

## Human Rights and the Rule of Law

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Rule of law has been part of the United Nation’s agenda for quite some time. The Secretary-General has defined rule of law under the following terms: *“For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”*<sup>1</sup>

In the solemn declaration adopted last year, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1, the Heads of State and Government, *“reaffirm that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.”*<sup>2</sup> Furthermore, the parties reaffirmed that *“[they]are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.”*<sup>3</sup>

In an earlier Report of the Secretary-General (A/66/749), rule of law is defined at a national level as *“the heart of the social contract between the State and individuals under its*

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<sup>1</sup> UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, U.N.Doc. S/2004/616 (Aug. 23, 2004), para. 6.

<sup>2</sup> A/RES/67/1, para. 5.

<sup>3</sup> A/RES/67/1, para. 7.

*jurisdiction, and ensures that justice permeates society at every level. The rule of law guarantees the protection of the full range of human rights, brings citizens and non-citizens alike legitimate avenues of recourse in cases of abuses of power and allows for the peaceful and fair resolution of disputes” and it is said that “Strengthening the rule of law fosters an environment that facilitates sustainable human development and the protection and empowerment of women, children and vulnerable groups, such as internally displaced persons, stateless persons, refugees and migrants.”<sup>4</sup>*

Many of the elements used to describe what constitutes the rule of law equate to the basic elements of democracy. Furthermore, democracy is the natural context for human rights to be respected and duly enjoyed; the defining elements of democracy provide criteria for the permissible limitations to certain human rights and even the necessity of derogation from certain rights during states of emergency.

Behind the wording of the different provisions that in different human rights instruments provide criteria for the permissible limitation of certain human rights, stands the notion of democracy and its link to the rule of law. The purpose of these pages is to present the close link between rule of law and human rights and to illustrate it through different human rights rules and cases so as to show the way of State practice in this field.

The notion of rule of law is widely present in the Universal Declaration of Human Rights. In its preamble, it is stated *“that human rights should be protected by the rule of law”*. Furthermore, the rights enumerated in its Articles 3 to 11 all describe basic aspects of the rule of law; life, liberty and security, ban on slavery, recognition before the law, equality before the law, effective remedies by a competent tribunal, protection from arbitrary arrest, fair and public hearing by an independent and impartial tribunal, presumption of innocence, etc.

Fifty years after the adoption of the Universal Declaration, the Commission on Human Rights issued several Resolutions on the matters of democracy, the rule of law and its impact on human rights. In its Resolution 2000/47, the Commission refers to *“its commitment to the process of democratization of States, and recognizing that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing, and that democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives”*.<sup>5</sup> Later, in Resolution 2002/46, the Commission recognizes *“the compatibility of the rule of law and democratic institutions with the wide variety of philosophical ideas, beliefs and social, cultural and religious traditions that exist in the world”* and specifies that *“the essential elements of democracy include respect for human rights and fundamental freedoms, freedom of association, freedom of expression and opinion, access to power and its exercise in accordance with the rule of law, the holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people, a pluralistic system of political parties and organizations, the separation of powers, the independence of the judiciary, transparency and accountability in public*

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<sup>4</sup> A/66/749, para 4.

<sup>5</sup> Commission on Human Rights Resolution 2000/47: *Promoting and consolidating democracy*, 62nd meeting, 25 April 2000.

*administration, and free, independent and pluralistic media;”. The Commission further “reaffirms that the full exercise of fundamental freedoms and human rights - which are universal, indivisible and interdependent - can only take place within democratic systems;”<sup>6</sup>*

Thus, the rule of law is a key element that provides context and, at the same time, qualifies the operation of other elements which are central for the observance of human rights. The “package” of international obligations underlying any human rights commitment expresses this rule of law in different ways; namely to respect the human rights embodied in legal rules, to ensure the free and full exercise of those rights to every person subject to its jurisdiction and to adopt all legislative and other measures as necessary to ensure the exercise of those rights.

