

THE ROLE OF THE STATE IN THE PROTECTION OF BASIC HUMAN RIGHTS AND FREEDOMS

Abstract. *The article addresses the question of the role of the state in the protection of human rights and freedoms. Like states, rights and freedoms are also created on the basis of social conventions, and any reference to the universal nature or natural character of rights and freedoms is only an ideological moment in the pursuit of political goals. The basic prerequisite for the protection of rights and freedoms is the establishment of organised coercion in the form of state power which brings under its authority the multitude of different interests and diverse ways of implementing justice. The conclusive findings show that for its successful introduction into the lives of individuals, the moral discourse of universal human rights and freedoms needs effective state authority that embeds these rights and freedoms into the foundations of the legitimacy of its own existence.*

Keywords: *Constitutionalism, the state, human rights and freedoms, Leviathan, Thomas Hobbes*

Introduction

The theory of the modern state represents a historical response to the shortcomings of feudal social order which in a political sense stemmed from, amongst other things, the dispersed exercise of sovereign power. To this aim the theory of the modern state has put the exercise of legitimate force in the hands of the sovereign and centralised state authority. This arrangement has strongly reinforced the central state power, and in turn this reinforcement has brought multiple authorities which have made state power the central violator of basic human rights and freedoms. Internationally, the bitter experiences of the two World Wars subsequently lead to the emergence of numerous conventions, such as the *European Convention of Human Rights* of 1950, which legally binds 47 signatory states and members of the

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Council of Europe, as well as institutions, such as the *European Court of Human Rights*. The basic principle of the latter is to ensure the judicial protection of human rights *vis-à-vis* the national authorities within the Council of Europe. At the same time, the trend developed in the democratic political systems of the Western type with the increasing influence of constitutional courts as the highest institutional ramparts of constitutional principles. In time these courts came to reach beyond the doctrinal foundations of the so called Kelsen's constitutional court and started to move towards acquiring the role of an active legislator, which is one of the central premises of the so called new constitutionalism.¹ This trend gained additional impetus after 1989, when the principles of the political system of the Cold War's victors started to show their influence. Furthermore, Eastern European countries, which before belonged to the Soviet Union's sphere of influence, at least formally started to adjust to the principles of constitutional democracy and today have mostly become full members of the European Union. Yet, are national states really only the mass violators of human rights or can they at the same time be understood as their defenders? Our argument in this article will take the direction of explaining this other dimension of the functioning of national states. Namely, we will attempt to show why the existence of state power is actually the *conditio sine qua non* of any effective protection and the implementation of basic human rights and freedoms. The main idea of our argument is that basic human rights and freedoms remain caught up in the abstract or ideational frameworks of human intellectual efforts until the emergence of sovereign state power. This, in turn, takes on as its normative and actual responsibility the protection of human rights and freedoms codified in one or another way. The aforementioned normative and actual responsibility comprises of much more than just the listing of certain rights of persons and citizens in constitutions and legal acts; rather it is about the establishment of the institutional architecture of the state that reflects structural commitment to the protection of these rights and freedoms. Essentially, this is about the establishment of diverse institutional entities, i.e. legislative, executive and judicial branches of power (the principle of the separation of powers). These are mutually checked, preventing each establishment going beyond the constitutionally defined competencies in exercising that state authority (the principle of checks and balances), while their actions are bound by constitution and laws (the principle of the rule of law). From the aspect of the efficient protection of basic human rights and freedoms, the existence of state power is necessary, as it is only through this that the process can be set in motion toward adoption (by the constitution-maker, lawmaker), execution (the government) and the judicial protection

¹ Cf. Stone Sweet (2000).

(ordinary judiciary, constitutional judiciary) of constitutional and legislative grounds for the recognition of individual rights and freedoms. This process must always be supported by a certain power that guarantees the holders of rights the *de facto* exercise of individual legal acts. This is why state power is only considered to be an internally sovereign power, when the use of force on the part of the state is monopolised. Historically, all the above mentioned principles and the process originate from the concept of the modern state, which is distinguished from its predecessors by its moral, political and legal foundations. The modern state is the first legal and political project in the history of humankind that accepted the protection of rights and freedoms of persons and citizens as its fundamental task. Thus, making the public-law aspect of the development of the concept of the state to qualitatively shift from empirical to normative constitutionalism.

