ACCEPTABILITY OF JUDICIAL REVIEW IN DEMOCRACY WITHIN THE CONTEXT OF HUMAN RIGHTS

*(*İnsan Hakları *Bağlamında Demokraside Yargı Denetiminin Kabul Edilebilirliği)*

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ABSTRACT

Human rights globally become an inarguable virtue and it requires the conviction that all human beings are born free and equal in dignity. According to the current dominant paradigm, the protection of human rights is one of the most important obligations of the state. In both national and international level, courts are primarily equipped to protect human rights in any circumstances. On the other hand, democracy representing by the elected parliaments traditionally means decisions by the majority. These two important merits, democracy or parliaments and human rights or courts, interact with each other. Usually the relationship between them is based on the fact that they support each other. However, over the years it is observed that there can be conflicts between them. In this case, the absolute power of majority and the rights of individuals or minorities in democracy may come into collision with each other. At this point the controversial question whether there is a rational and practical reason to give decision-making power to unelected judges rather than to democratic majority or not come to light. This essay focuses on the acceptability of judicial review in democracy and the sufficiency of democratic perspective of human rights.

Key Words: Human Rights, Democracy, Judicial Review, Parliament, Court, Jeremy Waldron.

ÖZ

Evrensel düzeyde insan hakları tartışmasız bir değer haline gelmiş ve tüm insanların onuruyla özgür ve eşit doğdukları kabulünü zorunlu hale getirmiştir. Günümüz egemen paradigmasına göre insan haklarının

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korunması devletin en temel görevlerinden biridir. Hem ulusal hem de uluslararası düzeyde mahkemeler, öncelikle insan haklarının her koşulda korunması için yetkilendirilmiştir. Bununla birlikte, seçilmiş parlamentolar tarafından temsil edilen demokrasi en eski anlamıyla çoğunluk tarafından alınan kararlar anlamına gelmektedir. Demokrasi ya da parlamentolar ile insan hakları ya da mahkemeler şeklindeki iki değer arasındaki bir etkileşim bulunmaktadır. Genelde bunlar arasındaki ilişki, bunların birbirilerini desteklemesi şeklindedir. Bununla birlikte, uzun yıllardır yapılan gözleme göre bunlar arasında bir çatışma olması da mümkündür. Bu halde, demokraside çoğunluğun mutlak gücü ile bireylerin ya da azınlığın hakları arasında bir çatışma hali yaşanabilir. Bu noktada, seçilmemiş olan hâkimlere karar verme yetkisi verilmesinin mantıksal ya da pratik bir nedeninin bulunup bulunmadığına ilişkin tartışmalı soru gündeme gelmektedir. Bu makale, demokrasilerde yargısal denetimin kabul edilebilirliği ve insan haklarında demokratik perspektif üzerinde durmaktadır.

Anahtar Kelimeler: İnsan Hakları, Demokrasi, Yargısal Denetim, Parlamento, Mahkeme, Jeremy Waldron.

1 Introduction

Democracy is a controversial topic of law and politics. It traditionally means decisions by people. However, there is not an explicit definition in legal or political materials. Therefore, its principles and main pillars cannot be determined easily. This indefiniteness is important in specifying the scope of majority power and the limitation on democratic institutions.

On the other hand, the awareness of human rights is a growing. Human rights globally become inarguable virtues after the genocides committed in the twentieth century, in Europe. It is thought that all human beings are born free and equal in dignity and their rights are inalienable and indispensable. Individuals can claim their rights not only from others but also from the state.

These two important merits interact with each other. Usually the relationship between democracy and human rights is based on the fact that they support each other. Civil and political rights facilitate participation in the democratic process. Freedom of speech is a good example of this. Without political speech, democracy remains incomplete. Human rights help individuals to participate in the political process, to search for truth and to develop their ability.

However, over the years it is observed that there can be conflicts

between them. In this case, the absolute power of majority and the rights of individuals or minorities in democracy may come into collision with each other. Some strongly suggest that democracy and human rights are separable and competing with each other: the one v the many.[2] Collision can appear from time to time. In this case, when they are not in harmony, which one is preferred and what extent? In other words, whether we should rely on democratic process and general public supervision or whether we should establish a specific court that can protect human rights and at the same time results in weakness of democracy remains a controversial issue.[3]

At the same time, this collision has an institutional aspect as well. Elected parliament represents democracy, while a court over the majority formally stands for human rights. Constitutional review of courts may result in a law-making power and this situation can cause tension between courts and democratic institutions.[4] Under the circumstances, the question could be whether there is a rational and practical reason to give decision-making power to unelected judges rather than to democratic majority.

