HOW MUCH IS THE RULE OF LAW RELEVANT FOR HUMAN RIGHTS PROTECTION?

Branislav Fridrich

Matej Bel University,
Faculty of Law,
Komenského 20, 974 00 Banská Bystrica, Slovakia
fridrich@fridrichpalko.sk

Abstract

Rule of law and human rights are connected categories. Rule of law would be empty definition without human rights and human rights protection cannot be enforced without the rule of law framework. The strong rule of law is key for human rights protection. Some of human rights are directly overlapping with the rule of law, as right for fair trial or freedom of speech. The paper is focused on the implementation of the rule of law framework adopted on international level into European level and it is followed by country analysis as the case study to verify the connection of rule of law and human rights.

Keywords: *rule of law, human rights, democracy, rule of law index, justice scoreboard*

INTRODUCTION

The Rule of Law concept is present in international environment for a long period of time, in some formalised version in las 15 years. In the European context, the Rule of Law was formed as the founding principle of the European Union, by setting the framework for its proper implementation [Modrzejewski 2016]. This is well understood and visible in the European territory also within the work of another body – Venice Commission of the Council of Europe. We also want to underline the important role of the rule of law in ensuring government accountability in implementation of human rights. We argue, that if national Courts fulfil criteria set as the rule of law standards, those Courts are better prepared to interpret human rights in the modern world and contribute to its effective protection.

1. THE RULE OF LAW AND HUMAN RIGHTS IN INTERNATIONAL LAW

1.1. Rule of law framework within the UN system

As written in the report of UN Secretary-General [UN 2005]:

> "while freedom from want and fear are essential, they are not enough. All human beings have the right to be treated with dignity and respect" (para. 27). Such dignity and respect are afforded to people through the enjoyment of all human rights and are protected through the rule of law. The backbone of the freedom to live in dignity is the international human rights framework, together with international humanitarian law, international criminal law and international refugee law. Those foundational parts of the normative framework are complementary bodies of law that share a common goal: the protection of the lives, health and dignity of persons. The rule of law is the vehicle for the promotion and protection of the common normative framework. It provides a structure through which the exercise of power is subjected to agreed rules, guaranteeing the protection of all human rights."

The rule of law concept requires that legal processes, institutions and substantive norms are consistent with human rights. It means, that the principles connected to rule of law as equality under the law, accountability before the law and fairness in the protection of human rights have to be observed. As presented also by UN SG, "the rule of law is the implementation mechanism for human rights, turning them from a principle into a reality".

According to this we can consider the rule of law and human rights as the two sides of the same coin, it has indivisible relation. The root of this relation can be found in the key international human rights document, the Universal Declaration of Human rights, in which it is stated that it is essential, "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" [UN 1948].

The following international documents confirmed this interlink between rule of law and human rights, i.e. in the Millennium Declaration [UN 2000], Member States agreed to spare no efforts to strengthen the rule of law and respect for all internationally recognized human rights and fundamental freedoms. In the following Resolution adopted by the General Assembly on 16 September 2005 [UN 2005a] Member States recognized the rule of law and human rights as belonging to the universal and indivisible core values and principles of the United Nations. And finally, in the Resolution A/RES/67/1 - Declaration of the High-level Meeting on the Rule of Law [UN 2012] Member States emphasized that human rights and the rule of law were interlinked and mutually reinforcing.

As from the procedural point of view, the competences to review the proper implementation of the rule of law was assigned to the Human Rights Council. Within the Council work, there had been adopted several resolutions, that directly relate to both human rights and the rule of law, including on the administration of justice; on the integrity of the judicial system; and on human rights, democracy and the rule of law.

The Human Rights Council has established several special procedure mechanisms directly related to the rule of law, such as the Special Rapporteur on the independence of judges and lawyers [UN 1994], the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence [UN 2011],

the Independent Expert on the promotion of a democratic and equitable international order [UN 2011a] and the Special Rapporteur on the promotion and protection of human rights while countering terrorism [UN 2005b].

1.2. Rule of Law Index

While universally agreed human rights, norms and standards provide its normative foundation, the rule of law must be anchored in a national context, including its culture, history and politics. States therefore do have different national experiences in the development of their systems of the rule of law. Nevertheless, as affirmed by the General Assembly in resolution A/RES/67/1 [UN, 2012], there are common features founded on international norms and standards.

