
IN AND AROUND THE BALLOT BOX: RECENT
DEVELOPMENTS IN DEMOCRATIC GOVERNANCE AND
INTERNATIONAL LAW PUT INTO CONTEXT

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1 INTRODUCTION

The *Financial Times* aptly dubbed 2004 the “Year of the Ballot”.¹ A recent series of national elections has brought balloting as a procedure and the formula “periodic, fair and free elections” (PFF) into sharp relief. Beyond these elections, novel fact patterns and shifts in international opinion concerning democracy are discernable. These developments are significant for the design and function of national political systems around the world. Accordingly, they call for renewed discussion of the prevalent values and rules that define democracy.² The following essay is intended to offer a conceptual framework for such a discussion. While there are no ‘hard and fast’

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1 B. Groom, “A billion votes and counting: Ukraine’s rerun election caps a ‘year of the ballot’”, *Financial Times*, 27 December 2004, p. 8.

2 For a critical review of the leading positions taken by scholars on democracy and international law in an earlier iteration of the discussion, see E. Macdonald, “International Law, Democratic Governance and September the 11th”, 3 *GLJ*, No. 9, 2002. Available at <http://www.german-lawjournal.com/print.php?id=184>. For an anthology of the so-called democratic entitlement debate and an account of the legal and policy issues involved, see G. Fox, B. Roth (eds.), *Democratic Governance and International Law* (Cambridge, Cambridge University Press, 2000).

rules as to how a democracy is to appear, its quality may be assessed according to certain criteria. The latest developments in democratic practice and thinking worldwide will here be situated in the broader context of international law, constitutionalism and political theory.

Our starting point is an examination of how the developments relate to international law. To this end, the contemporary meaning of the single elements of the PFF formula will be analysed as international constraints on the design and function of national political processes and institutions. Focus on the conduct of elections should not, however, be to the exclusion of other considerations. As will be explained, this risks neglecting the constitutional conditions that optimize representative democracy, namely fundamental rights and freedoms, rule of law and federalism. Representative democracy is for its part but one form of democracy and, though dominant today, is not necessarily to be preferred as a model; the possibilities that direct democratic mechanisms may offer governments and citizens are also to be considered. Lastly, to ensure that a discussion of democracy's values and rules remains grounded, attention must be given to the role of inter-governmental organizations (IGOs) in constructing the legal framework of democracy in national political systems. We will describe this role as we conceive it in particular in the concluding outlook.

2 THE DEVELOPMENTS IN QUESTION

Democracy as a form of government and as a concern of the international community has undeniably spread. Almost daily, news reports confirm the spread of democracy as a form of government. Free and fair elections were attempted with real success in several countries where no such elections had (ever or recently) been held and more, where they once seemed unimaginable. One thinks of Ukraine, the Palestinian Territories and Georgian in particular, where millions enjoyed the experience of voting in legitimate elections for the first time. The number of democracies in the world seems to be rising,³ resuming the trend that defined international politics in the late 1980s and early 1990s. Admittedly not all these countries are full-fledged democracies, and democratization has experienced some setbacks of late.⁴ None-

3 "Freedom House Survey", 2005. Available at <http://www.freedomhouse.org/research/survey2005.htm>.

4 E.g. in the suspension in February 2005 of democratic institutions in Nepal and arguably in the self-proclaimed 'CEO-style' of government of Thailand's Prime Minister, Thaksin Shinawatra.

theless, the observation of Boutros Boutros-Ghali, then United Nations (UN) Secretary-General, has been newly revalidated: “[t]he basic idea of democracy is today gaining adherents across cultural, social and economic lines.”⁵

Hand in hand with this trend, democracy as a concern of the international community is spreading. This concern expressed itself in human rights agreements in the postwar period. Recently, it has taken the more interventionist forms of observing national elections and assisting in national constitution-making (undertaken by IGOs, individual countries, as well as NGOs). Each of the aforementioned elections were monitored and assessed by foreign observers, whose opinion played a large role in determining the legitimacy of the results. Likewise, the constitution of post-conflict Kosovo was issued as a regulation of the Special Representative of the UN Secretary-General on the basis of a Security Council mandate to administer the territory.

Democracy as a form of government and as a concern of the international community has spread in conjunction with the political upheavals that many States have undergone in the last few decades.⁶ Over half of the national constitutions in force today were drafted within the last 25 years, most in the developing world: we seem, in short, to be living “in an era of constitution-making.”⁷ These transformations have been accompanied by a remarkable development in the nature of constitution-making / -revision, namely the provision of a central role for citizens in their new national political systems. Every single national constitution drawn up in the last three decades has established a citizen’s entitlement to vote.⁸ The concomitant electoral laws foresee meaningful participation by the governed in the formal political decisions that shape their lives and societies.

The transformations in Afghanistan and South Africa exemplify the trend to popular political empowerment. The open, inclusive nature of the constitution-making and the subsequent elections in the two countries recognized the citizens as the *authors* and *owners*, respectively, of their national

5 B. Boutros-Ghali, *An Agenda for Democratization*, Supplement to Reports A/50/332 and A/51/512 on Democratization, 17 December 1996, para. 3. Available at <http://www.library.yale.edu/un/un3d3.htm#VI>.

6 Military dictatorships have fallen: Portugal 1974, Spain 1978, Argentina 1983, Chile 1991. ‘Velvet Revolutions’ brought communist regimes in Central and Eastern Europe to an end. In South Africa, the apartheid regime condemned by the international community as being in violation of international human rights law was succeeded by the highly progressive constitution of 1996. Failing or failed States such as Haiti, Somalia and East Timor have been or are being reconstructed through multinational efforts.

