

## **THE IMPROVEMENT OF THE PROTECTION OF HUMAN RIGHTS IN CONSTITUTIONAL SYSTEMS**

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### **ABSTRACT:**

It was not until the end of the 18<sup>th</sup> century that fundamental human rights and freedoms, one of the most remarkable indicators and elements of democracy, have attained constitutional guarantees. The steps have been taken to provide human rights with protection at the 20<sup>th</sup> century in the international arena have been reflected at the national level and human rights have attained Constitutional Status in many countries.

This study addressing the process of being guaranteed of fundamental human rights and freedoms in constitutional systems will focus on the instruments and mechanics devoted to the effective protection of human rights. In this regard, the indispensability of the principle of Separation of Powers in terms of the protection of human rights, the impacts of the forms of constitutions and of government types on the protection of human rights, and the models of Continental and American Constitutional Review will be discussed.

**Keywords:** The Protection of Human Rights, Separation of Powers, Instruments and Mechanisms Established to Protect Human Rights.

### **ÖZET:**

Demokrasinin vazgeçilmez unsurlarından biri olan insan hak ve hürriyetlerinin Anayasal güvenceye kavuşması 18. yüzyılın sonlarına doğru mümkün olmuştur. İnsan haklarının korunması amacıyla uluslararası düzeyde 20. yüzyılda atılan adımlar, devletlerin ulusal politikalarına da yansımış ve insan hakları bir takım etkin mekanizmalar kurularak dünyanın birçok ülkesinde Anayasal statüye kavuşmuştur.

İnsan hak ve hürriyetlerinin Anayasal sistemlerde güvence altına alınma sürecini ele alan bu çalışmada, etkin bir korumanın ne tür araç ve mekanizmalarla sağlanabileceği hususu üzerinde durulacaktır. Bu bağlamda, güçler ayrılığı ilkesinin benimsenmesinin insan haklarının korunması açısından vazgeçilmez olduğuna, anayasa ve hükümet çeşitlerinin ve Kıta Avrupası ile Amerikan Yargı Sisteminin bu korumaya nasıl bir katkılarının olduğuna temas edilecek ve hangi tür mekanizmalar ile bu korumanın güçlendirildiğine değinilecektir.

**Anahtar Kelimeler:** İnsan Haklarının Korunması, Güçler Ayrılığı, İnsan Haklarını Korumak için Kurluan Mekanizmalar.

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## INTRODUCTION

The value attached to fundamental human rights and freedoms, one of the most remarkable indicators and elements of democracy, and considered as the legitimacy of political powers, has been increasing in importance in liberal democracies which have entrenched protections for human rights against dictatorship by the majority.

As is known, the recognition, protection and development of human rights and freedoms became universal in the 20<sup>th</sup> century, which can be characterized as the triumph of human rights. Nevertheless, this achievement was overshadowed by World Wars I and II where numerous human rights and humanitarian law violations, particularly genocides, occurred. In this century, human rights appear in every sphere of an individual's life; and have become an essential part of the economic, political and social debates on both the national and international arena.

However, the current position of human rights has been obtained as a result of long standing efforts. It was not until the late 20<sup>th</sup> century that human rights became a central concern to the world community, and were regulated and protected under international instruments. The establishment of the League of Nations in 1920, the United Nations in 1945, the League of Arab States in 1945, the European Union in 1951; and human rights protection mechanisms, such as, the European Court of Human Rights (ECtHR) in 1959, African Court on Human and Peoples' Rights in 2004, and the International Criminal Court in 2002, have made tremendous contributions to the recognition and protection of human rights. The most important purpose of these organisations and mechanisms is, arguably, "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, or sex..."<sup>1</sup> However, it can be convincingly argued that the efforts of international organisations dedicated to the protection of human rights will not be sufficient unless the developments at the international level are reflected on domestic law.

Human rights had attained constitutional guarantees after late 18<sup>th</sup> century. However, it was understood that regulating them under either international or domestic law was not adequate for the protection of human rights. The establishment of some mechanisms to protect human rights against abuses and prosecute abuses were needed. Therefore, national and international *mechanisms and instruments*, such as Constitutional Courts, the ECtHR and constitutional complaint, ombudsman, respectively, were established,

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<sup>1</sup> The United Nations Charter, 1945, Art. 1 (3)

particularly after the Second World War because of the fact that it was becoming increasingly difficult to ignore the importance of the protection of human rights. The main objective of the modern democracies in the context of protecting human rights is to prevent abuses in the first stage, then to increase the number of remedies and to make these remedies accessible.<sup>2</sup>

Instead of focusing on the history of human rights or international developments in the area of safeguarding human rights, the long history of the recognition and protection of human rights in *the constitutional context* will be addressed. Particularly, the definition of constitution; forms of government types and constitutions types, such as codified, un-codified, rigid and flexible constitutions, and their impacts on human rights protection; the process of taking human rights under constitutional protection; the impact of the American and Austrian continental constitutional review model on human rights protection; and constitutional mechanisms and instruments dedicated to the protection of human rights will be broadly examined in this article.