Our starting thesis says that states are only allowed to violate basic human rights and freedoms because, basically, they enable them. The ability of the state to curtail rights and freedoms and at the same time defend them is the reflection of its autonomy, *i.e.*, its abstraction both from concrete persons who exercise power as well as from the people from whose, according to the modern theory of the state, power originates. The principle of the rule of law can only start to take effect when governing is not in the domain of an arbitrary judgement of a concrete person or a group of people, but becomes the domain of abstract law which concrete holders of power are obliged to exercise in accordance with the predefined processional and material legal regulations. The requirement for the rule of law is rooted in distrust toward human nature and is actually a corrective measure for the human antisocial dimension. Therefore, state authority formally establishes rights and freedoms, which is why it can also defend them throughout its institutions. In other words, the state can only violate the rights and freedoms which it has been legally committed to defend and create conditions for their actual implementation. In this respect, the natural-law discourse of the universality of basic human rights and freedoms acts ineffectively to the extent that it does not recognise the defining influence of the constitution of state power as the mightiest guarantor of the respect of human rights and freedoms. What remains of the idea of the universality of human rights and freedoms is only empty abstraction, insofar as at the same time there is no real force which makes these rights and freedoms become concrete and, therefore, that *de facto* exercises them. Thomas Hobbes, the founder of the modern theory of social contract, understood this logic very well, when in his masterpiece, *The Leviathan*, he gave a comprehensive explanation of the causes for the constitution of political power whose fundamental mission is to protect the natural rights of the members of this community. While the circumstances of his life and work lead Hobbes to defend the idea of

natural-law absolutism, which from today's perspective is anachronistic, some of his ideas hold persuasive intellectual foundations regarding the understanding of the modern state as the first form of political community taking on, as mentioned before, the obligation to protect basic human rights and freedoms. Our aim is not to look for the seeds of liberal ideas in Hobbes, but rather to contribute to the return of the state into public discourse, at a time when the importance of the state for an individual's freedom seems to have been largely excluded by the neoliberal conceptualisation of an individual's freedom, and considered as being organically attached to the individual and, in turn, independent of the constitutive principles of the modern state and its real power.

Empirical and normative constitutionalism

The foundations of the modern conception of the state have been built since circa the 17th century on, when classical texts were written by the founders of the modern theory of social contract, starting with Thomas Hobbes and John Lock. Also, the first bourgeois revolution, the so called Glorious Revolution in England, took place between 1688 and 1689, which provided an important model for the revolutions in the 18th century, both in Europe, e.g. France in 1789, and, a few years earlier, in the United States. Certainly, it is no coincidence that it was in England that the process of radical social and political change started, which fundamentally rejected the idea of the absolutist rule of the monarchy, akin to the French model. In England, deep in the Middle ages, specific historical circumstances lead to the creation of the *Magna Carta Libertatum*, which enabled the then rebellious aristocracy to pose, with the help of the bourgeoisie, a "public-law" demand to limit the king's power. Historical experience of continental European states differed from the English one in that the liberal bourgeois ideas about the restriction of sovereign power only gained ground more than a century later. These experiences are mainly related to the continental tradition of the centralised power of the monarchy which, as opposed to the English tradition of power that was balanced between the aristocracy and the monarchy, propagated absolute power within the feudal body politic. The first modern theory of the state is the constitutional theory of the state, whose key idea is the idea of limited power. This idea stems from the wider principle of an individual's freedom - which modern conception mainly defines in negative terms, i.e. in terms of the prohibition of the state authority to interfere with one's personal space - the two main values of which being one's life and (private) property. The space of negative freedom is the space with which the state power has no authority to interfere, as it is the space where everything that is not explicitly prohibited is allowed. It is only