7 V. Hart, “Democratic Constitution Making, Special Report, United States Institute of Peace”, July 2003, p. 1. Available at <http://www.usip.org>.

8 A. Kirshner, “The International Status of the Right to Vote, Democracy Coalition Project”, November 2003, p. 1. Available at <http://www.fairvote.org/media/rtv/kirshner.pdf>.

political system.⁹ Provisions in the Afghani / South African basic laws for subsequent revision serve as a reminder of the people's role as the basis for any authority in the State. The political process has thereby come to possess as much importance in legitimizing governance as the outcome of governance itself: without a general sense of authorship and ownership, the public today will apparently not agree to and participate in constitutional government.¹⁰

3 THE SINGLE ELEMENTS OF 'PERIODIC, FAIR AND FREE ELECTIONS'

What is the content of the PFF formula? How might its single elements be defined in the context of voting for national representatives, and how might constitutional and electoral provisions be translated into reality? Although the formula is frequently used in the literature and in practice, it is not a universal term of art, being found in only one regional agreement.¹¹ The meaning of PFF can instead be derived from a variety of universal and regional human rights instruments that range from hard to soft law. The formula finds its basis in two analogous provisions from the *Universal Declaration of Human Rights* of 1948 (*UDHR*) and the *International Convention on Civil and Political Rights* of 1966 (*ICCPR*). Art. 21 *UDHR* provides:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives [. . .]
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections, which shall be held by secret vote or by equivalent free voting procedures.

Art. 25 *ICCPR* provides:

9 To be more precise: by helping to draft their basic law, the Afghani and South African peoples were recognized as a collective entity with sovereign power in their respective States; the resultant constitutions express in concrete form their collective judgments. By voting in subsequent presidential and parliamentary elections, they are expressing their individual preferences as to the future of their State.

10 D. Thürer, "Vom paradigmatischen Einfluss des Völkerrechts auf das Staatsrecht", in: K. Weber, N. Wimmer (eds.), *Vom Verfassungsstaat am Scheideweg* (Wien/New York, Springer, 2005), p. 407 et seq.

11 The term "periodic, fair and free elections" is found in the *Inter-American Democratic Charter*, adopted by the General Assembly of the Organization of American States on 11 September 2001.

Every citizen shall have the right and the opportunity, without [. . .] unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) 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 [. . .].

What these and other human rights instruments¹² have in common is that they seek to promote democratic governance and respect for the political rights of the individual. Specifically, the alternative wordings of PFF provisions and the difficulty in distinguishing the formula's elements precisely¹³ suggest that what is determinative is that elections are *effective* in fulfilling their purpose. National political systems should be constructed not according to fixed, exact criteria¹⁴ but according to guidelines that ensure that the poll results adequately reflect popular preferences under the particular circumstances.¹⁵ For its part, the purpose behind bestowing a right to PFF may be characterized variously. We consider periodic, fair and free elections to be more than merely an instrument by which the national collective may control political power generally and government policies in particular. They also embody an inherent value, above all that of self-government and self-realization as distinct individuals, and they serve to recognize human

12 Comprehensive sets of election standards and other texts aimed at advancing democracy adopted by international governmental and non-governmental organizations are available at the websites of the OHCHR (<http://www.ohchr.org>) and Forced Migration Online (<http://www.forcedmigration.org/guides/fmo020/fmo020-5.htm>).

13 The elements "fair" and "free" are, for example, often combined in international provisions under the term "genuine".

14 The 'lacunae' in the definitions are, however, problematic from a practical standpoint. To evaluate whether given elections are "free and fair", the standards must be clearly defined and distinguished from other prerequisites for democracy, broken down into operable parts, put into the context of the electoral process as a whole and weighted against one another. An IGO concluded its review of the criteria in human rights conventions so: "[f]rom the perspective of an election administrator, knowing whether or not specific procedures conform to basic principles of free and fair elections can be a difficult task." (International Organization for Migration, *Refugee and IDP Voting: Issues, Standards, and Best Practices*, April 2003, p. 5. Available at <http://www.iom.int/pep>.)

15 Elections may appropriately be characterized as PFF, even if they are not perfect. Adopting a broader view is especially called for during elections that are held as part of a democratic transition process. The elements in such situations must be understood as ideals to be approximated and not necessarily to be achieved. The elections' contribution to democratization itself must also be taken into consideration. (For more detail, see J. Elklit, P. Svensson, "What Makes Elections Free and Fair?", 8 *Journal of Democracy*, No. 3, 1997, 39.

dignity.¹⁶ In turn, if the holding of periodic, fair and free elections constitutes an objective right of the people and a subjective right of the natural person, a right to PFF includes a right to universal and equal suffrage (and to run for public office).¹⁷

The single elements of PFF (and more generally the concept of democracy) should be defined with these realizations in mind. We will therefore seek to identify the guiding principles that may be derived from the following usages and opinions rather than parse the universal and regional provisions as positive law.¹⁸ According to these principles, the proper conduct of elections and more broadly, the quality of particular government structures may be judged.¹⁹

A. “Periodic”

The requirement that elections be “periodic” means that it is not enough for the people to decide once or at prolonged intervals; they must have the opportunity to do so intermittently. As with “free” and “fair”, the rationale for the requirement that elections be “periodic” can be explained variously, according to how the purpose behind the bestowal of rights to political participation more generally are characterized – i.e. as an element of public control or of self-determination.

