RISKS AND CHALLENGES OF HUMAN RIGHTS IN EUROPE

Human rights in Europe in the 21st century

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Demonstration “Friday for Future” in piazza Duomo of Milan, Italy, 27 Sept. 2019, to demand action to fight global warming and the climate crisis | Photography: Alessio Mamo

The 21st century has brought a strange mix of rhetoric, facts and challenges to the human rights landscape. Human rights have never been so present in national and international political discourse, in social demands or in academic and scientific research. These rights are driving an impressive wave of new civil society organisations and specialised public institutions. They are present in all our communications, in our everyday lives, and it is probably because of this that we have long taken them for given, considering them unchanging, established and guaranteed forever. However, the fact is that they are now being challenged, both the force of events and in their very essence. In Europe alone, successive crises have put them to the test, and the return of war to the continent shows, unfortunately, that nothing can be presupposed in the field of human rights. Present challenges and future crises – some of which are already emerging – put our certainties to the test.

In this context, asking about the future of human rights in Europe is an intellectually perilous undertaking. [1] However, it is no less necessary for that. After all, how can we address our societies’ future without a solid understanding of how human rights have influenced political, social and legal developments in the past, and especially in the recent past? We must understand just how much impact the universal consensus on human beings’ value and their rights has had, as enshrined in the Universal Declaration of Human Rights

in 1948 and, more recently, in the Declaration and Programme of Action adopted at the end of the World Conference on Human Rights in Vienna in 1993. We must understand just how much the European Convention on Human Rights and other Council of Europe instruments have contributed to establishing a common legal framework and to creating the “mutual trust” that lies at the heart of European integration. An insufficient understanding of the impact of human rights and their role in our societies’ development leaves the way open to misunderstandings, disputes in bad faith, uncertainty and, inevitably, a desire to withdraw, often toward isolationism, which can only bring back the divisions and separations that were the cause of the suffering of the past.

We must also understand that whenever the human rights message has deviated from the positive law approach to become a mere ideological backdrop, challenges to these rights have found fertile ground for growth. The war on terror during the first decade of the 21st century and its excesses – for instance, and in particular, Abu Ghraib and the secret detention of prisoners in Europe [2]— have enabled human rights to be presented as part of the discourse of a Western imperialist policy, characterised by a lack of respect for others (not only their person, but also their culture and traditions), by an inconsistent, even selective, application of human rights, depending on the political or security goals pursued, and by impunity for one’s own misdeeds.

The financial and social crisis of the 2010s left large sections of society in phenomenal disarray. Human rights, and in particular social rights, which have formed the bedrock of the European social model, have proved ineffective in the face of growing exclusion and poverty.

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Even more recently, the inability to build a coherent, sustainable policy to address climate change has repositioned the debate on the value of individuals and their rights in relation to nature.

Finally, references to human rights are increasingly used to create societal and behavioural obligations that have no legal significance, thereby giving the impression that these are moral rights, interpreted by each person according to their own experiences, traditions or ideas. In the process, they lose their constitutionality and their status as the founding pillar of the modern State, and risk losing all binding force and becoming mere political demands.

Challenges and threats for human rights

Thus, the universal consensus on human rights seems to be receding in the face of relativism and isolationist tendencies that are flourishing, both globally and in European societies and politics, even though these rights are the only base from which it is possible to address today's many challenges.

For Europe, these challenges are manifold, starting with those posed by demographic and social transformations that require new inclusion policies, if not a complete abandonment of the 19th-century nation-state model. Positive actions on the part of the public authorities are becoming essential, which will probably require strengthening the role of the State. However, if state power is to remain a guarantor of democratic freedoms and not become a powerless observer of our societies' polarisation, this strengthening must be grounded precisely on human rights, including, of course, social, economic and cultural rights.

Communication and its new technologies are probably the area in which this phenomenon of supersedence of the State is most striking. For years, the Internet has offered previously unsuspected possibilities for freedom of expression, but it also poses risks, as criminal activity or hate speech grows and spreads. In turn, these risks, while real, sometimes provide pretexts for disproportionate restrictions on the freedom of expression. Like artificial intelligence, to take one example, which is advancing by leaps and bounds in all areas of life, these technological developments are turning our societies upside down, changing our perception of reality and reshaping the realm of public debate. Their self-regulation, based on the often financially self-interested criteria of the Internet platforms, leaves the State in the role of an abashed observer of these developments, which it can neither adequately control nor support.