From this point of view, this essay will firstly examine the nature of human rights to be able to highlight the tension between democracy and human rights. Secondly, the necessity of a bill of rights for better protection will be studied. Lastly, judicial review over democratic institutions, the democratic perspective of human rights and the essentiality of judicial review will be reviewed.

2 The Nature of Human Rights

The Human rights concept is very old and has its roots in Ancient Greek philosophy. However, the modern understanding of human rights is quite new. During the Second World War, humankind witnessed a very cruel and devastating violation of human rights. Millions of people were killed, just because they were a minority and they had different ethnicity. This cruelty raised awareness especially in Europe. It is said that the main principles of human rights in law were shaped during the Nuremberg Trials. Therefore, the modern concept was mainly refined after the Second World War.

Human rights can be based on different virtues that are precious for

2 Koji Teraya, 'For the Rights of "Nobodies": The Globalising Tension Between Human Rights and Democracy' (2007) 38 VUWLR 299, 301.

3 Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 OJLS 18.

4 George Williams, 'Judicial Activism and Judicial Review in the High Court of Australia' in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate 2000) 427.

people. One of them can be dignity; in this case human rights can be defined as '... human constructs designed to promote and preserve the conditions required for human dignity.'[5] Sometimes it is based on individual autonomy or self-fulfilment. Social contract is another conventionally well-accentuated legal or political theory.

Today, the debate on the foundation of human rights is not practically important for their relationship with democracy. However, there are two distinctive features of human rights and they can help us to illuminate the mentioned relation. Both of these features are about whether human rights are determinate or not. The level of determinacy of human rights sets down the extent of discretionary power of the institution that could say the last word about what human rights are.

One of which is about the scope of human rights. The content of human right is not agreeable; each person who offers a conception of human rights may consider that her thought is better than others.[6] According to Waldron, human rights are contested and any theory of human rights faces disagreement.[7] This disagreement is not only about how to define human rights but also about who right's bearers are and what limitations should be put on them.[8]

This can easily be proved by probing and contrasting national bills of rights or international human rights treaties. The result would be nothing else than a great difference that may change in accordance with states' ideology and their socio-economic development. Sometimes the same human rights are regulated differently, sometimes some rights are not regulated and sometimes some rights are much more focused in some legal systems. Because the supreme power will primarily consider the written and binding legal materials, there should be more emphasises on these materials.

It is not just the matter of written materials. The theories of human rights among jurists and political commentators differ as well. Some believe that human rights are what are in positive legal materials, while others cherish a superior natural set of human rights that shapes legal rights. Likewise, some reckon human rights are secondary and lag behind for instance state security or economic wellbeing.

The second feature of human rights is about their legal language or

5 Julie Debeljak, 'Right Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' (2002) 26 MULR 285, 293.
6 Waldron (n 2) 32.
7 Ibid 30.
8 Ibid.

wording. This assumption is essentially based on the assumption that modern human rights materials are vague and ambiguous in circumstances of diversity, controversy and indefiniteness.[9] Law is conveyed by language. However, the language of constitutions, treaties, statutes and other legal materials is not clear.[10] Thus, the intention of lawmakers takes a secondary position. Therefore, it is not wrong to claim that legal language is a keystone for law. Legal language is not explicit enough. Although experts write legal materials, when it comes to implementation, their wording becomes indeterminate and inconsistent.[11] Therefore, traditional legal thought pays attention to this problem.[12]

It is claimed that because materials of law are not determinate enough to decide accordingly, judges rely on their own personal references.[13] In other words, the ambiguity of the legal language gives judges discretionary power to perform their political preferences. For human rights, the language of legal materials becomes much more important. Many clauses of bills of rights are worded in abstract language as well.[14] Thus, this supreme power can enlarge or limit human rights.

Admittedly, these two features of human rights are not pure and unexceptional. To some extent, for instance the right to life in the European Convention of Human Rights, the African Charter on Human and Peoples' Right or in the Indian Constitution may be similar. Besides, the language of human rights articles could be comprehensible. Still, the understanding and the factual implementation of those legal materials are not even similar, especially in hard or politically contested cases, and this supports the argument above. Likewise, the disagreement among theorists inflexibly goes on as well.

