LEGAL STATE

Legal state is currently considered one of the supporting ideas many states try to follow. Together with democracy it often creates an axiomatic couple which can be found incorporated also in several constitutions as a fundamental constitutional standard. For example, Slovak Constitution of 1992 states in Article 1 (1): *"The Slovak Republic is a sovereign, democratic and legal state."* [57] But what does the term of legal state include?

5.1 Historical Genesis of the Idea of Legal State

The idea of a legal state dates back to Ancient Greece.[58] Law there was considered to be a part of harmony, natural order of the universe. It should rule above all and everything, even over the rulers. According to the opinion of **Plato** (427 – 347 BC) in his work Laws, law was an *unlimited master over rulers and rulers were only obedient servants of law.*[59] Formulation of the idea of legal state is obvious also it the works of **Aristotle** (384 – 322 BC) when he asserts that the rule of people introduces also an instinctive element into power, whereas he considers law as sublime product of reason. He further states in Nicomachean Ethics: *thus let us not allow a man but law to rule, because man rules for his own benefit and becomes a tyrant.*[60]

But it took the idea of legal state a very long period to transform from this plane of outlined thought ideal into reality. Actually, the idea of legal state was forced out in the Middle Ages by the preference of a stronger centralized state, defended in the constitutional thinking mainly by Jean Bodin (1530 – 1596) and Thomas Hobbes (1588 – 1679).

5.1.1 Rule of Law

Creation and development of the idea of legal state occurs only from the period of bourgeois revolutions and construction of democratic constitutionalism in England.[61] The quote of the English lawyer Sir Edward Coke (1552 - 1634) who in the dispute with English king defended his opinion that **not the king protects the law, but law protects the king**, is quite often cited in this regard.[62]

However, only the English Bill of Right of 1689 means a breach in a constitutional form into the then valid principle *princeps legibus solutus* (the ruler is not bound by the laws) which enables the arbitrariness of the ruler, his position above the law. The *Bill of Rights* set out lawful limits of ruler's authority. It defined them by the principle of *debet rex esse sub lege* as obligations established by law against the society and not as a matter of good will, as was the custom so far. This important constitutional document **thus places the law above the English king** and is considered to be the foundation of the Anglo-American concept of legal state (***rule of law***).[63]

But the Anglo-American doctrine of *rule of law* crystallizes in England only later – in the 18th and the 19th century. Its formation is related mainly with the name of important English constitutional theorist **Albert V. Dicey** (1835 – 1922). In his *An Introduction to the Study of the Law of the Constitution* he states three basic tenets of the *rule of law*:

1. No man can be punished except for direct breaches of law which was proved in due trial.
2. No man can be put above the law and all are equal before the law regardless their social, economic or political status.
3. Rule of law also includes result of judicial decisions determining the rights of private persons.[64]

5.1.2 Rechtsstaat

Elaboration of the legal state concept in Europe does not come until the German liberalism at the end of the 18th and in the first half of the 19th century.[65] **Immanuel Kant** (1724 – 1804) is considered the ideological father of the legal state (***Rechtsstaat***) theory. Although he formally does not use the term legal state yet, the modern theory of legal state in fact derives just from him. Kant saw the state's role only in creating a regime of lawfulness, thus in creation of system of valid law and ensuring its observance by all and everyone. Only so can the state ensure free development of individuals but also the development of the just state itself.[66]

The ideas of legal states were elaborated in the 19th century Germany mainly by lawyers **Robert von Mohl** (1799 – 1875)[67] and **Otto Bähr** (1817 – 1895).[68] They apprehended the legal state as necessary defence against too strong power: state that has power to efficiently protect its citizens is powerful enough also to oppress them. Their theories situate legal state **into contraposition to police state.** Both emphasise the idea that the state authorities are bound by law and that the state can interfere with the lives of individuals only on the grounds of constitution and laws.