One of the most valuable evaluation of the rule of law according to the requirement of the legal processes, institutions and substantive norms, is the Rule of Law Index. This is focused on evaluation whether the rule of law is performed conform to internationally set standards, but still respecting national legal and material surrounding. [WJP 2019]

Rule of Law Index measures countries' rule of law performance across eight factors: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice [WJP 2019]. Due its importance and the mechanism elaborated; the Rule of Law Index is applied in 126 countries all over the world. However, there are almost 70 countries not covered, which means, that the UN is not aware of approximately one third of UN members' rule of law state. As to the implementation value, the focus is primarily on countries, where the Rule of Law index refer to potential violations and fragility due other powers intervention to judicial power. As such, the Rule of Law Index is not providing sufficient data to European countries Rule of Law evaluation.

2. WHY AND HOW TO MEASURE RULE OF LAW IN PRACTICE?

2.1. EU Justice Scoreboard and reflection of international standards on European level

As concluded from above, it is very hard to measure the level of the rule of law. While it is pre-condition for human rights implementation, we focus on the way how to combine existing mechanism on the international level (the UN level) with the regional mechanism in the Europe (elaborated within the Council of Europe and European Union) to properly evaluate the rule of law in the country. As for the methodological point of view, we choose case study of the Slovak Republic, because it is not involved in the universal system of the rule of law evaluation (not a part of the WJP Rule of Law Index) and it is by territory close to the countries, which were recently subject of the European Commission investigation on the rule of law status. This fragility provides us the basis for the analysis, why and how to measure rule of law, to prevent consequences in relation to breach of this obligation internationally and under the European law.

The universal system of the rule of law is based on the acknowledgement of the legal processes, institutions and substantive norms in relation to human rights. According to the principle of supremacy of international law as well as the obligation of the EU stated in the article 6 TEU [Mokrá 2011: 398], the EU recognises the principle of human

rights protection as developed within the UN system. By analogy we can use the general approach of evaluation the legal processes, institutions and substantive norms in the country, to conclude on relation between the rule of law and human rights.

According to this, there are two mechanism of the Rule of Law evaluation in Europe:

1) Within the European Union - the system of Justice Scoreboard in the European Union, which had been adopted in 2013 by the European Commission. This is focused particularly on judicial institutions, its system of creation, independency and impartiality (mainly through the process of creation of courts and budget independence). The system evaluate the level of the Rule of Law by set criteria of quality and independence. The another criteria of efficiency was adopted in the way to evaluate processes, with special focus on protection of rights in judicial proceeding by legal authorities without unreasonable delay.
2) The system of monitoring Rule of Law and Human Rights by Council of Europe. This competence is exercised by the European Commission for Democracy through Law (the Venice Commission), a Council of Europe independent consultative body on issues of constitutional law, including the functioning of democratic institutions and fundamental rights, electoral law and constitutional justice. According to its Report on the Rule of Law [Venice 2011], the Venice Commission is able to issue opinion as the alert in relation to any situation or adopted legislation with potential to breach the rule of law principle in the member state.

Both of the systems are complementary, as for the preparation of the EU Justice Scoreboard, the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ) was asked by the European Commission to collect data and conduct an analysis. The European Commission has used the most relevant and significant data for elaborating this Scoreboard. The Scoreboard also uses data from other sources, such as from the World Bank, World Economic Forum and World Justice Project. [Commission 2013] The European Commission also rely on the individual opinions of Venice Commission in relation to rule of law in the EU member states.

The combination of the both systems provides us framework to evaluate stated universal criteria for rule of law – institutions, legal processes and substantive norms in relation to human rights.

a) judicial institutions

Courts have an important responsibility in ensuring the observance of human rights. In a sense, the challenge for the national court of first instance is the same as for one of Europe's highest courts: to ensure that human rights do not only exist on paper but that they are ‘practical and effective’.

