Elections, Democracy, the Rule of Law and International Law

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Twelve years ago I undertook a study for the Inter-Parliamentary Union ('IPU') which led to the adoption by the Inter-Parliamentary Council of a Declaration on the Criteria for Free and Fair Elections. At that time, the early 1990s, the talk was all about transition — transition from single party to multi-party States; transition from authoritarianism to democracy; and transition from conflict to political settlement.

In all of this, free and fair elections were seen to play a major role and were regularly endorsed by the United Nations ('UN') (which set up an Electoral Assistance Unit in 1992), the General Assembly, and regional organisations, such as the Organisation for Security and Cooperation in Europe ('OSCE'), the Council of Europe, the Organisation of American States ('OAS'), and the Commonwealth.

In contrast with 'democracy', which is not mentioned in the UN Charter or any of the early human rights instruments, the principle of free and fair elections, in purely formal terms, seemed to have a reasonably good international law provenance.

Article 21 of the 1948 *Universal Declaration of Human Rights* clearly sets out the right of everyone to participate in the government of his or her country, and prescribes that 'the will of the people shall be the basis of the authority of government'. These 'election rights' were later developed as formal obligations in article 25 of the 1966 *International Covenant on Civil and Political Rights*:

> Every citizen shall have the right and the opportunity ... to take part in the conduct of public affairs, directly or through freely chosen representatives ... to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors ... [and] ... to have access, on general terms of equality, to public service in his country.

† This speech draws on the book: Guy Goodwin-Gill, *Free and Fair Elections: New Expanded Edition* (2006).

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Just as importantly, they were backed up with recognition of what can be termed the 'political and campaign rights', that is, the rights to freedom of expression, peaceful assembly and association, which are critical to a meaningful election process: articles 19, 21 and 22.

Nevertheless, to my mind there is no doubt that now the 'quality of democracy' is very much on the international agenda, if not to everyone's pleasure, and what is interesting is the way in which the debate has moved on since 1994.

What was important then, and what was confirmed in the practice of States, the UN and a variety of regional and other organisations engaged in election observation and election monitoring, were essentially the following formal elements:

- the need for an electoral system laid down by law;
- provisions for constituency delimitation;
- an election management organisation;
- recognition of the right to vote;
- registration of voters;
- civic and voter information and education;
- implementation of political participation rights for candidates and political parties;
- regulation of electoral campaigns, particularly through the use of agreed codes of conduct and guarantees in key areas, such as media and publicity;
- transparent procedures for balloting and monitoring; and
- a prompt and effective complaints and dispute resolution process.

The IPU's Declaration on Criteria was based on existing universal and regional instruments, the practice of States, and the experience of regional and other organisations engaged in electoral monitoring and electoral observation — the UN, the OAS, the OSCE, the Organisation of African Unity, the Commonwealth and the Council of Europe.

While the Declaration supported measures in each of these areas, it did not purport to legislate anything — after all, the IPU itself is rather a unique organisation, being a union of national parliaments, not of States or governments, and having no power to bind. But one of the purposes of the Declaration was to disseminate international standards in an increasingly active and open electoral field. The authority of the Declaration was helped when it was acknowledged by the UN General Assembly, incorporated into the practice of international and regional organisations, and translated into a dozen or more languages, often by non-government organisations engaged in voter education and electoral observation.

Since then, much experience has been gained, first, in giving content to words which, like 'periodic', 'free', 'fair' and 'genuine', do not possess immediately obvious and applicable meaning. The basic requirements are now largely beyond question, and international standards are evolving more in the direction of strengthening popular participation and promoting accountability. But above all, there is a new focus on the *'democratic structure'*, as the framework for a society in which *human rights* can be fully realised.

Perhaps not surprisingly, *democracy* itself was a rather long time coming and was duly hedged about with qualifications respectful of sovereignty and choice. Typical of statements at the time was the 1993 *Vienna Declaration on Human Rights*, which proclaimed: 'Democracy is based on the freely-expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'. The implication again was that *choice* was a matter for the people and not a matter on which they should take dictation.