possible to constitute (*constituere*) such space under the circumstances in which the existence of basic rules enframes this space and guarantees the observance of these rules. The explanations of the emergence of the space of negative freedom are not to be looked for in the principles of the law of nature, which are said to be temporally and territorially unlimited. Rather, they are to be found in the specific conception of the state, which builds its own legitimacy on the protection of “natural” human rights. While state authority does not create “natural” rights, it creates the conditions for their recognition. Namely, the exercise of these rights primarily stems from the real power of the state authority to establish the conditions in which the rights of the weak are protected from the arbitrary demands of the powerful, which, as it were, is the first principle of the law, *per se*. The state, which normatively takes on the burden of protecting “natural” human rights, is the constitutional state which definitively takes away from those in power the status of *legibus solutus*, which was one of the basic principles of the absolutist state. The constitutional state needs a formalised hierarchy of rules which in the modern era replaces the archaic feudal social and political hierarchy. If the monarch, as God’s representative on Earth, was at the top of the medieval feudal hierarchy², in modernity, after the definite dissolution of the ideals related to the principle of the sovereignty of people, this status was gradually acquired by the legal system with the constitution at its pinnacle.³ These are the roots of one of the central principles of the modern state, *i.e.* the principle of the rule of law. Therefore, the principle of the rule of law is the catalyst for the formal equality of the citizens that replaces the medieval integration of unequal individuals into a corporative body⁴, while at the same time imposing restrictions on state power which, primarily in the 16th and 17th centuries, were proven necessary through the lessons of arbitrary absolutist power.⁵

The first modern theory of the state, being the theory of the constitutional state, does not mean that political communities existing in premodern historical periods did not know the concept of constitution.⁶ As has been pointed out, the central idea of *modern* constitutionalism is the (self) limitation of state power, and this idea most obviously separates the modern conception of constitutionalism from its premodern predecessors. While premodern constitutionalism is limited to the definition of the form of rule within a certain political community, modern constitutionalism, in defining

² For more details on feudal social and political relations see Bloch (1961) and Reynolds (1994).

³ Cf. Shapiro (2011), especially chapter 12.

⁴ Corporative nature of medieval political community is exhaustively described by Kantorowicz (1957), Ullmann (1961) and Gierke (2008).

⁵ For an insight into the then influential attempt of the defense of absolutism see Figgis (1914/2015).

⁶ For more on historical development of constitutionalism see McIlwain (1975).

the form of rule, at the same time and through different institutes introduces the idea of limited state power. The key institutional mechanisms of the limitation of power include, for example, the separation of powers and a system of checks and balances (Vincent, 1987: 98). The difference between the premodern and modern conceptions of the constitution is related to the transition from the empirical conception of the constitution, which reflects political conditions in a certain territory at a certain time, to the normative conception of the constitution, that establishes the rules based on which the exercise of political power is legally regulated (Grimm, 2016: 3). The concept of constitution acquires its modern meaning only with the division of legal order in two parts, *i.e.* traditional customary law stemming from the state and a new law proclaimed by the sovereign and which is binding for state power (*ibidem*: 11). This new law is a public law which serves the regulation of the authority of the respective holders of power. Therefore, the meaning of the existence of constitutional rules lies in the fact that they are positioned above the whims of the lawmaker, *i.e.* these are laws that govern the state and not laws with which the state governs (Vincent, 1987: 78). Actually, the rule of law, and not the rule of people, is fiction, but this fiction is necessary in order to preserve the concept of prior, *i.e.* constitutional rules that prevent the state (power) to exercise arbitrary power. The rule of law in this sense rejects the submission of person to person, while requiring the submission of one's actions to laws. Here, the question arises of the ideological relations between law and politics. In general, it applies that law always reflects the actions of the political power or ideology of those social groups that largely define the legal content. However, at the same time, law is also a relatively autonomous social phenomenon, defining, with its autonomy in relation to political power, the nature of the political system: the weaker the autonomous power of the law, the larger the deviation from democratic principles (Cerar, 2011). The meaning of the limitation of state power and the entirety of modern public law lies in its enabling the individual to change from a passive subject to an active citizen, who can claim their rights and freedoms in courts. The latter, while being integrated in the state power structure as the judicial branch of power, preserve their autonomy, through the aforementioned separation of powers and the system of checks and balances, from the other two – “political” – holders of power, *i.e.* the parliament and the government.⁷ The great ideal hiding behind these guiding principles is the ideal of human freedom and the related conception of justice. In the period of the bourgeois revolutions of the 18th century, the modern conception of freedom and justice became radically distanced from medieval conceptions, which 16th century absolutism intended to preserve,

⁷ Cf. Bickel (1962).