However, the pyramidal structure of the judicial system gives these different courts different roles. The higher courts have a greater responsibility for the interpretation of human rights that are laid down in the ECHR, the EU Charter of Fundamental Rights and national legislation. Via their binding interpretation of such legal provisions these courts can influence the practical significance of human rights. In the lower courts, the emphasis is on ensuring respect for human rights in the many individual cases that these courts handle. [EUI 2014: 14].

The annual evaluation of the work of national courts is incorporated in the EU Justice Scoreboard [Commission 2019]. It focuses on the three main elements of an effective justice system:

1) Efficiency: indicators on the length of proceedings, clearance rate and number of pending cases.
2) Quality: indicators on accessibility, such as legal aid and court fees, training, monitoring of court activities, budget, human resources and standards on the quality of judgments.
3) Independence: indicators on the perceived judicial independence among the general public and companies, on safeguards relating to judges and on safeguards relating to the functioning of national prosecution services.

While evaluating institutions (judicial institutions), we will focus on all criteria of quality and independence, which are conform to the evaluation of legal institutions.

Table No. 1 – Slovak Judicial Institutions and Independency

Year / number	2013	2014	2015	2016	2017
Number of courts of general jurisdiction	54	54	54	54	54
Number of specialised courts	9	9	9	9	9
Total number of judges	1342	1322	1292	1311	1376
Total number of non-judge staff at courts	4497	4468	4390	4482	4616
Annual public budget allocation	1687629	1719516	1582960	1714751	1728422

Source: [CEPEJ, 2017]

b) legal processes

The above-mentioned EU Justice Scoreboard use also element of efficiency to evaluate the quality of legal processes, mainly through the length of proceedings, clearance rate and number of pending cases.

From the point of efficiency, the number of received and pending cases has been developed as follow:

Table No. 2 – Efficiency of the Slovak courts

Year / number of cases	2013	2014	2015	2016	2017
1st instance courts pending cases (civil)	339930	407396	396248	320952	254068
1st instance courts incoming cases (civil)	690648	614273	535414	922805	855880
2nd instance courts pending cases (civil)	21467	26041	36764	31216	21695
2nd instance courts incoming cases (civil)	69217	87676	87688	68142	46920
High instance courts	-	9240	11948	12799	7992

Source: [CEPEJ, 2017]

As two out of three criteria of the rule of law e judicial institutions and legal processes are interconnecting, we can summarise from the above-mentioned short data presentation following: The number of cases increased especially in 2016 and 2017, however, the number of pending cases decreased. This is connected with the electronisation of the judicial proceeding and judicial registration desk at courts, as well as the increased number of judges at courts (see table No.1). What is however significant is, that in the 2nd instance courts there are still approximately one third of cases pending, which use to lead to prolongation of the judicial proceeding and then is even transferred into the increased number of applications to ECtHR due unreasonable delay in the proceeding.
As to the independency of judicial institutions, we may use the only presented criteria – the allocated money from state budget. The annual budget increased in 2016 due mentioned electronisation and increase of the number of judges, however since that time the increase of the budget in 2017 is under lower than the inflation rate. It does not allocate finances in relation to increased number of cases as well as to development and improvement of the judicial system in the country. The development in judiciary is not reflecting recommendations of the overall country analysis done in 2011 [Analysis 2011].

c) substantive norms

Unfortunately, the EU Justice Scoreboard does not evaluate the quality of the substantive norms. However, once we want to evaluate substantive norms and the relation of the rule of law and human rights, we may focus on those human rights directly overlapping with rule of law - right for fair trial or freedom of speech, as notified by the UN Secretary-General Report [UN 2005]. In t
This is in relation to Slovakia quite an issue, as these rights are not explicitly evaluated by the Human Rights Council (UN) or by the European Union. But due the fact, the principle of human rights protection is the key element and the common value of EU member states, upon which the European Union is founded [Mokrá 2011: 400], we can use the case law of the European Court for Human Rights to quantify

the level of the substantive norms in these indicated areas, referring to the Article 6, para 2 TEU, as the inspiration and source of the human rights system in the European Union confirmed by the case law of the Court of Justice of the European Union [Mokrá 2013: 231].
Based on the annual statistics of the applications and decisions of the European Court for Human Rights (hereinafter as ECtHR), there are following data for Slovakia available. We focus only on data which overlap with the period stated in tables No. 1 and 2.