### **1.1. HUMAN RIGHTS PROTECTION AT DOMESTIC LEVEL**

Human rights can be domestically protected by many different ways, such as introducing law or regulations, establishing non-governmental organisations which observe the exercise of human rights, establish the facts, and try to bring the attention of the authorities to the violation of rights. Moreover, the World Conference on Human Rights emphasised "the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights."<sup>3</sup> The major contributions to human rights protection are the principle of the separation of powers and constitutions.

#### **1.1.1. The Principle of the Separation of Powers and Its Role in the Protection of Human Rights**

The origin of the principle goes back to the period of Aristotle and Plato. Aristotle, for the first time, classified the functions of the state into three categories; deliberative, magisterial and judicial. John Locke envisaged a threefold classification of powers; legislative, executive and federative. He drew a distinction between the three types of power, but did not mention a separate

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<sup>2</sup> Köküsarı, İ., Hak Arama Özgürlüğü ve 2010 Anayasa Değişikliği. *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, 1, 2011, p. 164

<sup>3</sup> The World Conference on Human Rights, Vienna Declaration and Programme of Action, 1993, para. 36

judicial power.<sup>4</sup> The French Jurist Montesquieu enunciated the principle of separation of powers for the first time. Montesquieu's doctrine signifies the fact that "one person or body of persons should not exercise all the three powers of the Government viz. legislative, executive and judiciary. In other words each organ should restrict itself to its own sphere and restrain from transgressing the province of the other."<sup>5</sup> Although this principle identifies with Montesquieu, in fact, it was for the first time put into practice in England. In English history, there have been always efforts to restrict the power of the monarch. These efforts commenced with the adoption of the Magna Carta, and were continued by the establishment of *Commune Concilium* and *Magnum Concilium*, and the adoption of the Bill of Rights 1689 and the Act of Settlement 1701.<sup>6</sup>

This principle applying almost all over the world, with the exception of countries dictatorially governed, is an indispensable element of modern democracies and *human rights protection*. However, the application of 'separation of power' varies from country to country. Gozler separated forms of government types into two categories: 'Systems of unification of powers' and 'Systems of separation of powers'. Merging powers into *executive power* may give rise to the emergence of authoritarian dictatorship like Iraq (Saddam era); totalitarian dictatorship like Nazi Germany; or absolute monarchy like Saudi Arabia; and therefore, the existence of human rights has never come into question in these kinds of regimes by virtue of the dependence of judicial power on the head of state.

Conversely, the combination of executive and legislative powers in *legislative power* gives rise to the emergence of the 'system of convention' applied in Switzerland and in the very early years of Turkey, between 1921-1924. In the practice of this system, the legislative power embodies both the authorities of legislation and the enforcement of laws. It can be argued that the 'system of convention' can ensure an effective human rights protection due to the independence of judicial power. However, the members of judiciary should be assigned by an impartial authority other than legislative power to ensure the independence of the judicial organ and the impartiality of judges.<sup>7</sup>

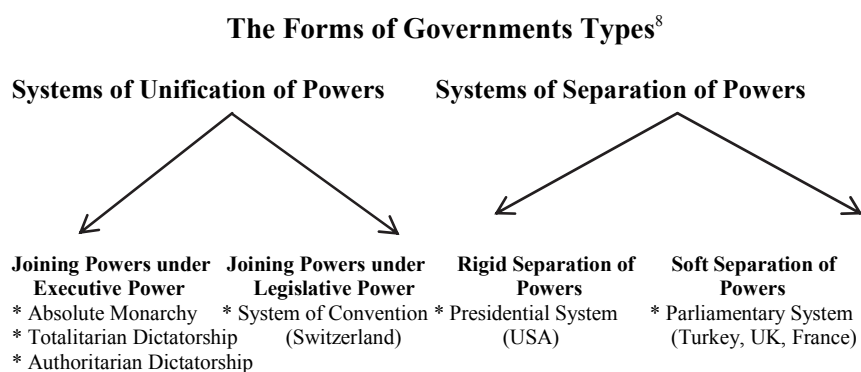
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<sup>4</sup> Parpworth, N., 7<sup>th</sup> ed., *Constitutional and Administrative Law*. Oxford: Oxford University Press, 2012, p. 19