16 The desire for self-expression comes particularly to the fore where individuals have been / can be oppressed subjects and not citizens. This desire is attested to by the fact that voters in new democracies typically go to the ballot boxes in larger numbers than in established ones (see Eastern European elections since fall of Wall) and that voters in unstable democracies often brave intimidation and risk danger to their personal security to cast their ballot (see Iraqi elections for the drafting of a national constitution in January 2005).

17 This means that in principle, everyone should have the right to take part in the government of his / her country (universality) and each vote should have the same weight (equality). The right to vote and voting rights are corollaries of one another in a full-fledged democratic system, as the conjunctive formulation of Article 25(b) *ICCPR* implies and the European Court of Human Rights’s interpretation in *Matthews v. the United Kingdom* (Application no. 24833/94) (18 February 1999) of Article 3 of Additional Protocol I of the European Convention on Human Rights confirms.

18 Instead, see the Human Rights Committee’s findings on state compliance and its general comments regarding Article 25 *ICCPR*. More generally, see A. Eide, G. Alfredsson, *The Universal Declaration of Human Rights. A Common Standard of Achievement* (The Hague, M. Nijhoff, 1999); G.S. Goodwin-Gill, *Free and Fair Elections – International Law and Practice* (Geneva, Inter-Parliamentary Union, 1994).

19 The present focus is not meant to obscure the fact that proper institutions for ongoing popular consultation must also be provided for in a full-fledged democracy. Democracy is “as much about what happens between elections as it is about what happens during them.” (S. Vieira de Mello, “Holistic Democracy: The Human Rights Content of Legitimate Governance”, Opening Statement to the Seminar on the Interdependence between Democracy and Human Rights, Geneva, 25 November 2002. Available at <http://www.unhchr.ch/>.)

The concern with periodicity follows ultimately from the conception of democracy as a political system based on the will of the people of a country: elections at intervals are necessary to ensure that democratic governments continue to reflect the people's will and the changeable political and social circumstances informing it. Holding elections from time to time shows that political power actually belongs to the people not to a group or an individual and that the people exercise it themselves and not the leaders. As a corollary, requiring elections at intervals is intended to ensure political accountability of officeholders to the people. Periodic elections serve to check official abuse of power (at its most extreme the absolute power that comes from not having to face the electorate and risking being thrown out of office). It hinders the untransparent accumulation of power and privileges as well as the corruption and repression that accompany it.

Periodic elections do *not* mean that government must then be changed, merely renewed. People must enjoy the right to recall, if they wish, the ruling parties and elected officials. The idea behind this requirement was well explained by *Karl Popper*, who argued that the crucial question is not who will rule, but whether people have the ability to vote a bad government out of office.²⁰ Next, periodic elections cannot mean merely soliciting a popular stamp of approval for a pre-selected candidate (or an already decided government policy) in plebiscites. Such consultation (e.g. as practiced in Egyptian presidential elections until 2005) does not offer voters the opportunity of passing full – and possibly final – judgment on the incumbent government. Instead, it merely secures the people's consent to others' rule. Lastly, the regularity at which elections are held should be considered. While the power to call an election is ultimately a matter for national law or convention to regulate, it should in principle be controlled. The power is otherwise open to abuse by the government to ensure that it remains in office. It is better for the health of democracy “for political leaders to be jittery about the verdict of the electorate than to take voters for granted.”²¹

Today, all western presidential and most parliamentary systems have fixed terms. Those that do not, like the British,²² offer the incumbents a potentially great electoral advantage. Recent German political history offers a case study in the control of this discretionary power. Art. 39(1) of the German Basic Law provides for legislative terms of four years. Under Art. 68,

20 K.R. Popper, *The Open Society and Its Enemies*, 5th ed. (Princeton NJ, Princeton University Press, 1966), Chap. 7.

21 P. Riddell, “Cut and run: a review of Alastair Smith, Election Timing”, *Times Literary Supplement*, 8 April 2005, p. 8.

22 The Parliamentary Act 1911 does, however, limit the maximum length of a Parliament to five years from seven as previously.

the Chancellor cannot dissolve the *Bundestag* voluntarily and call for new elections; the power is accorded the Federal President alone. In 1982 and 2005, Chancellors Kohl and Schröder deliberately put and lost non-confidence votes with the intention of seeking premature national elections. As their governments formally held majorities in the *Bundestag* (Federal Parliament) at the time, the German Federal Constitutional Court had to decide whether the action was constitutional. The Constitutional Court held in both cases that the Chancellor's discretion to put the non-confidence vote cannot be abused for political advantage; a mere desire for premature elections is not sufficient justification for a dissolution. The *Bundestag* is only to be dissolved when the Chancellor due to a politically instable situation can no longer be certain of its support and continuous governance is threatened. The prevailing situation is essentially for the Chancellor to assess, as it is a political question; in reviewing his / her request for a dissolution, the President is only allowed to prefer a different assessment if it is obviously more adequate, and the Court if the Chancellor's assessment is obviously wrong.²³

B. "Fair"

What does the requirement of "fairness" mean? It means that electoral rules are fixed and that the result of the electoral campaign is open – and not *vice versa*. The election cannot be structured in such a way that the outcome is preordained; all contestants must have a real opportunity to gain power. A fair election proceeds on a 'level-playing field', where the rules of the game (e.g. the electoral law) are applied impartially and the means to play it (e.g. public party funding) are not distributed unreasonably.