Also the often cited quote of **Friedrich Julius Stahl** (1802 – 1861), according to which the legal state should *"precisely and irrevocably establish both tracks and boundaries of its jurisdiction, as well as the scope of freedom of its citizens and it should not execute and directly impose moral ideas of state's paths outside law"*, must be mentioned in this context.[69]

In 1871, after the creation of the second German Empire, the perception of legal state takes a turn. Its liberal variant was suppressed and the conservative mode, promoting state power's dominance over law, got gradually asserted. It was represented by authors, starting with **Karl Friedrich von Gerber** (1823 – 1891), through **Paul Laband** (1838 – 1918) to **Georg Jellinek** (1851 – 1911).[70]

The development in Germany between two world wars significantly affected other theoretical perceptions of legal state. One of the questions arising in this regard is

whether the Third Reich (1933 - 1945) was a legal state. Basically the issue is whether there is connection between that state and Weimar Republic. On January 30, 1933, *Hitler* was appointed the Chancellor of Germany under the Weimar constitution. On February 28, 1993, he convinced the old president *Hindenburg* that Germany is on the threshold of state of emergency, underlined by the fire in Reichstag on the previous day. *Hindenburg*, using his constitutional authority, issued the "Decree of the Reich President for the Protection of People and State". Significant parts of Weimar constitution concerning fundamental freedoms thus lost its force and persecution of political opposition became possible. Such deprivation of force of fundamental rights by declaring the state of emergency was "temporarily" admissible under article 48 of Weimar constitution.

Persecution of political opponents (mainly communists), which had the impression of legality, began to be directed also against the members of Reichstag after Reichstag elections on March 5, 1933. (Hitler got more than 40% of votes but not majority.) The political opponent was thus successfully decimated and intimidated. So the decisive action could come from the top. On March 23, 1993, the Reichstag adopted the "Law to Remedy the Distress of People and Reich" *(Gesetz zur Behebung der Not von Volk und Reich)*. This law eliminated the constitution with dry formulations. Article 1 stipulated: *"Laws of the Reich may also be enacted by the government of the Reich"*. Article 2 stipulated: *"Laws enacted by the government of the Reich may deviate from the constitution of the Reich."* This law became effective through it declaration on March 24, 1933 and should be effective until April 1, 1937.

But Hitler renewed his power every four years until the end of Third Reich. Therefore, voting in 1933 - 1945 can be hardly questioned. Some theorists consider Hitler's dictatorship constitutional from technical point of view as well as from narrowly positivistic point of view. Legislature and courts continue to operate despite the fact that the law was brutally manipulated during the whole period to serve narrow interests of the party.[71]

Before Hitler's rise to power the Austrian legal scholar Hans Kelsen (1881 – 1973) came with the idea of distinguishing between the legal state in formal and material sense. According to him the **legal state in formal sense** is every state governed by law regardless of its content. On the other hand, the **legal state in material sense** is every state whose laws contain "legal institutions, such as democratic legislature, binding force of executive acts of the head of state in connection with countersignature by respective minister, civil rights of subjects, independence of courts, administrative judicial system, etc."[72]

This distinction gained importance in the context of described development and it was also reformulated. The event of World War II showed how important it is with

regard to state's existence to pay attention to value foundations of content of laws. Naturally, a basic requirement was to **ensure respect for human rights.** Many authors still consider that as key part of *legal state in material sense.*[73] Understanding was changed also in case of *legal state in formal sense*: state that recognizes as crucial the separation of powers, independence of judiciary, legality of public administration, legal protection against public acts and public law redress, is considered a legal state in formal sense.[74]

5.2 Principles of Legal State

Although there is no exact definition of basic, immanent features of legal state in legal theory and individual feature cannot even be strictly separated from each other, it is possible to set apart as most important mainly the following:

1. limited government principle,
2. principle of constitutionality and legality,
3. separation and control of powers,
4. safeguards of fundamental rights and freedoms,
5. legal certainty,
6. independence of judiciary.

5.2.1 Limited Government Principle

The principle of limited government is derived from Anglo-American rule of *limited government,*[75] which is understood in broader sense than just a requirement for limiting the activity of government or the executive power. (Self)limitation of power as a whole, all its elements (including legislative power) is required to make it function to the benefit of citizens.

A legal state in this sense is such state which **establishes binding limits of its power interference** into citizens' life **for itself through law.** The regulation (constitu-

[73] For example, see GAMPER, A.: *Staat und Verfassung. Einführung in die Allgemeine Staatslehre.* Wien : Facultas.wuv, 2010, p. 231 et seq.