3 The Necessity of the Bill of Rights

Human rights are generally regulated in constitutions. In this case, constitutions have special parts for human rights such as the U.S. Constitution.[15] The second way is an independent act on human rights

9 Debeljak (n 4) 304.
10 David Kairys, 'Law and Politics' (1983-1984) 52 Geoge Washingthon Law Review 243, 246; Richard J. Pierce, 'Is Standing Law or Politics?' (1998-1999) 77 NCLR 1741, 1785.
11 Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenalogy' (1986) 36 Journal of Legal Education 518, 562.
12 Miro Cerar, 'The Relationship between Law and Politics' (2009) 15 Annual Survey of International & Comparative Law 19, 27.
13 Emerson H. Tiller and Frank B. Cross, 'What is Legal Doctrine' (2006) 100 NWULR 517, 519.
14 Ronald Dworkin, *Freedom's Law* (1th edn, OUP 1996) 7.
15 Jeremy Waldron, 'The Core of the Case against Judicial Review' (2005-2006) 115 YLJ 1346, 1357.

such as the Human Rights Act 1998.[16] The outstanding feature of those rules is legally binding and the rule forces everyone to comply with it.[17] In this paper, the term 'the bill of rights' is considered in a broad sense and covers both options: the part of the constitution that regulates human rights and the independent act.

The necessity of a bill of rights is a controversial topic in legal and political circles. However, there is not any legal or political theory that explicitly trivialises human rights and their protection. Likewise, the discussion on the necessity of a bill of rights is not the debate on the importance of human rights. It is exactly to seek the best way to protect human rights within the principles of democracy.

Above all, it is an inevitable task to protect and to promote human rights. They have to be respected not only by others but also by the state.[18] Nevertheless, human rights as it is explained above are very vague and contested. They may remain abstract until they come into existence in a legal material, in the bill of rights. The bill of rights leads to carry human rights from much contested theories to precise legalisation.

The bill of rights protects individuals and the human rights of minorities against the arbitrariness of the government. Therefore, the bill of rights serves as a legal constraint on individuals and democratic institutions to respect human rights and to avoid violating them.[19] Individuals' interest to have human rights is vital enough to be regulated under a bill of rights against majority.[20] In other words, it is a reassurance or constraint to protect human rights against democratic majority.[21]

Although it is widely assumed that democracy is a prerequisite to realise human rights, democracy is not as assuring.[22] Without the bill of rights, human rights remain nominal and offer less guarantees against violations sometimes.[23] Moral rights have moral enforcement; however, the violation of legal rights means violation of law and it requires more severe sanctions. Therefore, an entrenched bill of rights can results in a

16 Ibid 1358.
17 Jeffrey Goldsworthy, 'The Philosophical Foundation of Parliamentary Sovereignity' in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate 2000) 231.
18 Cécile Fabre, 'A Philosophical Argument for a Bill of Rights' (2000) 30 British Journal of Political Science 77, 82.
19 Ronald Dworkin, *Taking Rights Seriously* (Revised edn, Duckworth 1978) 133.
20 Fabre (n 17) 83.
21 Thomas Christiano, 'Waldron on Law and Disagreement' (2000) 19 Law and Philosophy 513, 537.
22 Terayan (n 1) 300.
23 Fabre (n 17) 87.

better protection of human rights.[24]

The bill of rights does not weaken democracy and likewise it does not indicate mistrust of democratic institutions. Although it is not rational to accept that common will is always pure, democratically elected institutions generally regard individuals' and minorities' human rights. Still, there are times when the balance can be broken and human rights therefore might become susceptible to interference. In these times, human rights can be ignored or violated by majoritarian rule. Yet, democratic majority does not have moral rights to violate human rights and to avoid from promoting them.[25] In this case, the bill of rights can play an important role to protect fragile human rights. In other words, citizens can increase their rights by tying their legislators' hands.[26]

In contrast to previous thought, Waldron strongly opposes the legalisation of human right. The first reason is the verbal rigidity of legal materials.[27] According to him, the formulation of human right may freeze them and the bill of rights prevents free and flexible discourse on innovations.[28] Likewise, the bill of rights generally requires a super majority to amend it. Therefore, it is hard to amend it and to respond changing circumstances and new opinions in society over the time.[29] Instead, he advises less articulate and less formulaic human rights concern that is free from verbalism of particular written articles.[30]

This critique more or less reflects the truth for all kinds of legislation. Legislations may freeze the legal issues; however, it is inevitable to adopt legislation in parliament. In fact, flexible and reflective legal materials are desirable. Nevertheless, predictability, legal protection and transparency are vital principles for human rights as well. Therefore, the bill of rights may freeze human rights to some extent; however, it enhances human rights and their protection.