<sup>5</sup> Singh, T. B., Principle of Separation of Powers and Concentration of Authority. *Judicial Training and Research Institute Journal*, 4&5, 1996, p. 1

<sup>6</sup> Gozler, K., *Anayasa Hukukunun Genel Teorisi-Cilt II [The General Theory of Constitutional Law] Volume II*. Bursa: Ekin Yayınevi, 2011, pp. 539-540

<sup>7</sup> Gozler, 2011, pp. 539-544



As Montesquieu correctly pointed out, "there is no liberty, if the judiciary power be not separated from the legislative and executive."<sup>9</sup> "The independence of the judiciary is an integral part of democracy, intending to shield the judicial process from external influences and to provide full legal protection to all individuals going to court for whatever reason."<sup>10</sup> This is best provided by the regimes applying the principle of separation of powers: 'rigid separation of powers' and 'soft separation of powers'. The former is applied in the USA, where the three powers are rigidly separated from each other. The latter is applied by the majority of the countries, such as Turkey, Germany and the UK. The reason for defining this system as 'soft' is the absence of a certain line between executive and legislative powers.<sup>11</sup> As can be seen from the form of government having the principle of separation of powers, judicial power has more independence than other powers, albeit some judges of Constitutional Courts are appointed by the president (USA, France, Turkey) or parliament (Turkey, France).

According to Keith, six key constitutional elements are required for the existence of *separation powers* and *independent judiciary* to safeguard human rights.

1. Constitution must guarantee restricted removal of judges and 'terms of office', regardless of whether appointed or elected,
2. The establishment of exceptional and military courts should be banned,

<sup>8</sup> Gozler, 2011, pp. 539-544

<sup>9</sup> Montesquieu, *The Spirit of Laws [De l'Esprit des Lois]*. Translated from the French by Thomas Nugent. Botache Books: Kitchener, 1748, p. 173

<sup>10</sup> Murati, G., *The Independence of the Judiciary and Its Role in the Protection of Human Rights under UN Administration Using the Case of Kosovo*. [Online]. Available at: [http://www.esil-sedi.eu/sites/default/files/Murati\\_0.PDF](http://www.esil-sedi.eu/sites/default/files/Murati_0.PDF). [Accessed 18<sup>th</sup> August 2014], n.d., p. 1

<sup>11</sup> Gozler, 2011, pp. 554-568

3. The courts must have *fiscal autonomy* to protect courts from the financial retribution of an abusive regime,
4. The decisions of judges must not to be subject unto revision outside any appeals procedures.
5. Courts should have exclusive authority to decide without any restrictions, inducements, improper influences, threats or pressures.
6. The selection and promotion of judges must be based on merit-integrity, qualifications efficiency and ability.<sup>12</sup>

### 1.1.2. The American Judicial Review Model

The American model of judicial review based on the *Marbury* case, 1803, is widely implemented by many countries, such as Canada, Denmark, Ireland, Bangladesh, Iran and Israel. It was not until the 19<sup>th</sup> century, that the United States Supreme Court declared itself as an ultimate and paramount interpreter of the Constitution.<sup>13</sup> In this case, the Supreme Court authorised itself to examine the constitutionality of statutes and to declare such a statute invalid as a violation of the constitution, and thus, the era of judicial review began.<sup>14</sup> Therefore, *Marbury v. Madison* is a landmark, and can be deemed as a historical act having paramount importance just as the drafting of the first 1787 USA Constitution.<sup>15</sup>

In the American model, "There is no specific court or tribunals with monopolistic jurisdiction to examine only constitutionality of statues."<sup>16</sup> Therefore, the American system gives the authority to *all courts, including ordinary*, to assess the constitutionality of the laws. Although the United State Constitution does not explicitly describe the power of judicial review, the authority of judicial review has come out of the structure, the spirit and the history of the constitution. However, in the continental constitutional review model (The Austrian model), "civil law courts were not attractive organs to endow with the power of constitutional interpretation because they were staffed

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<sup>12</sup> Keith, L. C., Judicial Independence and Human Rights Protection around the World. *Judicature*, 85 (4), 2002, pp. 195-196

<sup>13</sup> Andrade, G. F., Comparative Constitutional Law: Judicial Review. *Journal of Constitutional Law*, 3(3), 2001, p. 980