[74] See SCHMIDT-AßMANN, E.: *Der Rechtsstaat.* In: ISENSEE, J. – KIRCHHOF, P. (Hrsg.): *Handbuch des Staatsrecht füt Bundesrepublik Deutschland.* Band 2. Heidelberg : Müller, 2004, p. 541 et seq.

[75] For details see SAMPLES, J. (ed.): *James Madison and the future of limited government.* Washington, D.C. : Cato Institutite, 2002.

tional or legal) defining the scope of state's activity at the same time must be explicit to prevent development of arbitrariness and to check the natural expansiveness of state power.

Law is not given to the state in advance; it can create, change and abolish it. The state itself thus decides how and to what extent it will limit its power. In this way it provides individuals and society with security, predictability of power interferences, mainly state coercion and finally it leads to limitation of the use of force.

State power limitation with regard to citizens is usually incorporated in **constitutions of democratic states** in such way that citizens are allowed to do everything that is not prohibited by law, whereas the public authorities can act only on the grounds of the constitution, within its limits and scope and in the way defined by law (see Article 2 (2) and (3) of the Constitution of the Slovak Republic).

5.2.2 Principle of Constitutionality and Legality

The principle of constitutionality and legality is considered a cornerstone principle of a legal state. Quite often the understanding of a legal state, which is usually called a **legal state in formal sense** in contemporary theories, is narrowed down to this principle.[76]

Constitutionality in *formal sense* means the requirement for strict observation of constitution and compliance of laws and subordinate legislation, exercise of power as well as rights and obligations with the constitution. Constitutionality in *material sense* is the right for constitutional guarantee of fundamental rights and freedoms, as right to constitution.

Legality means that law is generally binding and all subjects of laws have unconditional legal obligation to observe law in force. Therefore, in a democratic society the requirement to observe law shall be applied also to state authorities, including those creating the law. Even the parliament as the supreme representative of state's sovereignty, legitimized by elections, must observe constitution and procedural regulations created by itself in the process of creating and changing laws.

This requirement is formulated as the **principle of state authorities bound by valid laws.** Even though state authorities create law, as if it emancipated after it creation from its creator and binds him equally as other subjects. Certain independence,

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[76] For details see GAMPER, A.: *Staat und Verfassung. Einführung in die Allgemeine Staatslehre.* Wien : Facultas.wuv, 2010, p. 229-230.

separation of the life of law from the states shows also in that the legal standard lasts even after the body it adopted changes or ceases to exist.

State authorities shall be bound by strict legal rules also when exercising coercion. Thus they cannot wilfully exercise any coercion but only such that is executed in cases defined by law in advance and in a way described by law. Law protects in this way the scope of freedom which cannot be interfered with by any coercion not substantiated by law.

5.2.3 Principle of Division and Control of Powers

One of the oldest and still current questions concerning the exercise of power is: how to prevent concentration and abuse of power and how to efficiently control power or its exercise?[77]

Answers can be found already with several ancient authors. For example, **Aristotle** in the Athenian constitution distinguishes between making resolutions, commanding and judging. **Polybius** even proposes to divide the supreme power and to have individual powers separated and balanced to such extent so as *"no one would dominate the others and diverge but that all remained in balance as on scales, so that conflicting powers were overcome and the constitutional state be maintained for a long time."*[78]

The idea of separation of powers becomes particularly attractive only under the influence of experience with absolutist monarchy where the concentration of unrestrained, unchecked power in the hands of a ruler offers real opportunity for its abuse. Here, in the 17th and the 18th century, the concept of separation of powers, connected with the names of John Locke and Charles Montesquieu, was born. It is the result of their deliberations on how to institutionally prevent the abuse of power of unrestrained state authority, either made up by an individual or a certain group, or thus provide freedom of individuals and the society.[79]

According to **John Locke** (1632 – 1704), power should be divided to **legislative**, **executive** and **federative**. The highest of them, although not unlimited, should be the *legislative* power. As he writes, the legislative power has *"the right to decide how the state power should be used to maintain the community and its members"*.[80] The legislative power determines the rules of functioning of executive and federative power

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77 BRÖSTL, A.: *Právny štát: pojmy, teórie, princípy.* Košice : Medes, 1995, p. 53

78 ZIPPELIUS, R.: *Allgemeine Staatslehre.* München : C. H. Beck, 2003, p. 323.

79 OTTOVÁ, E.: *Teória práva.* Šamorín : Heuréka, 2006, pp. 73-74

80 LOCKE, J.: *Dvě pojednání o vládě.* Prague: ČSAV, 1965, p. 208.

through laws. In Locke's theory the judicial power is a part of *executive power.* Its role should be in constant execution of laws and control of their observance. *Federative power* should defend the interests of citizens against foreign countries. It should solve disputes between anyone from the society and those outside of it.

