RISKS AND CHALLENGES OF HUMAN RIGHTS IN EUROPE

Reykjavík and the future of Europe

Francesc Claret

Kherson residents of the city of Kherson, Ukraine, crowd around a volunteer aid truck to receive food and cloths, 18th November 2022, to cope with a particularly hard winter after Russian attacks on energy infrastructure | Photography: Alessio Mamo

After the Second World War, the world was compelled to embrace the notion of human rights in an effort, perhaps, to condense everything that had been worth fighting for into a single idea. This idea was embedded in the 1948 Universal Declaration of Human Rights (UDHR), which declared that the highest aspiration of the common people was to build a world in which human beings would enjoy freedom of speech and belief, and freedom from fear and want. Under the declaration, two fundamental principles interlocked to form the cornerstone of the human rights regime, with the intention of defining what it means to be human, and clarifying what it means to have rights. The declaration's idea of the human being emanated from the Enlightment principles of freedom, equality and autonomy. The "universal" in the title of the UDHR was introduced so that every individual across the globe would be considered a rights-bearing subject, endowed with dignity and equal to others in rights.

In its preamble, the UDHR warned us that "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge". And yet, reaching agreement on what it means to be human, endowed with rights, and determining which rights and how to protect them, was a difficult task from the start. In 1948, only 48 of the then 58 UN Member States voted in favour of the UDHR, with many countries under

colonial rule unable to cast their vote. And although not a Western concept per se, the way in which human rights were embedded in the declaration, and in the international system created around it, was completely dominated by the West. During the Cold War, the great powers were more preoccupied with establishing areas of influence and avoiding mutual destruction than agreeing on a common understanding about the meaning of human rights. Hence, it was not until the USSR disappeared, and the US became the super-power, that human rights became a discursive feature in international affairs. Consequently, for many people around the world, the idea of human rights was synonymous with a Western conception of international politics, and hence of dominance.

Nevertheless, during the last 75 years the declaration has been instrumental in shaping the current idea that we have of the international order. It has inspired around 80 treaties and conventions on human rights, a great number of regional instruments and even national constitutions.

From the international accountability framework created during the Nuremberg trials to recognizing the right to a healthy planet, human rights have given the international community a normative, positive and enforceable framework against which to actualize its own moral obligations. For many oppressed people around the world, human rights have been instrumental in helping them identify the source of the injustice they suffer and the constraints on their rights. Even domestic injustices are now increasingly being analysed as violations of international law, most prominently but not only as violations of international human rights law. [1]

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As a moral aspirational construct, the human rights discourse has expanded the normative possibilities for those that need to rely on protections external to the conditions that either subjugate them or prevent their progress. Human Rights have opened the political discourse to the language of rights, making it harder for states to bluntly deny them. Instead, regimes are forced to expose their real character, to create alternative narratives to justify their actions, even at the expense of their own internal legitimacy or their standing in the international order.

The new world (dis)order

And yet it seems that certain regimes no longer mind being labelled “non-compliant”. They are even somewhat conceited about it. The new international (dis)order reflects the ambition of several countries to assert their voice, creating their own counter narratives to advance their national priorities and interests at the expense of the common language of

rights. Some countries have denounced the West's double standards, and others have expressed their frustration with the fact that the UDHR never really bridged the gap between the language of human rights and their needs and expectations. For China, the ruling theme is sovereignty and the economy, not a global narrative of justice. Russia emphasizes its traditional values aligned with the Orthodox Church, while others, such as India, use the concept of foreign threat (from cultural to military) to increase state power. These countries are willing to confront the West, not only about the elements of the order, but about the order itself. [2]

The biggest challenge we face is a globalized unstable multipolar world in which the common narrative that served to hold the world together is being eroded. The liberal order has shrunk, and with it the moral authority of liberal democracies on the global stage. Political debate has been replaced by polarization and populism. International cooperation is increasingly organised along the lines of various clubs of like-minded countries, to the detriment of multilateralism. Democracy and prosperity are no longer paired concepts, with rising inequality and isolationism across all regimes. Consent is becoming irrelevant as we are told there is no alternative to the security of the state. [3] The number of people suffering from malnutrition has risen and life expectancy has fallen. Millions no longer have access to energy and, in 2022, the number of conflict-related deaths reached a 28-year high. [4] Some have already declared the SDGs dead. [5]

The rise of illiberal democracies

After the second world war, liberal democracies recognized the need to protect individual rights through positive social rights, while creating a society that needed to be morally antagonistic to that of communism. Fraternité was added to the basic concepts of the enlightenment, equality (egalité) and freedom (liberté), indicating that society should aspire to be more caring. And yet many were quick to wake from the promise of genuine democracy. The experiences of the 1960s – the May 1968 "revolution", anti-Vietnam protests, Martin Luther King and the civil rights movement – shocked the philosophical foundations of the liberal democracies. The last decade also saw what may have been the largest wave of mass, nonviolent, anti-government movements in recorded history. [6] Successive generations of activists realized that the illusion of universalized fundamental values was oftentimes not about human rights, but about the right humans and, in many instances, this meant placing "the citizen" (white, male, religiously appropriate, property owning, heterosexual and family-oriented) as the normative ideal of society.