Waldron's second objection is about the democratic aspect of the bill of rights. He claims that embodying human rights in an entrenched bill of rights comes from enthusiasm for disabling legislation.[31] Those who support the bill of rights demonstrate great trust in the existing legislators;

24 James Alan, 'Bills of Rights and Judicial Power-A Liberal's Quandary' (1996) 16 OJLS 337, 352.
25 Fabre (n 17) 85.
26 Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press 1995) 169.
27 Waldron (n 2) 26.
28 Ibid 27.
29 Ibid 41.
30 Ibid 26-27.
31 Ibid 27.

conversely, subsequent elected legislators will be less trustworthy and less able to rule.[32]

Passing the bill of rights does not mean that the present democratic majority does not trust the next legislators.[33] It is a functioning form to define the scope of human rights, their bearers, limitations and the ways of protection public. It does not trivialise democracy and parliament; it is parliament that passes the act and protect human rights.

Although it seems an artificial or statistical division, Hart legitimises the act that restricts democratic majority by accepting a superior legislation that can impose restrictions on other legislations.[34] Conventionally, a sovereign power makes law from a position outside any law; therefore, no such substantial legal limitations should be accepted on law making power.[35] The existence of a bill of rights does not deprive the majority from its democratic power.[36]

The last critique that is mentioned here is that Waldron states those who support a bill of rights are motivated by the human evil.[37] He goes on and raises an open question: if you do not believe in human dignity and autonomy and their responsibility of self-governance, why do you struggle for their human rights?[38]

Executive actions on human rights can be easily changed in accordance with the political necessities of the moment in hard times.[39] In addition, pure democratic participation is not the only political morality; political system must realise the set of human rights as well.[40] Therefore, the bill of rights is widely seen as a safeguard to protect and promote human rights.[41] In other words, it is a result of the protection of humans and their rights that people are reassured.

4 Judicial Review and Democracy

It is out of the question for legal theories to explicitly underestimate human rights. However, because human rights are ambiguous and most

32 Ibid.
33 Fabre (n 17) 91.
34 H.L.A. Hart, *The Concept of Law* (2nd edn, OUP 1994) 70.
35 Ibid 66.
36 Dieter Grimm, 'Constitutional Adjudication and Democracy' (1999) 33 Israil Law Review 193, 198.
37 Waldron (n 2) 28.
38 Ibid.
39 Michael Zander, *A Bill of Rights* (4th edn, Sweet&Maxwell 1997) 65.
40 Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 Law and Philosophy 451, 464.
41 Alan (n 23) 337.

of the theorists have their own understanding of human rights, there should be the bill of rights and a final decision maker to evaluate the bill in this field.[42] From different legal systems, it can be understood that this actor is the democratic majority or judges.

Conventionally, there was not a court over the legislative power and legislative power was assumed absolute until the United States Supreme Court gained this power in *Marbury v Madison*[43]. Today, an overwhelming majority of states have different types of courts that have competence to review legislation. Still, is it democratic to give judges the competence of judicial review to strike out legislation when they think legislation violate human rights? The judicial review discussed here is one that strikes out legislative acts and general administrative regulation and it mostly belongs in civil law. This type of strong judiciary has authority to strike out those legal materials or to modify their effect on individual applications. Judicial review that examines individual applications is not under consideration for criticism.

Most commentators believe that there should be a court to review legislation to see whether they are compatible with the bill of rights or not. To them, judicial review under the bill of rights might offer a better protection than democratic institution.[44] It is said that in the absence of an independent and impartial arbiter; conflicts between majority and minority on a legislation or general governmental regulation will always be finalised in favour of the majority.[45] They think that democratic majority is unreliable in protecting human rights and the majority may easily violate human rights.[46] In addition, regulating human rights in the bill of rights is not enough, when majority does not pay attention to legal rights.

On the other hand, according to this thought, constitutional judges have a very precious legal reasoning, strict procedural provisions and previous decisions that restrain them.[47] Accordingly, judges do not become superior to legislators; legislation still remains supreme. Therefore, judicial review is not a tough limitation on the power of majority. Instead, because people gain a right to evaluate acts, it reinforces participation of individuals to implement their will.[48]

42 Waldron (n 2) 32.
43 5 U.S. (1 Cranch) 137 (1803).
44 Kavanagh (n 39) 457.
45 Grimm (n 35) 202.
46 Terayan (n 1) 303.
47 Fabre (n 17) 92.
48 Alon Harel, 'Right-Based Judicial Review: A Democratic Justification' (2003) 22 Law and Philosophy 247, 249.