In his 1996 *An Agenda for Democratization,* UN Secretary-General Boutros Boutros-Ghali attempted to set out a more practical working concept of democracy, which he related also to the work of the UN. 'Democracy', he said, 'is not a model to be copied from certain states, but a goal to be attained by all peoples and assimilated by all cultures. It may take many forms, depending upon the characteristics and circumstances of societies.'[1]

Nevertheless, he was also conscious of the dangers inherent in a culturally relative approach. Even if there is no one model of democratisation or democracy suitable to all societies, it was important to beware of the tendency to 'cloak authoritarianism in claims of cultural differences'. [2] For him too, democratisation was not just about the holding of elections:

> Democratization [*sic*] requires ... the construction of a political culture of democracy and the development and maintenance of institutions to support the ongoing practice of democratic politics. [It] must seek to achieve a balance between the institutions of the State and the institutions of civil society.[3]

Towards the end of the 1990s, the UN General Assembly began to adopt this language too and could be seen regularly going beyond merely endorsing election-related activities; for example, in its 1998 Resolution (53/31) on UN support for the efforts of governments to promote and consolidate new or restored democracies, it expressed its appreciation for what had been done,

> … with respect to building a political culture through human rights observance, mobilization of civil society ... free and independent media, enhancing the rule of law and improving accountability, transparency and quality of public sector management and democratic structures of government.

Although I see a good, norm-based argument for the right to participate in government and to contribute to the expression of the will of the people through a vote cast in secret, at regular intervals, on the basis of universal suffrage; and although I believe that part of the justification for good governance resides in the obligation to protect fundamental human rights, my positivist background leads me to hesitate before jumping to conclusions about the substantive content of the concept of democratic, representative and accountable government.

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1 Boutros Boutros-Ghali, *An Agenda for Democratization* (1996) at 2.

2 Id at 1.

3 Id at 54.

Nevertheless, the democracy/human rights connection is clearly recognised in the doctrine of the Inter-American, African and European systems. Even if international human rights law does not impose any particular electoral system, the system chosen must still at least give effect to the free expression of the will of the people. The questions of representation and representative government are on the agenda however, and increasing attention is now being paid to *challenging* the effective exclusion of certain sections of the population, for example, because of political party monopolies in the presentation of candidates.

In practice, of course, any number of obstacles may intervene between the right of the individual and the reality of effective participation in political life. Women and ethnic minorities are still affected by long-standing practices of exclusion and there is now another worrying and growing group of 'non-participants', identified by their disenchantment by or alienation from a system of government which does not, in reality or in their perception, come close to representing their interests or views.

The British political scientist, David Beetham, has noted that while the nature of any electoral system is traditionally considered to reflect national culture, history and identity,

> ... it still stands to reason that there must be a level at which an electoral system becomes so skewed and unequal, whether to voters or to parties other than the favoured one, that basic principles of fairness and justice have been compromised and democracy diminished, perhaps gravely.[4]

He locates the principle of political equality squarely at the base of the elected assembly, considered as 'representative' of the whole electorate, where 'representative' implies reflecting the most important characteristics of the electorate, in the matter of geographical distribution, political opinion and social composition.

Democracy's Future Agenda

The question is whether international law can be said to require anything else beyond representative government, beyond political equality, and beyond protection of political and campaign rights.

The argument *'for'* democracy or a democratic form of government as a requirement of international law began in earnest during the early 1990s, but it has perhaps not progressed quite as some might have expected. On the one hand, democracy as a 'relevant criterion' has indeed strengthened across a broader field of political relations — the *right to democracy*, for example, occurs now in many regional instruments, as does the so-called 'democracy clause'; but the notion of democracy as an 'individual human right' with content beyond the procedural still remains largely rhetorical.

Whereas in 1994 it was important to stress the significance of elections according to internationally defined and agreed standards, now in the 21st century elections are beginning to be seen in social and political context, being not only about the free expression of the will of the people, but also about results which are consonant with the goal, not only of representative, but also of accountable democracy.

4 David Beetham, 'Freedom as the Foundation' (2004) 15(4) *Journal of Democracy* at 70.

And yet, although the protection and guarantee of fundamental human rights for everyone without discrimination is widely accepted as a condition of democracy — a matter not only of political and civil rights, but also of *justice* in the field of economic, social and cultural rights — the democratic goals of popular participation, equality, social justice, and non-discrimination still face resistance, particularly among western developed nations, whenever international fora attempt to make the linkages between democracy, poverty, globalisation and development. Australia, Austria, Belgium, Canada, Germany, Ireland, Poland, Sweden, Ukraine, the United Kingdom, and the United States all voted against the Commission on Human Rights Resolution 2003/35, when these connections were attempted.