<sup>14</sup> *Marbury v. Madison* [1803] 5 US 137

<sup>15</sup> Tanchev, E., *Constitutional Control in Comparative and Bulgarian Prospective*. [Online]. Available at: [http://www.venice.coe.int/wccj/Papers/BUL\\_Tanchev\\_E.pdf](http://www.venice.coe.int/wccj/Papers/BUL_Tanchev_E.pdf). [Accessed: 22<sup>nd</sup> August 2014], n.d., p. 2

<sup>16</sup> Andrade, 2001, p. 979

by civil servants and were ideologically accustomed to being subservient to legislatures."<sup>17</sup>

Arguably the most important criticisms of the review of constitutionality by ordinary courts are that predictability and uniformity are indispensable elements for all legal systems, "and a diffuse system of review without *stare decisis* undoubtedly would put these two fundamental values at stake."<sup>18</sup> In other words, granting indiscriminately the power to control the constitutionality of norms to all judges will cause conflicting decisions as to the validity of a statute, and will undermine the system altogether. Thus, unelected and unaccountable judges can overturn the will of the democratically elected and accountable legislature.

### **1.1.3. Protecting Human Rights through Constitutional Law and Constitutional Mechanisms (The Austrian, Continental-Constitutional Review Model)**

#### **1.1.3.1. The Definition of Constitution**

The definition of a constitution is more a general idea than an exact legal concept, thus, the term can be described by how it is used in practice. The majority of commentators have endeavoured to capture the essence of a constitution. However, each of them has emphasised different aspects of the notion.<sup>19</sup> According to Bradley and Ewing, a constitution is "a part of national law which governs the system of public administration and the relationship between the individual and the state".<sup>20</sup> This definition is accepted as 'constitution in material sense'. Ozbudun gave a wider description by combining both constitution in the *material* and *formal* sense that a constitution is the superior law which regulates the allocation of functions, duties and powers among the various organs and officers of the state, the relationship of these organs with each other and defines the fundamental principles of the relationship between the state and the public. The concept of 'superior' was used in this definition by virtue of the fact that the procedure of amending a constitution is more difficult than an ordinary code.<sup>21</sup> Superiority of a constitution is the main feature of the 'constitution in the formal sense'. Therefore, all written constitutions should be situated at the top of the hierarchy

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<sup>17</sup> Schor, M., Judicial Review and American Constitutional Exceptionalism. *Osgoode Hall Law Journal*, 46, 2008, p. 554

<sup>18</sup> Andrade, 2001, pp. 983-984

<sup>19</sup> Adler, J., 8<sup>th</sup> ed., *Constitutional and Administrative Law*. Hampshire: Palgrave Macmillan, 2011, p. 7

<sup>20</sup> Bradley, A. W. and Ewing, K. D., *Constitutional and Administrative Law*. 15<sup>th</sup> ed. Harlow: Longman, 2011, p. 9

<sup>21</sup> Ozbudun, E., *Anayasa Hukuku*. Eskişehir: Anadolu Üniversitesi Yayını, 2005, p. 1

of norms and be amended by a qualified majority to be able to protect fundamental rights and freedoms and the administrative system of a state.

### ***1.1.3.2. Constitution Types and Their Impacts on Human Rights Protection***

Although constitutions can be classified as written or un-codified, rigid or flexible, monarchical or republican, parliamentary or presidential and federal or unitary,<sup>22</sup> only the first two constitution types will be examined under this subtitle. When looking at them from the aspect of human rights, only written-un-codified and rigid-flexible constitutions are worth evaluating.

#### **1.1.3.2.1. Written and Un-Codified Constitutions**

A written constitution is a single or related group of documents which have binding force, usually being superior to other kinds of law, and are entrenched to protect their provisions concerning the operation of the state and human rights.<sup>23</sup>

The custom is the oldest formal source of the legal rules, and it remained the only source of constitutional rules until the 18<sup>th</sup> century. The English Constitution is the clearest example of such a type of constitution, since the constitutional law was formed by customs, usage, and precedent, but not codified. Also, Statutes, court judgments and legal instruments are part of the customary constitution. For instance, despite the absence of any rules, the laws which were adopted by Parliament have approved by the Monarch since 1707.<sup>24</sup> Also, it became the rule applied for centuries that the Monarch has always assigned the Prime Minister from inside of the House of Commons.