At the same time, war has resurfaced in Europe, Ukraine and elsewhere with unprecedented intensity, replacing law with violence, the peaceful settlement of disputes with military action, and the protection of fundamental freedoms with war crimes.

The Russian Federation was excluded from the Council of Europe after having been a member for more than twenty-six years. [3] It is not difficult to identify the stages in the gradual deterioration of Russia's commitment to the standards of this pan-European organisation, which acts as a guardian of democracy, human rights and the rule of law. Despite sincere efforts on the part of the Council of Europe – and certain circles in Russia itself – to maintain this vital link for the continent's security and future, aggression in Ukraine has put an end to this cooperation. This process of progressive distancing from the Council of Europe's standards heralded a break with international law, culminating in the invasion of Ukraine. However, reflections like this are hardly reassuring: the Russian Federation has not been the only State to show defiance towards the Council of Europe and the principles it upholds. Other political circles in Europe have put forward the idea that the Council of Europe's standards do not take account of a country's realities and do not sufficiently respect its social or other traditions. In other Member States of the organisation, nationalist and xenophobic movements flourish, defending positions that

target certain groups, divide society and jeopardise not only human rights but also democracy and the rule of law. Obviously, it is not just women's, LGBT or migrants' rights that are being criticised; the entire edifice of the separation of powers, independent justice, freedom of expression and the media, freedom of association and assembly, the inviolability of communications and the private domain is under attack, in other words, the very foundations of the democratic system of governance.

The aggression against Ukraine also raises questions about the compatibility of the responses to it with the principles of human rights. Ukraine is still a Member State of the Council of Europe; it is bound by strict obligations to respect human rights. How can we help a country facing armed aggression to fulfil its obligations and respect the rights not only of the victims but also of the perpetrators of war crimes? How can we safeguard the democratic freedoms of the press and access to information? How can we guarantee freedom of association or the role of political parties and pluralist debate in a country targeted by disinformation attacks? In addition, what effects is this war having on the attitudes of other threatened states (or states that think they are threatened) towards protecting the human rights of the people under their jurisdiction?

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Not since the end of the Second World War has our continent faced so many serious challenges all happening at once. How these challenges are met in a coherent and coordinated manner, while preserving a European legal space founded on the values of democracy, human rights and the rule of law is something that can – and must – be addressed within the Council of Europe. After all, that is what this organisation is all about, and what it has been doing for over 70 years.

In this context, the Heads of State and Government of the 46 Member States of the Council of Europe met on 16-17 May 2023 in Reykjavik. [4]

The war in Ukraine

It comes as no surprise that the first action agreed at the 4th Council of Europe Summit concerns Ukraine. European leaders spoke out in favour of a lasting and just peace. If justice is to be done, those responsible for the crimes committed must answer for their actions before courts that guarantee the rights of victims and accused alike, as stipulated by the European Convention Human Rights. The authorities have an obligation to the victims of crimes to carry out effective inquiries into the circumstances of these crimes and to prosecute and punish those responsible. Victims must also be cared for and receive adequate compensation. To this end, an International Register of Damage Caused by the

Aggression has been set up; it is only the first step, but an indispensable and decisive step. [5]

The democratic future of Europe

European leaders also agreed to secure Europe's democratic future, adopting the Reykjavik Principles for Democracy. [6] Measuring the vitality of European democracies and strengthening their resilience is now a fundamental objective. While the question of participation in elections guaranteeing people's free expression is at the heart of this approach, other aspects of public life are just as important: free media and the safety of journalists, [7] the vitality of civil society and freedom of association; protection of privacy in the face of the development of mass surveillance systems. [8] These constituent elements of freedom that will be illusory without an independent judiciary, and without the presence of independent authorities in the most sensitive areas: protection of human rights, the fight against corruption, regulation of the media and preservation of media pluralism, protection of personal data, among others.

