)

¹⁴⁶ *Harris*, at 232

¹⁴⁷ *Id*

¹⁴⁸ *Id*

¹⁴⁹ *Id*

practice they will not be removed during their term of office.¹⁵⁰ For the observance of this condition, the judges should not be instructed by the executive. Here also, only the practice of being not instructed is enough without further requirement that it be prescribed by law.¹⁵¹

The next condition of ‘appearance of independence’ was determined by the objective test developed through case law. The Court would find the violation of this condition e.g. when a civil servant serving in the tribunal should judge on the matter when one of the parties to the case is the immediate superior (of the civil servant) that represents the interests of the government in the case. Even in the absence of any authority of the superior to give instructions to that member of the tribunal it would raise a ‘legitimate doubt’ concerning that tribunal’s member’s independence of one of the parties.¹⁵²

b) *An impartial tribunal*. The relation between ‘independent’ and ‘impartial’ tribunal is very close.¹⁵³ A tribunal cannot be impartial if it is not independent of the executive. The same applies to a member of a tribunal. The court defined ‘impartiality’ as lack of ‘prejudice or bias.’¹⁵⁴ However, the court created a two-fold test—subjective and objective—to conform to the requirements of impartiality:

‘The existence of impartiality for the purpose of Article 6(1) must be determined according to a subjective test, that is on the basis of a personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect’.¹⁵⁵

The subjective test here means to prove that the judge ‘acted with personal bias’ against the applicant.¹⁵⁶ The presumption, however, is that the judge is impartial unless proved otherwise. Therefore, to satisfy the subjective test one cannot argue ‘legitimate doubt’ but must ‘prove actual bias’.¹⁵⁷ Indeed, it is extremely difficult to meet the subjective test and so far no breach of subjective test has been found.

The objective test resembles the English law doctrine ‘justice must not only be done: it must be seen to be done’.¹⁵⁸ Public should be confident in the administration of justice. The opinion of the party challenging impartiality is ‘important but not decisive’. In applying the objective test it is important that ‘doubt as to impartiality can be objectively justified’.¹⁵⁹ The judge should withdraw from the case when there is a ‘legitimate doubt’ as to his impartiality.¹⁶⁰ If a trial judge had participated in the proceedings at the pre-trial stage ‘in a variety of different capacities’ (e.g. a judge may have been investigator or prosecutor at that time) the objective test would apply in such cases.¹⁶¹

4.4 Enforcement

¹⁵⁰ *Id*

¹⁵¹ *Id*, at 233

¹⁵² *Id*

¹⁵³ *Id*, at 234

¹⁵⁴ *Id*

¹⁵⁵ *Id*

¹⁵⁶ *Id*, at 235

¹⁵⁷ Harris, at 235

¹⁵⁸ *Id*

¹⁵⁹ *Id*

¹⁶⁰ *Id*

¹⁶¹ *Id*, at 236

Enforcement of rights constitutes the very essence of the rule of law state. In order not to be classified as ‘lofty declarations of intent’ both states and the international community must create effective mechanisms for the realization of human rights. It should be mentioned, however, that enforcement is crucial not only for human rights but also for any law as a requirement of the rule of law state. Indeed enforcement of human rights has become a state obligation under international law. The domestic enforcement of human rights can be divided into four categories: function of ending violation, remedial function, a punitive function and preventive function.¹⁶² The means for realizing these functions are left to the discretion of states. However, the states are bound under international law to fulfill the following minimum conditions:

- ‘To allow individuals to invoke human rights at the domestic level (duty to incorporate) and to seek an effective domestic legal remedy in the event of violations (duty to provide a legal remedy)
- to investigate alleged violations (duty to investigate) and in certain cases of particularly serious violations to punish the perpetrators (duty to punish);
- To compensate or rehabilitate victims of violations (duty to compensate); and
- To prevent future violations (duty to prevent).’¹⁶³