Charles de Secondat Montesquieu (1689 – 1755) followed the ideas of John Locke. As he writes *"each state possesses three types of power: legislative power, executive power that governs the issues of international law and executive power that governs issues of civil law. Through the first one the sovereign or an institution issues laws, permanently or temporarily and corrects or abolishes those already issued. Through the second one he concludes peace and wages war, delegates or accepted ambassadors, establishes security, anticipates the enemy attacks. Through the third one he punishes crimes or tries the disputes of individuals. Let's call the last one the judicial power; and second simply the executive power of the state."*[81]

The essence of separation of powers theory is to ensure balance of all three powers. Only when no power has dominant position, the powers can effectively control each other, inhibit its expansion. However, this principle was finished only by American constitution theorists. Requirement for its exertion are the principles, elaborated by Locke and Montesquieu, of already mentioned separation of legislative, executive and judicial power, their independence, mutual unaccountability and incompatibility.[82]

Principles of Separation of Powers

The principles of separation of powers are:

- separation of powers and division of powers to three,
- their independence,
- incompatibility of powers,
- mutual unaccountability and non-subordination of powers,
- balance of all three powers, their mutual cooperation or competition through the mechanism of mutual control, checks and balances - mutual balancing of powers.[83]

The **principle of mutual independence** of individual powers is represented by the independence of individual powers with regard to their creation (so-called creation independence). It means that ***one power should not create another*** (e.g. the president of the USA as a representative of executive power is not elected by the par-

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[81] MONTESQUIEU, Ch. S.: *Duch zákonov.* Bratislava : Tatran, 1989, p. 206.

[82] For details see GAMPER, A.: *Staat und Verfassung. Einführung in die Allgemeine Staatslehre.* Wien : Facultas.wuv, 2010, pp. 163-164.

[83] OTTOVÁ, E.: *Teória práva.* Šamorín : Heuréka, 2006, p. 76.

liament but by people through electors and a member of any house of parliament cannot become an elector). As opposed to *parliamentary system* with its constitutional and political accountability of the government to the parliament, such accountability cannot be applied within the separation of powers system in the *presidential republic.* Individual powers are therefore mutually politically unaccountable and are not subordinated to each other.

Powers are **incompatible** to be held in the hands of one state official. He can exercise his office only within one element of power. For example, the member of government cannot be a member of parliament or judge during his term.

Separation, independence, unaccountability and **incompatibility** of legislative, executive and judicial power are in term of separation of powers theory, however, not safeguard against the possibility of wilful abuse of power within individual powers. They do not eliminate the possibility of any of power gaining dominance, its own uncontrollability and control over other powers. Therefore, the most important principle of the system of separation of powers is the mechanism of **mutual control, checks and balances.** Hence constant tension should be between individual powers, whole network of control mechanism, ensuring that no power has the chance to significantly tip the scales to its side at the expense of other powers for a longer period.

This relativizes the Montesquieu's principle of separation of powers. This means that even though the highest representatives of individual powers (president, parliament, judiciary) are still separated, independent and individual bodies, at the same time each of them should act as a check and balancing agent against the other two. None of the powers thus can adopt a final decision without certain form of cooperation (control, consent or eventually support) with a body of another power.

Consistent application of separation of powers theory is constitutionally incorporated in the presidential form of government of the United States of America. Continuously it spread with certain modifications into countries of South America, East Asia and former Soviet Union. In continental Europe the prevailing system of democratic states is the parliamentarianism with characteristically dominant position of parliament. In spite of that the distinctive elements of the separation of powers are gradually exerting in constitutions of European parliamentary states (including the Slovak Republic).

