

HUMAN RIGHTS PRACTICE: GENERAL ANALYSIS

Current challenges for human rights: balance of 75 years of The Universal Declaration of Human Rights

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Demonstration in support of refugees in the port of Catania, Italy, on August 25, 2018.

More than 150 refugees were disembarked after ten days of being blocked on the Italian Coast Guard ship. This fact caused a political crisis between Italy and the European Union |

Photography: [Alessio Mamo](#)

This year marks three quarters of a century since the Universal Declaration of Human Rights was adopted by the United Nations General Assembly on 10 December 1948. An anniversary is always a good time to take stock and, in particular, reflect on the relevance and current challenges of a document that represented a significant milestone at the time, as it established a shared understanding of a set of inalienable rights and freedoms based on universal needs and interests.

The Declaration is certainly not a binding treaty, but it has served as a foundational framework for the subsequent development of international human rights law. The Universal Declaration of Human Rights categorises a set of basic rights and freedoms as universal, i.e. applicable to all individuals throughout the world, irrespective of nationality, race, religion, gender or any other identity trait. Underlining this ideal of equality through

non-discrimination, the Declaration emphasises the treatment of all persons with equal dignity and respect, and enshrines a series of civil and political rights (such as the right to life, liberty, security and freedom of thought). It also recognises the category of economic, social and cultural rights, such as the right to work, education and an adequate standard of living.

Taking an optimistic view of the history of these 75 years, we could argue that the Universal Declaration of Human Rights marked a turning point in promoting recognition and respect for human rights based on a global vision of humanity that aspires to overcome particularism and hierarchies of class, economics and status. Although improvement has been gradual and insufficient, we have witnessed the consolidation of the ideal and the very concept of human rights as a global legal - not just moral - language that has inspired various waves of individual and collective emancipation. These waves have led to significant advances, such as the extension of suffrage, the end of apartheid and the abolition of slavery, as well as recognition of workers' rights, women's rights, LGBTIQ+ rights, the rights of national minorities and the rights of indigenous peoples.

The Universal Declaration of Human Rights ultimately contributed to a greater global awareness of the existence of universal and inalienable rights deserving of respect. Today, contemporary theorists of law and democracy agree that the concepts of rule of law, democracy and human rights are intertwined and mutually reinforcing. [1] The United Nations, the Council of Europe and other international organisations have also embraced this essential interconnectedness in developing their human rights practices and perspectives. [2]

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In the UN context, the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws, which are adopted by democratic parliaments, publicly promulgated and consistent with international human rights. Democracy and the rule of law therefore involve a number of substantive requirements related to human rights: separation of powers, citizen participation in decision-making, legal certainty, procedural and legal transparency, and adherence to other principles, such as the principle of equality before the law and fairness in its application by independent and impartial judges. The fundamental idea, now practically a cliché, is that, without human rights, democracy can only exist in a formal, nominal and deficient sense. Moreover, this substantive conception of the rule of law and democracy as a concept inherently linked to the protection of human rights is seen as fundamental to international peacekeeping and political security, and to making progress in global economic and social development, in the terms set out in the 2030 Agenda

Sustainable Development Goals (SDGs).

Thus, human rights have been incorporated into both international and domestic law in very intense and complex ways and we have come a long way from the original conception of human rights as “natural rights”, as mere moral aspirations outside legal norms. Today, these rights are considered paramount for safeguarding human dignity and protecting the individual from arbitrary or excessive intrusion of state power into their freedoms. These rights are also binding to private actors. Hence, the rule of law is no longer understood exclusively in a strictly formal sense, linked to the principle of legality, of government by law; rather, these legal rules are considered as requiring a specific qualitative component that adds a criterion of legitimacy, thus giving them normative validity.

In Europe, we have recently seen an example of this procedure, of democratic regression amounting to regression in human rights, in Hungary, where in 2020 the Parliament adopted a bill granting the prime minister, Viktor Orbán, full powers to rule without parliamentary approval and for an indefinite period. The opposition and several international organisations have rightly denounced this as a covert coup d'état. While from a purely formal perspective the parliamentary decision could be framed within the principle of legality, in real terms, linked to the ideal of democracy and human rights, it is a substantive subversion of the rule of law.