In 1986, when the Government of Uruguay requested the Inter-American Court of Human Rights give an advisory opinion on the scope of the word “laws” in Article 30 of the American Convention on Human Rights, it went to the heart of the question. Said provision reads that *“the restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”* The State supported its request stating that *“another factor to be taken into account is the indispensable harmonization of the Pact of San Jose with the other basic instruments of the inter-American juridical system, especially the Charter, which makes “the effective exercise of representative democracy” (Art. 3(d)), one of the principles of the American States. Obviously, representative democracy is based on the Rule of Law which presupposes that human rights are protected by law (para. 8).”*

In its Advisory Opinion, the Court recalls the close link between human rights and the restriction of state power.<sup>7</sup> As a consequence of this connection, the Court highlights the importance of surrounding these rights with guarantees designed to protect them beyond the discretion of government and affirms that *“Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution. Such a procedure not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement, propose different initiatives, participate in the shaping of the political will, or influence public opinion so as to prevent the majority from acting arbitrarily. Although it is true that this procedure does not always prevent a law passed by the Legislature from being in violation of human rights --a possibility that underlines the need for some system of subsequent control-- there can be no doubt that it is an important obstacle to the arbitrary exercise of power.”<sup>8</sup>* The Court refers to the principle of legality by which

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<sup>6</sup> Commission on Human Rights Resolution 2002/46: *Further measures to promote and consolidate democracy*, 51st meeting, 23 April 2002.

<sup>7</sup> The Word " Laws " in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, May 9, 1986, Inter-Am. Ct. H.R. (Ser. A) No. 6 (1986), para. 21.

<sup>8</sup> Advisory Opinion OC-6/86, para. 22.

fundamental rights can only be restricted by law emphasizing the idea that it is precisely through law that the will of the people is legitimately expressed.<sup>9</sup>

The Court goes on to emphasize the relationship between representative democracy and the rule of law in the following terms: *“Under democratic constitutionalism, the requirement of law (reserva de ley) in cases of interference in the realm of freedom is essential to the legal protection and full existence of human rights. For the principles of legality and requirement of law (reserva de ley) to be an effective guarantee of the rights and freedoms of the individual, not only must the latter be formally proclaimed but there must also be a system that will effectively ensure their application and an effective control of the manner in which the organs exercise their powers. (...) Within the framework of the protection of human rights, the word “laws” would not make sense without reference to the concept that such rights cannot be restricted at the sole discretion of governmental authorities. To affirm otherwise would be to recognize in those who govern virtually absolute power over their subjects. On the other hand, the word “laws” acquires all of its logical and historical meaning if it is regarded as a requirement of the necessary restriction of governmental interference in the area of individual rights and freedoms. The Court concludes that the word “laws,” used in Article 30, can have no other meaning than that of formal law, that is, a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State.”*<sup>10</sup>

Finally, the Court recalls the importance of representative democracy as a basic principle of the OAS and Inter-American system evidenced by the fact that *“The Convention itself expressly recognizes political rights (Art. 23), which are included among those rights that cannot be suspended under Article 27. This is indicative of their importance in the system.”*<sup>11</sup> and concludes that *“The “laws” referred to in Article 30 are, therefore, normative acts directed towards the general welfare, passed by a democratically elected legislature and promulgated by the Executive Branch. This meaning is fully consistent with the general context of the Convention, in line with the philosophy of the inter-American system. Only formal law, as the Court understands that term, can restrict the enjoyment and exercise of the rights recognized by the Convention.”*<sup>12</sup>

In this way, the Court associates any restriction to human rights to the operation of the democratic system and, accordingly, allows said restriction to be qualified as “permissible”. The rule of law expresses itself here through the role of Parliament as guardian of human rights because of its plural composition, because of the debate that is intrinsic to it and also because of the representation of political minorities.

The Inter-American System went ahead with this association in the Advisory Opinions N° 8 and 9 on judicial guarantees during states of emergency. When requesting a legal opinion on the Habeas Corpus as a judicial guarantee in the context of article 27 of the American Convention, the Inter-American Commission of Human Rights presented the principle of

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<sup>9</sup> Advisory Opinion OC-6/86, para. 23

<sup>10</sup> Advisory Opinion OC-6/86, para. 24 and 27.

<sup>11</sup> Advisory Opinion OC-6/86, para 34.