Concerning the enforcement of the duty to provide effective remedy, Article 13 of ECHR and Article 2(3) of ICCPR oblige states to provide remedies to individuals whose rights have been violated. Consequently, individuals are empowered by the main human rights treaties to challenge the decisions of governmental bodies that violate their rights. But, under general international law there is no such obligation on states that individuals can directly invoke human rights treaties before national authorities.¹⁶⁴ Individuals can invoke directly treaty provisions if treaty provisions are self-executing and the state belongs to a monist system. Indeed, individuals shall invoke at the national level those rights that are incorporated in state constitutions and other legislation. However, ‘the lack of effective remedies or the denial of access to existing remedies is in itself a violation of human rights’.¹⁶⁵ The remedy will be effective if either the judicial or administrative body reviewing the challenged decision has sufficient independence from the body that made the decision and enough authority to quash that decision.¹⁶⁶ In its judgment *Jabari v. Turkey* the Strasbourg Court indicated that ‘the notion of effective remedy under Article 13 requires independent and rigorous scrutiny of a claim’.¹⁶⁷

Regarding the enforcement of the duty to investigate and punish the case law of the Strasbourg Court provides sufficient basis to conclude that state authorities are under a duty to investigate and punish those responsible for at least such fundamental human rights violations as torture, right to life and enforced disappearance of persons.¹⁶⁸ The Strasbourg Court has interpreted Article 2 (right to life) so as to attach to it procedural requirement that when state authorities become aware of a killing of an individual by whoever and whatever circumstances it gives rise ‘ipso facto to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death’.¹⁶⁹ This requirement (to investigate) is imposed on states also by the Convention against Torture (CAT).¹⁷⁰

¹⁶² WALTER KALIN AND JORG KUNZLI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS, [Hereinafter referred to as Enforcement], at 31

¹⁶³ *Id.*, at 32

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*, at 33

¹⁶⁶ *Id.*

¹⁶⁷ ECtHR, *Jabari v. Turkey*, Reports 2000-VIII

¹⁶⁸ Enforcement, at 33

¹⁶⁹ ECtHR, *Ergi v. Turkey*, Reports 1998-IV, para. 82

¹⁷⁰ Art. 12, CAT

As far as the enforcement of duty to compensate is concerned most of human rights treaties require states to provide reparation.¹⁷¹ The case law of the Strasbourg Court also compels state parties to provide reparation to those ‘who have successfully asserted a claim’.¹⁷² The last important aspect of enforcement is the duty of state authorities to prevent violations that are imposed by a few treaty provisions, such as Article 2 of CAT and Article 2(c) of the Convention Against Racial Discrimination.

5. Constitutional review

After WWII the constitutional review of legislative and executive action in all continents of the world in one form or another significantly increased. This form of control over governmental power was exercised mostly in countries with liberal constitutions which embodied a set of fundamental rights. Constitutional review was introduced especially in those countries where a ‘special procedure’ was required for constitutional amendment instead of ‘ordinary legislative process’.¹⁷³

Constitutional control of legislative action can be done, however, not necessarily by judicial bodies (e.g. French *Conseil Constitutionnel*). Indeed, judicial review of legislation and executive action will fall to one of two general models—either the ‘Austrian’ or the ‘American’. It is also possible to have a system of judicial review that is a hybrid or combination of these models. Under the ‘Austrian’ model it is the special constitutional court that is authorized to decide the conformity of legislation with the constitution where the review will be both *a priori* and *a posteriori*. Whereas under the ‘American’ model, the review (it is only *a posteriori* here) is done by Supreme Court.¹⁷⁴

Constitutional review is seen as a ‘necessary mechanism to check and sanction any violation of the enactments of the legislative body’. In countries where the constitutions ‘acknowledge human rights as the supreme values of the society’ which can be effectively protected through ‘specific guarantees,’ one important aspect is citizen access to the judicial power to rehabilitate their rights when they are violated by state authorities. However, the judicial review of statutes raises the question of the legitimacy of the judicial power to review the legislation adopted by the democratically elected parliament. The proponents of judicial review support their position by the notion of constitutional supremacy. Since ‘the judiciary has considerable experience in applying law’ they argue that it should be left to the courts to protect the norms of ‘higher law’.¹⁷⁵