together with feudal social relations. This happened first on the continent, in France, and then also in England, where the Glorious Revolution definitively defeated the Stuarts' intentions to introduce the "divine right" of the monarch to exercise absolute power, and instead appointed the parliament as the sovereign and thereby created the foundations of the constitutional monarchy.⁸ Therefore, historically, modern constitutionalism is the response to the absolutist tendencies of the monarchies of the time, which is why (mainly written) constitutions, limiting the power of the state, became a symbol of the individual's freedom and the introduction of justice in social and political relationships, where social predetermination would no longer prevail, and the empowerment of the individual would be based on their rights and capabilities. Many supporters of the bourgeois movements in Europe and North America were full of such an exhilaration, imbued with the Enlightenment spirit. This was aptly illustrated by the British-American political theoretician Thomas Paine for whom the (written) constitution was not an act of a government, but of a people, who are the only able to constitute the government, and a government without a constitution equalled mere power without right (McIlwain, 1975: 2).

The modern era, with all its characteristics, *i.e.* economic, political, cultural, *etc.*, that made it differ from previous periods, required a state order which would better reflect the changed social relations of power. It is no exaggeration to define the modern state a legal and political project of the bourgeoisie that, on the wings of the triumph of capitalism, managed to resist and also defeat the feudal remnants of the time, where there was no longer room for the stifling conceptions of man's freedom and his "inborn" rights and freedoms. Historically, this legal and political project mainly took place under the ideological label of liberalism, which highlights as its core value the freedom of the individual, defining thereby as its goal a society which will establish the conditions for attaining the self-fulfilment and dignity of each individual. Liberalism begins its historical march at the barricades of the political and economic privileges of feudal aristocracy, also mapping the positive side of its political programme through advocating the industrialised and market-oriented economic order as "free" as possible from state interference (Heywood, 2012: 25). For the bourgeoisie even the enlightened absolutist ruler had proven to be untenable by imposing, through mercantilism, far too many restrictions, mainly on the market, and in disposing with private property, which lead to the changed relationship between state authorities and civil society (Poggi, 1990: 53). In the 18th and

⁸ *An indictment from 1649 reproached Charles I. His appropriation of unlimited tyrannical power stemming only from his own personal will. The indictment describes Charles's seizure of power as his tendency to abolish the existent applicable rights and freedoms, which would destroy the foundations of the political order. For a more detailed description see Skinner (2003).*

19th centuries the concept of constitution gained ground to characterise this changed relationship. This relationship could only be able to develop in the circumstances in which society was economically and culturally developed enough to create its own capacities for development and self-regulation, while the bourgeoisie became strong enough to be no longer interested in the competition with the aristocracy for royal privileges (*ibidem*: 54).

Human rights and freedoms in relation to the great Leviathan

The aim of this chapter is to explain how Hobbes's theory of the state, which he most thoroughly elaborated on in the *Leviathan*, can help us understand the co-dependence of the existence of political power and the exercise of individual human rights and freedoms, which are presumed to be universal in nature. Of the main importance in our choosing Thomas Hobbes was his pioneering role in the grounding of modern contractual theory, in which he encompassed both the elements of (modern) natural law and legislative positivism. Thomas Hobbes provided the explanation of the emergence of political community, which differed in key starting points from the predominant explanations that existed up to that time. He did this in the circumstances of the conflict between the intellectual tradition of absolutism and natural-law ideas of the universal and inalienable rights of the individual that arose from the ashes of feudalism and the rise of capitalism. These circumstances were marked by the civil war in which, basically, two political visions were confronted, each of them addressing the changing social structures in their own way. On one side there was the monarchy, which tried to integrate its vision of absolutist power in the ideological construction of the divine right, and on the other there was the coalition of aristocracy and bourgeoisie building its vision of limited sovereign power, which would be kept within the centuries old framework within which basic political relations were outlined. While Hobbes's *Leviathan* represents his direct response to these circumstances, his text also offers important analytical highlights that reach beyond the meaning of historiographical contextualisation. Within the latter, Hobbes can easily be considered an advocate of natural-law absolutism and a member of the monarchy, while an analytical examination of his text shows that he importantly contributed to the development of positivist legal tradition that was later further developed by Jeremy Bentham, John Austin *etc.* This contribution is vital in the very part that touches on the two basic aspects of the relationship between law and politics, *i.e.* the transformation of the political (power, interest) into legal (right, duty). When Hobbes describes the emergence of the political community, he is actually describing the embryonic stage of this relationship, for the understanding of which we need to understand the concept

of power or coercion. For the purpose of this article it is thus of key importance to explain how it is only the existence of power that can guarantee the respect of rights or how the established force transforms the content of its own “orders” into the legal norm.