While elections are still the central means by which the people expresses its will, and through which it lays down the constitutional basis for the authority of government, they are neither the beginning, nor the end of democracy. That elections are a necessary but not a sufficient condition for democracy is hardly surprising, in so far as democracy is not a received state, a given place, or a single destination, but rather an evolving system or systems of self-rule; hence the intrinsic importance of the principle of accountability, which elections alone cannot provide.

Accountability of itself implies the broadest participation by those affected and the existence of *effective* means, in and outside the electoral context, by which the people may express their will. What matters therefore is not only elections, but also outcomes, in the sense of government which is demonstrably based on the will of the people does not unreasonably or disproportionately reflect the particular interests of minority groups or corporations, reflects the widest popular participation, and which delivers basic democratic 'goods', including social justice and the rule of law.

Susan Marks, in her important study, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (2003), has argued that 'the fact that parliaments are subject to periodic recall is not, of itself, sufficient to justify public power. Democracy demands that state authority be required to justify itself to the citizenry on a continuing basis.' She has in mind a vigorous 'public sphere' of participation, but not to the exclusion of other 'parallel' means and institutions.

The evolving international discourse on the *results* of free and fair elections builds on and contributes to the applicable international standards. Representative and accountable democratic government is now associated with, among others, the rule of law, the separation of powers, an independent judiciary, protection of human rights and fundamental freedoms, and the progressive and effective implementation of economic and social rights. In his review of John Dunn, *Setting the People Free: The Story of Democracy* (2005), David Wootton notes that, 'It is a feature of [representative democracy] that the representatives of the people cannot always be assembled; thus there has to be a standing source of authority separate from the legislature, *and that authority has to be controlled*'[5] [emphasis added]; hence, the written constitution, the separation of powers and, above all, the necessity for entrenched rights.

5 David Wootton, 'Book Review', *Times Literary Supplement,* 23 September 2005 at 7–10.

It is this concern for a deepening of democracy that brings me to that aspect of the rule of law and the separation of powers in particular, which involves the judiciary and its role in a very changed environment.

It is fashionable for politicians to attack the judiciary, not merely to disagree with their decisions, but also to question their democratic entitlement, as so-called non-elected judges, to dare to question the judgement of those supposedly better qualified to govern by reason of the fact of their election. We might argue whether 'being elected' is actually a qualification, and we might also argue that it might be better to be qualified first, before being elected, but that is not my point.

My principal thesis is that the judiciary has no need to justify its democratic credentials, and that an inherently democratic function is implicit in the judicial function. Moreover, the centrality of an independent judiciary is both implicit and explicit in the regime of international human rights law.

As the political philosopher John Lucas put it, we divide authority between different persons or bodies precisely to make it more difficult to abuse, with a view to encourage thought about reasons, and to make the decisions of authorities as open as possible to the influence of reason. Elsewhere, he contrasts the ideally *equitable or just* decision as one which is purely rational, taking into consideration all the relevant factors of the case; and contrasts it with the purely deductive decision in accord with legality, which limits itself to such finite matters as are specified in statute.

Parliaments these days do not have a good record in maintaining this division or separation of powers and in curbing executive excess; too often, they let themselves be led down the garden path by an executive determined to control information and generate fear in the name of power. It is increasingly clear that the balance, particularly in constitutional matters, can only be restored and maintained by a democratic judiciary.

David Cole, reviewing Michael Posner's *Not a Suicide Pact: The Constitution in a Time of National Emergency* in the *New York Review of Books* had this to say about constitutional analysis:

> [It] requires an effort, guided by text, precedent and history, to identify the higher principles that guide us as a society, principles so important that they take precedence over the decisions of democratically elected officials. [6]

Although written with the United States in mind, this approach is no less applicable in a country such as the United Kingdom, where there is no written constitution though there is a Human Rights Act, than in a country such as Australia, where there is a written constitution, but it says nothing about fundamental rights. It is *not* about judgement by whim and inclination, but about justice within the law.