In short, the rule of law and democracy are today concepts that go beyond their primitive, formal meaning and are now associated with a set of substantive elements relating to human rights. Submission of power to the law does not refer to just any law, but to a democratic law that must respect specific content. Democracy and the rule of law also refer to the *quality* of regulation: legal rules must be clear, predictable and non-discriminatory, and they must be applied consistently and effectively, with a range of procedural guarantees, by independent and impartial judges and courts. Hence, the separation of powers is also associated with the above-mentioned substantive conception of democracy linked to human rights, which must guarantee both the supremacy of the legislature (through legal mechanisms that ensure normative hierarchy and the prevalence of law) and the limitation and independent review of the exercise of public power (accountability, or responsibility of those who govern on behalf of citizens).

Thus, the consolidation and strengthening of democracy as a legitimate form of government has also developed out of a close link to the idea of human rights and not just the existence of regular elections, i.e. formal or procedural democracy. The legitimacy of law in a democratic state requires a degree of formal and material justice; in other words, it refers not only to the formal processes of rule-making, but to the content of what the rules prohibit, permit or oblige among those they address. Without human rights, both the rule of law and democracy become merely “nominal”. Hence, post-war democratic constitutions have incorporated international human rights law as directly applicable fundamental rights that legitimise and validate all other domestic legal norms, preventing the tyrannical impulses of majorities. Even the most minimalist, procedural conception of democracy necessarily presupposes individual rights and freedoms such as the right to vote and formal equality among citizens.

In terms of specific content, the first decades of the 21st century have seen a significant expansion of human rights in many areas, going beyond the narrow framework of the Universal Declaration of Human Rights: climate change, global development and corporate accountability, as well as in the context of minority and indigenous peoples' rights (particularly relevant given the current rise of reactionary populism) and democratic regression. There are differences in detail that I am unable to discuss in this limited space, but what is remarkable is the tendency to broaden the scope of positive obligations in institutional protection - and not just negative ones of non-interference - so that states can effectively guarantee these rights. Above all, this applies to civil and political rights, but also to other categories, such as social, economic and cultural rights, minority rights and the rights of indigenous peoples.

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In terms of economic development, defenders of human rights and the relevance of the Universal Declaration of Human Rights often emphasise their relevance to a model of humanised and sustainable economic growth and development. As issues such as economic and social rights gain social relevance, there is a greater capacity to address issues such as poverty, health care and education, which are intertwined with awareness of a development model that places respect for human rights at its centre. Today, the critique of capitalism and the global neoliberal model is closely linked to an awareness of the legitimacy and necessity of guaranteeing these rights. In this sense, the so-called "horizontal effect" of human rights represents a remarkable development. It links these rights to individuals and the private sector in general, a process which has been strengthened to become a central aspect in raising awareness that companies, and not only states, represent a major risk for the protection of human rights.

Europa: reptes actuals

The waves of democratisation following the collapse of communism seemed to reassert the narrative of liberal democratic and human rights-based development, leading to Francis Fukuyama's optimistic proclamation of the "end of history" in the summer of 1989. In his opinion, the universalisation of Western liberal democracy should mark "the end point of mankind's ideological evolution". And there was no way back.

Today, however, these predictions of liberal democracy, human rights and free markets expanding both within and beyond the State, becoming a "common ideological heritage of mankind", seem to many social critics to be ludicrous, part of a Western myth that is sinking from within. There is much talk of democratic "crisis" or "fatigue", of a "backlash" against liberalism, human rights and cosmopolitanism, which critics see as fuelling the

resurgence of forms of populism leading to authoritarian forms of government. Trump, Bolsonaro, Orbán, Modi, Erdogan, Hofer, Shinzo Abe, Salvini and Meloni are among the prominent leaders who have emerged from a deep economic and cultural crisis that has produced increasingly polarised societies and put these ideals to the test. In Zygmunt Bauman's illuminating account, there is a sense of territorial dislocation, of blurring identities and altered economies, which informs the experience of human life in an age of globalisation that has accentuated the liquidity of modernity.