The British scholar A. V. Dicey emphasised the term of 'constitutional convention'. According to him, a convention determines duties or obligations, but so 'morally and politically' not 'legally'.<sup>25</sup>

*In the English context, the ultimate purpose of constitutional conventions is to secure the supremacy of Parliament over the monarch and the democratic accountability of the legislature. Political power should be exercised in such a way as to maintain democratic government. To do otherwise is to violate the spirit of the constitution, even if it does not violate any particular rule. The critical enforcement mechanism for preserving these 'habits of obedience' is ultimately public opinion.*<sup>26</sup>

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<sup>22</sup> Parpworth, 2012, pp. 6-7

<sup>23</sup> Adler, 2011, p. 7

<sup>24</sup> Chrimes, S.B., English Constitutional History. London: Oxford University Press, 1953, p. 13

<sup>25</sup> Whittington, K. E., The Status of Unwritten Constitutional Conventions in the United States. *University of Illinois Law Review*, 5, 2013, p. 106

<sup>26</sup> Whittington, 2013, p. 106



In the light of the foregoing findings, a case could be argued for un-codified constitutions in that; because of the absence of a superior codified instrument regulating and protecting human rights, there is always a *potential* risk of the derogation or restriction of human rights and freedoms, unlike written constitution.

#### 1.1.3.2.2. Rigid and Flexible Constitutions

Rigid constitutions "can only be amended through political procedures that are more complex than those that are followed for the enactment and repeal of ordinary legislation. A flexible Constitution, in contrast, can be amended following the ordinary procedures."<sup>27</sup>

The main purpose of this device is to protect the status quo and the existing constitutional provisions concerning the running of state organs or human rights.<sup>28</sup> Some constitutions, such as the USA, Turkey, Portugal and Germany, require a referendum or parliamentary supermajority (2/3 or 3/5 of the parliament) for the amendment of constitution. In contrast, under other constitutions, a simple majority is sufficient for an amendment.

Rigid constitution can be deemed as the best type of constitution in terms of human rights protection. It can be accepted that human rights attain a better protection by constitutional rigidity. Thus, human rights under constitutional guarantee cannot be amended by the government having a simple majority. On the other hand, it should be noted that it depends on what the constitution says, and how it is enforced. For instance, despite the fact that the Turkish Constitution of 1961 was a well-prepared constitution in terms of the inclusion of almost all fundamental rights and freedoms and ensured the judicial protection of rule of law, it is impossible to say the same for the enforcement of the Constitution; to be more precise, law enforcement bodies have avoided the implementing the provisions of the Constitution.

Nevertheless, supermajority requirement will not help small groups or minorities all the time. A requirement of a three-fifth supermajority can help only the minority of 34% to a large degree, whereas it cannot help the minorities of 5% very much.<sup>29</sup> Benz correctly emphasises that the rigidity and flexibility of the constitution should be balanced to ensure better protection for human rights.<sup>30</sup>

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<sup>27</sup> Ferreres-Comella, V., A defence of Constitutional Rigidity. *Analisi e Diritto*. pp.45-68, 2000, p. 46

<sup>28</sup> Rasch, B. E., Foundations of Constitutional Stability: Veto Points, Qualified Majorities, and Agenda-Setting Rules in Amendment Procedures. *ECPR Joint Sessions of Workshops*, 2008, pp. 12-13

<sup>29</sup> Ferreres-Comella, 2000, p. 57

<sup>30</sup> Benz, A., Balancing Rigidity and Flexibility: Constitutional Dynamics in Federal Systems. *West European Politics*, 36 (4), 2013, p. 726

### 1.1.3.3. Constitutionalism

In both Christian and Islamic culture, it was deemed that 'sovereigns' acceded to the throne by courtesy of God willing, (*Omnis potestas a Dio*) and therefore, obedience towards sovereigns was deemed a religious duty. The idea of restriction of the sovereign's power comes under question through 'constitutionalism'.<sup>31</sup> It was understood that the power is not unlimited and cannot be used arbitrarily, and the power should be used to establish justice and protect human rights and freedoms. Gathering full power under one authority gives rise to a wide range of human rights violations, in other words, 'tyranny'.

It has been claimed that the root of constitution goes back thousands of years; for instance, to the book of Aristotle, 'Constitution of Athens, and Politics'. Also, it is asserted that 'Solonian Constitution' (6<sup>th</sup> century BC), 'Code of Manu' (3<sup>rd</sup> century), Charter of Medina (622) and Magna Carta (1215) are pre-modern constitutions. Nevertheless, they should not be accepted as 'constitutional documents' because of the fact that they do not have the characteristic features of a constitution. Generally, to be able to define as a written constitution, the document should be situated at the top of the '*hierarchy of norms*', and the enactment and repeal of the constitution should be more complex than ordinary legislation.<sup>32</sup>

