doi:10.1017/aju.2018.37

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

THE EMERGING RIGHT TO GOOD GOVERNANCE

*Dobrochna Bach-Golecka**

From the perspective of international law, democracy may be regarded as a multifaceted phenomenon. On the one hand, it reflects the collective right of self-governance of a particular political community; on the other hand, it reflects an individual entitlement to participate in the conduct of public affairs of one's country. Democracy is connected to the principle of self-determination, understood as the freedom of a group to decide the system under which it wishes to live, while requiring a formalized set of voting procedures in order to implement this freedom. Democracy is focused on the procedural aspect of organizing elections, while not mandating any particular substantive outcome of those elections. In this essay, I propose that the right to democratic governance should be supplemented with a more robust concept: the substantive notion of good governance.

I argue for the vital importance of a substantive element of democratic decision-making, which I call the requirement of good governance, in order to ensure the protection of all members of the political community. Good governance should be regarded as having two components: a standard placed on office-holders in power, and an entitlement of citizens under the authority of those office-holders. Nevertheless, I recognize the precise scope and content of the right to good governance remains to be identified and determined, as does its relationship to human rights provisions. This essay also touches on some specific issues connected to the right to good governance, such as the involvement of women in the process, the incorporation of the ethics of care (civic friendship, solidarity) as a potential justification for the right to good governance, the scope of individual autonomy, and the geographical distribution of good governance.

The Principle of Self-Determination and Democracy

The international right to a democratic form of government has been identified as flowing from the principle of self-determination.[1] In its external aspect, self-determination focuses on the formation of separate political units in the form of independent states. In its internal aspect, the principle of self-determination requires a state to allow a discrete political community to rule itself in an autonomous manner. The external aspect of the self-determination principle is connected to the political freedom of a particular community within the international arena, while the internal aspect focuses on the political freedom of the same community to make decisions within the domestic sphere.

* *Associate Professor of Law, Faculty of Law and Administration, University of Warsaw.*

[1] Franck recognizes the importance of self-determination as "the historic root from which the democratic entitlement grew." Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 52 (1992).

The American Society of International Law and Dobrochna Bach-Golecka © 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.2018.37 Published online by Cambridge University Press

Democracy is the best method to implement the principle of internal self-determination, as it allows all members of the political community to participate in the decision-making process. Moreover, democracy is a unique political arrangement designed to include not only the present generations of the political community but also future generations. The requirement that elections be organized at regular intervals means that the composition of individuals entitled to participate in those elections is subject to constant change, and facilitates the gradual inclusion of new citizens.

Within the framework of the major human rights treaties, the right to democratic governance is structured as an individual entitlement. Article 21 of the Universal Declaration of Human Rights (UDHR) provides individuals with the right to take part in their government, either "directly or through freely chosen representatives," and provides that government should be based on "the will of the people," as expressed in "periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."[2]

Similarly, Article 25 of the International Convention on Civil and Political Rights (ICCPR) states that every citizen has the right to participate in public affairs, to vote and be elected, and to have access to public services on a nondiscriminatory basis. Again, the language about elections is very precise: they shall be "genuine periodic elections" that rely on "universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."[3]

Within this framework, the will of the people as a collective entity is to be understood as the will of those entitled to participate in the elections in a given country. This means that there is a discrepancy between the population as such and those entitled to vote and take part in the conduct of public affairs. Traditionally the most visible groups excluded from the electoral process were women and minor children below the age of adulthood.[4] Nowadays, in most systems female and male citizens are entitled to participate in the democratic process on equal footing, but the exclusion of minors seems to have the consequence of "aging" the will of the people, in the sense of representing the interests of senior members of the population in a disproportionate manner.

Democracy and the Right to Good Governance

While the right to democratic governance is designed to implement the mandate of a political community to self-govern, which it does by establishing rules and procedures in order to facilitate the decision-making process, the concept of good governance is focused upon the substance of those democratic decisions. The will of the people established in a democratic manner should be directed towards the attainment of the good of the people.

The right to good governance should be regarded as a two-fold norm. First, the requirement of good governance places an obligation on those in authority to pursue the good of the political community they govern. Within this aspect, good governance may be connected to domestic constitutional provisions and various theories of common good. The notion of good governance in international law may be identified as embodying human rights provisions dealing with various aspects and conditions for a peaceful, good life for the ordinary individual. Article 28 of the UDHR provides an individual entitlement to "a social and international order in which the rights and freedoms set forth in [the UDHR] can be fully realized."[5]

[2] Universal Declaration of Human Rights, G.A. Res. 217 art. 21 (Dec. 10, 1948) [hereinafter UDHR].

[3] International Covenant on Civil and Political Rights art. 25(b), Dec. 16, 1966, 999 UNTS 171.

[4] Certain jurisdictions (i.e., Austria) have made attempts to grant some electoral rights to children by lowering the required age to vote to 16 years. There also have been attempts to construct the institution of citizenship in such a way as to grant an additional number of electoral votes to adults with children in order to have the children's existence reflected in the democratic decision-making process. *Cf.* John Wall, *Why Children and Youth Should Have the Right to Vote: An Argument for Proxy-Claim Suffrage*, 24 CHILD., YOUTH & ENV'TS 108 (2014).