Besides, it is supposed that judicial review before independent courts offers individuals the opportunity to draw public attention to their human right to protect them effectively.[49] Moreover, in the scenario that democratic institutions pay a great attention to protect human rights, it is still advantageous to apply an independent court to help legislation to rectify any shortcomings in legislation.[50] In other words, it fortifies democratic recourse and participation.

Generally, it is believed that democracy is a value, but it is not the only value.[51] Likewise, democracy is not statistical; in democracy, everybody, including democratic majority, has to respect others' human rights and behave with equality.[52] For human rights, putting an end to parliamentary monopoly does not undermine democracy.[53]

The role of judiciary in protection of human rights become significant in term of poltical and social tribulance in which the majority of elected parliament is disposed to ristrict or violate minorities human rights and this treatment is back by public. In such condition, the court that rules in line with rule of law and international human rights legal texts may play an effenctive role to ptotect rights and freedoms.

This approach to judical review in democracy is assumed acceptable by radical democrats. According to them, it is based on the weak assumption that judges are better possitioned than legislators to protect human rights. Judges' growing powers in judicial review are ignored and democracy is sacrificed in favour of unaccountable judges for contingent utility.

To expand these criticisms, firstly, judicial review is not a good idea to protect human rights. Human dignity, autonomy and self-governance are not only a part of human rights but also democracy as well.[54] Besides, democracy cherishes human rights as well. Thus, democratic majority may be better at protecting human rights by amending existing restrictive legislations and abolishing unnecessary limitations.[55] Legislators have power to set up new institutions, to pass necessary acts or to allocate fund to promote and to protect human rights.

In addition, it is widely believed that legal review for protection of human rights in a bill of rights diminishes elected parliaments; in contrast,

49 Kavanagh (n 39) 480.
50 Ibid 478.
51 Debeljak (n 4) 295.
52 Dworkin (n 13) 364.
53 Debeljak (n 4) 286.
54 Waldron (n 2) 37.
55 Waldron (n 14) 1405.

it does empower unelected and unaccountable judges.[56] The bill of rights that includes judicial review unquestionably gives judges competence to see themselves more openly as lawmakers.[57] Judicial review has its own legal reasoning. In this methodology, they may broaden some rights or contrarily narrow others. They can omit some parts of articles or generate new rules or principles. This means they play the role of constitution makers. So, courts cannot be restrained in accordance to acts, while they have the sole power to evaluate legal materials. Thus, judicial review may set aside the demand of democratic majority without undertaking equal accountability to people and without bearing equal democratic legitimacy.[58]

Moreover, if courts have competence to strike legislative acts out, there is no surprise that, as it happened in the United States, judges will play a more valuable role within society.[59] They will become the leading actors about what each right in a bill of rights means, what rights people have and what restrictions are welcomed on which rights.[60] Countries in which judicial review over parliament is not allowed, can decide finally on hotly contested human rights issues such as abortion or same gender marriage.[61] On the contrary, in the United States, people and their representatives may address these issues, but they know judges say the last word.[62]

Waldron does not accept the idea that judges are a part of democracy.[63] Whether it comes from the selection of supreme judges that is done by parliament, president or together or the role of judges supposed to be limited to implementing legislative will. Then, he claims that being selected by representatives is not enough to be a democratic institution at all.[64] First, he refuses the secondary role of judges in constitutional judicial review; contrarily they play the primacy role and they, thus, weaken the strength of democratic institutions.[65]

It is essential to say something about tyranny here. It is said that democratic majoritarian rule can turn into tyranny. Therefore, a modern human rights protection model gives the judiciary some competence to

56 Murray Hunt, 'The Impact of the Human Rights Act on the Legislature: A Diminution of Democracy or a New Voice for Parliament' (2010) 6 EHRLR 601.
57 Zander (n 38) 105.
58 Grimm (n 35) 204.
59 Waldron (n 2) 19.
60 Ibid 43.
61 Waldron (n 14) 1349.
62 Ibid 1350.
63 Waldron (n 2) 43,44.
64 Ibid 44.
65 Ibid 43.

review decision of legislative and executive branches of government.[66] Democratic majoritarian rule theoretically can become tyranny.[67] American-style judicial review is generally supported to eliminate the possibility of majoritarian tyrannical outcomes.[68] However, when everyone has an equal right to participate in political discourse and to affect legislative process, it is not easy. There are very few example of this assumption. They were seen just before Second World War when the human rights awareness has been premature yet. Today, democratic participation of people to governance in modern liberal democracies is not limited to elections, instead, people continuously observe, supervise and affect democratic institutions. Moreover, if tyranny has a broad definition that covers democratic majoritarian rule of law itself, it may primarily take in the judiciary too.