Arguably the most notable constitutional document is Magna Carta, signed between King John and a group of influential barons who were powerful local land proprietors. Magna Carta outlines some significant principles *curbing the arbitrary power* of the monarch in favour of both individuals and barons.<sup>33</sup> Magna Carta was followed by the Bill of Rights of 1689 which extended the Parliament's authority and power, and the Act of Settlement of 1701. As a consequence, although the United Kingdom does not have a codified constitution, it achieved to shift the balance of power from the royal family and aristocracy to the House of Commons by these constitutional documents. Thus, transition period of the UK from 'absolute monarchy' to 'parliamentary constitutional monarchy' became the source of inspiration for other countries and accelerated the process of democratisation and constitutionalism.<sup>34</sup>

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<sup>31</sup> Ozbudun, 2005, p. 4

<sup>32</sup> Elster, J., Forces and Mechanisms in the Constitution-Making Process. *Duke Law Journal*, 45 (2), 1995, p. 366

<sup>33</sup> Rathbone, M., *The Human Rights Act: a Magna Carta for the twenty-first century?*. [Online]. (s.l.): Political Studies Association. Available at: <http://magnacarta800th.com/wp-content/uploads/2014/05/Rathbone-Essay-Human-Rights-Act-and-Magna-Carta.pdf>. [Accessed: 19<sup>th</sup> August 2014], 2014, p. 3

<sup>34</sup> Gozler, 2011, pp. 538-540

The 18<sup>th</sup> and 19<sup>th</sup> centuries were the greatest era in constitutionalism in modern Western societies. For instance, the United States Constitution, 1787; Polish Constitution, 1791 (never come into force); France Constitution, 1791; Sweden Constitution, 1809; Spain Constitution, 1812 (abolished in 1814); Norway Constitution, 1814; Belgium Constitution, 1831; Switzerland Constitution, 1848; Italy Constitution, 1848 (statuto albertino); Prussia Constitution, 1848-1850; Denmark Constitution 1849; Greek Constitution, 1864; Romania Constitution, 1866; Luxemburg Constitution, 1868; German Empire Constitution, 1871; the Ottoman Empire Constitution, 1876 and Netherland Constitution, 1887.<sup>35</sup>

Constitutions generally appeared after chaotic atmosphere, such as war, revolution and independence.<sup>36</sup> The primary reason for making a constitution is to restrict the state power, and expand individual's rights and freedoms. In a constitutional system, the power has to be used by special authorities commissioned by the constitution, and therefore, the principle of separation of powers has become even more important.<sup>37</sup>

#### ***1.1.3.4. What are Constitutions For?***

What are constitutions for and what are they designed to achieve? Almost all countries in the world have a documentary constitution. The main aim of constitutions is to organise the work and relationship of state institutions to guarantee minimum security, services, and freedom for the citizens. The characteristics of the documentary constitutions of the modern democracies are to draw the line between powers; to determine who has which power, and how these powers can be controlled to safeguard and enforce human rights and to prevent abuses whether or not of human rights.<sup>38</sup> Constitutions are made to determine:

1. "The choosing and removing of rulers
2. The relationship between the different branches of government,
3. The relationship between the state and external bodies,
4. The rights and freedoms of citizen in relation to government,
5. And, to enable the accountability of both government official and government bodies."<sup>39</sup>

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<sup>35</sup> Gozler, 2011, p. 3

<sup>36</sup> Elster, 1995, pp. 368-369

<sup>37</sup> Gozler, 2011, p. 132

<sup>38</sup> Barendt, E., *An Introduction to Constitutional Law*. Oxford: Oxford University Press, 1998, p. 1

<sup>39</sup> Adler, 2011, p. 4

Besides, depending on the country and their circumstances a constitution can try to achieve more. For instance, "in countries that suffer from social injustice and high levels of poverty, constitutions can contribute to redressing the imbalance by providing for social and economic rights and the means to enforce them."<sup>40</sup> Moreover, a constitution should not serve as a weapon during political turmoil, particularly in countries which are highly divided and volatile.

#### ***1.1.3.5. The Process of Taking Human Rights under Constitutional Protection***

Human rights are rights inherent to all mankind, whatever their nationality, place of residence, colour, religion, language, sex, national or ethnic origin, or any other status. These rights are inalienable, indivisible and interdependent, and are held by all people equally and forever.<sup>41</sup>