Liberal democracy and human rights are clearly vulnerable to this fluidity, and their resilience remains uncertain. Undoubtedly, both representative democracy and human rights remain central to the contemporary public imagination, as all reliable indices show. If people are asked whether they broadly support democracy and human rights, they tend to agree. However, [Freedom House](#) and the [V-Democracy Project](#), among other reliable sources, have detected a systematic decline in "global freedom" over the past 12 years. In Europe alone, five countries have been downgraded from liberal to electoral democracy, or from electoral democracy to electoral authoritarianism. In an article entitled "Democratic Disconnect", [3] the authors report that a growing proportion of young people in Europe and the United States no longer feel represented by their parliaments and would place greater trust in a government run by experts.

Globalisation, climate change and migration have produced a sense of dissolution of identity, of liquidity and disconnection, challenging the liberal idealism of progress being inherent to modernity. Such transformations are met with hostility from those hard hit by the disruptions they cause. Liberal democracies have proved powerless to govern this post-modern liquidity; instead, corporations and global economic elites are acquiring increasing power in political life. This causes what Jürgen Habermas calls deterioration towards a "façade" democracy, where decision-making processes are driven by finance capital, which disciplines states and disables deliberative democratic processes.

In this context, conservative populist leaders effectively exploit the growing fear and anger of a growing community of middle and working classes who feel alienated and insecure in a deeply unequal world. Populist candidates promise easy recipes and a return to solidity by manipulating these pathological fears and distrust of the well-established liberal elites (both local and global), who are perceived as the only real beneficiaries from globalisation. Their discourse often calls for a return to isolationism and a uniform (ethnic rather than civic) vision of the nation, and they then use this vision as a means of exploiting the grievances of the broad middle classes regarding what they see as the broken promises of liberal democracy. Growing insecurity in this less solid world is arbitrarily blamed on minorities and excessive liberal tolerance that allowed the current disorder.

Leaving aside the problem of generalised mistrust, [4] what needs to be stressed here is that this liberal vacuum, so to speak, is used by authoritarian movements to discredit human rights. Indeed, these new leaders are coming to power through electoral mandates, promising easy solutions to complex issues, such as managing diversity. These mandates deny the human rights of, for example, migrants and refugees, or simply deny that these problems exist, which is the strategy of Donald Trump and others in dealing with climate

change. In this process, the spirit of the rule of law in a constitutional democracy is subverted, as it moves away from the universal normative ideal inherent in human rights. In particular, this new wave of “authoritarian democrats” – if the expression makes sense – operates by pitting democracy against the universal values embedded in human rights, which are rooted in many post-war constitutions as legal constraints on majority rule. Thus, we see how the bonds by which human rights restrict executive power are being loosened through legal reforms; or how the divide between lawful and unlawful violence is effectively exploited by using the law (especially criminalisation and *lawfare*) as a tool to depoliticise and marginalise dissent and civil resistance.

In conclusion: democratic decline and the regression of human rights in contemporary Europe is NOT a story of military coups abolishing elections and sweeping replacement of existing officials; in most cases, there is a progressive dysfunction of democratic structures, which comes to the fore in the form of ordinary elections. The decline comes in small steps, often covered by a semblance of legality: tinkering with public institutions; aligning the courts; enlarging the executive; reducing the critical role of the media; intimidating opposition politicians or simply persecuting them on fiscal grounds; and making large areas of state functioning opaque under the pretext of “emergency” or “national security” to avoid public scrutiny and accountability or to violate human rights, such as the right to privacy. It is also, very centrally, about discrediting the role of international institutions and courts that apply international human rights law. There is no major dramatic moment, such as a coup d’état, but a gradual “rollback”.

