

THE ROLE OF ATTORNEY IN ESTABLISHMENT OF RULE OF LAW AND PROTECTION OF HUMAN RIGHTS

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***Annotation:** One of the items of rule of law in any political and legal system is existence of an efficient and independent judicial system. Independence and efficiency in judicial system and hearing process are not realized without counsellorship and the regulatory and supportive role of the lawyer. With consideration of different approaches and viewpoint of rule of law in its formal and substantive aspects, one could observe the significance of position and role of lawyer and advocacy in establishing the rule of law and protection of human rights in any society.*

***Keywords:** rule of law, role of lawyer, judicial independence, equality, human rights.*

To realize justice and prevent the abuse and violation of rights, the theorists of philosophy of law and political thought refer to the theory of rule of law and believe that through the rule of law, one can witness a dynamic, sustainable and vibrant society in which the law dominates every action, entity and figure. Despite of polemical and controversial nature of the rule of law, all of the associated philosophers and thinkers support this theory and state that this law should dominant every aspects of a society. But each one of them explained the rule of law and offered their distinctive perception of the rule of law based on their ideas and the essence, content and conditions of their surrounding legal and political system. The different conceptions of rule of rule led to different laws and behaviors in every society from the legal, political and judicial viewpoints.

The historical and philosophical evolution of the legal and philosophical thought, as well as international law and the international human rights system shows that the trend toward the rule of law and supremacy of law over structures and figures have an incremental trend and the number of UN General Assembly resolutions on the rule of law manifests the significance of this issue more clearly. Among all conceptions and viewpoints of the rule of law, one could point to two dominant trends each of which promotes a different and significant conception of rule of law and originate the two schools of natural rights and legal positivism. These two dominant conceptions and viewpoints offer distinctive items and elements for the rule of law and refer to different principles of the theory of rule of law. Each one of the two conceptions unexceptionally deal with the role of judicial system and independence of this system in stabilization and application of the rule of law. They regard the rule of law to be impossible without existence of a judicial system. These two conceptions are referred to as the formal and substantive conceptions of rule of law. Different criteria have been developed in regard to the independence of judicial system and its regulative and controlling role in association to the actions of citizens and behavior and decisions of the authorities. The independence of judicial system and its users depends on the competency that the system has in realization of justice.

Advocacy as a part of civil society and associated with the judicial system of any society might play a role in different levels to support the rule of law, realize justice and consequently protect and promote human rights. An independent and efficient judicial system as one of the elements of rule of law cannot be realized without advocacy and the supportive and surveillance role of the lawyer. One could clearly observe the significance of position and role of lawyer as well as advocacy in establishment of rule of law and protection of human rights in any society and through the consideration of different viewpoints and conceptions of the rule of law in its formal and substantive kinds. When lawyers advise clients they help the law to accomplish both its function as a system of social settlement, and the respect for the governed reflected in its processes

and structure – i.e., the rule of law. A lawyer can only do so, however, if her advice provides an objectively reasonable assessment of the law, while also facilitating the accomplishment of the client's goals and objectives. (Woolley, 2014:1)

In a broad perspective, one could assert that the lawyer can play a meaningful role in establishment of the rule of law and its promotion, drafting of bills and legislations, trial stage and playing regulatory role as well as teaching rules and making them predictable for the citizens. The review of some items such as equality before the law, the supremacy of law, legal certainty, predictability, objectivity of law, and other elements of rule of law manifests the necessity of presence of lawyer and significance of advocacy in realizing such concepts, establishment of rule of law, and protection, education and training of human rights. To study the subject and understand the role of lawyer in establishment of the rule of law and protection of human rights, the conception of rule of law as viewed from the advocates of formal and substantive perspective and identification of their elements are reviewed. Then, the position of advocacy and the role of lawyer in realization of elements of rule of law and its effects on support of human rights and reinforcement of models of human rights are studied.