It is believed that all individuals, regardless of their social status, have universal and inalienable rights and can benefit from these rights without being exposed to discrimination. This belief has progressed as a consequence of improvements in scientific and philosophical thought through the human history.<sup>42</sup> However, it took some time to reach this outcome, since the treatment of states towards their citizens had been accepted as a domestic affair until World War II; and thus, the rights of individuals could have been easily violated. Furthermore, the absence of international instruments and mechanisms protecting human rights and punishing the violation of rights perpetrated by the national authorities has contributed to innumerable cruel and inhuman treatments,<sup>43</sup> during the 20<sup>th</sup> century, particularly in World War I and II. Conversely, after the Second World War, two interrelated positive developments have been observed. The first of these is the idea of providing human rights with universal protection. Indeed, adoption of the Universal Declaration of Human Rights, the Helsinki Declaration, the European Social Charter and the European Convention on Human Rights (ECHR) and its Additional Protocols, and the establishment of the ECtHR are some of the substantial indicators of the importance attached to human rights in the international arena. As for the second development, it has been understood that administrative transactions against the rights of individuals guaranteed by a

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<sup>40</sup> Al-Ali, Z., *Egypt's Third Constitution in Three Years: A Critical Analysis*. [Online]. (s.l.): International IDEA. Available at: <http://www.idea.int/wana/egypts-third-constitution-in-three-years-a-critical-analysis.cfm>. [Accessed 18<sup>th</sup> August 2014], 2013, p. 1

<sup>41</sup> Cranston, M., *What are Human Rights?* London: The Bodley Head, 1973, pp. 1-3

<sup>42</sup> Uygun, O., *İnsan Hakları Kuramı*. Istanbul: Yapı Kredi Yayınları, 2000, pp. 13-18

<sup>43</sup> Perry, M. J., *The Idea of Human Rights: Four Inquiries*. New York: Oxford University Press, 1998, p. 11

constitution ought to be under the supervision of an impartial mechanism, 'constitutional court'.<sup>44</sup>

It has been claimed by Gülsoy that the main reason for the emergence of constitutional jurisdiction is to ensure the compatibility of codes and bylaws to constitution and to protect the constitutional order.<sup>45</sup> Another significant function of constitutional jurisdiction is to provide fundamental rights and freedoms with protection. The function of the protection of human rights is one of the essential characteristic features of modern constitutional systems,<sup>46</sup> while it had been accepted as a secondary and exceptional feature in the past. Indeed, constitutional mechanisms have been established since World War II; and they play a pivotal role in the realization of human rights and freedoms.

#### ***1.1.3.6. Constitutional Mechanisms and Instruments Devoted to the Protection of Human Rights***

The administration's involvement in various issues, the complex nature of legislation, and the deficiency of judiciary reform and other inspection mechanisms in addition to changing expectations, conditions, and needs of society have encouraged society to seek new ways of preserving and pursuing their rights and freedoms.<sup>47</sup> Therefore, constitutional control mechanisms were created, such as, constitutional court and the office of ombudsman.

##### **1.1.3.6.1. Constitutional Court**

A constitutional court is the highest judicial authority that deals primarily with the review of constitutionality of acts of parliament and allegations of infringement of individuals' rights and freedoms. It is quite difficult to imagine the sanction power of a constitution without a constitutional court which is a guardian of constitution. Indeed, the primary duty of a constitutional court has not changed since 1919 (the first constitution, Austrian Constitutional Court): to review the constitutionality of norms (abstract and concrete review of norms). These methods of review are a legal procedure brought before the constitutional court.

**a) Abstract Review of Norms:** The constitution can empower certain people or organs with the right to file an annulment action to review the

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<sup>44</sup> Kılınç, B., Karşılaştırmalı Anayasa Yargısında Bireysel Başvuru Kurumu ve Türkiye Açısından Uygulanabilirliği. *Anayasa Yargısı*, 25, 2008, pp. 19-20

<sup>45</sup> Gülsoy, M. T., *Özgürlüklerin Korunmasında Anayasa Yargısının Yeri ve Meşruluğu*. Ankara: Yetkin Yayınları, 2007, pp. 80-90

<sup>46</sup> Sweet, A. S., Politics of Constitutional Review of Legislation in France and Europe. *International Journal of Constitutional Law*, 5 (1), 2007, p. 85

<sup>47</sup> Efe, H., Demirci, M., The Concept of the Ombudsman and Expectations from the Ombudsman Institution in Turkey. *Sayıştay Dergisi*, 90, 2013, p. 49

constitutionality of an act of parliament and decrees having the force of law. The president, parliamentary groups of ruling party or parties, main opposition party or a certain number of members of parliament have a right to apply for an annulment action. Annulment action is used in a great number of European Countries, such as, Germany, Austria, Armenia, Belarus, Croatia, Poland and Latvia, in the same manner, except for small differences. For instance, the right to make an application for annulment action belongs to 50 parliamentarians in Spain, 110 parliamentarians in Turkey; to Prime Ministers in Germany, France and Spain; to a minimum of one-third of the total number of the parliament in Germany and Austria. The time limit for the action is 30 days in Italy, 3 months in Spain, and there was not any time limit set in Germany and Austria.<sup>48</sup>