Table No. 3 – Applications to the ECtHR against Slovakia

Year / number of applications	2017	2018
Applications allocated to a judicial formation	425	390
Communicated to the Government	47	32
Application decided:	395	439
Of which declared inadmissible or struct out (single judge)	354	391
Of which declared inadmissible or struct out (committee)	22	27
Of which declared inadmissible or struct out (chamber)	1	2
Decided by the judgement	18	19

Source: [ECtHR, 2019]

Right for fair trial and Slovakia
The number of applications is quite high, as visible from the last two years development, there are approximately four hundred applications submitted each year. To draw the overall picture, there had been by 30 November 2019 submitted 2817 applications at all against Slovakia, from which those argued violation of the right for fair trial presented 941 applications (both in civil and criminal matters, of which 422 were only civil matters). However approximately 80% of the applications are found inadmissible (see table No. 3 as well), it is the most frequently used reason for submission of the application to the European Court for Human Rights, like every third application is arguing by the violation of the right for fair trial. Using the argument presented in the table No.3, there is constant feed of applications to ECtHR. In this sense we can conclude, that at least perception of the guarantee of the right for fair trial is low, due highest number of applications.

Freedom of speech and Slovakia
Freedom of speech is defined in the Convention on protection of Human Rights and Fundamental Freedoms [Convention 1950] as the freedom of expression. When analysing the quality of this freedom granted on the national level through the optic of how many applications had been submitted to the ECtHR, we can find out 101 applications by 30 November 2019. It means only 3 per cent of the overall applications.

CONCLUSION

„Nowadays, any government of a member state of the Council of Europe has to explain itself if it fails to take sufficient account of human rights.“ [EUI 2014: 1]. This concluding observation is not only of the political declaration of the government's political liability, but also of the substantive legal character. As the mechanism of the rule of law evaluation provides us the framework of the effective human rights protection, we have to consider different available mechanism not to omit some of the criteria. The effective human rights protection may be provided only in the effective national systems based on the rule of law. The rule of law can be evaluated on the basis of the existence of working and independent judicial institutions, effective legal processes and substantive norms, granting every individual protection of his/her rights according to national constitution and internationally recognised human rights standards.

None of the presented systems of evaluation of the rule of law is perfect. Each is using different perspective and different indicators to evaluate it. The UN system is focused mainly on the rule of law alerts and the system in the countries, where the human rights system is fragile and there are several or systematic violations of human rights due ambiguity of the legal and political system. The Council of Europe system is more precise; however, the general evaluation is fragmented in relation to individual rights and freedoms as granted by the Convention on Human Rights and Fundamental Freedoms. The foundation of the Venice Commission as the independent expert body help to communicate awareness of the rule of law in particular cases, when Council of Europe member states intervene into the independency of the judicial power as the conditio sine qua non for the rule of law application. And finally, the European Union due recent development in its member states, adopted its own Rule of Law Framework. The rule of law as fundamental value is granted by the Article 2 TEU, however there was missing interpretation or the implementing legislation. Investigation of Poland, Hungary, Romania and Malta, even initiating the investigation and the judicial proceeding against the member states based on Article 7 TEU due the violation of the rule of law principle, led us to the new development phase. The rule of law needs precise definition of the content and as the principle has to be observed. Once it was considered as the key element common to all member states, there cannot exist exception in the implementation practice.

When evaluating the situation in Slovakia, we have to conclude, that there are not filled all required characteristics of the effective rule of law system: legal institutions are not effectively working, because of the length of procedure connected with the low budget of the judicial power. The public perception of the independency of the judicial power is also very low. The quality of the judgement has to be seen in the light of the number of cases reviewed or appealed at the court of higher instances – almost one third of first instance courts cases are reviewed by second instance courts and from that approximately one third is reviewed by the highest courts. As to substantive norms, valued upon two main rights implementation – the right for fair trial is one of the most frequently violated right granted by international human rights treaty – Convention on the human rights and fundamental freedoms. The positive impact has the freedom of expression (freedom of speech), which is one of the lowest argued freedom before the ECtHR. Due the latest development in this area and protection of journalists, the final percentage should be viewed in wider perspective. Unfortunately, there we are missing quantitative data to analyse it.