Identifying democratic backsliding while there is still time to react is a major challenge, first and foremost for the national authorities themselves and for the people in whose name these authorities exercise their power. Nevertheless, democratic security is also an issue that affects the continent as a whole. This observation is as old as the Council of Europe itself, and is reflected in the preponderance of the "collective guarantee" on which respect for human rights is based, notably in the European Convention on Human Rights. [9] A firm commitment was also made in Reykjavik to implement this Convention, in particular with respect to executing the judgments made by the European Court of Human Rights, which remains an unconditional obligation for all of the Convention's High Contracting Parties. As an instrument of European public policy, the European Convention on Human Rights is a core part of the arsenal for the protection of human rights, both through the institution of individual petitions, enabling any person who considers that their rights have been violated by one of the 46 Member States to petition the European Court of Human Rights, and through the system of supervision of the execution of this Court's judgments by a collegiate body: the Council of Europe's Committee of Ministers. Aware of this instrument's uniqueness, the Heads of State and Government reaffirmed their call for rapid completion of the European Union's accession to the Convention. [10]

Technological developments and artificial intelligence

Technological developments have not escaped the attention of European leaders, particularly those linked to artificial intelligence. Indeed, the Council of Europe's Secretary General has particularly stressed the urgency of this issue. Artificial intelligence is changing the information we receive and, consequently, the choices we make; it will play a fundamental role in the functioning of public institutions and how citizens interact and participate in the democratic process. [11] The Council of Europe has already invested heavily in the protection of human rights in digital developments. It has also proven its ability to be at the forefront of new standards, which have become global benchmarks. It is

hardly surprising that the Heads of State and Government have entrusted the Council of Europe with the task of rapidly finalising a new Framework Convention on the Development, Design and Application of Artificial Intelligence, based on Council of Europe standards, which will then be supplemented by sector-specific work conducted throughout the organisation.

The environment protection

The environment was also high on the agenda of the Reykjavik Summit as one of its concerns and a key priority for the Council of Europe. Here again, there are no surprises. The Council of Europe has already done a great deal to protect biodiversity [12] and the landscape. [13] However, it is through the case law of the European Court of Human Rights, the conclusions and decisions of the European Committee of Social Rights, and the growing number of cases brought before national courts that the interconnection between the protection of human rights and the environment has become evident and indispensable. [14] The Court receives individual petitions challenging the environmental policies of several High Contracting Parties to the European Convention on Human Rights, arising from these policies' impact on climate change and their effects on human rights, particularly those of the younger members of society. [15] For its part, the Parliamentary Assembly of the Council of Europe has called for an ambitious new legal framework, at both national and European level, to "anchor the right to a right to a safe, clean, healthy and sustainable environment" in the European Convention on Human Rights: a proposed additional protocol that would make this right legally valid in all ratifying countries. The Assembly asserted that such a legal text would finally give the European Court of Human Rights "an indisputable basis for decisions concerning violations of human rights arising from environment-related negative effects on people's health, dignity and life", and pointed out that half of the world's countries have recognised a "right to a healthy environment" in their constitution, including 32 Member States of the Council of Europe. Only Europe, as such, does not have a regional agreement or arrangement recognising such a right. [16]

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The deep links between human rights and the environment have become increasingly obvious and explicit in recent years, leading the Committee of Ministers of the Council of Europe to adopt Recommendation CM/Rec(2022)20 to Member States on human rights and the protection of the environment in September 2022. This Recommendation invites Member States to reflect on the nature, content and implications of the right to a clean, healthy and sustainable environment and actively consider recognising this right at national level and put in place a series of recommendations, principles and guidance. It is on this basis that the Council of Europe's Steering Committee for Human Rights (CDDH) is

continuing to examine the matter of a new instrument, which could take the form of a Protocol to the European Convention on Human Rights or the European Social Charter, or of a specific instrument that recognises at European level the right to a healthy, clean and sustainable environment.

However, the guidance given at the Reykjavik Summit goes even further. Insofar as the Council of Europe has recognised the contribution of criminal law to environmental protection since 1977, it is within its sphere of responsibility to draft a new global Convention on the protection of the environment through criminal law. Environmental crime has harmful effects on economies, health and safety, and undermines the efforts of states to protect the environment and foster the rule of law. Contributing to the degradation of natural resources and climate disruption, environmental crime has evolved to take on a global and systemic dimension. The new Council of Europe Convention will establish the general basis for pan-European environmental criminal law, providing a common global framework in line with the cross-border nature of the environmental challenge that needs to be addressed. On the subject of safeguarding our world, Vaclav Havel observed that “we are still under the sway of the destructive and vain belief that man is the pinnacle of creation and not just a part of it… We still don’t know how to put morality ahead of politics, science and economics.” [17] This observation could not be truer, and it is a fact that in recent years, individual responsibility in this area has become a key issue. Moreover, while it is true that morality and the notion of responsibility are prior to politics, it is equally true that without political commitment at international level, we will not be able to meet the urgent challenge of climate change.

