The Problem of Human Rights in Direct Democracy

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Abstract:

The main aim of this article is to illustrate the relationship between human rights and referendums. In international and constitutional law theory, human rights are considered to be fundamental. A modern democratic state should guarantee the protection of such human rights as dignity, freedom, and ownership of property, as well as ensure equality and social and economic rights. But from their beginnings, the foundations of these rights have been associated with conflict, and at times, such as during the French Revolution, even with terror, with dictatorships and totalitarian systems often abusing terms taken from the vocabulary of human rights, including *liberty* and *equality*.

As the most basic institution of modern direct democracy, the referendum would seem to be an excellent means of protecting human rights. However, referendums also provide opportunities for limiting these rights, and not only by totalitarian and authoritarian regimes seeking use this institution to legitimize their power. In democracies, when people are asked about a very difficult subject (e.g. a moral problem) they are often driven by emotions during the campaigns and when voting. In relation to human rights, referendums can thus be a double-edged sword.

Keywords: Direct Democracy, Human Rights, Referendum, Plebiscite

Resumen:

El objetivo principal de este artículo es ilustrar la relación entre los derechos humanos y los referendos. En la teoría del derecho internacional y constitucional, los derechos humanos son considerados fundamentales. Un Estado democrático moderno debe garantizar la protección de los derechos humanos como la dignidad, la libertad y la propiedad de los bienes, así como garantizar la igualdad y los derechos sociales y económicos. Sin embargo, desde sus inicios, los fundamentos de estos derechos han sido asociados con el conflicto y en épocas como la Revolución francesa y el tiempo de terror, en situaciones como dictaduras y sistemas totalitarios a menudo se abusa de términos tomados del vocabulario de los derechos humanos, entre ellos la *libertad* e *igualdad*.

Como la institución más básica de la democracia directa moderna, el referéndum parece ser un excelente medio de protección de los derechos humanos. Sin embargo, los referendos también ofrecen oportunidades para limitar estos derechos, y no sólo por parte de regímenes totalitarios y autoritarios que buscan utilizar esta institución para legitimar su poder. En las democracias, cuando se pregunta acerca de un tema muy difícil (por ejemplo, un problema moral) a menudo son impulsados por emociones durante las campañas y la hora de votar. En relación con los derechos humanos, los referendos por lo tanto puede ser un arma de doble filo.

Palabras clave: Democracia directa, derechos humanos, referéndum, plebiscito

In discussing the relationship between human rights and democracy, two main problems must be considered: Can we regard democracy as the best means of protecting human rights, and can we find historical examples of its accomplishing this. The main aim of this paper is to consider some recent historical examples of the violation of human rights in democratic systems. Direct democracy was the only form of democracy until the French Revolution. There were no human rights in this system, for which the most important value was community. We can see this expressed in relation to Athens in Pericles' Funeral Oration, in which he praises the ancient city's democracy:

> Our public men have, besides politics, their private affairs to attend to, and our ordinary citizens, though occupied with the pursuits of industry, are still fair judges of public matters; *for, unlike any other nation, regarding him who takes no part in these duties not as unambitious but as useless* [emphasis added – P.K.], we Athenians are able to judge at all events if we cannot originate, and, instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all.[1]

Barbarian war-democracy communities, such as those of Viking crews, were also ruled democratically. In them, community was of primary importance, and took priority over individuality. Gilbert Keith Chesterton describes this situation aptly: "The old pagan commonwealths were democratic, but they were not in the least humanitarian. They had no tears to spare for a man at the mercy of the community; they reserved all their anger and

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[1]Thucydides, *Peloponnesian War*, Book 2.34-46 http://www.fordham.edu/halsall/ancient/pericles-funeralspeech.asp

sympathy for the community at the mercy of a man. That individual compassion for an individual case was a pure product of Christianity (…)".[2] This description applies to many political systems (where religion was not most important), including those embodied in medieval Swiss village assemblies and northern Italian city-states. We can find two pillars of human rights in these historical democracies: equality and liberty, but both of these values were understood differently than today. Equality was a privilege reserved for a narrow group; for instance, in Ancient Athens the notion applied to about 8% of the population, that is, citizens with full political rights. For them liberty had only an active dimension, and no passive aspect, in relation to freedom. Meanwhile, in Swiss communities all free peasants were to obligated to participate in local councils (*landsgemains*).