**b) Concrete Review of Norms:** As for the concrete review of norms, if an ordinary court has a doubt as to whether an act of parliament applicable in a concrete case violates the constitution, the courts or plaintiff brings a preliminary question before the constitutional court. However, in the remedy of *actio popularis*, every person has a right to take action against an act of parliament without needing to *prove* that complainant is directly and currently affected by the provision. This legal remedy, applying in Croatia, Georgia, Chile, Malta and Peru is quite effective.<sup>49</sup> These remedies give an opportunity to certain people, the State's organs or individuals affecting to seek the annulment of law which is against constitutionally protected human rights.<sup>50</sup>

**c) Constitutional Complaint:** It can be argued that the peak of the level of developments in the context of protecting human rights by constitutional jurisdiction is the right to individual application/constitutional complaint. The point attained at present in human rights protection allows individuals to bring their complaints before constitutional courts by alleging that their rights and freedoms are violated by state authorities.<sup>51</sup>

**d) Quasi Actio Popularis:** Another institution '*Quasi actio popularis*', exists in Greece. It can be described as a remedy taking place between 'abstract *actio popularis*' and 'constitutional complaint'. The standing rules of the institution are more restrictive than constitutional complaint and *actio popularis*, since the applicant has to prove that he has a certain legal interest in

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<sup>48</sup> Gozler, 2011, pp. 749-750

<sup>49</sup> Council of Europe Venice Commission CDL-JU (2010)018rev, 2010, pp. 17-21

<sup>50</sup> Bilgin, A., Genel ve Türk Hukuk Tarihi Yönünden İnsan Haklarının Analizi. *Yeni Türkiye Dergisi*. 2003, pp. 30-35

<sup>51</sup> Atasoy, H., Constitutional Complaint in Turkish Law. *TAAD*, 3 (9), 2012, pp. 71-72

the annulment of the norm, but he does not need to be affected. In other words, his rights, legal interest or legal position are interfered by the legal provision.<sup>52</sup>

#### **1.1.3.6.2. Ombudsman Institution**

In parallel with social change and development, the institution of ombudsman was established in many countries to improve human rights, inspect bureaucracy, investigate complaints and to draw government agencies' and the public's attention to the inconvenience of bureaucracy. Generally, an ombudsman is elected by Parliament, and no one is allowed to give any orders, recommendations or suggestions to him.<sup>53</sup>

In spite of the fact that an ombudsman has no power to impose sanctions, the ombudsman, who is a kind of neutral mediator between state and individuals listens, examines research and investigates complaints, and announces the result of the investigation to the public.<sup>54</sup> Reif emphasises the importance of the ombudsperson in building good governance in a state that the institution can improve/advance the legitimacy and fairness of government administration, and thus, increase government accountability. Also, it can act as a mechanism for the domestic exercising of the international human rights duties and obligations of the state, and help strengthen the protection of human rights.<sup>55</sup>

## **CONCLUSION**

The goal of this work has been to assess to some degree the development process and the current position of human rights in the constitutional context in various countries and systems. To be able to afford adequate protection to human rights and prevent the human rights abuses, regulating them under constitution is one of the most effective measure. Moreover, having a rigid and written constitution is one of the most significant way to strengthen human rights.

Nevertheless, as is seen from the some democratic and liberal countries which have not a written or rigid constitution, human rights could have a better protection in this countries than others.

The basic components of ensuring democratic and liberal system without a written or rigid constitution in these countries are the recognition of separation

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<sup>52</sup> Council of Europe Venice Commission CDL-JU (2010)018rev, 2010, p. 21

<sup>53</sup> Fendoglu, H. T., Public Auditorship (Ombudsmanship) and Right to Constitutional Complaint to the Constitutional Court. *Ankara Bar Review*, 4, 2013, pp. 23-24

<sup>54</sup> Efe and Demirci, 2013, p. 50

<sup>55</sup> Reif, L. C., Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection. *Harvard Human Rights Law Journal*, 13, 2000, p. 2

of powers, judicial review of executive acts, constitutional review of legislative acts and the independence of the judiciary. However, the inclusion of all these components is not the only qualifier to make a constitution democratic and liberal. In this regard, the constitution should include a number of remedies such as Abstract and Concrete Review of Norms, the institution of Ombudsman, constitutional complaint, Quasi Actio Popularis, and make these remedies accessible to protect the human rights and freedoms.<sup>56</sup>

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<sup>56</sup> Köküarı, 2011, p. 164



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