If state authority is to emanate from the people, forming the popular will must start with the people. In order to ensure the free and open formation of the popular will, participants in political life are in turn bound by certain constraints. State organs must be prohibited from becoming active in this process and influencing its outcome. An application of this requirement may be found in the decision of the Ukrainian Supreme Court of 3 December

23 *BVerfGE* 62, 1 (16 February 1983); *BVerfGE*, 2 BvE 4/05 (25 August 2005), available at http://www.bverfg.de/entscheidungen/es20050825_2bve000405.html. Initial reactions to the reasoning of the majority of the Constitutional Court in the later judgment have focussed on its significance for the power of the Chancellor relative to the Parliament. Critics argue that with the judgment, democracy has been weakened, as the former can threaten to dissolve the latter rather than to seek its approval of controversial legislation. To our mind, a more differentiated understanding is appropriate: democracy *as such* has not been weakened, rather *representative* democracy, while *plebiscitarian* democracy has actually been strengthened.

2004. The Court held that the campaign in the mass media before the second round of the national presidential elections violated the principle of equality of chance. The Court annulled the results and ordered a third round.

Democracy must be ensured in the conduct of political parties as well as state organs. As the German Basic Law formally recognizes, political parties are agents of democracy and integral units of the constitutional state, mediating the concerns and preferences of the citizenry to the State. Accordingly, Art. 21(1) of the Basic Law declares that the “internal organization [of parties] must conform to democratic principles” and political parties “shall publicly account for the sources and use of their funds.” In a series of decisions limiting undue influence on and promoting transparency in political parties, the Federal Constitutional Court has sought to ensure that parties play their prescribed role in a way in itself compatible with a representative parliamentary democracy.

A common but much more serious violation of the fairness requirement is the use of legal or physical pressure by political groups to influence the outcome by distorting the vote’s representativeness. The intimidators may be any group having an interest in the outcome, including an occupying power (such as possibly Israel in the Palestinian Territories), terrorists (e.g. in Iraq in January 2005) as well as incumbents.

The work of electoral commissions against inappropriate attempts to influence the outcome of voting (especially through inciting caste and communal feeling) should be noted. In particular, the Model Code of Conduct for the Guidance of Political Parties and Candidates of the Electoral Commission of India²⁴ constitutes a practical and sensible scheme to realize the principle of fairness. It has been implemented with considerable success in Indian campaigns over the past four decades. The Code might indeed serve as a model as to how to ensure the integrity of the electoral process in trying circumstances.

The idea of fairness takes its most concrete and final form in the secret ballot, which guarantees voters the freedom to exercise their franchise as they wish without concern that their choice will be revealed and that they may suffer negative personal consequences. The secret ballot means that political actors are unable – inside the polling station at least – to influence the electorate to vote for particular candidates or parties and to bring about a particular outcome.

24 Available at <http://www.eci.gov.in>.

C. “Free”

What does the formula’s third element “free” mean? Freedom implies choice. “Free” requires that it be possible for all popular opinions to be voiced and all popular preferences to be represented in the course of the campaign as long as they are compatible with the democratic structure of the State. It makes explicit, from a liberal democratic perspective at least,²⁵ that competition among candidates, plural political parties and contested elections must be permitted in the State.

The Canadian Supreme Court decision in *Figueroa* regarding registered party status is a case in point.²⁶ The Canada Elections Act, which provided that political parties must nominate candidates in at least 50 electoral districts to qualify for certain benefits, was held by the Supreme Court to infringe unjustifiably the constitutionally protected right to vote and to run for office. As the court majority observed, the participation foreseen by this right of individuals as candidates and as voters is intended to ensure respect for diverse ideas and opinions as well as the capacity of individuals to enhance democracy: “[f]ull political debate ensures an open society benefiting from diverse opinions and a social policy sensitive to the needs and interests of a broad range of citizens.”²⁷

A system in which the government picks the electoral slate (e.g. in Castro’s Cuba) violates the requirement. (The resultant decision without a real choice may, at the risk of seeming flippant, be called the ‘Henry Ford approach’. The automaker famously told his customers that they could have a Model-T in any colour they wished, as long as it was black.) Pre-selection of candidates or representatives limits, if not deprives, citizens of a role in the electoral process and of an opportunity to take part in their country’s governance.

4 THE CONSTITUTIONAL SETTING OF ‘PERIODIC, FAIR AND FREE ELECTIONS’

Periodic, fair and free elections must be considered in the larger context of constitutionalism as well as in its single elements; ensuring that voters are able to choose without coercion among candidates in equitable competition

²⁵ The right to form political parties is not expressly recognized in either the *ICCPR* or the *UDHR*. Other international instruments and many national constitutions do stipulate that there should be political parties.

²⁶ *Figueroa v. Canada (Attorney General)*, [2003] 1 SCR 912 et seq.

²⁷ *Ibid.*, case headnotes.

is to our mind a necessary but not sufficient condition for full-fledged democracy. It is not merely that the aforementioned UN instruments speak of human rights more generally as well as of periodic, fair and free elections and help thereby to define the meaning of democracy. The rights to political participation are part of a larger legal order providing for a just and stable society. Specifically, the relationships – and possible tensions – between them and the concepts of fundamental rights and freedoms, rule of law and federalism should be examined closely.²⁸

A. *Fundamental Rights and Freedoms*

The PFF requirement is open to abuse: ostensibly democratic processes may be used to justify and enhance authoritarian governments' power, as contemporary Russia shows.²⁹ To prevent abuse, certain civil liberties like freedom of speech, conscience, assembly and association are also necessary under self-rule. Every citizen should be free to put forward his / her beliefs and interests alone or in conjunction with others without fear of intimidation, coercion etc. from the government or other groups, whether or not an election campaign is underway. A vibrant civil society and a free press enable the State's actions to be monitored and different views to be tested in order to make collective judgments. The will of the people cannot be said to have been expressed without at least a minimum of political discussion.