Vertical Separation of Powers

The power in state is separated, apart from horizontal separation (i.e. at the level of highest state authorities), also vertically - between central (national) and local au-

thorities. Vertical division of power in state depends on the vastness of territories of modern states, which cannot be efficiently controlled from one centre. At the same time, territorial scope and scope of jurisdiction of individual territorial units of the state can be different (for details see chapter Internal Structure of the State).

Internal Separation of Powers

The term internal separation of powers is also used in theory and practice. It is separation and mutual balancing of power within one state authority. For example, the system of two chambers (the House of Representatives and the Senate) within the parliament of the USA, where the law to be adopted must win competent majority in both houses of Congress (for details see the subchapter on Parliament).

Control Power

In today representative democracies, where the people are represented in the decision-making processes mainly by their elected representatives who often represent rather the interests of political parties or their own interests and not the public interest, the existence of **fourth element of power – control**, is needed more and more. Today, control is considered by many theorists as the highest value of democracy.

5.2.4 Safeguards of Fundamental Rights and Freedoms

The priority of rights and freedoms of citizens and society against the state is specific for the legal state. Human rights and freedom are the most important subjective rights that are today guaranteed internationally and constitutionally.[84] However, such guarantees were not common in the past: international safeguarding mechanisms of respecting human rights appear within the Western civilisation area only after World War II, in states of former Soviet bloc only after the fall of individual totalitarian regimes.

Several generations of human rights are distinguished under one of the most gen-

[84] For details see , e.g. JANKUV, J.: *Medzinárodné a európske mechanizmy ochrany ľudských práv.* Bratislava : Iura edition, 2006; STRÁŽNICKÁ, V. a kol.: *Medzinárodná a európska ochrana ľudských práv.* Bratislava : Eurokódex, 2013.

eral classification:[85] **First generation** of human rights is represented mainly by personal freedom, civil and political rights. They are rights that should protect individual area of citizens' freedom mainly against the state and to ensure equality of all before the law.

On the European continent, the human rights of first generation were born in the fight of bourgeois against the institutional structure of feudal society, in the North America in the process of revolutionary movement for political independence from the British Empire. These movements produced documents which formally recognized human rights of individuals as natural result of their human essence. The milestones of evolution in this regard are considered to be the French ***Declaration of the Rights of Man and of the Citizen*** of 1789 and the United States ***Bill of Rights*** of 1791 (composed of the first ten amendments to the Constitution of the United States of 1787).

Today, the first-generation human rights are regulated mainly by United Nations international documents, specifically in the **Universal Declaration of Human Rights** of 1948 and the International **Covenant on Civil and Political Rights** of 1966. In the Constitution of the Slovak Republic, the fundamental human rights and freedoms (personal rights) are incorporated in Articles 14 to 25 and political rights in Articles 26 – 32.

The first-generation human rights comprise mainly of these rights:

a) **Civil Rights**

- right to life,
- right to inviolability of person and its privacy,
- right to personal freedom and prohibition of forced labour and services,
- right to protection of human dignity, personal honour, reputation and protection of name,
- right to privacy,
- right to ownership,
- right to inviolability of home,
- right to privacy of correspondence, secrecy of mailed messages and other document and protection of personal data,
- freedom of movement and residence,
- freedom of thought, conscience, religion and faith,

[85] It is said that the first to come with classification of human rights to generations was the Czechoslovak-French lawyer Karel Vašák. His classification into generations reflects the principles of the French Revolution: freedom, equality, brotherhood. See VASAK, K.: *Human rights: s thirty-year struggle: the sustained efforts to give force of law to the Universal Declaration of Human Rights.* UNESCO Courier 30:11, Paris : UNESCO, 1977.

- right to fair trial,

b) **Political Rights**

- freedom of expression,
- right to information,
- right to petition,
- right to assembly,
- right to organise,
- right to vote,
- right to resistance.

Unlike with the first-generation rights and freedoms connected with the state's obligation not to interfere with defined space of individual freedom, in case of the **second-generation rights** the activity of state is expected. It is the so-called positive obligation, based on which the state should adopt measures which enable exercise of these rights.

