Inclusive Democracy and the European Convention on Human Rights

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Council of Europe; Democracy; European Court of Human Rights; Human rights; Politics and law; Ukraine

Abstract

We live in an era of upheaval and uncertainty. Liberal democracy is under threat. True "democracy values everyone equally, even if the majority does not". This magnificent phrase captures beautifully the concept of inclusive democracy which is firmly anchored in the European Convention on Human Rights (the Convention), further explained in the article. The Convention's inclusive democratic concept assumes that the axiomatic human trajectory of unchecked majority rule, that takes no account of the interests of the minority, risks descending into authoritarianism. The rights and freedoms of the Convention have as one of their primary purposes the exclusion of a human reality where elections create omnipotence. The benefits of the collective guarantees of human rights in Europe, the undoubted moral worth of the constellation of rights and values embedded in the Convention, indeed, the dignitarian foundations of the social contract which forms the political basis for its existence, remain steadfast. In fact, they have become more important than ever. A civilised society can never succumb to violence and war, it must react aggressively by reaffirming the fundamental principle of human dignity and equality for all. The Council of Europe must seize this moment, at its 4th Summit in Reykjavík, Iceland, in May 2023, to chart a path forward towards the resurgence of inclusive democracy.

Introduction

We live in an era of upheaval and uncertainty in which liberal democracy is under threat. Although this pre-eminent structure of government was famously termed the "end of history" by Professor Francis Fukuyama just over 30 years ago, by which he claimed it to constitute the final form of government for all nations,[1] it is currently contested all over the world. We must not, however, give up our fight for making Fukuyama's claim a reality. There is simply no other acceptable form of government which can sufficiently protect the three main moral and legal principles of human life upon which happiness, stability and prosperity rely: *dignity, equality and liberty*.

The problem we must now acutely address is that we have lost sight of what liberal democracy really means, what it requires and how we can make it effective to protect and preserve the fundamental principles of human dignity, equality and liberty. This onset of social and moral blindness to the core ideals of liberal democracy is creating a reservoir for populism and extremism which feeds off of our mutual mistrust, our fears, our lack of belief in democratic structures of governance. Make no mistake, continuing along this path will only lead us to oblivion as earlier generations have experienced.

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[1] F. Fukuyama, *The End of History and the Last Man* (Free Press, 1992).

In this brief article, I will make and defend the claim that the founders of the European Convention on Human Rights (ECHR, the Convention) realised that liberal democracy is the cornerstone of a collective community of human life. They understood that by their very nature, human beings, living in communities with others, must find ways to evade conflict and resort to decision-making processes that are respectful and sensitive to the common interests of all peoples. They understood that human beings have a tendency to affiliate with like-minded groups, both in body and spirit, thus risking the oppression of *the Others*, which most often are the vulnerable, the minority or the politically underrepresented. After all, these were the horrible teachings of the Second World War. The ECHR was therefore infused with an *inclusive concept of democratic governance*. As I will explain, the European Court of Human Rights (ECtHR, the Strasbourg Court) has enforced this inclusive form of governance in its case-law for the last 63 years.

Politics, populism and the separation of powers

In the precarious times that we currently live in we see politicians emphasising more and more that they have a democratic mandate, which in fact means that they should only speak and act for *their people*, but not *the Others*. Representative politics is thus reduced to a power-game where the winner takes all. It is based on a belief that representative politics, where representation is exclusive, not inclusive, is morally justified. But, I ask, is this belief in the virtues of representative politics belied by past and more recent history? The answer seems clear. A society of rational human beings, a community of civilised peoples, can learn from their past failures and readily appreciate the foibles of the human condition. Society may have readily experienced that the "opacity, inconsistency and fudge" of the political process,[2] can carry with it grave dangers. This is the fundamental premise of the ECHR adopted after the Second World War. European societies established a structure of liberal democracy in which certain fundamental rights and values were given normative status limiting majoritarian rule. In this manner they attempted to make the political process itself more rational, less prone to being dominated by gut feelings, by fear, anger and hatred, all primitive human elements that have given life to populist and ultimately self-destructive tendencies.

At its core, the claim that democracy simply means majority rule, a purely exclusive concept that accentuates factionalism and vested interests, constitutes a claim that human life should be fully regulated by pure politics and not law. As we increasingly see, this development has put pressure on the separation of powers, the relationship between government and the judges, with loud calls by politicians to limit the powers of judges.