This is why I find the self-laudatory approach of certain minded judges to be proudly legalistic and profoundly anti-democratic. One judge, not so long ago, attacked what he pretended was an overly creative streak among his colleagues (or prospective colleagues, for I understand the pamphlet may have been instrumental in his later elevation...), and

6 David Cole, 'How to skip the Constitution', *New York Review of Books,* 16 November 2006 at 18.

objected to the spurious invocation of 'values' into the judicial process. Without any apparent sense of irony, this hard-line proponent of applying, not changing the law, recalled the judges' duty — that he or she do justice by the law. The way he told it, justice could as well be excised for redundancy; all that was needed was to apply the law, and justice and the lessons of equity could all go hang.

But justice cannot be cut away from the judicial function, at least not if we have come some way along the road to democracy. John Stuart Mill, in Chapter V of *Utilitarianism*, looks at conceptions of justice and concludes that, 'the *primitive* element, in the formation of the notion of justice',[7] and I emphasise the 'primitive', 'was conformity to law'. Nor should justice be cut away, particularly in a political climate where executive dominance of the legislature, of parliament, has replaced the sovereign of the 17th century, and institutionalised all its ills.

In a system of democratic, representative and accountable government — to which we all aspire and must continually strive — the judiciary is an essential pillar, without which we are unlikely to be either democratic or representative, let alone accountable. The judiciary does not need to claim 'legitimacy' through elections or other expressions of the popular will; indeed, to do so would likely compromise its essential independence and impartiality.

No, its democratic credentials are inherent in its function, which is to do justice according to law and, if necessary, to find justice — by reference to constitutional principle, written or unwritten, and even on occasion in the part of the common law which looks beyond the territorial demesne to universal principles endorsed by the community of nations at large.

Although basing its decision clearly on applicable United Kingdom anti-discrimination legislation in *R v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, the House of Lords nevertheless had no hesitation in invoking both treaty and customary international law prohibitions in support of its decision.

In the House of Lords again, this time on the prohibition against the use of evidence obtained by torture, the court in *A & Ors v Secretary of State for the Home Department* (No 2) [2005] 3 WLR 1249 drew deeply on the common law to show both the strength and the continuity of a principle of fundamental constitutional (and individual rights) significance. The court held (at 1250) that

> … evidence of a suspect or witness which had been obtained by torture had long been regarded as inherently unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles on which courts should administer justice.

Referring to *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, Lord Bingham cited (at 1263) Lord Griffiths' view in the case:

7 John Stuart Mill, *Utilitarianism* (11th ed) (1891) at 70.

> If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

Lord Hope, talking of torture, but in terms equally applicable to the infringement of any fundamental rights, said (at 1296-7):

> The lesson of history is that, when the law is not there to keep watch over it, the practice [of torture] is always at risk of being resorted to in one form or another by the executive branch of government. The temptation to use it in times of emergency will be controlled by the law wherever the rule of law is allowed to operate. But where the rule of law is absent, or is reduced to a mere form of words to which those in authority pay no more than lip service, the temptation to use torture is unrestrained....

That is why, in my view, the High Court's judgment in *Al Kateb v Goodwin* is wrong in principle.[8] There, you will recall, the High Court reviewed the question whether the *Migration Act* 1958 (Cth) authorised indefinite detention of a stateless person — a so-called unlawful non-citizen — in circumstances where there is no real prospect of removal in the foreseeable future. A majority determined that it did, finding the words of the statute unambiguous, and not subject to a 'purposive limitation', an intention not to affect fundamental rights, or a 'reasonable period' requirement. By limiting itself to statute law and ignoring its fundamental duty to do justice (and therefore to find justice in principle), it disregarded its constitutional and democratic duty.

As a matter of international human rights law, I suggest, no State and no government has the right to detain indefinitely a human being, other than in exceptional circumstances determined by that person's conduct. International law increasingly provides the reference point for principle over ad hoc judgements alleged to be pragmatic.

The 'democratic imperative' now goes beyond the important but nonetheless limited formality of free and fair elections and insists upon accountability and the rule of law as conditions of truly representative government. The role of the judiciary is implicit; it is built into democracy.

Democracy, however, demands responsibility in return, and looks to the judges not to take the easy road of deference to the other branches of government, or to give in to subjective methods of open-ended balancing; but rather to do justice by the law and to ensure that governments keep within their democratic remit.

8 *Al-Kateb v Godwin* (2004) 78 ALJR 1099.