Thomas Hobbes considered his own work as pioneering, namely, from the aspect of political science (*civil science*). However, some authors place Hobbes’s work in political jurisprudence.⁹ Political jurisprudence stems from the combination of sociological jurisprudence and judicial realism, as well as substantive and methodological aspects of political science, the basic premise of which is the assumption that law is an integral part of the social system rather than an independent organism (Shapiro, 1963: 294). At the heart of this approach lies the basic positivist maxim of law as the product of human will and reason, unrelated to any metaphysical ideas of discovering law that are typical of various natural-law approaches. Nonetheless, Hobbes did not neglect the influence of natural law: quite the contrary, he placed it at the centre of his doctrine on the emergence of the political community, thereby actually arguing in favour of the moral obligation of the individual to subordinate themselves to the established law, created only by the sovereign state power, which, however, is rejected by most of the modern and contemporary positivist legal tradition.¹⁰ For Hobbes it was not even possible to avoid natural law, as he was not only interested in the authority of established law but also its legitimacy (Loughlin, 2012: 11).

Hobbes’s intellectual legacy belongs to the modern era. To corroborate this estimate it is his obvious intention to fundamentally unburden societal life of the metaphysical ideas that looked for, and found the source of, authority in theological interpretations, with which they attributed the legitimacy for governing to God’s will and God’s deputies on earth.¹¹ Though such interpretations were more influential in continental Europe, even England could not avoid them as can be seen from the claims of the Stuart dynasty that triggered the English Civil War. For Hobbes, political community is the product of the rational will of the people who commit contractually to the emergence of political power. The unbearable co-existence in the natural state dominated by the unlimited desire to interfere with the individual’s life and property forces people to connect with each other. It is in relation to property that modern authors took the standpoint that the world was given for use to all people, implying the absence of private property, which is why they had to look for just reasons for its private appropriation

⁹ E.g. Loughlin (2012).

¹⁰ Cf. Raz (2009) and Murphy (2014).

¹¹ *The great Leviathan is not of divine descent, it is a human invention. In a way its great power equals it with divinity, but this divinity is mortal rather than eternal, i.e. it is not part of the inevitable destiny, but stems from human convention.*

(Lukšič, 2016: 633). Of course, the natural state is only a theoretical construct used throughout history by authors who belong to the tradition of social contract, with the intention to explain the reasons for the creation of politically organised communities linked to allegedly intrinsic human characteristics, *i.e.* human nature, from which the most appropriate forms of social and political structures are then deduced to ensure human coexistence.¹² Thomas Hobbes followed this logic, which is why in *Leviathan's* Chapter 13 he explains the nature of human life in the state of nature, *i.e.* a pre-political state in which state power does not exist, and as a result the criteria of law or (conventional) justice do not exist. In the glory of the modern age Hobbes rejects Aristotle's conception of natural inequality, and explains that nature makes people equal despite some of the obvious differences between them, *e.g.* physical or mental abilities. However, it is this equality that represents the source of trouble, because of which the life of individual man in the state of nature sooner or later becomes unbearable (Hobbes, 1651/1996: 87). Human equality in capabilities leads people to aspire to acquire the limited resources that obviously cannot be enjoyed and appropriated by everybody at the same time, which is why any two people who want to take possession of the same thing find themselves in a hostile relationship (*ibidem*). Hobbes discerns human tendency to conflict from human nature, namely, one aspires to gain for their own personal benefit, safety and respect, in which their aim is to dominate over other people and their property (*ibidem*: 88). In this state man is primarily an enemy to his fellow man (*homo homini lupus*), and even the strongest or wisest of people have no guaranty for physical survival, while the absence of any effective mechanisms of control and stability drives people into a permanent state of fighting for property, domination and glory (*bellum omnium contra omnes*). In these circumstances the existence of the *Lex Naturalis*, that Hobbes describes as a general rule stemming from human reason and prohibiting man to do anything that would be destructive to his life, and at the same time permitting him to do what is to his benefit, in no way contributes to peaceful coexistence. Both are in accordance with the *Right of Nature* and man's natural freedom (*ibidem*: 91). Every man has a natural right to everything he deems necessary to fulfil his needs including other people's lives, which in fact means that man exercises his inborn executive power with total arbitrariness. The