The second-generation rights include:

a) **Economic Rights**

- right to free choice of profession.
- right to engage in entrepreneurial or other profitable activity,
- right to work,
- right to equitable and adequate working conditions,
- right to freely associate with others in order to protect their economic and social interests,
- right to strike,
- right of women, minors, and disabled persons to an enhanced protection of their health at work as well as to special working conditions,

b) **Social Rights**

- right to adequate material provision in old age, in the event of work disability, as well as after losing the provider,
- right to protection of health,
- right to special protection of marriage, parenthood and family,

c) **Cultural Rights**

- right to education,
- right to freedom in scientific research and in art; right to legal protection of creative intellectual activity.

The origin of second generation of human rights was related to industrial revolution, when the excessive use of cheap labour of workers, who worked often in inhumane conditions, was quite common. Bourgeois freedoms were just an empty clause for them and for other people living on the poverty line. The second generation of human rights thus emphasises humanely respectable conditions and social environment, social guarantees of human rights equality.

The development of rights of the second generation is characteristic mainly for the period after World War II. Important international documents incorporating social right are mainly: The ***Universal Declaration of Human Rights*** of 1948 and ***International Covenant on Economic, Social and Cultural Rights*** of 1966, which were adopted on the ground of the UN. For Europe, it is mainly the ***European Social Charter*** of 1961. Extent of their incorporation in constitutions of individual states depends on each state. In the Constitution of the Slovak Republic they are incorporated in Articles 35 to 43.

The **third generation** of human rights emerge significantly later than the previous two. Whereas the first two generations of human rights present individual rights, the third generation consists of collective rights, rights reflecting the effort of joint solution of humanity's global problems. These include:

- right to a healthy environment,
- right to economic and social development,
- rights of national and ethnic minorities,
- rights to participation in cultural heritage,
- right to natural resources,
- right to communicate,
- right to intergenerational equity.

It is obvious from the basis of these rights that to ensure their protection certain form of participation and cooperation of multiple individuals and states is required. Exertion of these rights exceeds state borders and in many cases also the borders of regions or continents. But state sovereignty, controversial nature of these right and different economic conditions in different states are obstruction in incorporation of

these rights in international treaties. Therefore, the third-generation rights are included in non-binding documents only, such as the ***Declaration of the United Nations Conference on the Human Environment*** (Stockholm Declaration) of 1972 and the ***Rio Declaration on Environment and Development*** of 1992.

The second and third generation of rights have their advocates as well as critics. The most prominent critics include the representatives of liberal movement, such as F. Bastiat[86] or F.A. Hayek.[87] On the other hand, one of the prominent advocates of the second-generation rights is J. Waldron.[88]

Protection and Safeguarding of Human Rights

One of the most important guarantees of transformation of human rights from the level of their legal incorporation into execution is mainly the activity of independent and impartial **courts**, which are obliged to provide protection to these fundamental right in case of their violation by state authorities (so-called vertical effect of human rights) or individuals (so-called horizontal effect of human rights). Important role in human rights protection is played also by other state institutions, mainly **the office of public prosecution** and **ombudsman** (public defender of rights).

Guarantees of human rights are also reinforced by the existence of international mechanism of their protection. The base of the universal system of international protection and development of human rights became the already mentioned documents: *the United Nations Charter, the Universal Declaration of Human Rights* of 1948 adopted on its grounds and two covenants - *the International Covenant on Civil and Political Rights (1966)* and *the International Covenant on Economic, Social and Cultural Rights (1966).*

The covenants define in more detail the rights declared in the Universal Decla-

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86 E.g. following quote of Bastiat's work the Law is being often cited in this regard: *"M. de Lamartine wrote me one day: "Your doctrine is only the half of my program; you have stopped at liberty; I go on to fraternity." I answered him: "The second half of your program will destroy the first half." And, in fact, it is quite impossible for me to separate the word "fraternity" from the word "voluntary." It is quite impossible for me to conceive of fraternity as legally enforced, without liberty being legally destroyed, and justice being legally trampled underfoot."* LEONI, B. – BASTIAT, F.: *Právo a svoboda/Zákon.* Praha : Liberální institut, 2007, p. 303.