The second point of debate is about politicians. It is said that politicians are pragmatic and they do not care about human rights when they do not gain votes; however, judges are inspirational in protecting them against even the public itself. This argument may not be always correct. In spite of many attempts[69], law is not purely a science. Many legal issues of human rights are immensely related to politics and morality such as same sex marriage or abortion. In such cases, more or less judges could be affected by their own political or personal affiliations. Therefore, judges may prioritise their preferences rather than the rights of individuals and minorities as well. Where judges play as political actors, why should we trust them more than elected and responsible legislators?

Hiebert raises a question and claims that those who are sceptical about judicial review against majoritarian rule and who still believe there should be a bill of rights are in a contradiction.[70] There is a rational explanation to this inquiry. The bill of rights is a decision of parliament to protect human rights. In addition to its advantages, it does not have to establish a court to implement it; parliament still implements it. On the contrary, judicial review might restrain the supremacy of parliament and instead it gives power to unaccountable judges. The bill of rights is a manoeuvre within democracy.

66 Debeljak (n 4) 286.
67 Waldron (n 14) 1398.
68 Waldron (n 2) 33.
69 see Hans Kelsen, *Pure Theory of Law* (Max Knight tr, first published 1934, University of California Press 1978).
70 Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (McGill-Queen's University Press 1996) 95.

5 Conclusion

The protection of human rights is one of the most important obligations of the state. This obligation requires the negative obligation that obliges the state not to violate and the positive obligation that urges it to promote and protect them. Those obligations are not solely left to the state; international human rights treaties force the state parties to do their duty. Therefore, there should be a written bill of rights to legalise human rights for a better protection. Without it, there will be a continuing debate over the scope and limitation of them.

It is agreed that democracy resulted in the Nazi holocaust and this potential problem has never disappeared.[71] Therefore, an effective legal review is needed to eliminate this possibility of majoritarian tyranny and to protect people. Despite the fact that parliaments have improved human rights since the Second World War, the extreme example of the weakness of democracy such as Nazi's Holocaust should not be a starting point for arranging relations between powers in democracy. The assumption that legislators are prone to ignore human rights is as hypothetical as judges tend to protect them. In this case, judges occupy the supreme position over democratic organs. Because human rights questions are very controversial and susceptible to personal affiliations, judges could be politically grouped such as liberal, social democrat, republican etc. Somehow, the legal system leaves judges free to make judgements based on their personality, instincts, preferences, social and philosophical make-up and sense of public mood.[72]

Similar to executive power, the judiciary is an established power and its duty is to safeguard the implementation of legislation. However, uncontrolled judicial review could reverse democracy and gives nondemocratic judges power to strike out legislation. Likewise, judicial review over parliamentary acts is not solely a prerequisite for the protection of human rights.[73] Moreover, there is enough empirical evidence that a democratic state can live without constitutional judicial review.[74]

As a result, democratic parliament should remain the most authorised institution among other government institutions. The main legal and political issues including human rights ought to be discussed and decided by legislators. The legislature should have the final say to determine the

71 Terayan (n 1) 302.
72 Lord McCluskey, *Law, Justice and Democracy* (1th edn, Sweet&Maxwell 1987) 8.
73 Goldsworthy (n 16) 248.
74 Grimm (n 35) 199.

legal limits on its acts.[75] The parliament is better positioned to protect and improve rights and freedoms in its territories. Democracy should not be disabled in favour of judges. It is obviously hypothetical to claim that judges are in a better place to protect human rights than legislators are. This assessment is especially free of terror for the states whose judiciary does not have strong will for rule of law.

The prevention of the violation of rights and freedoms is nonignorable obligation of the state. Judicial review should not be forced to leave the floor. In any case, judicial review is not worthless. It should be carried out by courts that aspire to the rule of law. Both parliament and judiciary should protect rights and freedoms shoulder to shoulder against any kind of infringements.

75 Larry Alexander, 'Is Judicial Review Democratic? A Comment on Harel' (2003) 22 Law and Philosophy 277, 278.

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