¹² A similar approach can be found in the Bible, which through the original sin explains the reasons for the expulsion of the first humans, Adam and Eve, from Eden. Adam and Eve were expelled from Eden because they violated God's command, and for this their lives and the lives of their descendants became harsh, because they were pushed to the state of nature which corresponded to human characteristics of humanity's first parents, *i.e.* Eve's slyness and Adam's disrespect of authority. Throughout the Middle Ages especially influential was the discussion by St. Augustine from the 5th century who integrated the biblical explanation in political philosophy. For more see Augustine (1998).

objective criteria of justice and law do not exist in this natural state, and man can never even commit unjust or unlawful acts. Hobbes clearly says that in the state of nature the ideas of justice and injustice have no place, because it applies that where there is no power there is no law, and where there is no law there is no injustice (ibidem: 90). Instead of law or obligation what rules in the state of nature is the right, an individual's right to freely pursue his own interests as he sees fit. Hobbes explains that there is an important distinction between the natural right and the natural law, namely, the natural right highlights individual's freedom, while the natural law restricts it (ibidem: 91). The problem is that in the state of nature the law of nature does not have any practical value, which in turn leads to the absolutisation of the individual's natural right to freedom. An individual's exercise of their natural right to freedom is unbearable for everybody, because everybody has the same right, which means that in reality nobody has it. The individual who would take the life of his fellow person could soon become the victim of another individual, and if that happened, it would not be counted as punishable or unjust. It is then logical that the natural right should be replaced by the natural law, which will limit human freedom to the extent that it will stop interfering with the lives of other people. This is why Hobbes introduces the basic natural law in his theory, which prescribes that every person seeks peace. In practice, they can only do so by respecting the second natural law, which prescribes to every individual that in the name of peace they renounce their rights and are satisfied by those rights that they themselves recognise for other people (ibidem: 92). In Chapter 15 of *Leviathan* Hobbes lists a further 17 natural laws to be obeyed by all those who are committed to respect the basic natural law, *i.e.* striving for peace. For our purpose mainly the third natural law is important, which tells people to respect the agreements that they have made (*pacta sunt servanda*), because Hobbes attaches the definition of justice to it. In Hobbes, injustice always occurs when the individual does not hold to what they have previously committed to, and it is very telling that Hobbes's definition of justice is only negative, namely, for him, everything that is not unjust, is just (ibidem: 100). The listed natural laws are unchangeable and eternal, because they come from human reason. However, they have an important weakness of being, as Hobbes argues, binding to the individual only *in foro interno* and not *in foro externo*. This means that there is no external force that would make the individual obey these laws. Because these are "only" moral principles, Hobbes calls the science of these principles moral philosophy, which basically deals with the questions of good and evil (ibidem: 110). Moreover, it is misleading to call these moral principles "laws" as in truth they are theorems rather than laws, which by definition are the words of those who have the right to command over others (ibidem: 111). It is this, Hobbes's definition of law, which is the

reason that within legal theory he is classified in positivist tradition. Namely, modern legal positivism understands established law as an autonomous system that includes its own criteria of just and unjust, and this understanding originates in Hobbes's work (Loughlin, 2012: 11).

Hobbes resolved the riddle of how to connect people into a unified political community in which the sovereign's power will not only be effective but also legitimate by relating it to the contractual relationship between people. Because people are free and rational, they have the possibility to become connected to each other by contract, and create, in this way, a political power which speaks and acts in their name, as their representative, while at the same time accepting, as its basic mission, to protect their rights, that before in the state of nature were unbearably violated. Political community emerges with the intention of protecting an individual's rights, and it emerges when the multitude becomes unified in one person, *i.e.* a feigned or artificial person that represents the words and acts of natural persons (Hobbes, 1651/1996: 111). The transformation of the multitude into a unified whole is completed only when this multitude creates its representative who speaks and acts in their name, which must happen with the explicit consent of each individual. Again Hobbes clearly writes that it is the unity of the representative and not the unity of the represented that creates a unified (artificial) person (*ibidem*: 114). Individuals make the social contract between themselves and by doing so create the authority of power to which they transfer the competence of adopting obligatory social rules, thereby renouncing their own natural freedom. The latter, however, does not mean that the individual has revoked the right to make decisions, because each individual remains the author of each individual act of power. However, this decision-making is indirect, carried out through the authority created to this aim. Consequently, any ignoring of the acts of power is a direct violation of the third natural law, that requires the observance of the agreed, and the potential violation of the acts of power is not aimed directly at the holder of power but against the other parties with which the individual who violates the acts of power made the social contract. Hobbes addresses the individual that would directly break the third natural law as the fool, *the Foole*, who denies both the existence of justice and God (*ibidem*: 101).