87 See HAYEK, F.A.: *Cesta do otroctví.* Praha : Barrister & Principal, 2004.

88 *„In any case, the argument from first-generation to second-generation rights was never supposed to be a matter of conceptual analysis. It was rather this: if one is really concerned to secure civil or political liberty for a person, that commitment should be accompanied by a further concern about the conditions of the person's life that make it possible for him to enjoy and exercise that liberty. Why on earth would it be worth fighting for this person's liberty (say, his liberty to choose between A and B) if he were left in a situation in which the choice between A and B meant nothing to him, or in which his choosing one rather than the other would have no impact on his life?"* WALDRON, J.: *Liberal Rights: Collected Papers 1981–91.* Cambridge : Cambridge University Press, 1993, p. 7.

ration of Human Rights. Moreover, each of them also regulates procedures through which the respective UN bodies can control whether the member states apply the protected rights. These procedures are applied against states that agreed with them and thus acceded to the so-called *Optional protocol*.

Complaint can be filed by a person under the jurisdiction of a given state that thinks their rights guaranteed by any of mentioned international UN human rights treaties were violated. The essence of proceeding lies in the fact that after the complaint was filed the treaty body shall decide whether the violation of right occurred and shall propose eventual steps to be taken by that state to remedy. Decisions of treaty bodies thus do not have a character of a court decision but only recommendations for member states.

The specific control in the area of economic and social rights is performed by the **International Labour Organisation**, established in 1919. The specialized international agency **UNESCO** is concerned with supporting cultural rights.

Another element of the control system are non-governmental organisations, such as **Amnesty International, International League of Human Rights**, and others.

The European System of Human Rights Protection

The European Convention on Human Rights of 1950, adopted in the then newly established **Council of Europe**, is the expression of common European traditions and culture of European democratic states on the European continent.[89]

Every person or group of persons (organisation) convinced that any signatory state violated their rights recognized by the Convention, can on its ground file a complaint to the **European Court of Human Rights**, based in Strasbourg. The condition is that no more than six months have passed since the domestic decision. The subject of complaint before the European Court of Human Rights is usually the breach of right to court protection in civil cases, right to counsel in criminal cases, violation of right to freedom by the decision on detention or arrest, inadequate length of court proceedings, etc. In terms of Article 40 of the Convention, the final decision is binding and the state is obliged to execute it. The state has an obligation to provide restoration of violated rights, however it is free to choose the means to achieve this goal.

Another institution that became involved in the human rights protection system in Europe, has also lately become the **European Union**. That is, by the end of 2000 it has adopted the ***Charter of Fundamental Rights of the European Union*** at an intergovernmental conference in Nice as joint and not binding document of the European

[89] For details see e.g. CAMERON, I.: Úvod do Európskeho dohovoru o ľudských právach. Bratislava : Nadácia Občan a demokracia, 2000.

parliament, the Council of the European Union and the European Commission. Originally, the Charter should become the second part of the European Constitution (and thus gaining legal binding force), but when this project failed, the Charter got into the document, which is valid at the moment and which replaced the Constitution – into the ***Treaty of Lisbon***.

The extent of fundamental human and civil rights, shown in the Charter, is substantially broader, compared to codes of human and civil rights incorporated in constitutions originating shortly after World War II, as well as compared to the *Convention on Human Rights*. New conception of human and civil rights in the *Charter of Fundamental Rights of the European Union* essentially abandons usual classifications shown in previous international law and constitutional documents on human and civil rights. This fact does not mean that authors of the Charter dismissed in theory the traditional classification, but they abandoned it during the design of Charter's text so that the Charter could express equal value position of all rights incorporated in it as fundamental.

Since the Treaty of Lisbon became effective (December 1, 2009), the **Court of Justice of the European Union**, based in Luxembourg, can apply and construe the *Charter of Fundamental Rights of the European Union*. The Court of Justice of the European Union has strict rules for filing actions, thus making the possibility to file an action more difficult. Therefore, the possibility to file complaint with the European Court of Human Right in case of violation of human rights is used more often in practice.

Since 2007 also a special agency of the European Union in the area of human rights protection – the European Union Agency for Fundamental Rights, based in Vienna. Its goal is to provide assistance and professional counsel to respective bodies and agencies of the Community and its member states on fundamental rights in execution of legal regulations of the Community, adopting measures and proposing adequate procedures.

