doi:10.1017/aju.2018.33

SYMPOSIUM ON THOMAS FRANCK'S "EMERGING RIGHT TO DEMOCRATIC GOVERNANCE" AT 25

DEMOCRACY'S DEMANDS

*Roberto Gargarella**

In a classic article published in 1992, Thomas Franck wrote of an "emerging right to democratic governance" in international law.[1] In his view, such a right implied that the acceptance of a government by other states in the international arena depended on whether the government ruled with the consent of its own people. In a later piece, published in 2000, Franck elaborated, stating that

> [w]hile democracy has long been a right of people in some nations, enshrined in their constitutions and traditions and enforced by their judiciary and police, this has not been true universally. That democracy is *becoming* an entitlement in international law and process is due in part to the very recent political reality of a burgeoning pro-democracy movement within the States that constitute the world community.[2]

Franck's claims have been the object of intense academic dispute.[3] In my opinion, there are important things to say both in favor and against an "emerging right to democratic governance," as I shall briefly elaborate.

Rights Versus Democracy

Franck's original argument was timely and enormously important. It emerged at a moment when political and academic reflection was obsessed with questions about rights, which tended to displace other, equally crucial questions about democracy. The obsession with rights was, of course, a central feature of the postwar world order, and of course was understandable after the serious and massive violation of rights carried out by the Nazi and fascist governments in Europe. The UN General Assembly proclaimed the Universal Declaration of Human Rights (UDHR) in Paris on December 10, 1948, and the political history of the world was transformed. Of course, the UDHR built on prior movements around the world, including in Latin America, where there had been a long history of incorporating rights in national constitutions.

The growing obsession with rights and their constitutionalization was important, but was also problematic in some ways. One consequence of the "obsession with rights" was that it helped popularize the idea that what really mattered, particularly at a constitutional level, was the strength of the declaration of rights, rather than the strength

* *Professor, Universidad Torcuato di Tella, Buenos Aires, Argentina.*

[1] Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992).

[2] Thomas Franck, *Legitimacy and the Democratic Entitlement*, *in* Democratic Governance and International Law 27 (Gregory Fox & Brad Roth eds., 2002).

[3] *See generally* Democratic Governance and International Law (Gregory Fox & Brad Roth eds., 2002).

The American Society of International Law and Roberto Gargarella © 2018. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

https://doi.org/10.1017/aju.2018.33 Published online by Cambridge University Press

of the democratic machinery (which I have called the "engine room of the Constitution").[4] Worse still, in some cases this growing concern with human rights was accompanied by a crude critique of democracy, and of participatory mechanisms in general. After years of terror and genocide, many began to associate "more democracy" with a greater risk of having a massive violation of rights, again. This position simplistically assumed that Hitler or Mussolini were the "product" of processes of mass mobilization, and led to a distrust of majoritarian democratic processes.

This result was very unfortunate for numerous reasons, but for our purposes, one stands out: a weak democratic process does not produce strong enforcement of constitutional rights. This is so because the implementation and enforcement of rights requires a broad social consensus in support of it. Rights, after all, can be very expensive![5]

Let me illustrate this claim through one example that I know well. Since the beginning of the twentieth century, most Latin American countries have updated their rather aristocratic nineteenth century constitutions. Usually, this process involved countries expanding their declarations of rights, while leaving intact their old organization of powers (the "engine room"), including powerful executive branches.[6] Unsurprisingly, strong presidents tend to approach the long lists of social and economic rights present in their constitutions with a sense of political opportunism. The enforcement of those rights thus becomes completely dependent on the discretionary will of one person: the president herself. For example, in Bolivia, Venezuela, and Ecuador, the enforcement of the potent environmental rights incorporated into the most recent constitutions depended almost entirely on the president's discretionary judgment about the benefits derived from the exploitation of natural resources. Weak democratic institutions produced uneven rights enforcement.

Many other examples exist, but the main point is that, during most of the twentieth century, concerns about rights improperly superseded concerns about democracy. This explains why many of us enthusiastically celebrated the publication of Franck's article. His piece served to restore our commitment to democracy, assured us of its compatibility with rights, and helped scholars to focus academic attention, again, on the "democratic" side of our constitutions.