<sup>12</sup> Advisory Opinion OC-6/86, para 35.

separation of powers as an element of the rule of law: *“Even with respect to the right to personal liberty, which may be temporarily suspended in special circumstances, the writ of habeas corpus enables the judge to determine whether the warrant of arrest meets the test of reasonableness, which is the standard prescribed by the case law of certain countries that have found themselves in states of emergency. To hold the contrary view - that is, that the executive branch is under no obligation to give reasons for a detention and may prolong such a detention indefinitely during states of emergency, without bringing the detainee before a judge empowered to grant the remedies set forth in Articles 7(6) and 25(1) of the Convention - would, in the opinion of the Commission, be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems.”*<sup>13</sup>

The Court elaborated on its previous advisory opinion and stated firmly that the suspension of guarantees does not allow for the “suspension of the rule of law”<sup>14</sup> and that *“The concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning”*<sup>15</sup>. The conclusion goes on to say that *“in a system governed by the rule of law it is entirely in order for an autonomous and independent judiciary to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency.”*<sup>16</sup>

The rule of law expresses itself in this case through the role of the judiciary, safeguarding legality and verifying the necessary requirements for the suspension of personal freedoms. What is more, the Court recognizes that the possibility to suspend certain rights is only permissible in the context of the rule of law; where an autonomous and independent judiciary may verify the lawfulness of such suspension.

Later, in its Advisory Opinion N° 9, the Court reiterates that the observance of the rule of law is intrinsic to the respect for human rights<sup>17</sup> and further clarifies that *“the judicial guarantees*

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<sup>13</sup> Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987), para. 8.

<sup>14</sup> 24. *The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law (The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 32).*

<sup>15</sup> Advisory Opinion OC-8/87, para 26.

<sup>16</sup> Advisory Opinion OC-8/87, para 40.

<sup>17</sup> *“The Court has already referred to the rule of law, to representative democracy, and to personal liberty, and has described in detail how essential they are to the inter-American system and in particular to the system for*

*essential for the protection of the human rights not subject to derogation, according to Article 27( 2 ) of the Convention, are those to which the Convention expressly refers in Articles 7( 6 ) and 25( 1 ), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees.”<sup>18</sup>*

Thus, the Court points out that the judicial guarantees essential for the protection of human rights which are not subject to derogation include, precisely, those necessary to preserve the rule of law. Meaning that in cases of exception, States may suspend certain guarantees but the rule of law itself cannot be suspended.

In 1992, Tom Franck published an article in the American Journal of International Law entitled *The Emerging Right to Democratic Governance* which launched an important debate on the relationship between international law and democracy. In this article, Franck proposed that legitimacy of governments was no longer a matter exclusively of national action but rather, was becoming a matter of international law. At an international level, the author proposed that we were witnessing a “*transformation of the democratic entitlement from moral prescription to international legal obligation.*”<sup>19</sup> The cases described above seem to prove Professor Franck right.

In the international community, the American States have been pioneers in the matter. As described above, the Inter-American System has taken important steps in defending the importance of democracy and the rule of law as essential in guaranteeing the protection of human rights. Furthermore, in 2001 the General Assembly of the OAS adopted a Resolution proclaimed as the Inter-American Democratic Charter through which it expresses the fundamental right to democracy, in the following terms: “*The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it.*”<sup>20</sup>

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*the protection of human rights contained in the Convention (...)* The Court considers it relevant to reiterate the following:

*In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning (Habeas Corpus in Emergency Situations, supra 16, para. 26). When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be nonexistent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law (Ibid., para. 24; see also The Word " Laws ", supra, para. 32). (...) Thus understood, the "guarantees... derived from representative democracy as a form of government" referred to in Article 29(c) imply not only a particular political system against which it is unlawful to rebel (Ibid., para. 20), but the need that it be supported by the judicial guarantees essential to ensure the legality of the measures taken in a state of emergency, in order to preserve the rule of law (Ibid., para. 40)."*

Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987), para. 35 and 37.

<sup>18</sup> Advisory Opinion OC-9/87, para. 38.

<sup>19</sup> 86 AJIL (1992) 46, p. 47.

<sup>20</sup> Inter-American Democratic Charter, AG/doc.8 (XXVIII-E/01), Adopted by the General Assembly at its special session held in Lima, Peru, on September 11, 2001.

In this context, it has become evident that the international community has come full circle, and we are facing an emerging right to democracy. This is especially important given the consequences it entails; mainly that such right would allow for the anticipation of human rights violations. Recognizing the right to democracy would mean that we no longer have to wait for the violation of human rights that result from non-democratic regimens to occur, but rather can intervene when democracy and the rule of law are at risk.

The international community has been progressively establishing a human right to democracy which simultaneously contains the scenario and condition for the realisation of other human rights. Protecting the core values of democracy, which are precisely those of the rule of law, (liberty, equality, justice, etc) sets the foundation for an adequate and stable environment in which human rights can continue to develop.