Whereas, the opponents of judicial review counter that, according to the principle of separation of power, no power should be above another. All three branches of government should have equal power to ‘examine and interpret according to its own lights’.¹⁷⁷ According to this view the most dangerous aspect inherent in constitutional review is that ‘laws may be subject to political considerations’.¹⁷⁸ But the argument of Alexander Hamilton rebutting those who would not accept constitutional review is strong:

‘The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance

¹⁷¹ Art. 14, CAT

¹⁷² Enforcement, at 34

¹⁷³ Comparative legal traditions, at 74

¹⁷⁴ *Id.*, at 76

¹⁷⁵ Almanac, at 89

¹⁷⁶ CRISTIAN STARCK, THE LEGITIMACY OF CONSTITUTIONAL ADJUDICATION AND DEMOCRACY: THE GERMAN CONTRIBUTIONS TO THE FIFTH WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW, [Hereinafter referred to as Starck], (BADEN-BADEN 1999), at 16

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents'.¹⁷⁹

The opponents of judicial review may also argue that constitutions often incorporate norms that are not clearly formulated but resemble 'programmatically purposes' (e.g. the direction of a state towards the well-fare state). In this situation judges should avoid reviewing constitutional provisions which are not sufficiently clear. Starck states that: 'Eloquently vague programs and proclamations can cause considerable harm if judges hold the legislature bound to them as to positive law'.¹⁸⁰ One argument against the constitutional review might be that 'parliament will lose its legislative discretion to shape the legal order' in the sense that the legislature will always be restricted to strictly follow the constitution. Logically, the statute will not always be complete or perfect which accordingly will need improvement through judicial review. 'The narrower-meshed the Court makes the net of constitutional postulates and requirements, the more it restricts the legislature's possibilities of action and cripples its political imagination'.¹⁸¹ In this context, 'the statutory text then will lose its reliability, its independence and its authority'.¹⁸²

Nevertheless, the constitution should not be interpreted in a way to restrict legislature's political discretion though this is not related to fundamental human rights which clearly put limits on governmental power.¹⁸³ Even though the arguments against judicial review are strong enough, the legitimacy of this institution is beyond any doubt. Logically, any law contradicting the 'higher law' should be void. There is also the argument that judicial review of legislation conflicts with the principle of direct democracy in the sense that the rule adopted by the majority is quashed by some appointed judges. Grimm says: 'the democratic principle requires that only those who can be held accountable through the vote may decide'.¹⁸⁴ However, democracy requires that not only the majority's interests, but also those of the minority be protected. Moreover, the interests of individuals, whose rights are engrained in the constitution, also suggest that judicial review is an important mechanism for effective implementation and enforcement of their rights. Indeed, the 'anti-democratic' argument of judicial review is completely defeated by the fact that all non-democratic governments 'invariably suppress the institution of judicial review'.¹⁸⁵

Finally, it is argued that the constitutional court promotes the development of civil society through judicial review since individuals have to know their constitutional rights in order to 'defend them against infringements of the state'.¹⁸⁶ Here not only court decisions or governmental decrees should be subject to review but also laws, 'since no act or court decision can be constitutional when the underlying law is unconstitutional'.¹⁸⁷ Judicial review was one of the methods the judiciary checked the other 2 branches and that it is an essential aspect of the check and balance system. Walter Kalin affirms that:

¹⁷⁹ *Id*

¹⁸⁰ *Id*, at 18

¹⁸¹ JUTTA LIMBACH, THE ROLE OF THE FEDERAL CONSTITUTIONAL COURT, CONFERENCE REPORT, [Hereinafter referred to as Jutta Limbach], at 27

¹⁸² *Id*, at 19

¹⁸³ *Id*

¹⁸⁴ *Id*, at 27

¹⁸⁵ Comparative legal traditions, at 75

¹⁸⁶ Jutta Limbach, at 29

¹⁸⁷ *Id*, at 30

‘Constitutional review allows for institutionalizing the continuous adjustment and fine-tuning of the normative content of fundamental rights. In the absence of such a possibility, a democracy may degenerate into a dictatorship of the majority’.¹⁸⁸