We can only welcome the fact that the declarations made by European leaders in Reykjavik are just, realistic and ambitious. We have reason to congratulate ourselves on the relevance of the projects we have launched, which have every possibility of providing answers to the challenges posed. However, for the moment, they are still on paper. If these declarations are not followed by concrete, rapid, inclusive and convincing actions, the answers will remain illusory. The Council of Europe will have a definite role to play in identifying solutions, but their implementation will depend on the commitment of European societies, of individual citizens, young people and authorities. The challenges we face are immense. They demand energy, resources, determination and dialogue. But the stakes are worth the effort. The freedoms that have sustained the European adventure, and enabled the European continent to develop in peace for over 70 years deserve to be passed on to future generations.

REFERENCES AND FOOTNOTES

1 — The views expressed in this article are those of the author and are not necessarily held by the Council of Europe.

2 — The Abu Ghraib affair concerns the treatment of prisoners by the US military and intelligence personnel during the Iraq war between 2003 and 2004. The secret prisons affair concerns the illegal detention of suspected terrorists by the CIA in European states, with the complicity of those states' intelligence services; see the judgements of the European Court of Human Rights in Al Nasiller vs. Poland, Abu Zubaydah vs. Lithuania, Husayn (Abu Zubaydah) vs. Poland, El-Masri vs. Former Yugoslav Republic of Macedonia, Nasr and Ghali vs. Italy, and Al Nashiri vs. Romania.

3 — Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, adopted by the Committee of Ministers on 16 March 2022, at the 1428th meeting of the Ministers' Deputies.

4 — Reykjavik Declaration – "United around our values", 4th Summit of Heads of State and Government of the Council of Europe.

5 — Several Member States of the Council of Europe, as well as several non-member countries, including Canada, the United States and Japan, and the European Union have agreed to create a Register of Damage caused by Russia's war of aggression against Ukraine. Intended as the first component of a future mechanism for compensation, this register will be used to record evidence and information relating to claims for compensation for damage, loss or injury caused to natural and legal persons in Ukraine and the Ukrainian State since 24 February 2022.

6 — Annex III to the Reykjavik Declaration.

7 — See in particular Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors adopted on 14 April 2016, at the 1253rd meeting of the Ministers' Deputies. A campaign for the safety of journalists was launched in Riga on 5 October 2023.

8 — See the Report "Pegasus spyware and its impacts on human rights", Tamar Kaldani and Zeev Prokopets. Council of Europe, June 2022. Available online.

9 — The Preamble to the European Convention on Human Rights states that the aim of its High Contracting Parties is to ensure "collective enforcement of certain of the rights stated in the Universal Declaration".

10 — Annex IV to the Reykjavik Declaration underlines "that this accession will enhance coherence in human rights protection in Europe" and encourage timely adoption of the agreements.

11 — See Marija Pejčinović Burić, Secretary General of the Council of Europe, about artificial intelligence. Available online. See also Meneceur, Yannick and Hibbard, Lee (2021). "The Council of Europe's contributions to global regulation of artificial intelligence – Review of Council of Europe's legal instruments relating to artificial intelligence and particular stakes in the area of healthcare and biomedicine". *Droit, Santé et Société*, no.3, p. 55 a 63. Available online.

12 — See the Bern Convention on the Conservation of European Wildlife and Natural Habitats (CETS no. 104).

13 — See the Florence Landscape Convention (CETS 176).
14 — See Steering Committee for Human Rights (CDDH): Handbook on Human Rights and the Environment, 3rd Edition; Council of Europe, 2022.
15 — The European Court of Human Rights held a Grand Chamber hearing on 27 September 2023 in the case of *Claudia Duarte Agostinho and Others v. Portugal and 32 Other States*. The case concerns the greenhouse gas emissions produced by 33 Member States, which according to the petitioners, contribute to global warming, leading in particular to heat waves that affect the petitioners' living conditions and health.
16 — Recommendation 2211 (2021) of the Parliamentary Assembly of the Council of Europe, "Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe".
17 — Quote from Vaclav Havel, mentioned in the Manual for Human Rights Education with Young People – Theme Environment. Available online.



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