Is the Constitutional Democracy a necessary condition for implementing human rights?

Sebastian RĂDULEŢU

Faculty of Law and Administrative Sciences, University of Craiova

Abstract:

The relationship between democracy and human rights has triggered vivid debate among scholars, human rights activists and politicians. This article sustains that the effective realization of fundamental rights could be ensured only in a constitutional democracy were rule of law and pluralism are paramount while in authoritarian regimes human rights seem to be merely standards or norms at the mercy of political power. In this type of regimes they are enlisted in a declaration of rights but they are not enforced by national courts. In its first part, the essay will approach the concept of constitutional democracy followed by the assertion of the significance of the rule of law, the pluralism and the electoral process for the effectiveness of human rights. Secondly, it will present the international and European law in this field, with a special view on the relevant case-law of European Court of Human Rights. In the last part, the paper will shortly challenge the main counter-arguments to its statement, in order to address all the relevant aspects of the topic.

Keywords: human rights, constitutional democracy, rule of law, pluralism

Since the aftermath of the Second World War, the human rights concept seems to achieve international legitimacy, becoming one of the most influential of our time, while the collapse of communist regimes created for democracy the opportunity to remain the single type of government with a universal vocation. In this framework, after the end of The Cold War, the relationship between human rights and democracy has fostered a vivid debate among scholars, human rights activists and other practitioners in these fields. The main topic of this debate has been whether the democracy, in its sense of liberal democracy, characterized by pluralism and rule of law, should be considered a condition for effective human rights or, on the contrary, the two concepts should be separated, especially for practical reasons, in order to assure a broader acceptance of human rights at international level. Some authors have argued for the idea of a strong

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1) The author is currently a postgraduate student in the Master program in International Human Rights Law of the University of Oxford (2012-2014), receiving for this program of study a Clarendon Fund Scholarship.


link, an interdependence relationship between human rights and democracy, which have common values and have developed together, while others\textsuperscript{4} have considered that democracy does not seem to be a condition \textit{sine qua non} for implementing human rights. Therefore, in the latter opinion, a link with liberal democracy could delay the development of human rights inside various political regimes. This essay will argue that the rule of law and pluralism, as key elements of the liberal democracy, represent essential conditions for the effectiveness of fundamental rights. It will also go on to sustain that promoting human rights in authoritarian regimes is necessary too, but this type of approach transform them merely in standards or norms, not in effective rights like in constitutional democracies. Nevertheless, this does not mean that such a practical demarche would be useless. On the contrary, it could be a necessary step towards a full implementation of human rights in the future. Due to its strict framework, this essay will not assert the influence on this topic of other important concepts such as development or globalization. In the first part, the essay will approach the concept of liberal democracy followed by the assertion of the significance of the rule of law, the pluralism and the „genuine electoral democracy” for the effectiveness of human rights. Secondly, it will present the international and European law in this field, with a special view on the relevant case-law of European Court of Human Rights. In the last part, the work will shortly challenge the main counter-arguments to its statement, in order to cover all the relevant aspects of the topic.

In order for a contemporary regime to be characterized as democratic, it needs not only to organize free and fair election at reasonable periods of time, but also to protect the rights of individuals and minorities\textsuperscript{5}. In this acceptation, the regime is called a liberal democracy or a constitutional democracy and it limits the rule of majority by recognizing fundamental rights to each individual or minority group. This tension between the majority rule, specific to a democratic regime, and the individual rights, guaranteed by constitutions and based on classical liberal philosophy, should be solved in favor of human rights\textsuperscript{6}. A liberal democracy should not be just a pure electoral democracy, merely emphasizing the procedures for choosing the rulers, because it could degenerate into empty formalism; furthermore it should provide the ruler with an effective control over the government\textsuperscript{7}. In order to achieve this goal, some authors propose procedural means such as multiparty elections\textsuperscript{8}, others insist on extensive political freedom\textsuperscript{9} or emphasize the pluralism, the diversity of groups that exert influence in the society\textsuperscript{10}. Without entering into the difficult debate between procedural or substantive conceptions\textsuperscript{11} about democracy, that would exceed the framework of this article, the liberal democracy conception presented above could be considered a „genuine electoral democracy”.

\textsuperscript{5} Marc F. Plattner, \textit{Populism, Pluralism, and Liberal Democracy}, Journal of Democracy, 21\textsuperscript{st} of January 2010, p. 84.
\textsuperscript{6} Jack Donnelly, \textit{ibidem}, p. 192.
\textsuperscript{7} Jack Donnelly, \textit{ibidem}, p. 191.
\textsuperscript{8} Jure Vidmar, \textit{ibidem}, pp. 209-240.
\textsuperscript{10} Marc F. Plattner, \textit{ibidem}, p. 89.
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democracy” because it protects the individual rights and assures peoples’ control over
the rulers that are chosen by fair and open elections.