Equality was also connected with identity and with political, cultural and religious homogeneity, so there was no place for plurality. An example of such homogeneity is the medieval communes in Marsilius of Padua's imagined perfect state. In his political treatise *Defensor pacis*, he sought to demonstrate, using arguments based on reason and authority, the right to independence of the Holy Roman Empire from the Papacy, which ultimately led him to argue for the sovereignty of the people.[3] In his theory, community always takes priority over individuality because the majority is wiser than a single man, and due to a person's preference for laws, even bad ones, he has created himself. Marsilius also emphasized the superiority of laws created by the state over natural law –God's law– which has no sanction.[4]

An exception to cultural and religious homogeneity can be found in Poland's nobles' democracy, where political liberty was assigned the highest value. Every nobleman, as well as the noble community as a whole, respected class solidarity and the privileges that constituted their 'golden freedom', including the famous *liberum veto* (*I oppose!*). *Liberum veto*, in theory, exemplified the protection of individual freedom, but in practice it completely paralyzed the political system, especially in the 18th century. In Poland we can also find the first example of religious tolerance and the acceptance of minorities, which we can refer to as an *embryonic* plurality value. Poland functioned quite well as a multicultural society thanks to collaboration among local communities of nobles, but it was also a historical democracy in which political rights –values like liberty, equality and dignity– were reserved exclusively for the nobility (political nation).[5] The relation between religion and democracy in this system is also worth analyzing from the perspective of human rights. I would like to offer some remarks about the Polish Nobles' Democracy as an example of religious tolerance in theory and practice during a period of violent and brutal religious wars in Western Europe, that allows us to identify the ideological sources of political and religious tolerance and, at the same time, to examine the contemporary issue of inter-religious dialogue in a new light. The Polish Golden Age era is an ideal example of tolerance, having produced the first modern European constitution in 1791, which guaranteed freedom of religion. This example is also interesting due to its pluralism. Historically, democratic societies were mostly homogeneous, with no place for differences in religion or culture.[6] The Kingdom of Poland was different, as all nobles, regardless of

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[2] Chesterton G. K., *William Blake*, New York: Cosimo, 2005, p. 114.

[3] Sabine G. H., Thorson T. L., *A History of Political Theory*, Hinsdale, Illinois: Dryden Press 1973, pp. 273-274.

[4] Maiolo F., *Medieval Sovereignty . Marsilius of Padua and Bartolous of Saxoferato*, Amsterdam: Eburon, 2007 p.173-174; 207-217.

[5] A. Zajączkowski, *Główne elementy kultury szlacheckiej w Polsce. Ideologia a struktury społeczne*, Zakład Narodowy imienia Ossolińskich, Wrocław 1961, p. 118.

[6] J. Michener, *Poland*, New York, Random House, 1984, p. XIX.

differences in terms of origins, language or religion, had equal political rights. Limitations on religious minorities (mainly Protestant and Orthodox nobles in the second half of the 17th century) were connected not only with the political situation and wars with Lutheran Sweden and Orthodox Russia, but also with their effects –the weakening of democratic structures and the rise of an oligarchy.[7]