But we should ask ourselves the following question: Is this really the time in our common history to place our bet on more politics and less law? To entrust our destiny to the existence of good faith in the political process and to argue in favour of limiting the review powers of independent and impartial judges? Truth is after all a cornerstone of democracy. The fundamental premise of democratic politics is that societal solutions and communal compromises are adopted on the basis of some minimum set of shared values and the existence of objective truths. Does that premise hold true in contemporary political processes in our part of the world? I fear not. Nationalism, tribalism, dislocation, fears of social change and the distrust of outsiders are on the rise again as people, limited by their partisan silos and filter bubbles, are losing a sense of shared reality and the ability to communicate across social and sectarian lines. No, I argue, it is not unjustified to claim that now is not the time for more politics and less law.

Just to be clear, so these words will not be misconstrued or misinterpreted as a demand for judicial imperalism by a former judge and president of an international court. I do not argue here for the weakening

[2] I refer here to Lord Sumption's description of the democratic process in his Reith Lectures, reproduced in his book, *Trials of the State: Law and the Decline of Politics* (Profile Books, 2019), to which I responded in R. Spano, "The Democratic Virtues of Human Rights Law—A Response to Lord Sumption's Reith Lectures" (London: 20 February 2020), The Inaugural Bonavero Institute Annual Human Rights Lecture, *https://echr.coe.int /Documents/Speech_20200220_Spano_Lecture_London_ENG.pdf* [Accessed 25 February 2023].

of the role of politics, but rather for the rule of law to continue to sustain its true and inclusive democratic character. By this I also do not mean that pure policy issues and matters of high politics should be resolved in the courtroom. Far from it, but I do argue that in the age we live in, where democracy has, it seems, lost sight of its moral and political compass, independent and impartial judges have become even more important for the sustained legitimacy of the political process and the separation of powers.

A perfect case in point is the rule of law protective reaction of federal judges in the US in refuting Trump's attempts to subvert the results of the November 2021 presidential elections. When the structural edifice of democracy starts to weaken, when the orderly and peaceful transition of power, the true hallmark of a functioning democracy, is threatened, what remains is the rule of law and its adherence by reasonable people of all persuasions. It is therefore pure populist propaganda to cry out that this is all about "judges seizing the policy agenda", as some have claimed.[3] Of course judges should not remake society. The fine line between judicial moderation and judicial overreach is often difficult to identify. When judges are at their best they occupy a modest, but important, role. They assist society in not losing sight of our consensus principles, in particular the accepted rules of democratic governance. Courts are in this sense concerned with "process not substance, with how things get done rather than what is done". Judges are in other words primarily, although not only, "oiling the democratic machine, not telling it what to produce".[4]

Inclusive democracy, totalitarianism and the ECHR

The former President of the Supreme Court of the United Kingdom, Lady Brenda Hale, once famously proclaimed in a judicial opinion: "Democracy values everyone equally, even if the majority does not".[5] This magnificent phrase captures beautifully the concept of *inclusive democracy* which is firmly anchored in the case-law of the ECtHR. Indeed, this inclusive view of the democratic concept has a long historical pedigree. Almost 40 years ago, the Plenary of the Old Court said the following in the famous judgment in *Young v United Kingdom* :

> "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."[6]

It is important to further unpack this concept because it has a transversal nature; it infuses all of the rights and freedoms of the ECHR. The Convention's inclusive democratic concept assumes that the axiomatic human trajectory of unchecked majority rule, that takes no account of the interests of the minority, risks descending into authoritarianism.[7] It follows that the rights and freedoms of the ECHR have as one of their primary purposes the exclusion of a human reality where elections create omnipotence.

The ECHR's inclusive democratic concept is no coincidence. It is the vaccine, the proverbial drug, created to fight against the totalitarian disease that ravaged the European continent during the Second World War. The totalitarian, the dictator, rejects inclusive democratic compromise whereas compromise is necessary for the furtherance of peace in a democratic society. Politics, at its best, produces factually

[3] Spano, "The Democratic Virtues of Human Rights Law—A Response to Lord Sumption's Reith Lectures" (London: 20 February 2020), The Inaugural Bonavero Institute Annual Human Rights Lecture, *https://echr.coe.int/Documents/Speech_20200220_Spano_Lecture_London_ENG.pdf* [Accessed 25 February 2023], p.7.

[4] C. Gearty, "The Supreme Court judges are oiling the democratic machine, not telling it what to produce" (25 September 2019), *LSE Brexit*, *https://blogs.lse.ac.uk/brexit/2019/09/25/the-supreme-court-judges-are-oiling-the-democratic-machine-not-telling-it-what-to-produce/* [Accessed 25 February 2023].

[5] *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 at [132].