The degradation of democratic practice has become the new normal, with leaders undermining the very rules of democracy to hold on to power and favour individual interests rather than the common good. Governments take advantage of all kinds of crisis to increase their control, while keeping people coerced under the pretext of continuous threats to the system (whether security, immigration, or epidemics). The response to demands for greater civic engagement is usually met with violence, either via "lawfare", the politicization of the judicial, or through the police, with the courts dissolving the collective character of resistance into individual acts that can be prosecuted and penalized. Some

democracies have turned into systems under which citizens are treated as mere duty holders rather than rights bearers.

Europe, a community of values

From Thomist concepts about the legitimacy of power to the 1789 Declaration of the Rights of Man and of the Citizen, the understanding of human rights in Europe is the outcome of centuries of history and internal wars, but also of the struggle to build peace through common values. The 1949 Statute of the Council of Europe (CoE) committed its Member States “to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”. A year later, the 1950 European Convention on Human Rights (ECHR) codified the fundamental values that formed the moral basis for cooperation among the Member States of the CoE. And although it was the first instrument to give effect and binding force to some of the rights embedded in the UDHR, the convention was not really a reflection of any universal agreement on the meaning of those rights, for it imagined rights belonging, not to humans qua humans, but rather qua Europeans. [7] What the ECHR did was to consolidate the idea that Europe was a community of values, that those core values were absolute and, as such, were not for balancing. [8] Since its inception, the European human rights regime has been under pressure to deliver, and especially so since the wave of accessions of new democracies to the CoE at the end of the cold war.

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On 22 March 2022, the CoE expelled Russia from the organization, showing a firm commitment to protect European values and the order. But the strength of that decision did not solve the problems of erosion of the European ethos. Russia – or any other external threat – cannot be blamed for all the evils affecting the continent. The backsliding of rights, the politization of the judicial, bad faith and non-execution of the rulings of the European Court of Human Rights, political attacks on the CoE and its mandate, and the underfunding of the organization have long preceded the invasion of Ukraine. Even the European Court of Human Rights has acknowledged that the implementation of judgements on human rights are a political issue [9] motivated by the desire to adjust its interpretation of the Convention in light of present day conditions. [10]

The Reykjavík Declaration

The 4th Summit of Heads of State and Government of the Council of Europe took place in Reykjavík on 16 and 17 May 2023. Convened to show Europe's united stand against Russia's war on Ukraine and establish clearer priorities and direction for the organization the summit was Europe's response to the threats posed to its founding values from the new world (dis)order and, most notably, from within. And yet, despite the significance and urgency of the meeting, the fact that little attention was paid by many was perhaps a sign of the very affliction that prompted its convening, the increasing segregation of human rights in the political discourse. The very eagerness of certain European leaders to avoid being held accountable for their responsibility in weakening the rights order lowered expectations about the outcome of the summit.

The Reykjavík Declaration also includes the Member States' reaffirmation of their unconditional obligation to abide by the judgments of the European Court of Human Rights (ECtHR), the pillar of European defence against the backsliding of democracy and human rights. Unlike the UDHR, the ECtHR largely succeeded in bridging the gap between the language of human rights and the aspirations of the people of Europe, because Europe was able to agree on a common legal framework that actualized its core values across borders. [11] Yet the advanced mechanisms established by the CoE to protect human rights and democracy still seem to be insufficient to prevent this backsliding.

Buried in the language of the Reykjavík Declaration, "United around our values", are two concepts that went largely unnoticed, despite their extraordinary importance. In paragraph 44 of the declaration, the Member States affirm that "democratic security (is) key for member States to address current and future challenges together and to secure peace and prosperity in Europe". In Appendix III (Reykjavík Principles for Democracy), the declaration speaks of resistance: "we will prevent and resist democratic backsliding in our continent, including in situations of emergency, crisis and armed conflicts, and we will stand firm against authoritarian tendencies by enhancing our shared commitments as member States of the Council of Europe".