The source of human rights can be found in Ancient and Medieval traditions (like the famous *Magna Carta*), but it was during the Enlightenment that an abstract system of human rights based on reason and justice was codified. The primary foundations were the ideas of philosophers like Rousseau, Voltaire, Diderot and Montesquieu, and, in particular, Locke's idea of nature and before-state society.[8] Rousseau tried to connect natural/individual freedom and the political rights of the community. In his famous *Du contrat social ou Principes du droit politique* (1762), he sought to find the ideal proportions between equality and freedom, but this was hampered by the domination of the community over the individual. The form of government was also a problem for Rousseau's formulation, as he desired a small rural community of smallholders. In his project for society, education and religion were to be available to all. This universality (laws and education) was guaranteed by the *people's will* and paradoxically, according to Rousseau, society could force *freedom* on an individual. This reveals the dark side of majority domination and democracy where there is no a guaranty of human rights, and, according to Jacob Talmon, we can see in this example the totalitarian origins of modern democracy.[9]

Two documents –the American *Declaration of Independence* (1776) and the French *Declaration of the Rights of Man and Citizen* (1789)– became the main sources for human rights. In both of them, we find that the rights of man include liberty, property, dissent, happiness (only in the American *Declaration*), and freedom of religion; the right to equality, however, was not a pillar in their construction, and the political systems they represented were far from democratic. The republican concepts of country and human rights were close to individualism and liberal ideas, but they feared democracy.[10] The Jacobin dictatorship was, moreover, anarchical, unstable and dangerous, as in this system the uneducated and unconscious majority dominated over the individual.

After the French Revolution, modern democracy slowly became linked with representation, with political elites in parliaments replacing direct democracy. The argument for this system was that most countries were too big for direct democracy, and this was the argument Montesquieu used against allowing the people a higher level of

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[7] S. Salmonowicz, *O tolerancji religijnej w „modelu polskim"(XVI–XVIII w.)*, [in:] S. Salmonowicz, *Kilka minionych wieków: szkice i studia z historii ustroju Polski*, Towarzystwo Autorów i Wydawców Prac Naukowych UNIVERSITAS, Kraków 2009, p.38-44; J. Tazbir, *Reformacja w Polsce. Szkice o ludziach i doktrynie*, „Książka i Wiedza", Warszawa 1993, pp. 247-260.

[8] *Enlightenment and Human Rights* http://chnm.gmu.edu/revolution/chap3a.html [17.11.2012]: "Liberty meant freedom of religion, freedom of the press, and freedom from unreasonable government (torture, censorship, and so on). Enlightenment writers, such as Voltaire, Montesquieu, and Rousseau, influenced ordinary readers, politicians, and even heads of state all over the Western world".

[9] Talmon, J. L., *The Origins of Totalitarian Democracy*, London, Mercury Books, 1961, p.47: "Now at the very foundation of the principle of direct and indivisible democracy, and the expectation of unanimity, there is the implication of dictatorship, as the history of many a referendum has shown".

[10] "The Declaration of the Rights of Man and Citizen" of 1789 brought together two streams of thought: "one springing from the Anglo-American tradition of legal and constitutional guarantees of individual liberties, the other from the Enlightenment's belief that reason should guide all human affairs. Enlightenment writers praised the legal and constitutional guarantees established by the English and the Americans, but they wanted to see them applied everywhere. The French revolutionaries therefore wrote a Declaration of Rights that they hoped would serve as a model in every corner of the world". http://chnm.gmu.edu/revolution/chap3a.html