The interdependence of human rights and democracy holds in the opposite direction as well; the full exercise of the one set of rights requires the existence of the other. Human rights are more completely realized through democracy. Not only do PFF elections respect the freedom of the person and individual dignity; democracy also encourages respect for human rights, civil and political as well as economic, social and cultural. Democratic processes by themselves do not, however, guarantee such respect,³⁰ as formally democratic apartheid South Africa illustrated.

28 Although it is not possible to do so here, the role of prevailing social and economic circumstances in hindering or facilitating the realization of rights of political participation should be considered in a comprehensive treatment of the subject. (Democracy is very difficult to realize, for example, where the majority of people are illiterate.) One should think in terms of "holistic democracy", a political system that goes beyond rights and formal processes. de Mello, *supra* (note 19).

29 Freedom House changed its classification of Russia from "partly free" to "not free", the only country to be so downgraded this year, in light of the deterioration in the political rights and civil liberties experienced by its citizens. *Supra* (note 3).

30 The late German Chancellor *Willy Brandt* allegedly went so far as to define democracy as existing where there is no torture: no properly consulted electorate would tolerate a government that severely abuses its own citizens' human rights.

B. *Rule of law*

The rule of law is another *sine qua non* for the existence of democracy and human rights. The term ‘rule of law’ has many substantive and procedural components, foremost among them a judiciary independent of any influence other than that of the law. It must serve as an additional, objective check on the political power of the legislative and executive branches of government. Crucial for a free and fair election is also a professional, impartial and apolitical body that administers the entire process (e.g. the choice of leaders, equality at the ballot box, apportioning of voting districts, fairness of campaigns, management of conflicts).³¹ An independent judiciary is, however, the ultimate guardian of electoral procedures; it must be empowered to review the work of the electoral commission and to enforce constitutional provisions concerning political participation. (The aforementioned Ukrainian Supreme Court decision demonstrated the indispensability of such a guardian for the proper functioning of democracy.)

An engaged Ukrainian citizenry also played an essential role in delegitimizing the election results and bringing about the ‘Orange Revolution’. Democracy should not, however, be understood as merely as majoritarian rule, just as the rule of law should not be reduced to the principle of legality and juridical positivism. Majoritarian rule can degenerate into an instrument of oppression through the denial or infringement of individual and minority rights. Abuse may be hindered by requiring substantial majorities for important decisions and by according human rights the status of higher norms. Above all, courts must be allowed to judge (and if necessary overrule) the people’s decisions in referenda, assemblies etc. in order to protect against arbitrary or disproportionate judgments. In this regard, established democracies should not be smug; they, like emerging democracies, can diverge markedly from the democratic ideal. The history of slavery and racial discrimination in the United States, the ‘world’s greatest democracy’, is a salutary lesson. More recently, some western States have experienced an upsurge of illiberal tendencies, motivated by crude populism.³² Such tendencies in policymaking can pose a serious threat to the rights of politically less powerful members of society (especially immigrants and minorities) or to disfavoured opinions. Constant vigilance is required everywhere.

31 For a discussion of the role an independent electoral commission can play, see the Zimbabwe Electoral Reform Project of the Zimbabwe Election Support Network, a NGO coalition critically examining the present electoral system in that southern African land. Available at http://www.zesn.org.zw/cd/reform_project.htm.

32 E.g. see “One critical assessment of current state of democracy in Austria”, *Neue Zürcher Zeitung*, 4 January 2005.

The rule of law sets another limit on the exercise of democracy in that it proscribes the use of elections to establish an illiberal regime. Political pluralism is essential for a functional democracy, but it cannot be allowed to be used to attack democracy's own basic values. Such attacks may come full-frontal, from would-be autocrats and theocrats, whose aim is to end real elections; they may also be insidious, from criminals, the wealthy and even bureaucrats, who diminish liberty and democratic rights by manipulating the political system in their self-interest.

This truth has been painfully learned in different countries. The Nazis came to power in 1933 via democratic procedures, including free and fair elections.³³ As a consequence, the drafters of the German Basic Law sought measures to defend their new democracy against its enemies. These measures include banning political parties opposed to the "free democratic basic order" as unconstitutional (Art. 21(2)). Since the implementation of a ban reduces the freedom of political debate and risks being abused by the established parties, it is subject to restrictive conditions at the exclusive discretion of the German Constitutional Court. The relevant test is whether the party in question seeks to overturn the highest values of the state order, such as human rights and the self-determination of the German people. If so, as a former President of the Court put it, the principle of tolerance regarding political viewpoints finds its limit and a ban its justification.³⁴ The lessons of history were also sensibly applied in the more recent decision of the ECtHR in *Refah Partisi*. The European Court held unanimously that the dissolution of a fundamentalist political party by the Turkish Constitutional Court did not violate the *ECHR*, even though the party was democratically elected and was part of the government. The Court observed that the Convention's freedoms of thought, expression and assembly "cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State's institutions, of the right to protect those institutions."³⁵

On this German and European view respectively, the activities of a non-democratic party in a democratic election pose no 'paradox of tolerance'. A legal compromise can and must be struck between the requirements of

33 In the words of a contemporary observer: "Chose curieuse, cet appel sans pareil au peuple a fini par écarter le peuple de toute véritable influence sur les affaires publiques." ("Ein Schweizer Staats- und Völkerrechtler der Krisen- und Kriegszeit": D. Schindler (Sr.), *Vorlesung 1935 an der Internationalen Sommeruniversität in Santandèr, Spanien*, 3rd Lecture, unpublished.)