[6] *Young v United Kingdom* (App. Nos.7601/76 and 7806/77), judgment of 13 August 1981; (1983) 5 E.H.R.R. CD519 at [63].

[7] Spano, "The Democratic Virtues of Human Rights Law—A Response to Lord Sumption's Reith Lectures" (London: 20 February 2020), The Inaugural Bonavero Institute Annual Human Rights Lecture, p.5, *https://echr.coe.int/Documents/Speech_20200220_Spano_Lecture_London_ENG.pdf* [Accessed 25 February 2023].

sound, reasonable, proportionate and inclusive solutions for society where the interests of all have been taken fairly into account. Therefore, political action in achieving such common solutions, which excludes the meaningful participation of marginalised groups or minorities, is anathema to a true and inclusive democracy. *Exclusive democracy*, or, to put it differently, the creation of a governance and decision-making structure which ultimately has, as its sole or primary purpose, the goal of guaranteeing the continued monopoly of power of a political party, is nothing short of totalitarianism. The party becomes the state and the state becomes the party, the Nazis, the Bolsheviks, excluding *the Others*. As Hannah Arendt observed in 1951, in her seminal work, *The Origins of Totalitarianism* :

> "all serious students of the subject [of totalitarianism] agree at least on the co-existence (or the conflict) of a dual authority, the party and the state. … It has also been frequently observed that the relationship between the two sources of authority, between the state and party, is one of ostensible and real authority, so that the government machine is usually pictured as a powerless façade which hides and protects the real power of the party."[8]

It is within this context that one should view the overall historical trajectory of the ECHR. The inclusive democratic concept under the Convention is manifested in many different ways. Already in the 1970s and 1980s, before majoritarian views had progressively evolved on these issues in Europe, the Court took a pioneering interpretive stance on the rights of children born out of wedlock,[9] towards the protection of LGBTI persons[10] and, in the new millennia, towards discrimination of Roma people,[11] to name some of the more salient areas. This is because the Convention requires that the interests of all human beings be the subject of good faith democratic action and not subjected to disproportionate and unreasonable majoritarian stigma and oppression. This is the only way that the three major moral principles of peaceful democratic life are protected, namely human dignity, equality and liberty. This is not a counter-majoritarian approach but simply the enforcement of the true scope and purpose of an inclusive concept of democracy.

When it comes to the principles of democratic governance, the Court has moreover robustly defended freedom of expression,[12] freedom of assembly[13] and the right to free and fair elections,[14] all fundamental elements of a true concept of inclusive democracy. For it is anathema to inclusive democracy to exclude the interests and views of *the Others*. Inclusive democracy requires the interests of all to be a part of the overall democratic calculus. This is the way we should understand the Court's consistent references for decades to the importance of "pluralism, tolerance and broadmindedness without which there is no 'democratic society'".[15] After all, a dictator and an autocrat are unable or unwilling to govern with a pluralistic, broadminded and tolerant mindset. These hallmarks of a true democratic society threaten their monopoly of power. Exclusive democracy or to use an even better term invoked by some in Europe these days, *illiberal democracy*, in fact only protects the interests of the majority, and often even only a subset of groups within that majority that wield the reins of power. It is therefore put under pressure by pluralism, a broadminded view of democratic life and a tolerant attitude towards *the Others*. The ECHR was exactly designed to prevent the rise of illiberal forms of majoritarian governance and the Strasbourg Court has consistently played an important role in this regard for the last 63 years.

[8] H. Arendt, *The Origins of Totalitarianism* (Penguin Books, 1951), p.517.
[9] *Marckx v Belgium* (App. No.6833/74), judgment of 19 June 1979; (1979–80) 2 E.H.R.R. 330.
[10] *Dudgeon v United Kingdom* (App. No.7525/76), judgment of 22 October 1981; (1982) 4 E.H.R.R. 149.
[11] *DH v Czech Republic* [GC] (App. No.57325/00), judgment of 13 November 2007; (2008) 47 E.H.R.R. 3.
[12] *Handyside v United Kingdom* (App. No.5493/72), judgment of 7 December 1976 (1979–80) 1 E.H.R.R. 737.
[13] *Kudrevicius v Lithuania* [GC] (App. No.37553/05), judgment of 15 October 2015; (2016) 62 E.H.R.R. 34.
[14] *Mugemangango v Belgium* [GC] (App. No.310/15), judgment of 10 July 2020; (2020) 71 E.H.R.R. 32.
[15] *Handyside* (App. No.5493/72), judgment of 7 December 1976 at [49]: "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to para.2 of art.10 (art.10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

The Convention as a "social contract"—reflections on the Council of Europe in the face of war in Ukraine

For Lord Arnold Duncan McNair, the court's first President in 1959, the Convention was the expression of the Contracting States' democratic tradition and the further recognition of rights and freedoms was also a method for achieving greater unity amongst its members. It is clear that Lord McNair's vision of the underlying logic and purposes of the system was influenced by the western-European genesis of the Convention. As such, it is not surprising that the expansion of the system to the East with the fall of the Berlin Wall in 1989 created internal tensions. States transitioning away from Communist rule and aspiring to become liberal democracies were met with difficult challenges in conforming to the principles laid down by the Convention. The exponential increase in the number of applications lodged with the court in the first decade of the new millennia supports this claim.