participation.[11] During the 19th century, universal suffrage became the rule in most countries. This process was almost complete following the First World War. After the Second World War, when the UN's declaration codified a set of human rights, and then, the *Charter* expanded the scope of human rights (social, economic and cultural rights); democracy became the only real system that guaranteed all human values. The Universal Declaration of Human Rights arose from experience of the Second World War such as war crimes (including the Nazi genocide of Jews, Gypsies and Slavs) and represents the first global expression of rights to which all human beings are inherently entitled. This act became the basis for two International Covenants in 1966. This procedure was close to experiences of the American and French Revolutions[12] In modern international and constitutional law theory, human rights are considered to be fundamental. A democratic state should guarantee the protection of such human rights as dignity, freedom, and ownership of property, as well as ensure equality and social and economic rights. This idyllic condition has been negated and criticized because of the interrelation between dictatorship and direct democracy. In many cases, direct democracy has been used by dictatorships as a weapon against parliaments and popular representation. Political freedoms and what we would call human rights often do not exist in such cases. A very significant example of a democracy that included both institutions for direct democracy and a total lack of respect for human rights was the last years of the Weimar Republic, when Hitler took leadership in Germany. The Nazis used the institutions of democracy and plebiscites to demonstrate popular support and to create an imagine of legitimacy for their rule.[13] The relation between direct democracy and human rights remains a valid issue today. The main problem in this area is connected with the referendum. In most constitutions this procedure is only means of realizing the people's will. As the most basic institution of modern direct democracy, the referendum would seem to be the best way of protecting these rights. However, referendums also provide opportunities for limiting human rights, and not only by totalitarian and authoritarian regimes seeking to use this institution to legitimize their power.

The basic legal principles contained in constitutions forbids voting on human rights in a referendum. But there are many ways of restricting these rights in democratic systems. When asked about a very difficult subject (e.g. a moral problem) people are often driven by emotions during the campaigns and when voting. This problem is a very serious one for Giovanni Sartori and the relation he establishes between referendums and human knowledge.[14] In relation to human rights, a referendum can thus be a double-edged sword.

This raises both very serious moral questions and others connected with human rights, such as freedom of religion. Today's modern political democratic systems emphasize a distinction between religion and politics. However, following Huntington's famous thesis, contemporary major conflicts have cultural –and, most of all, religious– origins; we should

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[11] *Démocratie*, Raynaud, P., [in:] *Dictionnaire critique de la Révolution Française. Idées*, (ed. F. Furet, M.Ozouf), Paris, Flammarion, 1992, p. 103.

[12] *Universal Declaration of Human Rights* passed by the United Nations after World War II, on 10 December 1948. They are very similar, though the UN document refers to "human beings" in place of "men." http://chnm.gmu.edu/revolution/chap3a.html

[13] Roussillon, H., *Contre le référendum*, op. cit., pp. 181-190; Strong Ch. F., *A History of Modern Political Constitutions*, New York, Capricorn Books, 1964, p. 223.

[14] "Therefore, the objection that referendum democracy becomes a zero-sum democracy should not be expected to shake the confidence of the populist or the participationist in the overriding goodness of a referendum –based policy". Sartori, G., *The Theory of Democracy Revisited*, New Jersey, Chatham House Publishers, 1987, pp. 115 and ff.

therefore consider the mutual relationships and influences between religion and democracy. Recent cases involving direct democratic institutions, for example, the Swiss (2009) or Turkish referendums (2010), constitute a good starting point for more general reflection. Some positive historical examples of religious freedom, such as that of Poland, can contribute to a better understanding of the foundations of tolerance and modern liberalism. In general, human rights were linked to tolerance and the Enlightenment as anti-religious values, based on abstract reason. Most philosophers believed in this construction and trusted people's common sense.[15] When problems with emigrants and multicultural societies started to arise, these values (religious) began to be voted on, as in the case of Switzerland in 2009. The result shocked public opinion, but this problem of the limits of tolerance has much more serious implications. Enlightenment values could become a powerful weapon to be used against non-European cultures. It is interesting to note that first state to create a system of tolerance as a foundation –a state that was a republic, not a tyranny– started the first genocide, as well. A referendum can divide society, and the emotions aroused during a campaign can lead to abuses of human rights and a failure to protect them. The result itself can also limit human rights, as in the case of a California referendum with rejected a law that legalized same-sex marriage in November 2008. The voting led to a debate in *The Economist* about democracy and human rights, entitled *Direct Democracy. The Tyranny of the Majority*: "Firstly, by circumventing legislatures in the minutiae of governance, direct democracy overrules, and often undermines, representative democracy. Secondly, by letting majorities of those voting-who are often a minority of the state's residents-circumscribe the rights of minorities, direct democracy can threaten individual freedom".[16] The rule of law, which is meant to guarantee human rights, can be limited or even removed by the people's will. In this way, the constitution of a state can be ignored and certain rights cease to exist. Populism can eliminate certain rules and guaranties. The referendum represents a danger for the rule of law because the existence of constitutional controls can be removed by the people, who may find them shocking or frustrating. On the other hand, avoiding such votes would not always be honest, as it thwarts the people's will and denies them a significant venue for exerting political influence. Therefore, paradoxically referendum can eliminate the legalism and rules of law, but avoiding this institution has also dangerous consequences in political as well in legal decisions. People in such a society can complain that there is no dialogue between them and politicians, that nobody trusts society, and a new oligarchy created by *professional politicians* controls every part of life and takes decisions about everything, including human rights.[17] Such a schema sometimes becomes very dangerous, because some politicians often do not know the real conditions and cultural circumstances in a given country or region. People sometimes prefer bread to political liberty, while their rights are given to them by a political class lacking in awareness.[18]