Therefore, the emergence of the political community is marked by the emergence of the institution of power that abolishes the state of nature. The natural state by definition is a pre-political state. In the natural state there are no laws that would be really binding and effectively executed. Hobbes insists that laws have to be written and published (*ibidem*: 188) and at the same time external signs should exist showing that they stem from the will of the sovereign (*ibidem*: 189). "Laws" that do not fulfil these criteria are natural laws. In general, a law is a command not a recommendation, but this

is not just any command of an individual to another individual, but it is a command to the one who previously made a commitment to obey the command. (ibidem: 183). In other words, only the command that has legitimate grounds can be considered law, which basically means that it is issued or proclaimed by an authorised person or institution. Fundamentally, Hobbes explains the legitimacy of political order based on coercion, namely through the principle of mutual consent (Loughlin, 2000: 163). The individual is obliged to obey the law, because it was issued by the authority that was authorised for this purpose by the individual himself. This is not only a legal obligation, but also a moral one. For a political community to exist it is not enough that individuals are only bound by the law *in foro externo*, meaning that the individual obeys the law, because they are afraid of coercion behind the exercise of laws, but the law also has to bind them *in foro interno*, that is, morally. Obeying laws *in foro externo* is guaranteed by strong coercion, while only reason, disclosed by natural laws, works *in foro interno*. The just sovereign power adopts just laws, *i.e.* laws that protect man's natural rights, while power only protects those natural rights which it recognises and acknowledges as such. Therefore, the substantive judgement of natural rights is on the side of the sovereign power and this is the key to peaceful and stable civil society, which is impossible to achieve in the circumstances where each individual explains the content of justice according to their own mind and ability. The grand challenge of political theory lies in its telling of how to ensure the peaceful coexistence of people with the indisputable fact that in their understanding of substantive justice people often have different views, or how to subject people with different interests to one political power (*ex pluribus unum*). Naked force is not enough to resolve this challenge and it seems that Hobbes understands this when he claims that the law of nature and civil law are contained within one another, and the relationship between them is equalised (Hobbes, 1651/1996: 185).

Moral principles put on the pedestal of natural rights by the modern era were different from those in previous epochs. Modern natural rights come from individualist moral principles that were better suited to the growing influence of capitalist economic order than to stiff medieval ideas about the divine body, and the "natural" inequality derived from it, which in Antiquity Aristotle had defended with different arguments. Medieval corporativism became too narrow for the modern individual who had freed himself from collective identities, which before integrated him into the divine community (Spruk and Lukšič, 2017: 473). The rights of nature could start to serve their purpose only with the emergence of stronger state authority, which excluded these rights from the metaphysical deductions on human nature and made them obligatory in reality in relation to state authority itself. This, in fact, means that the legislator enacted them, the judiciary used them in

concrete judicial procedures, and the government implemented them. In apportioning the power to the state, Thomas Hobbes went much too far to be referred to even by those who today claim more state interventionism is necessary. However, this does not change the fact that Hobbes left us a valuable treatise about the key prerequisite for respecting either natural or constitutional rights, namely: the existence of the legitimate state authority whose power guarantees the implementation of these rights. From then on it applies that the state is not simply a potential violator of human rights and freedoms, but at the same time their strongest rampart. While the law, certainly, is not simply a command as could be discerned from Hobbes's definition, its coercive nature is certainly a quality not to be ignored, if we want to understand what law is in the first place, even if contemporary analytical jurisprudence would disagree.¹³ Finally, one of the basic aims of law is the peaceful resolution of conflicts. In civilised society the scope of our rights is considered to end, where the rights of other people begin. When we forget about this, it is just that a more powerful instance reminds us of this. It is just that a more powerful instance reminds us when we neglect our legal obligations either to the state or to our fellow person. This more powerful instance is the state authority which, on presuming the rule of law, warns us by referring to processual and material regulations applied in the territory in which we live, and, if necessary, punishes us on the same grounds. In the debate about the relation between law and coercive power we could say that the law makes us do things we do not want to do (Schauer, 2015: 1). This aspect is extremely important when or if we decide not to respect other people's rights. In this case it is necessary that a legitimate state power tries to stop us and make us do something we do not want to.