34 J. Limbach, *Das Bundesverfassungsgericht* (München, C.H. Beck, 2001), p. 64. To date, the Court has banned two parties. (*BVerfGE* 2, 1; *BVerfGE* 5, 85.)

35 *Refah Partisi's* activities included speeches calling for the elimination of secularism and for its replacement with *Sharia* and alluding to the use of force for the achievement of such goals. (ECHR: *Refah Partisi (The Welfare Party) and Others v. Turkey* (Applications No. 41340/98, 41342/98, 41343/98 and 41344/98 (13 February 2003).)

defending individual rights and defending democratic society.³⁶ The future of nascent democracies in the Middle East will partly depend on how Muslim parties are handled. Here we note that Islamists are in principle entitled to the same basic rights to contend for office as other groups, but that a so-called 'one man, one vote, one time' situation must be avoided. The most likely means of ensuring these nascent democracies' long-term viability is by integrating Islamists into the new political system.³⁷

C. *Federalism*

Federalism is not a necessary but is an appropriate means of ensuring minorities' representation and participation in governance, of simultaneously encouraging unity and diversity in a common political system. An electoral system should always permit the transformation of political minorities into majorities. In a plural society, the additional attribute of decentralization can, we believe, optimize the working of democracy by encouraging the expression of the people's will without ignoring the opinions of ethnic / religious / linguistic etc. minorities.

Pierre Trudeau, the great Canadian federalist, argued that federalism is above all a "product of reason in politics".³⁸ It can be a pragmatic means of coping with the given diversity of a population and the resultant risk of political instability from divergent interests.³⁹ By limiting state power between governmental levels and institutions, federalism can recognize and support diversity, enable individual preferences to be better expressed and secure widespread cooperation in the exercise of political power. Specifically, federal structures can reduce the divisiveness inherent in the alternative 'winner-takes-all' model (*à la* Westminster) and promote the feeling among

36 For more detail as to how States may under international law exclude anti-democratic groups from electoral processes, see G. Fox, G. Nolte, "Intolerant Democracies", 35 *HILJ*, 1995, 1, as well as the various responses and rejoinders in: various, 37 *HILJ*, 1996, 231.

37 Specifically, these activists should be brought together with their secular rivals in a national congress, in which the rules of the democratic game (such as periodic, fair and free elections) are agreed and enshrined in a national charter, which participants then sign on to. The highest courts of the land should stand ready to guarantee that all groups abide by the rules. (Further see S.E. Ibrahim, "Islam can vote, if we let it", *International Herald Tribune*, 24 May 2005, p. 9.)

38 R. Graham (ed.), *The Essential Trudeau* (Toronto, 1998), p. 117 et seq.

39 The matter of prescribing political systems for deeply-divided societies is more complex, given the fundamental instability of the situation arising out of the competing groups, mutual suspicion and possibility of future violence etc. In such situations, institutions aimed at overcoming group identities and integrating communities into a single national identity may work better than consociational systems devolving significant autonomy. *Inter alia*, see B. Reilly, A. Reynolds, *Electoral Systems and Conflict in Divided Societies* (Washington DC, 1999).

citizens that ‘they are all winners’. Local / regional consensus expressing local / regional values may thereby be fostered together with the collective sense of sharing a common identity and political destiny.

While these prescriptions may seem self-evident, experience from several States suggests that federalism is often misunderstood and that ostensibly federal structures may be used by national rulers to enhance and expand their power. (For example, President Putin’s decision in 2004 to end the popular election of regional governors and to personally appoint them instead signifies a centralization and de-democratization in Russia.) The *raison d’être* of federalism is just the opposite: namely to distribute power vertically and to support a variety of fora for public expression and decision making.

5 BEYOND REPRESENTATIVE DEMOCRACY

In dealing with elections, we have thus far dealt with representative or indirect democracy. This is the realm of thought of Montesquieu and the US Founding Fathers,⁴⁰ following whom, representative democracy has become the world model for democracy. Rather than simply continuing along this train of thought and with this form of democracy, let us pause and ask the ultimate question. ‘Democracy’ may translate as rule by the people, but who are the people, and what should it mean for them to rule? Is representative democracy the ideal form, or is direct democracy, the original form, to be preferred? Put more pointedly: if the people really are the source of sovereignty and State legitimacy, why are they in the vast majority of democracies represented through parliament rather than allowed to make their own voice heard through initiatives and referenda? Moreover, the term ‘democracy’ implies an exchange of information in governance. Might not forms of direct democracy enable citizens to intervene actively in decision making and make governments more receptive of and public policy more reflective of social needs and aspirations? Similarly, it is widely acknowledged today that parliament has its own spirit, beliefs and dynamics, which do not always correspond to those of the people ‘represented’. Why then is not more trust and less suspicion placed in decision making by the people? Finally, if democracy is a political system in which the human rights of the people are respected and observed, as argued, which of the two models better guarantees such respect and observance should be examined.

40 Thomas Paine, the Enlightenment philosopher and U.S. political activist, even invented a mathematically perfect system of representation that was to reflect the will of the people exactly.

From a legal as well as theoretical perspective, posing this ultimate question seems appropriate. The UN instruments prescribing the right of citizens to take part in public governance provide for both forms and even prioritize direct participation in their structure: the *UDHR* and *ICCPR* state that the right may be realized “directly or through freely chosen representatives”. Indeed, one might argue that if these instruments are understood as prescribing a status for the individual as an active subject, then direct democracy in the form of unmediated participation in communal decision making is the sole political system compatible with human rights. Moreover, direct democracy seems to be gaining ground worldwide. A recent comprehensive study finds, for example, “a broad movement to redesign institutions in ways that give citizens more opportunities to exercise direct control over political decision making.”⁴¹ The trend has even manifested itself in hitherto alien governance structures beyond the nation-state, as exemplified by the right of citizens’ initiative in the Treaty for the Constitution for Europe.