Facts and Methods

In spite of this initial attraction, I find numerous difficulties in Franck's work on the right to democratic governance. While I tend to agree that "the democratic entitlement" has gradually transformed "from moral prescription to international legal obligation,"[7] I do not always understand the way in which Franck describes this change; I do not follow some of his claims about democracy; and I tend to disagree with many of his assertions about international politics. For instance, take this statement, which is representative of Franck's approach: "the notion of democracy as validation has been challenged" quite powerfully by two ideas, one being that of the "dictatorship of the proletariat" and the other the "*related* theory of forced-march modernization."[8] In my view, those two notions were, historically and theoretically speaking, quite *un*related. In addition, it is odd to read that the theory of "modernization," which "originated in European fascist-charterist dictatorships of the 1930s," finally "found new respectability among leaders of postcolonial Latin America, Africa and Asia."[9] What "postcolonial" countries

[4] Roberto Gargarella, Latin American Constitutionalism 1810-2010 (2013).

[5] *See, e.g.*, Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, *in* Liberalism and the Moral Life (Nancy Rosenblum ed., 1989).

[6] Carlos Santiago Nino, The Constitution of Deliberative Democracy (1993).

[7] Franck, *supra* note 1, at 47.

[8] *Id.* at 48 (emphasis added).

[9] *Id.*

https://doi.org/10.1017/aju.2018.33 Published online by Cambridge University Press

is he thinking about? What does he mean by "found … respectability"? What "leaders" does he have in mind? Some of his central descriptive claims can only be taken as imprecise and implausible generalizations.

For present purposes, I neither want nor need to press much on these imprecise generalizations, which abound in this line of Franck's work. What worries me most is something larger, namely that the descriptive problems are similar to those that I find in international human rights law more generally, especially in its use of concepts such as *customary law, natural law, jus gentium,* and others. Unfortunately, these important but usually imprecise notions play an absolutely crucial role in international law. Thus, there are crimes that are not pardoned because they violate customary law; there are other offenses that are considered unpunishable because this is supposedly what the *jus gentium* determines. But the fact is that nobody knows exactly what "natural reason has established among all mankind," to quote Vattel. In finding new rights, international law professors should tell us, first, what *method* they use to define the content and contours of customary international law. The oracles of our time, who regularly inform us about what customary international law *really* says, should tell us something about the *methodology* they use in order to ground their conclusions, which have real-world effects.

My impression is that Franck's story about "the emerging right to democratic governance" is afflicted by methodological deficiencies of this kind. It is not enough to list a series of important events that have taken place sometime in the past in the international arena, in order to affirm that we have a "new right," or that a new international consensus is already in play. We first need to know the standard: under what precise circumstances can we conclusively assert that we have a new right in the international legal sphere? (As a final point: in order to present his story about "the emerging right to democracy," Franck heavily relies on declarations made by the UN General Assembly, which is not exactly an institution that we could characterize as having internally democratic procedures, or a robust record of supporting democracy.)

What Conception of Democracy?

For the sake of argument, let us maintain, with Franck, that a "right to democracy" has finally emerged at the international level. In line with this new consensus, the acceptance of a government would now depend on whether the country enjoys periodic and meaningful elections. At this point, some new questions appear, including: Does this development represent good news for our turbulent times? How should we assess this "evolution" of international law, in the era of Donald Trump, Nicolás Maduro, and many others, who assumed power through elections, but who have done everything they could to undermine democracy? Could it not be said that these new and tragic experiences should force us to reconsider our celebration of regular elections? Shouldn't our "validation" parameter be a different one, such as the validation of certain core rights?