The quality of the particular data influences the level of the overall system. If some instruments and measures are not working, the whole system is failing. We do not need another evaluation mechanism of the rule of law, once recognising it is necessary framework for effective human rights implementation. The government of the concrete country once fulfilling criteria as set in relation to rule of law on international and European level, cannot fail in protecting its citizens and inhabitants.

ACKNOWLEDGMENT

This work was supported by the Slovak Research and Development Agency under the contract No. APVV-16-0540.

REFERENCES

Analysis (2011), Analysis of judiciary in the Slovakia and its efficiency by 2010. Ministry of Justice of the Slovak Republic, 2011, Online: www.justice.gov.sk/Stranky/Sudy/Statistika%20sudy%20a%20sudcovia/analyza_sudnictva2011.pdf

CEPEJ (2017), Study on the functioning of judicial systems in the EU Member States. European Commission. Online: https://ec.europa.eu/info/sites/info/files/20180405_-_eu_scoreboard_-_indicators.pdf

Convention (1950), European Convention on Human Rights and Fundamental Freedoms, Council of Europe. Online: https://www.echr.coe.int/Documents/Convention_ENG.pdf

Commission (2013), EU Justice Scoreboard 2013. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2013_en.pdf

Commission (2019), EU Justice Scoreboard. Online: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2232

ECtHR (2019), Proceeding before the ECtHR. Online: [https://www.echr.coe.int/Documents/CP_Slovak_Republic_ENG.pdf]:

EUI (2014), Corstens, G. Human Rights and the Rule of Law. Florence, EUI. CJC DL 2014/03

EU JS (2019), EU Justice Scoreboard 2019. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf

EU JS (2018), EU Justice Scoreboard 2018: Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf

EU JS (2017), EU Justice Scoreboard 2017. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2017_en.pdf

EU JS (2016), EU Justice Scoreboard 2016. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2016_en.pdf

EU JS (2015), EU Justice Scoreboard 2015. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2015_en.pdf

EU JS (2014), EU Justice Scoreboard 2014. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2014_en.pdf

EU JS (2013), EU Justice Scoreboard 2013. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2013_en.pdf

Modrzejewski, A., (2016), The European Union and Crisis and Values, in Governing for the Future: Interdisciplinary Perspectives for a Sustainable World, A. Taranu (ed.), Bologna: Medimond, 167-172.

Mokrá, L., (2011), Evropská unie a základní lidská práva In: Evropské právo. Plzeň, Aleš Čeněk, 2011, p. 394-405.

Mokrá, L., (2013), Koncepcia Európskeho unijného práva ľudských práv. In: Ústavné garancie ľudských práv. Bratislava, Univerzita Komenského, Právnická fakulta, 2013. p. 226-239.

UN (2012), Resolution A/RES/67/1 - Declaration of the High-level Meeting on the Rule of Law. Online: https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf

UN (2011), UN resolution No. 18/7 on Independent Expert on the promotion of a democratic and equitable international order. Online: https://www.ohchr.org/EN/Issues/IntOrder/Pages/IEInternationalorderIndex.aspx

UN (2011a), UN resolution No. 18/6on the promotion of a democratic and equitable international order and the Special Rapporteur on the promotion and protection of human rights while countering terrorism. Online: https://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx

UN (2005b), Human Rights Resolution 2005/80. Online: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20Commision%20on%20Human%20Rights%20RES-2005-80.pdf

UN (2005a), Resolution adopted by the General Assembly on 16 September 2005. Online: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf

UN (2005), Report of the Secretary General No. A/59/2005: In larger freedom: towards development, security and human rights for all. Online: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CPR%20A%2059%202005.pdf

UN (2000), The Millennium Declaration. Online: https://www.ohchr.org/EN/ProfessionalInterest/Pages/Millennium.aspx

UN (1994), UN resolution No. 1994/41 on the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. Online: https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx

UN (1948), Universal Declaration of Human Rights. (General Assembly resolution 217 A). Online: https://www.un.org/en/universal-declaration-human-rights/

Venice (2011), Report on the Rule of Law. Online: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e,

WJP (2019), Rule of Law Index. Online: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019