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[15] I mean Western European and North American civilization, we can find this experience as a universal proposition for all political societies: The French revolutionaries therefore wrote a *Declaration of Rights* "that they hoped would serve as a model in every corner of the world. Reason rather than tradition would be its justification". http://chnm.gmu.edu/revolution/chap3a.html

[16] *The Economist* XII 09/I 10, pp. 73-74.

[17] Todd, E., *Après la démocratie*, Paris, Gallimard, 2008, pp. 67 and ff.

[18] Berlin, I., *Two Concepts of Liberty*, [in:] idem, *Four Essays on Liberty,* Oxford: Oxford University Press 1969, pp. 3-4. *"It is argued, very plausibly, that if a man is too poor to afford something on which there is no legal ban - a loaf of bread, a journey round the world, recourse to the law courts - he is as little free to have it as he would be if it were forbidden him by law. If my poverty were a kind of disease which prevented me from buying bread, or paying for the journey round the world or getting my case heard, as lameness prevents me from running, this inability would not naturally be described as a lack of freedom, least of all political freedom".*

Problems concerning the respect for human rights can be also considered from the perspective of the referendum and the plebiscite. The fundamental question is: what can be decided by voting? These kinds of questions were raised after the negative results of a referendum on the legalization same-sex marriage in California (2008) and when parliament rejected a referendum on that same problem in Portugal (2009). Moreover, there is still no norm as to what kind decision can be submitted to (democratic) voting. Charles Tilly's *Democracy* explores the relation between democracy and the end of human rights. Tilly's research is based on his experience at Freedom House*, which is described as *an independent nongovernmental organization, supports the expansion of freedom in the world. Freedom is possible only in democratic political systems in which the governments are accountable to their own people.* This organization was found in 1941 by Wendell Willkie and president Roosevelt's wife, Eleanor.[19] Tilly compares the relation between a state's influence on politics and its socio-economic situation. His criteria are connected with both political rights and civil liberties. Among the factors he considers are procedural elements, such as a competitive, multiparty political system; universal adult suffrage for all citizens; regularly contested elections conducted in conditions of ballot secrecy and significant access to the electorate by major political parties through the media and political campaigning.[20] His description of democracy is dynamic and concentrates on factors, such as consultations, the protection of opposition rights and, above all, elections. Most governments who are members of the OAS accept the definition of democracy included in the Inter-American Democratic Charter. Its main characteristics are respect for human rights and the rule of law; periodic, free, and fair elections and a pluralistic system of political parties; a separation of powers and the subordination of all state institution to civilian authorities; and transparency. Democracy, according to him, is dependent on many social and economic relationships, but, he emphasizes, in its classical procedural definition there is no place in it for direct democracy.[21] From this point of view, we will try to answer the question of whether direct democracy generally serves or limits human rights. Dahl's notion of *polyarchal democracy* also concentrates on representation and election. He highlights the rise of the institution of citizenship and a state's size in terms of area as important conditions for democracy and, in consequence, for human rights.[22]