Conclusion

Most countries today have written constitutions which, amongst other things, state basic human rights and freedoms, to the observation of which the holders of state power are committed. Therefore, first and foremost, the constitutional act is the act that limits state power in the way that it guarantees each individual the rights and freedoms listed in this act. This protects an individual's freedom with the intention of preventing any arbitrary interference of the respective political majority in their legally protected interests. Democracy alone cannot achieve this purpose, which is why it is necessary to upgrade it qualitatively to the level of constitutional democracy, *i.e.* a political system within which state power comes from the will of the people. Rather than being supreme power, this power is itself subjected to

¹³ Cf. Hart (2012).

the supremacy of the constitutional order outlined in the formally supreme legal act. Of course, the constitution is not only a legal act but also a political one. It lays down the basic principles adopted by a political community, when it is constituted, as constitutive elements of its own statehood. Therefore, a constitution's primary function is to formally constitute the state and define the basic relations between its authority and its citizens. The essence of the state is its institutional architecture, which does not only determine the authority of individual institutions but also establishes certain relations between them. The latter are important from the aspect of the prevention of the accumulation of political power, which is why legislative, executive and judicial powers have to lean on the principle of distrust in relation to each other, while belonging to the same entity. Although lawmakers, ministers and judges have different authorities, they all work in the name of the state. In exercising their authorities they are all obliged to respect basic human rights and freedoms, but the question arises, who actually defines their concrete contents. They are abstractly defined by the creator of the constitution or the lawmaker, and their concrete implementation lies in the domain of the judiciary, which is two state institutions. Basic human rights and freedoms can be derived from different sources, from God's will or human nature, whereas the modern era found them in human reason. Regardless of where we find them, the breaking point is always where these rights and freedoms are recognised by some organised coercive power (the state), which is legitimised for their implementation. Their abstract determination in the constitution and legal acts is not enough: the conditions for their observation are only fulfilled with the establishment of an institutional framework for their concrete judgement. This institutional framework is represented by independent courts as the part of state authority which enables the individual to represent their concrete claims. From this aspect the most important human right is the individual's processual right to access the independent arbiter, who fills abstract provisions with concrete content. It is not the individual themselves that makes judgements of the content of human rights and freedoms. This is done by a state body which holds the required legitimacy for this. And most importantly, this state body leans on organised coercive power which guarantees for the implementation of each individual judiciary decision. Legal history teaches us that the meaning of law is peaceful conflict resolution. Thomas Hobbes explained to us that for this goal to be achieved there should first be a state authority, which brings the multitude under one authority. This is the only guarantor for the prevention of violence, depicted by Hobbes as existing in the state of nature. The state of nature is but a pre-political state, where every individual uses their own mind to define justice and their own physical power to actually execute the content of justice.

We wrote in the introduction to this article that the state can only violate human rights and freedoms because it basically enables them. The state and the law are human creations, and any metaphysical explanations for their existence are superfluous. Their being human creations primarily means that people not only create them but also have the ability to change them. There are human rights and freedoms that can be considered universal, independent of time and space, the eternal moral maxims. However, such a view only makes sense when put in the context of pursuing a concrete political programme. It only has any real grounds insofar as these grounds are built by concrete people in concrete time and space. Throughout history, many people died for the rights and freedoms that we today consider eternal. Although these people are referred to when discussing the rights and freedoms they died for, they weren't necessarily subject to them during their lifetimes. Based on moral discourse, a person could be given countless rights and freedoms which could also be called natural rights, but their real power is only exercised when they are recognised in the sphere of law and in the political sphere. The basic prerequisite for this to occur is the existence of real power or coercion which can and wants to protect this process. While it is true that such real legitimate power takes away some of a person's freedom, it takes it away in order to actually, to a greater extent, protect it.

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