It is of particular interest the experience of the German Constitutional Court. In Germany the constitutional court will accept a complaint for review if it is of ‘fundamental constitutional importance’, if the violation of the right is of ‘special severity,’ or ‘if the complaint would suffer particularly severe detriment’ in the case of failure to decide it.¹⁸⁹ The German Constitutional Court’s role is crucial for the development of fundamental rights which in turn promotes the ‘free, democratic rule-of-law state’.¹⁹⁰ Jutta Limbach states ‘citizens have understood that they are called to be the guardians over the Constitution by way of the right to file a complaint’.¹⁹¹ In the *Luth* decision the court articulated the so-called radiating effect of fundamental rights, further developing the protective duty of a state ‘to protect human rights against threats from private individuals or groups’. Thus, the court concluded that fundamental rights are not only rights against the state but also an objective principle which ‘spreads to all sections of the law’.¹⁹²

Albeit the explicit privileges of judicial review, it is not a *per se* precondition for a rule of law state unless there are alternatives for it. The experience of Switzerland is a vivid example to prove this point. In Switzerland, the initiative and referendum are seen as alternatives for judicial review:¹⁹³ when the law seems to not be so good, or when social changes create a need to revise the law, people can initiate a referendum to change that law, and in so doing the need for judicial review terminates here. Additionally, the Swiss constitution is drafted very comprehensively and with great detail. Conversely, ‘where a constitution has very broad and general formulations and where the hurdle to amend or change is very high, the opportunities for judicial activism are enhanced’.¹⁹⁴ Thus, though judicial review be desired it is not a necessary element of rule of law state if some alternatives for it such as an easy procedure for amendment and clear or detailed constitutional provisions exist.

6. Conclusion

Although there is no unanimous agreement about the content of the rule of law and human rights in the academic opinion there are some elements that are mandatory for the existence of these notions. Indeed, rule of law connotes the idea of law in its higher sense meaning that not only some external qualities such as stability or generality of law must be observed. But the content of law itself is determining factor because a state with ‘bad’ laws e.g. imposing the values of one social group on the other or discriminating against another groups will not be considered as truly rule-of-law state. However, the idea that the law should conform to the fundamentals of social justice does not necessarily mean that law should pursue certain social goals. Its content must be limited to facilitating and accommodating of social relationship rather than directing society toward certain direction.

Even if both the rule of law and human rights are independent theories they are interconnected and in practice they cannot survive without each other. There can be no rule-of-law state where fundamental rights are systematically violated e.g. torture or appropriation of property of individuals without due process etc. (it would be illusion to say that there is a state where no

¹⁸⁸ WALTER KALIN, CHRISTINE ROTHMAYER, THE JUDICIAL SYSTEM, HANDBOOK OF SWISS POLITICS, [Hereinafter referred to as Kalin], (ZURICH 2004), at 186

¹⁸⁹ Jutta Limbach

¹⁹⁰ *Id.*, at 30

¹⁹¹ *Id.*, at 30

¹⁹² *Id.*, at 21

¹⁹³ Kalin, at 184

¹⁹⁴ *Id.*

violation of human rights occur). And conversely the human rights cannot be protected without having proper distribution of power among the branches of government, a government based on democratic and liberal principles whose actions are in harmony with the principle of legality; existence of independent and impartial judiciary, effective enforcement of legal acts which are indivisible elements of the rule of law principle.

Though Institutional design significantly facilitates the promotion of the rule of law and human rights in many constitutional states it is not to say that it is a requisite element of the rule of law state. A state without constitution can really be classified as the rule of law state e.g. the UK. Conversely, states having adopted very liberal constitutions engraining all elements of the rule of law including protection of fundamental rights are far from being rule of law states. In practice those states have very poor record of human rights. It is the substance but not formality that counts for the theory of the rule of law.

Neither, the existence of constitutional review is precondition of the rule of law state. Even though the legality and efficacy of this institution is beyond any doubt it is not mandatory for the rule of law state. Indeed, the experience of constitutional courts of many states such as Germany show that the judicial review play a vital role for effective protection of fundamental human rights. But the experience e.g. of Switzerland exhibits that there can be a rule of law state without constitutional review subject to the following conditions: firstly, there should be an easy mechanism for constitutional review through referendum and secondly the constitution here preferably should be drafted in a more detail without general formulations exposed to further clarifications.

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