Modern Swiss history offers some insights, if not a definitive answer, to this ultimate question. A very important practical and philosophical experiment in government took place in Geneva in the 18th century. There and then *Jean-Jacques Rousseau* developed his theory of democracy, in which direct democracy was held to be the ideal – indeed the sole – model of democracy. Sovereignty or the “general will”, he argued, cannot be represented just as it cannot be transferred: allowing people’s deputies to be their representatives rather than merely agents – i.e. to take definitive decisions for them – denies the people the exercise of their will. Representation is in effect not democracy, rather the basis of oligarchy and authoritarianism.

Perhaps Rousseau’s theory of direct democracy is too radical; it certainly was for the city’s leaders at that time, who burned his works and forced him into exile.⁴² Perhaps it is only realizable in Athenian-like small communities; people are not apt to draft legislative texts in a larger State. Theories of semi-direct democracy like that of the *Philosophe Marie-Jean Condorcet* might instead be applied.⁴³ From this perspective, political deci-

41 See S.E. Scarrow, “Direct Democracy and Institutional Change: A Comparative Investigation”, 34 *Comparative Political Studies*, No. 6, 2001, 651. For a regional evaluation of direct democratic procedures and practice, see B. Kaufmann, M. Dane Waters (eds.), *Direct Democracy in Europe* (Durham NC, Carolina Academic Press, 2004). Excerpts available at <http://www.iri-europe.org>.

42 The Geneva Prosecutor feared that chaos would break out if the General Assembly discussed politics and Rousseau’s beliefs in equality and freedom were disseminated widely. See C. Landgrebe, “Ich bin nicht käuflich”, in: *Das Leben des Jean-Jacques Rousseau* (Weinheim/Basel, Beltz, 2004), p. 238 et seq.

43 Regarding the influence of Condorcet on modern Swiss direct democracy, see A. Kölz, *Neuere Schweizerische Verfassungsgeschichte* (Bern, Stämpfli, 1992).

sion making should, wherever feasible, be participatory, with rights of initiative and referendum; representation on the basis of periodic, fair and free elections is otherwise appropriate.

Assessing in detail the various arguments for and against direct democracy would go far beyond the scope of this essay. We wish merely to make clear that the idea of direct democracy should be taken seriously. The arguments in favour are, from the perspective of theory, many;⁴⁴ and the arguments against have, from more recent Swiss experience with initiatives and referenda, not been realized.⁴⁵ At a minimum, it can be proposed that when a particular political system suffers from a ‘representational deficit’, institutional reforms encouraging participatory democracy should be seriously considered.⁴⁶ Anxieties about the workability or abuse of such mechanisms can be met by a careful selection of issues and procedures⁴⁷ and practical problems in the implementation presumably overcome through modern technology.

Whatever its virtues and popularity, direct democracy is merely one model within the wide spectrum of democratic regime design permissible under international law. In assessing the different models, two realities must be kept in mind. First, no national democracy is perfect when measured against these high standards: the actual implementation of any such rules in any given system will always fall short of the ideal. (The last two US presidential elections have provided dramatic proof of this reality.) The correct response is not to seek out a different political system; all countries should instead engage in ongoing democratization. Second, democracy and its constituent elements are contested: there is a wide variety of theories, ideologies and historical realizations of democracy today, even among western

44 From an instrumental perspective, direct democracy can enhance the legitimacy of laws, ensure the political *élite* concerns itself with the citizenry, encourages the citizenry to address the issue concerned, promotes general knowledge about the same and further societal integration. Understood as an end in itself, participation in the decision making process arguably recognizes the equal right of all individuals to codetermine decisions, it is the surest way of taking into account each individual’s choices and expresses the individual’s freedom.

45 The exercise of rights of initiative and referendum in Switzerland has not in general led to the problems that proponents of representative democracy predict, i.e. questions too complex for citizens – as opposed to experts – to handle, slow and awkward decision making, provincialism (dominance of regional / local concerns over national), provocation of demagoguery, misuse for expressions of (un-)happiness with the incumbent government.

46 For an assessment of one political system, see D.Thürer, “Direkte Demokratie für Deutschland? – Zu einem Projekt der Einfügung direkt-demokratischer Rechte ins Grundgesetz”, 98 *SJZ*, No. 24, 2002, 593.

47 The law – and the State’s basic law above all – cannot, of course, be wholly contingent on the protean expression of the people’s will; allowing it to be would afford no systemic stability and no security for rights. It would also be unrealistic to require that every citizen be preoccupied with public affairs every day and that there be a continuous dialogue between them and the government.

countries. Many alternatives are defensible as well as legal, from consensus democracy to élite competition.⁴⁸ In short, democracy should be understood as a process, an institution and a model to be constantly revised nationally and internationally, in keeping with social and political developments.⁴⁹

6 OUTLOOK

Among the UN's founders were 'federalists' in whose idealistic conception the UN of 1945 was a halfway house to a quasi-state organization of the world community. Today, we live – as Secretary-General *Kofi Annan* succinctly puts it – in “a different world”. The federalists' dreams and schemes for a world legislature, a world administrative power and a world compulsory jurisdiction have lost their appeal. A strong, stable international community must be built on strong, stable States; they are the basis of an effective ordering of cross-border relations through international and municipal law. The best means of protecting and more, of applying States' strength and stability for the general good is in turn a democratic political system.⁵⁰