Democratic security

The theory of democratic security argues that democracies rarely, if ever, go to war with each other, but in the context of the summit, this interpretation is confusing. The Reykjavík Declaration aimed to present a united front against Russia's invasion of Ukraine, but Russia is not a democratic State. The inclusion of defensive language in parallel with the revival of the once thought dead NATO may be a source of concern, particularly because the declaration does not clarify the measures to be used. And yet, despite this firm statement of intention, only 37 of the 46 Member States of the CoE agreed to the Register of Damages caused by the Russian invasion of Ukraine that was adopted in Reykjavík, a worrying sign of internal division.

The theory of democratic security also maintains that democratic practices should protect

states from internal strife. In a society with functioning institutions, fair and inclusive laws, independent powers, and genuine concern for the common good, there would hardly be a need for resistance. But we are not there yet. Security and genuine democracy are difficult terms to reconcile, for security has become the ultimate reason for those in power to justify restrictions on the enjoyment of other rights, including those of political participation, freedom of expression, or peaceful assembly. And yet, these restrictions may not be incompatible with the Convention. The second paragraph common to articles 9 (freedom of thought), 10 (freedom of expression) and 11 (freedom of assembly) of the ECHR provides that these rights may be derogated under circumstances of public emergency, or where the restriction has a legal basis, pursues a legitimate aim and is necessary. In an age when everything can potentially be interpreted as either terrorism, a threat to public health, an immoral public engagement, or as violence, everything becomes potentially exposed to serious interference and abuse by the State, not only to support those interpretations, but also to generate them. [12]

After the Paris attacks of November 2015, the French Government imposed a state of emergency and formally informed the CoE that it was derogating from some of its obligations under the ECHR. The United Kingdom is threatening to leave the Convention because of the incompatibility with its "illegal migration bill", and Poland has refused to comply with interim measures of the European Court of Human Rights regarding the reform of its judiciary. Although Europe was largely designed and defined by cooperation between France and Germany, the war in Ukraine has propelled the UK and Poland into leading the continent's political responses. An analogy could be made with that of seeing Russia preside over the UN Security Council while launching missiles against Ukraine.

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The United Nations also shares the concerns of the CoE regarding the threats to democracy and human rights. The July 2023 UN Secretary-General's policy brief of the New Agenda for Peace (NA4P) also uses more defensive language to assert the role of the UN in a time when multilateralism and the common language of rights are increasingly being contested and marginalized. To counteract those risks, the NA4P proposes a formula to converge around basic norms, tie those norms to effective structures that can verify them, and add some form of accountability. We need not reinvent the wheel. Europe already converges around basic norms – human rights, democracy, and the rule of law – and has structures and a legal instrument (the Council of Ministers and the ECtHR, respectively) capable of verifying those norms and holding states accountable.

We must maintain our resistance

Resistance has traditionally been considered a right of the oppressed to oppose injustice by the ruler, a reaction to an expression of power, an engagement that suggests some sort of exceptionality. In many instances, the moral obligation to resist arises out of the practices of those in power at the expense of the rights of people. But people are not free from responsibility. Aristotle used the term *akrasia* to refer to weakness of will, lack of command, and acting against one´s better judgment. The greatest danger we face is that of people internalizing narratives that drive them, contrary to their own interests, to contribute to the continuation of their own subjugation and endorse norms that make oppression, regression or totalitarianism appear not to be oppression, regression or totalitarianism at all.

The Reykjavík Declaration sets out the "what", but not the "how". Given its largely declaratory nature, in common with all declarations and all rights, its value is contingent on whether it is backed by the will to act. In legal theory, it is will that creates rights, and rights are only worth having if they are worth defending. The CoE and human rights in general may have somehow lost their appeal, particularly for illiberal regimes within Europe, but they remain the sole source of legitimacy for governments.

Scholars have traditionally considered that the social contract is broken if the State does not fulfil its obligations, and the ECHR is a contract between the people of Europe and their governments. The Reykjavík Declaration is a mandate to governments to resist the backsliding of rights against those that seek to defeat who we are, whether these threats are external or from within. If they do not follow through with their promise, then we must hold them to account, for without options to do so the idea of democracy is rendered meaningless. In the words of the late David Sassoli, during the Second World War resistance became European and, in her name, Europe found the strength to unite to become a space of peace, solidarity and cooperation. We must continue to resist so that Europe may remain a space of peace, solidarity and cooperation.

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9 — Resolution 2178 (2017) on the implementation of judgments of the ECHR.
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11 — However, the Convention is violated frequently by all of its Member States across all of the rights it purports to protect. More information online.
12 — Article 52 of the Spanish Organic Law 4/2015, of March 30, on citizens’ security presumes the truthfulness of police reports as the basis for the immediate enforceability of heavy fines and other penalties.

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