The interesting and indeed complex question which arises in this context, a question that has now become more salient than ever due to the atrocities of war in Europe, is whether the Convention and the Strasbourg Court have overall had a beneficial impact in the Member States or whether their impact has been less than we hoped for. This is a very difficult question and one has to be careful when attempting to give an overly general answer. It goes without saying that Russia's invasion of Ukraine brings this issue into stark relief.

To begin with, the Convention is based on the fundamental premise that human rights and the rule of law are a common European heritage and fostering and nurturing the rights and freedoms in the Convention help to keep us together. These are the moral and political foundations which all High Contracting Parties accepted when they, on the basis of their sovereign choice, decided to become a part of the system and undergo the obligations which flow inherently from such membership.

It is the Strasbourg Court which is entrusted with enforcing the constellation of values which underpin Convention rights and guarantees. After more than six decades, it is difficult to challenge the contention that the Court has made an extraordinary contribution to the betterment of lives and to improving good governance across the Continent. Indeed, it has created an elaborate edifice of human rights' protection spanning every article of the Convention which can now be used domestically by national courts to ensure that human rights are protected "at home" and which also form the minimum guarantees which animate the Charter of Fundamental Rights of the European Union and the case-law of the European Court of Justice.

I leave open the question on how one would now define in overall doctrinal terms the normative nature or core of the Convention. Professor Angelika Nussberger, the former Vice-President of the Strasbourg Court, has recently argued that the Convention cannot be considered a "Constitution" in legal terms,[16] more a European *social contract*. There is much to be said for this claim in my view. Viewing the Convention as analogous to a human rights based social contract between Europeans goes also to the heart of the matter so to speak when it is alleged that the Strasbourg Court has failed in bringing peace to Europe when one witnesses the war in Ukraine.

For if the Convention is a "social contract", entered into by states in the field of human rights, it requires good faith for the contract to be enforced, to exist, to survive. It is not realistic to suggest that an international court can, by itself, prevent international or internal armed conflicts if the political will of leaders of Member States is lacking or indeed when the trajectory of national political developments is directed towards undermining, subverting or indeed destroying the foundations upon which this social contract on human rights protections, the Convention, rests.

The salient question is this: Would life in Russia, or in other Member States of the Council of Europe for that matter, have been better if they had not acceded to the Convention and not been subject to the

[16] A. Nussberger, *La Convention Europeenne des Droits de L'Homme—une Constitution pour L'Europe?* Les soixante-dix ans de l'adoption de la Convention européenne des droits de l'homme: enjeux et perspectives / K. Blay-Grabarczyk et L. Milano, 2021.

external control powers of the Court and the Council of Europe? Remember, Russia left the Convention system on 16 September 2022 after having been a High Contracting Party for 27 years. Has the work of the Court not had any beneficial impact on the lives of the Russian people or brought about positive institutional and procedural changes in that country? It may be difficult to make the claim that it has had such a positive impact in the face of the realities of war we are now witnessing, but I invite the reader to adopt a broader, more nuanced, perspective.

Over the last 27 years, the Court has dealt with approximately 180,000 applications brought against Russia. The vast majority ended in inadmissibility decisions being adopted, while 3,000 judgments have been handed down. These judgments have brought about positive changes to the lives of prisoners and persons in detention, immigrants, provided access to justice, procedural fairness and the protection of property. Yes, there have been serious failures on the part of the Russian Government to execute a number of important judgments rendered by the Court as well as interim measures, but these failures cannot be attributed to the Court. They relate again to the question of political will, or the lack thereof, and the need for sustained international pressure to make the social contract a reality.

In sum, we must not give up in the face of the kind of adversity brought about by the terrible and atrocious war in Ukraine. The benefits of the collective guarantees of human rights in Europe, the undoubted moral worth of the constellation of rights and values embedded in the Convention, indeed, the dignitarian foundations of the social contract which forms the political basis for its existence, remain steadfast. In fact, I would make the claim without hesitation that they have become more important than ever. A civilised society can never succumb to violence and war. It must react aggressively by reaffirming the fundamental principles of human dignity, equality and liberty for all.