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What is particularly worrying about this phenomenon is not only the large number of democracies that have proven to be fragile, but the way in which democracy is sabotaged from within, so to speak, to significantly lower standards of protection for human rights. Minorities and dissident groups are portrayed as outsiders, disloyal and dangerous, their struggle criminalised and their rights increasingly restricted for the sake of a vision of a unified, strong and conflict-free nation.

Conclusion

Without wishing to recreate a critique of catastrophism, I believe we are witnessing a dangerous backlash against the robust conception of human rights as involving significant limitations on state sovereignty (and thus on the will of the majority).

In promising to immunise countries from disorder and the negative effects of interdependence and diversity, conservative populist leaders tend to claim the centrality of

state sovereignty against supranational political institutions and international norms. These include international human rights norms, which are reformulated as non-binding in the context of a utilitarian philosophy barely compatible with a conception of these rights that assumes limitations on majority rule. A good example of this is the failure of Western democracies to address the current global migration and refugee crisis in a way that does not involve abandoning the principles of humanity embedded in international human rights law. Of course, nothing seems more terrifying than a flood, and the seductive metaphor of being swamped by waves of migrants and refugees is indeed invoked as an existential threat, however abstract and vague, by rising populist leaders. The politics of fear unites and mobilises people to combat what is perceived as a clear “external” threat to stability and progress in post-war liberal democracies. Cultural and identity differences are represented as a clash of values (or of “civilisations”, to use Huntington’s expression) and the categories “natives” versus “migrants”/“refugees” become binary, while belonging becomes exclusive. The narrative masks a pervasive ideology of national, cultural, racial and status hierarchy.

The 75th anniversary of the Universal Declaration of Human Rights serves as a reminder of the enduring importance of human rights and the need to continue striving to protect and promote them. We must underline the responsibility of governments, civil society and individuals to work for a world in which everyone can enjoy these rights and live in dignity and freedom. Addressing these challenges requires sustained international cooperation, advocacy and commitment from both states and civil society to promote and protect human rights worldwide. International law continues to evolve and adapt to meet these challenges, but progress is slow and uneven. The role of international organisations such as the UN and regional organisations and structures is fundamental to defending and promoting human rights across the world.

Above all, in the process of institutionalising these ideals, democracy and human rights need to be re-imagined from the perspective the marginalised and excluded. What is needed is the courage to empathise with those who suffer and are invisible; to recover the memory of those who are dead, absent, silenced or marginalised. Margins matter because they force us to see things we often prefer not to see, let alone experience. Poverty, cultural alienation, linguistic or racial domination, being a refugee in transit to some vague destination. We must build a *culture* of human rights to regain their normative force in international and domestic law. More especially, we must preserve the transformative power that emerges at the margins of the State and authoritarian politics: the discourse of NGOs, of human rights activists, of war journalists, are crucial parts of this struggle. Because only by including those who have been left behind, or who have been historically and structurally oppressed, can we rescue both democracy and human rights.

REFERENCES AND FOOTNOTES

- 1 — For a recent review of the notion of the rule of law, see Gowder, Paul (2016). *The Rule of Law in the Real World*. Cambridge University Press. Some works that have become classics on this controversial relationship include: Bobbio, Norberto (1991). *The Age of Rights*, translated by Allan Cameron, Polity Press. Cambridge; and Ferrajoli, Luigi (2007). *Principi iuris: Teoria del diritto e della democrazia*, Volume I, Teoria del Diritto. Laterza, Rome.
- 2 — See "[What is the Rule of Law](#)" and also [Direcció General de Drets Humans i Estat de Dret](#).
- 3 — Mounk, Yascha; Foa, Roberto Stefan (2016). "The Danger of Deconsolidation: The Democratic Disconnect". *The Journal of Democracy*, 27/3, p. 5-17.
- 4 — I discussed this in Torbisco-Casals, Neus (2015). "Beyond Altruism? Globalising democracy in the age of mistrust". *The Monist*, vol. 98, no. 4, Trust and Democracy, pp. 457-474.



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