Today's problem –the crisis of democracy– can also be regarded from the perspective of a lack or the abuse of human rights. Dominique Schnaper, the president of Société Française de Sociologie and Conseil Constitutionnel, finds the crisis of democracy arising from the abuse of egoism. The selfishness of individuals spoils the democratic system, and works against community and the state.[23] Emmanuel Todd finds this crisis in a lack of democracy, with political elites avoiding democracy and separating themselves from society. The consequences of a post-democratic era will be class warfare and an absence of

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[19] http://www.freedomhouse.org

[20] Tilly C., *Democracy*, Cambridge University Press, Cambridge 2006, pp. 13-15.

[21] Ibidem, pp. 10-11.

[22] Dahl. R. A., *Who Governs?:Democracy and Power in an American City*, Yale, Yale University Press, 2005, pp. 188-189.

[23] Schnapper, D., *L'avenir de la démocratie*, http://www.institutdiderot.fr/dialogues-du-matin.html?rendezvous_id=66 [07.12.2010]: *"Les démocraties, irremplaçables, n'en comportent pas moins des risques de dérives que dans le vocabulaire de Montesquieu on pourrait qualifier de «corruption». La liberté des individus risque de se corrompre en licence, l'autonomie en refus de toute forme d'acceptation des contraintes liées au collectif et l'égalité en aspiration à l'indistinction des êtres et des situations. Quant au relativisme, valeur démocratique par excellence, il risque de se corrompre en interdisant toute référence à l'idée même de vérité. L'avenir des démocraties repose sur la faculté des individus à résister à ces risques pour maintenir l'esprit même du respect des autres et du respect des institutions qui fonde l'ordre démocratique".*

religion.[24] His sad prophecy is close to Chesterton's words against plutocracy hidden (according to him) under the term *representative democracy*: "We shall have real Democracy when the problem depends upon the people. The ordinary man will decide not only how he will vote, but what he is going to vote about".[25] Groundbreaking use of the referendum in the early 21st century pose serious problems for socio-political life, for the political elites avoid this procedure. The referendum at a national level is being used less and less in Western Europe. We can observe this process for example in France, where since 2005 there were no direct voting. Moreover, a very difficult problem with a double vote in Ireland in 2008 and 2009 proved that in cases where initiatives are only in the hands of those governing, the referendum is not used. Therefore, the main function of referendum in contemporary democratic countries is no longer to facilitate the expression of dialogue between rulers and the governed in the law-making process. The problem of correctly understanding the term *democracy* in its historical and political meaning – that is, whether we find democracy as a value or a procedure, whether we find it as a goal or as a measure for protecting human rights – is of primary importance. When we try to connect human rights with democracy, it is important to remember that the roots of democracy were far removed from human rights. Paradoxically, from the 5th century BC to almost the 20th century, we can observe a slow transformation from an exclusive minority citizenship that enfranchised a narrow political class in a small, homogeneous city-state to large modern countries with majorities dominating pluralistic societies, in which democracy in its primary (historical) meaning is insufficient for the conditions.[26] Thus, human rights become a very important means for protecting the average citizen. When citizenship is a common, rather than exclusive, institution, and participation is available to everyone, individual rights (the first generation of human rights) are essential for protecting the individual from the state and society. However, the roots of democracy itself are not connected with the idea of human rights.

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[24] Todd, E., *op. cit.*, p. 67.
[25] Chesterton, G., K., *A Miscellany of Men*, Sioux Falls, NuVision Publications, LLC, 2008, p. 34.
[26] Tilly Ch., *Democracy*, pp. 27-30.