Scholars surely have different answers to these anxious questions. My response diverges from Franck's in at least two important respects. First, my defense of a "democratic entitlement" would not be based on a mere descriptive claim about the popularity of democracy among nations of the world, but rather would be grounded in normative reasons. As I have tried to do elsewhere, I would tie the democratic principle to values such as those of individual autonomy and collective self-government.[10] In my view, those values are important per se, independent of how much they are respected in actual practice, but I also note they have a long grounding in national constitutions. Along with Franck, I note that a renewed "democratic awareness" has emerged in the Western World since the beginning of the twentieth century, particularly as universal suffrage has gradually gained acceptance during this period. Again, by pointing to those facts, I do not mean to suggest that democracy matters *because* many people began to care more about it during the twentieth century. Democracy was equally important during the nineteenth

[10] Gargarella, *supra* note 4, at 5-6.

https://doi.org/10.1017/aju.2018.33 Published online by Cambridge University Press

century, when most established governments were not democratic, and after World War II, when it began to lose respectability among political and legal scholars.

In any case, my main objection to Franck's approach lies with the thin and fragile conception of democracy that he presents. Democracy, for him, seems to be reducible to regular elections, for the most part. In my view, democracy (undoubtedly an "essentially contested concept") should be understood in a more robust way.[11] Democracy, I submit, should be defined in connection with a collective and inclusive public debate, and should be considered justified as a system of governance only when (and as far as) it favors such an open and inclusive conversation better than alternative institutional arrangements.[12] This more "deliberative" understanding of democracy would require governments, at minimum, to ensure an important array of rights (including, prominently, rights to speech and to participation in decision-making) conducive to making the "collective conversation" possible.

Of course, my deliberative conception of democracy is not the only possible one on which to ground a criticism of Franck's approach. As Susan Marks put it:

> According to some political theorists, democracy entails not just the right to participate in the selection of national governments, but also the right to participate directly in decision-making affecting one. For other theorists, democracy involves not just the process of selecting government but also the process of connecting people with their governments through civil society. Still other theorists emphasize that democracy requires not just the right to vote and stand for election and associated civil liberties, but also the whole range of further rights that actually enable participation in public life on a footing of equality.[13]

The trend among scholars is toward thicker, not thinner, conceptualizations. In the end, we may disagree about our precise conception of democracy, but still agree that we should challenge Franck's unjustifiably thin understanding of that concept.

I believe that a more robust conception of democracy would resolve many of the problems that flow from Franck's view. For instance, under a thicker conception, the fact that authoritarian President Maduro won a democratic election wouldn't say much in his favor, particularly if we took into consideration the way in which he restricted basic liberties, like freedom of the press, or targeted his political rivals. The right to democracy would justify condemning, rather than supporting, Maduro and his regime.

Unlike Franck's approach, if we use this or a similar deliberative approach to democracy, nobody could claim that the criterion for "the validation of governance in member states" is too weak, or is compatible with the occurrence of serious violations of fundamental rights. I would also note that this more demanding approach to democracy is not merely based on theoretical or normative considerations. While I am not suggesting that the strong democratic view that I propose actually describes the prevailing practice at the international level, I do believe that, at present, all around the world, there are strong forces promoting more robust forms of democracy, and that these should be normatively defended. It is not only that, in many countries, we find active social movements demanding "more democracy" (from the "Arab Spring," to the mobilization of the youth in Iran, to the anticorruption movement in Brazil).

It also seems that, in our time, international organizations have come to recognize the existence of demanding democratic rights, which numerous countries have put in practice and different international tribunals have enforced. To take just one significant example, consider Convention 169 of the International Labour Organization, referring to the rights of indigenous peoples, whose Article 6 creates an obligation to "consult

[11] *See, e.g.*, Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept?*, 21 Law & Phil. 137 (2002).

[12] *See, e.g.*, Jürgen Habermas, Between Facts and Norms (William Rehg trans., MIT Press 1996) (1992); Deliberative Democracy (Jon Elster ed., 1998).