The effective realization of rights supposes *inter alia* that, if they are violated, their
titular should have a judicial remedy in order to protect his or her rights. Therefore, the
human rights should not only be recognized by the states through formal declarations, but
they should also be enforced by the national courts. Without this judicial protection, they
would remain only standards or norms at the discretion of political power, but not rights
as such. Although the rule of law belongs rather to liberal conception of government
than to democracy, it represents a feature of contemporary liberal democracy. From this
perspective it helps to temper majority rule in order to protect individual rights. One
of its most important forms is the constitutional review of legislation, whose principal
purpose is to defend fundamental rights against violations from the legislation enacted
by the elected representatives of the people.

Furthermore, pluralism represents another mean to assure the effective realization
of individual rights in a liberal democracy, against the populist movements. Same as
the rule of law, originally, the pluralism does not belong to the classical conception of
democracy, but to the liberal theory, referring to economic interests. In contemporary
liberal democracies it is used to refer to ethnic, cultural or religious groups for
emphasizing the liberal side of this type of regime. This trend, to encourage diversity,
could limit the populist temptation in contemporary societies and, this way, it could
help to the effective realization of rights.

Finally, we can sustain that the genuine electoral democracy could contribute to the
development of human rights. The effective realization of human rights is possible only
in a democratic regime, because only in this regime they could be conceived as inherent
rights belonging to every human being, rights whose implementation is assured by
mechanisms that permit to citizens to become involved in the process of determination
of their rights. On the contrary, in authoritarian states, the rights are rather norms or
standards granted and ultimately determined by the regime.

From a practical perspective, the international human rights law seems to prefer a
procedural conception about democracy separated from human rights. According to
the article 21 of the Universal Declaration of Human Rights and the article 25 of the
International Covenant on Civil and Political Rights, everyone has the right to political
participation. In addition, any limitation of the rights recognized by these international
documents should refer to a „democratic society”. Other UN documents, such as the
Vienna Declaration and Programme of Action (1993), refer to democracy. Nevertheless,
the obligations imposed on the states by the rights to political participation and
other human rights provisions do not demand a specific political system or electoral

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12) This expression is used with a different sense by art. 25 (b) of ICCPR.
15) Encyclopedia of Democracy, cited by Marc F. Plattner, *ibidem*, p. 88: „A political movement that emphasizes the interests, cultural traits, and spontaneous feelings of the common people, as opposed to those of a privileged elite“.
20) Art. 29 (2) of UDHR.
method". In this framework, the UN approach for implementing human rights within an enormous variety of governmental systems of its member states seems to be more of a practical nature than the ideal approach described above.

At regional level, it should be mentioned that European Convention on Human Rights offers *grosso modo* the same references to democracy. The preamble of the Convention, but also the article 3 of Protocol no. 1 refers to „effective political democracy" and to „the right to free elections". The Convention also provides limitation of rights if they are „necessary in a democratic society". Nevertheless, this general framework has become more specific due to the case-law of the Court that established certain features of the concept of „democratic society" or of „the right to free elections". For example, a „democratic society" implies „pluralism, tolerance and broadmindedness", which are specific to a liberal democracy, as presented above. Moreover, the right to free elections implies multi-party elections. Finally, under the article 8 of the Convention concerning the right to privacy, the Court establishes for the national authorities the obligation to guarantee the participation of the public to decisions that could affect them, especially in „pollution cases". The unitary concept of democracy designed by this jurisprudence seems to be the ideal framework for the flourishing of the human rights guaranteed by the Convention. This evolution of European human rights law has been possible due to the relative homogeneity of political systems of the member states of the Council of Europe, in comparison to the diversity of the member states of the United Nations. Nevertheless, even at this regional level, the European Court has encountered problems in adapting its view about a „democratic society" to a Muslim country.

Unlike in Europe, at international level, a more practical approach of the relationship between democracy and human rights is used. The years since 11 September 2001 are associated with a retreat of democracy worldwide, due to the “war on terror". In this context, the practical approach that separates human rights from democracy seems to gain momentum. The main arguments in favor of this opinion are the fact that human rights movement is internationally recognized and the fact that the international human rights law applies to all states. From this perspective, linking human rights to democracy could delay their implementation. In addition, some human rights do not require democracy in order to be implemented, for example working conditions, labor rights or education. As mentioned above, it is hard to conceive the effective realization of human rights outside a liberal democratic government. In authoritarian regimes, human rights are only norms or standards enlisted in a declaration of rights, but depending in their implementation on the mercy of political power. Nevertheless, even at this lower level, they could be useful in order to improve the life of the people in nondemocratic regime and as a step towards the future implementing of their rights as such.

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22) In its articles 6, 8, 9, 10 and 11.
24) United Communist Party of Turkey and others v. Turkey App. No 19392/92 (ECHR, 30th of January 1998), §44.
26) Jure Vidmar, ibidem, p. 236.
28) Anthony J. Langlois, ibidem, pp. 998-1002.
In conclusion, this essay has argued that the rule of law and the pluralism as means of liberal democracy, but also the democratic rule itself contribute to the effective realization of human rights. This ideal situation does not exist at international level, where a separation between democracy and human rights is made for practical reasons. At regional level, such as in Europe, this link is used by European Court from Strasbourg, in order to develop human rights. Nevertheless, it is not a general answer to all the problems encountered by human rights, not even in „consolidated democracies” from Europe, where the situation of Roma minority or the populist movements foster a public debate.