Notwithstanding these – in our view – evident truths, much work remains to be done in building consensus regarding the significance and content of relevant international provisions and more, in building support among States for the provisions' enforcement. Each of the aforementioned recent national elections is cause for considerable satisfaction but not for complacency: the condition of emerging democracies – their nature and sustainability – warrants closer, critical attention. It must be ensured that the

48 Reports of the recent demise of the Swiss model of *Konkordanz* are greatly exaggerated; Swiss politics may have experienced a polarization of late but not a blockage. (Evidence of the model's continuing success may be seen in the recent federal measures concerning maternity insurance, financial equalization between the Cantons and the Confederation and the bilateral Schengen / Dublin Agreements, each of which was accepted despite hardline opposition at the ends of the party spectrum.) Furthermore, Switzerland's consensus democracy remains, in principle, exportable to Sri Lanka, Sudan, Cambodia etc. as a guarantor of political cooperation in plural societies.

49 If nothing more, see the well-chosen title of a leading collection of essays on the history of democracy, namely “The Unfinished Journey”. See J. Dunn (ed.), *Democracy: The Unfinished Journey, 508 BC to AD 1993* (Oxford, Oxford University Press, 1994).

50 From a functional perspective, it is also arguable that “it is only within identifiable territorial units of a manageable size that people can realistically form ties of identity and loyalty through which they can take part meaningfully in the democratic process.” See S. Tierney, “Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State”, 54 *ICLQ*, No. 1, 2005, 171.

PFF standard is not being abused and that a full-functioning democracy is maintained long term.⁵¹

Contemporary events also raise the tricky issue of the role of IGOs in constructing the legal framework of democracy. Demands for and the introduction of political reform in the Middle East,⁵² for example, present a particular challenge for external (as well as internal) actors regarding democratization. Governance in the region has traditionally been characterized by autocratic and theocratic regimes.⁵³ Are contemporary events a mirage or do they, in the words of an Egyptian democratic activist, bode an “Arab spring” of real, lasting democracy?⁵⁴ The answer will depend partly on the role that IGOs play in encouraging reform. In principle, we believe the *raison d’être* of IGOs in dealing with such events – be they in the Middle East or Central Asia – lies in helping to promote change, end complacency and reverse setbacks. IGOs’ existence and efforts are primarily justified in making law inside and outside States stronger and more just regarding democracy and similar concerns.

Within European institutions, the talk is of peaceful approaches, ‘soft power’ and ‘carrots and sticks’. The Iranian electoral commission’s decision to accept only a few reformers as candidates in 2005’s presidential elections was, for example, criticized by the EU. In this and other contexts, the EU has urged the introduction of democratic reforms in exchange for economic aid, favourable terms of trade, technology transfers and security guarantees. The legitimacy and mission of the OHCHR for its part may be found in stimulating dialogue and cooperation regarding human rights internationally. A chief task of the Office is to guard democracy as a principle of law and to contribute to the advancement of its core norms. Best (and worst) practices regarding democratic processes may be usefully identified among

51 The threat to democracy in the latter case lies not so much with the regime as with the people. The populations of some countries apparently put a “strong economy” before a “good democracy” and would prefer to rely on a “strong leader” to solve local problems rather than “democratic government”. See “What the World Thinks in 2002”, Pew Research Center. Available at <http://people-press.org/reports/display.php3?ReportID=165>.

52 E.g. in Saudi Arabia (holding of municipal elections in February 2005), Kuwait (enfranchising women as of May 2005), Iraq (*supra*), Egypt (introduction of pluralism in the presidential elections of September 2005).

53 This preference is reflected in the *Arab Charter on Human Rights*, which limits political rights to their mere expression. “[A] right to access to public office is granted, but there is no right to take part in the conduct of public affairs, directly or through freely chosen representatives. Nor is there mentioned the right to vote and to be elected at genuine periodic elections.” See International Commission of Jurists, *Arab Charter on Human Rights Must Meet International Standards*, Press Release, 20 June 2003. Available at http://www.icj.org/news.php3?id_article=2948&lang=en.

54 Ibrahim, *supra* (note 37).

States for imitation (or avoidance) elsewhere. The OHCHR has already done much to advance a common understanding of the relationship between human rights and democracy as well as to assist in a practical way state and non-state actors and institutions in democratization. International observers such as the UN Fair Elections Commission can assist in ensuring that a given election meets the aforementioned standards; assuming that they themselves are politically and ideologically impartial, their approval can also contribute to the legitimization of the results. Taken as a whole, these international efforts enable and encourage a people to use their sovereignty wisely and well.

States retain a discretion in the domestic implementation of the international right to periodic, fair and free elections as long as their political system is consistent with their international obligations. States should continue to exercise this power: the form of democracy in a given State should be chosen according to its particular needs, desires, resources and traditions and not according to any universalized model. Two qualifying tendencies are at the same time discernable in contemporary international relations, namely a growing acceptance of a responsibility of States to respect democratic principles within their constitutional order and a corresponding affirmation of a legal entitlement for societies to be governed democratically.⁵⁵ These tendencies cannot be denied; indeed, we believe that they should be supported in international fora. National constitutional and electoral laws must be aligned with identified international best practices. As the late High Commissioner *de Mello* observed, “the combination of domestic democratic structures with universal democratic norms is a formidable tool in our quest to strengthen the roots of democracy.”⁵⁶

55 C. Pippin, “Book Review”, 15 *EJIL*, No. 1, 2004, 213.

56 Vieira de Mello, *supra* (note 19).