[13] Susan Marks, *International Law, Democracy and the End of History*, *in* Fox & Roth, *supra* note 3, at 532, 558-59.

https://doi.org/10.1017/aju.2018.33 Published online by Cambridge University Press

the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."[14] In recent years, the right to prior consultation has been used on numerous occasions in cases contesting the exploitation of natural resources in areas traditionally inhabited by indigenous groups.[15]

An Example

Of course, for some people, all these theoretical discussions about democracy are irrelevant, with little practical significance for international law. To illustrate why this is not the case, consider the presence of theoretical disagreements about the definition of democracy in the remarkable *Gelman* decision, issued by the Inter-American Court of Human Rights in 2011.[16] The case was a complex one, involving the consequences of an amnesty law, and here I shall only focus on one crucial aspect of it, namely the way in which it addressed the "democratic question." In its decision, the Court condemned Uruguay for the forced disappearance of María Claudia García Iruretagoyena de Gelman, and ordered Uruguay to remove all obstacles that had enabled those responsible to go unpunished. Accordingly, it held that the Law on the Expiry of Punitive Claims of the State, which prevented criminal prosecution of those who had committed serious human rights violations during the period of military dictatorship, lacked any legal effect because of its incompatibility with the American Convention on Human Rights and the Inter-American Convention on Forced Disappearance of Persons. The Court did so while recognizing that the law had been democratically adopted, and was subsequently reaffirmed *twice* by popular referenda.[17] In the Court's opinion, "[t]he Expiry Law's having been passed by a democratic regime and even ratified or supported by the citizenry on two occasions does not automatically or in itself grant it legitimacy as regards international law."[18] For the Court, the relevant factor was not "the process of adoption" of the norm or "the authority that issued the amnesty law," but rather "its *ratio legi*s," that is, "leaving unpunished serious violations of international law." The incompatibility of amnesty laws with the American Convention—the Court maintained—"does not derive from formal considerations, such as their origin," but rather from their substantive aspect.[19] The form or depth of democratic approval is irrelevant, in keeping with the thin concept of democracy.

Stated very briefly, I object to the Court's narrow understanding of democracy in *Gelman*, which led it to overturn what the vast majority of Uruguayan people had decided regarding past crimes. What was at stake in Uruguay was a profound social disagreement concerning how to best interpret the country's international obligations. And it is not at all clear, in my view, that the American Convention on Human Rights prohibited the enactment of an amnesty law, which a profoundly hurt society might consider necessary, in some extreme circumstances and after careful deliberation. The case shows what is at stake in adopting either a narrow or a robust conception of democracy. For the narrow view—which was the one that the Court adopted, and which seems also to be the one that Franck recommends—strong popular decisions made by the Uruguayan people meant very little, if in conflict with

[14] International Labour Organization, Indigenous and Tribal Peoples Convention, C169, June 27, 1989. The right to prior consultation has been incorporated into numerous Latin American constitutions.

[15] *See, e.g.*, César Rodríguez Garavito, *Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields*, 18 IND. J. GLOBAL LEG. STUD. 263 (2011).

[16] Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 221 (Feb. 24, 2011). For an extensive discussion, see Roberto Gargarella, *Democracy and Rights in* Gelman v. Uruguay, 109 AJIL UNBOUND 115 (2015).

[17] Uruguay conducted the first popular consultation in April 1989 by referendum. The second, in 2009, involved a general plebiscite, which put to popular vote a projected constitutional reform that would have nullified part of the Expiry Law.

[18] Gelman, *supra* note 16, at paras. 229, 238.

[19] *Id.*

https://doi.org/10.1017/aju.2018.33 Published online by Cambridge University Press

international law. For the robust view, in contrast, those cautious, committed, thoughtful decisions represented the best response a democratic society may offer in the face of disagreement.[20] Respecting the right to democracy requires, in some cases, deferring to democratically adopted decisions.

Conclusion

Today—and perhaps more than ever before—there are good normative reasons to advocate for a strong right to democratic governance, grounded in contemporary international practices. I have suggested here that we still have reasons to consider such a democratic entitlement to be a legal obligation in the international context, as Thomas Franck lucidly proposed decades ago. In applying the right, we should not be shy about demanding a rich conception of democracy; too much is at stake to do otherwise.

[20] Jeremy Waldron, Law and Disagreement (1999).

https://doi.org/10.1017/aju.2018.33 Published online by Cambridge University Press