However, the guarantees of fundamental rights and freedoms are not only the matter of state or institutions of international community. Also the "civil maturity" is their guarantee. If citizens do not know their right or if the civil awareness and sentiment, respect to human rights and freedoms are underdeveloped, it is hard to expect quality of their implementation. Therefore, the importance of education and training in the area of human rights is being globally emphasized. The objective of human rights education is to achieve self-respect, that everyone will be aware of their rights and at the same time also respect and sensitivity towards rights of others shall be taught and activity to provide rights of all shall be supported. With this comes hand in hand development of tolerance, mutual respect and solidarity. Education should ensure that individuals know how the human and social rights can be introduced into social and political reality, at both the national and international level.[90]

[90] OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 87.

5.2.5 *The Principle of Legal Certainty*

Law, through establishing clear, predetermined and generally knowable rules and its consistent execution, allows to recognize what actions are required from us, what actions can we expect from others, mainly from state authorities. It allows predicting the results of actions and thus it provides subjective certainty to individuals that law will be complied with against them, that justice will be served in specific cases. Legal certainty is therefore certainty provided to us by law, its confidence in law.[91]

Partial principles, specifying the principle of legal certainty, are:

1. actions of state authorities must be **predictable** within some limits to the citizens and thus possible **to be estimated**;
2. laws should be formulated **clearly** and **unambiguously** to allow for the citizen to get an idea about the legal situation; this implies that the legislator should be using vague legal terms and general clauses minimally;
3. laws should not be retroactive (so-called **prohibition on retroactivity**), i.e. they should not introduce into laws upon becoming effective specific rights and obligations that are treated as if they were valid already in the past; it is necessary to add in this context that it should be distinguished between ***true*** and ***false retroactivity*** – as for true retroactivity, the later legal regulation does not recognize rights and obligations acquired during the validity of previous legal regulation; as for false retroactivity, the rights and obligation acquired under previous legal regulation are recognized, however these relations are assessed according the new legal regime since the new regulation became effective, thus rights or their content can be changed or new right introduced.[92]

6.2.6 *Independence of Judiciary*

Judges in a legal state are independent in the performance of their office and are bound only by law in taking decisions. The concept of independent judges has two roots. It stems from the neutrality of judge as a guarantee of just, impartial and objective proceedings (trial) and of securing rights and freedoms of individual by the judge who is protected from political power.

Theory distinguishes between three types of judicial independence:

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[91] OTTOVÁ, E.: *Teória práva.* Šamorín : Heuréka, 2006, p. 88.

[92] Compare BRÖSTL, A.: *Právny štát: pojmy, teórie, princípy.* Košice : Medes, 1995, pp. 81-82.

- **personal independence** – the judge has his profession guaranteed by law with the freedom to apply for judicial profession, he *cannot be removed* (or more precisely, he can be removed only in extreme cases, e.g. if he commits a wilful crime) *nor transferred.*
- **organisational independence** – courts are strictly separated from the administration (executive power, government); also it is inadmissible for a legislative body to exercise judicial power;
- **functional independence** – interference with the functions of judiciary by other element of public power is prohibited, including influencing trials, abolition of judgements by executive bodies or by implementing retroactivity of laws governing trial proceedings or merits of crimes by legislative power.[93]

Moreover, the condition of judicial independence is also the **professionalism of a judge**, his/her **impartiality** and **judicial ethics**. With regard to professionalism, the fact that the judicial profession is performed by lawyers with university degree with particular specialisation, confirmed by professional exam, is not sufficient for the judicial profession. Also preparation for every particular decision is important and not only with regard to the knowledge or relevant legal regulation but also other expert information that are necessary to pronounce qualified judgement.

The impartiality of the court and the judge is basic condition for objective and just decision. Impartiality is the state of judge's internal open-mindedness toward the case, his conviction that he is not influenced in favour or against any of the parties to proceedings, which could affect his decision.

Judicial ethics is the manifestation of non-legal rules of conduct of a judge in his profession, which has also considerable importance. Though, a judge is also led by his moral sentiment, conscience and knowledge in making decision. Ethical codes of judiciary profession exist in many states to make the decision making and finding justice for judges easier.

[93] See details and compare MACKOVÁ, A.: *Nezávislost soudců.* Praha : Právnická fakulta Univerzity Karlovy, 1999; SVÁK, J. – CIBULKA, Ľ.: Ústavné právo Slovenskej republiky. Osobitná časť. Bratislava : Eurokódex, 2009, p. 729 et seq.