Current crises and challenges—reflections on the future

Recently, the Court has more and more examined complaints on the merits under art.18 in its jurisprudence.[17] This provision prohibits the use of ulterior, abusive and arbitrary motives, in restricting Convention rights. In other words, these cases depict a reality in which raw political power has been used to remove political opposition forces from influencing the trajectory of national politics. This trend is manifested in the retrogression of inclusive liberal democracy in some Member States. The ultimate and catastrophic development of this trend towards the destruction of democracy is of course the Russian invasion of Ukraine which I discussed above. As I have previously said publicly when I served as President of the Court, this tectonic and transformative event in modern European history is an example of what happens when true and inclusive democracy has failed to take hold, when the majority enforces a unilateral and oppressive view of the "right way to live" on *the Others* and when the full social and cultural history of a nation is reduced to the anachronistic views of the powerful. No pluralism of views, no broadmindedness, no tolerance, the power of one, for the interests of the few.[18]

Whilst the war in Ukraine is only the most egregious manifestation of democratic decay in Europe, let's not be naive and think that it is a limited occurrence. No, we see similar trends in our backyard, all across Europe. So, how should we respond? Allow me to attempt, a possibly feeble, reply in three parts.

First, the rise of exclusive, illiberal democracy has been made possible because our post Second World War project towards economic prosperity has taken a bad turn.[19] If there is anything we inherently react to as human beings it is injustice and unfairness in the distribution of economic prosperity and entrenched limitations on social mobility. Poverty and uncertainty as to whether we can put food on our tables, receive

[17] Article 18 ECHR: "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." See, in particular, *Selahattin Demirtas v Turkey* [GC] (App. No.14305/17), judgment of 22 December 2020; (2019) 69 E.H.R.R. 27.

[18] R. Spano, "The European Court of Human Rights in 2040—Lost Utopia or Trademark of the 21st Century" (16 September 2022), *Colloquium on European Human Rights Protection Twenty Years from Now*, University of Cologne.

[19] See Robert Reich's excellent book, *The System: Who Rigged It, How We Fix It* (Vintage Books, 2020).

health care or educate our children embolden the populists and the enemies of freedom for they seek to recruit the afflicted to their cause. But their opportunistic gambit is more often than not a facade, for they seek only to profit from the rage of inequality to accumulate power for the benefit of the few. History has repeatedly taught us what the endgame is in these circumstances. It is social strife, misery, conflict and ultimately warfare. For us to avoid this historical repetition, inclusive democracy is the only viable answer, but it will require a social and economic realignment towards a vision of true and substantive equality. The Council of Europe must seize this moment, at its 4th Summit in Reykjavík, Iceland, in May 2023, to chart a path forward towards the resurgence of inclusive democracy.

Secondly, the separation of powers must be defended at all costs. It is inherent in inclusive democracy that power must be checked and abuse must be held to account. The rule of law and inclusive democracy go hand in hand; one cannot survive without the other. This is the reason for the recent developments in the Court's case-law robustly enforcing the independence of the judiciary,[20] a trend we have also seen in the Court of Justice of the European Union. Of course, judges themselves must be aware of the limits of their power, but they must not shy away from enforcing the limits of the rule of law and inclusive democracy when necessary.

Thirdly, we need to speak up and become active defenders for inclusive democracy, in all facets of our lives. We must understand that inclusive democracy does not come naturally to human beings, it is a choice, a decision, it must be fought for, every day, always. It requires us to listen to others, not condemn our fellow human beings for being different or for having views we may dislike. It requires us to forgo being judgmental of how others choose to lead their lives, but rather embrace diversity and pluralism of viewpoints. It requires us to understand that we all deserve dignity, equality and to be free, in body and spirit. The future is now and we all have to seize the moment to overcome the existential struggle that must be won.

Conclusion

Every generation in human history has been faced with challenges that affect the trajectory of human life. The challenges we face are clear. Do we uphold and protect inclusive democracy as the final form of government for all nations or do we accept its demise. The articulation of the challenge we face can be put in those stark terms I am afraid. I am an eternal optimist, perhaps because failure is not an option. I simply don't believe or want to believe that human beings are condemned to always making the same mistakes. Human reason and an inherent sense of the importance of dignity, equality and liberty for happiness and prosperity are powerful tools. It has made us who we are. If we believe in them, they will also make our future.

[20] R. Spano, "The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary" (2021) 27 *European Law Journal* 211.