One of the main criteria and elements of rule of law is equality. The principles of equality exist in both types of formal and substantive conceptions of rule of law which constitute one of the cornerstones of rule of law. This means that everybody is equal before the law and the law should be equally applied on all of its followers. In addition, the content of laws should be identical for everybody. Equality before the law originates from formal conception of rule of law in which assigning any special advantage and right to a distinctive individual or group is denied and endeavors to apply law on everybody in an unbiased and impartial manner. One of the objectives of rule of law is to equally implement the laws and realize justice. The realization of justice in any society is due to existence of an independent judicial system to guarantee the fair and impartial implementation of the laws. The objective application of the laws is among the elements of rule of law and at the center of the theory of rule

of law. The judicial system, in addition to guaranteeing the supremacy of law and equal application of the rules, should itself include the principles of rule of law. It should do all of its measures in the framework of rule of law and its resulting requirements because the judicial system follows the laws. Otherwise, one cannot expect the rule of law in the society.

One of the basics of fair judgment that is also included among procedural rights is that the involved parties should be in similar conditions of raising the lawsuit, defending and approving it. There should always be a balance between plaintiff and defendant. This finds more significance when the defendant is prosecuted by the court and prosecuting attorney or when a person is questioned intelligence services and power system. In such a case and against its opposing party, plaintiff, prosecuting attorney or intelligence system, should have equal conditions in regard to access to evidence and documents. The equality of means and conditions necessitates that the defendant doesn't undergo unfavorable and feeble conditions in comparison with plaintiff, prosecuting attorney and intelligence system and benefits all of his rights of defense. The advocate might guarantee the defendant's access to these rights, mean and conditions and prevent from deprivation of the defendant from such rights (Rouhi, 2013: 68). So, the advocate can guarantee the equality and observation of procedural rights as instance of human rights and a criterion of rule of law. Lack of culprit's awareness of regulations and rights caused him to be in a feebler condition compared with judicial system or prosecuting attorney as claimant. The presence of lawyer in the process of trial can preserve the rights of the individual or reinforce them. This is among the cases in which the lawyer's role in application of rule of law and support of human right is embodied. Because the citizens have different conceptions of a good life, if the state prefers one perception to another the state may not act against somebody's offense because of its belief in essential supremacy of him or because the person is supported by numerous powerful groups (Dworkin, 1985: 191). This type of conception might be realized in different social and political layers and cause larger inequalities, even in the judicial system.

In sum, the presence of the lawyer can end such inequalities. The rule of law had diverse elements which despite of difference in principles and content of formal and substantive conceptions of rule of law, they are generally on the same ground in regard to equality before the law and submission to it, limitation of authorities of state officials and associated entities, independence of judicial system, supremacy of law, division of forces and other similar issues. Each one of these conceptions has different mechanisms to realize the rule of law. In this regard, one of the effective and efficient mechanisms of advocacy is that the advocate executes a part of these mechanisms due to his supervisory and defensive role. Advocacy, from its formal and substantive aspects, is influential upon application of rule of law and support of human rights. The role of advocate is to ascertain that the equality of plaintiff and defendant is observed, especially when the plaintiff is the public or a governmental entity. In such a case, he might contribute to application of equality as one of the factors of rule of law. The supervisory role of the lawyer can act as a guarantee that the judicial system does not violate the procedural rights and regulations, properly selects and applies the laws, and observes the equality of involved parties in a lawsuit. This role as played by the lawyer can prevent the judicial system to violate impartiality and reinforce its justice and fairness. One of the elements of rule of law is predictability or certainly of laws. This issue enables the citizens to predict the results of their own actions and get informed of consequences of any action in regard to its legality or illegality. Today, advocacy might play a significant role in publicizing the laws, realizing legal certainty and predictability, and play an educational role as a civil and professional entity. Notification and information by this professional entity could be highly useful and effective in the stage of drafting and codification of rules. Therefore, one might claim that advocate and advocacy can play a direct role in establishment of rule of law, support of human rights and basic freedoms through realization of some elements of rule of law. The denial of lawyer of this role and limiting lawyers to mere presence in trial sessions can act as a major obstacle against the realization of rule of law in any society and would certainly be

followed by weakness of civil society and supervisory systems and mechanisms such as the judicial system.

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