[5] UDHR, *supra* note 2, art. 28.

https://doi.org/10.1017/aju.2018.37 Published online by Cambridge University Press

The human rights provisions relevant to the right to good governance are found in the group of documents known as the International Bill of Human Rights: the UDHR, whose provisions have influenced national constitutions,[6] the ICCPR, and the International Covenant on Economic, Social, and Cultural Rights. The International Bill of Human Rights may be regarded as universal both because it contains the whole spectrum of human rights and because the two treaties contained therein are in force for the vast majority of states.

The right to good governance may therefore be understood as a meta-norm requiring those in power to respect human rights and to implement their specific requirements in the course of conducting public affairs. The real novelty of the right to good governance lies in its second aspect, dealing with the individual entitlement to be governed in a good manner. In this conception, citizens are not merely passive recipients of the actions taken by the authorities, but instead have a claim to be governed in a specific way, conducive to the attainment of human rights.

Moreover, the right to good governance is connected to the entitlements of every individual of a political community, especially those members in a fragile or vulnerable condition. One may point in this regard to specific categories of people, such as women (at least in some societies), children, and disabled people. States have concluded specific treaties to address the entitlements of those members of the political community.[7] The right to good governance encapsulates these general and specific human rights as both an individual entitlement and a template for public authorities' action.

The Empowered or Weakened Self?

One may discern still another, more contemporary perspective on the principle of self-determination, beyond the external and internal aspects that are familiar to international lawyers. The *individual* aspect of self-determination reflects the sphere of autonomy of an individual and the ability to create one's identity as an act of personal self-determination. As Franck himself noted in other work, in the age of individualism it is possible for an individual to construct various aspects of his or her identity, including elements of the self, such as citizenship, name, gender, career, or private affiliations.[8] The individual is treated as the primary rights-holder. The vision of an empowered individual provides an elegant theoretical vision, but as of now it still lacks direct application in contemporary international law. Instead, and quite interestingly, the UDHR contains provisions not only on human rights and freedoms but also on the duties of the individual towards one's community.[9] This community is recognized as the milieu conducive to the free and full development of individual's personality, but in some cases the community may restrict one's options in this regard.

Another argument against the vision of the empowered self as a description of present international law is the actual state of world conditions, in the sense of the state of poverty of the vast majority of the global population.[10] This state of poverty means the consequent inability to secure one's fundamental needs. Indeed, it is more

[6] Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 313 (1995–96).

[7] Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (Dec. 18, 1979); Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Dec. 13, 2007; Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3. The latter is a unique example of universal validity as it has been ratified by every member of the United Nations, except for one: the United States.

[8] THOMAS M. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM 150 (1999).

[9] UDHR, *supra* note 2, art. 29(1).

[10] PAYAM AKHAVAN, IN SEARCH OF A BETTER WORLD: A HUMAN RIGHTS ODYSSEY (2017); SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

https://doi.org/10.1017/aju.2018.37 Published online by Cambridge University Press

appropriate to describe the contemporary situation in many parts of the world as reflecting the image of a weakened rather than empowered self. Individual self-determination as the supreme form of the observance of human rights may be within the realm of possibility only for the minority of the global population residing in the affluent states of the West, while the material conditions of the majority of global population inhibit their actual ability to voluntarily shape their identities. Moreover, the conditions of particular individuals in the affluent states, particularly those subject to economic inequality and social immobility, may also form obstacles to those individuals' development of their identities.[11]

The weakened position of individuals in poverty limits the range of human rights accessible to them, in particular economic and social rights. Moreover, those persons may not easily activate procedural safeguards and other mechanisms in order to protect their rights. Their situation may be characterized as lacking the autonomy enshrined within the notion of human rights. One possible option left to those weakened individuals is to escape from the jurisdiction of the government that is failing to protect them and to provide for their human rights. Real-world examples of such escape are found in the migration of children and families from South to North America, or migration flows from African countries or the war-torn Middle East to the European Union.

The Ethics of Care and Good Governance

The legitimacy of the right to good governance may be grounded in the foundations of human rights provisions, requiring actions performed in the spirit of solidarity toward the human race. It seems that this attitude of solidarity or civic friendship should also be the basis for the acts performed within the ambit of good governance.

Solidarity as the basis of the right to good governance means that the traditional scope of governmental activities, which are political and economic, must be supplemented with social ones. These three spheres of engagement by public authorities may be regarded as vital for the proper functioning of a particular community. Nevertheless, as Sybil Schwarzenbach has pointed out, those three spheres have not developed in a parallel manner.[12] Political and economic engagement seem to be overemphasized within contemporary international relations, while the social perspective is the most neglected sphere of governments' activities. This state of affairs may be linked to the masculine attitude to engage in politics and commerce and the feminine attitude to concentrate on social relations. This masculine-feminine divide is reinforced by the conception of the social as a private sphere, with the political being seen as part of the public sphere.

My proposed method to stimulate public authorities' engagement with the social sphere is to implement the ethics of care within the public domain. Such soft "feminine" values as care, friendship, and solidarity should be embraced by public institutions to reinforce good governance within the state. The methods would include use of non-paternalistic interpretation of norms, cooperative assessments of needs, and the spread of shared and inclusive decision-making in public policy.

Such a reinterpretation of human rights obligations by the public authorities would be conducive to the proper functioning of the state, the implementation of the right to good governance, and the survival and flourishing of society.[13] As framed by the work of Philip Allott, the primordial aim of the new society is simply living the good life together.

[11] Michael Perry offers interesting real-world examples of those phenomena, stating that: "(1) A society's economic inequality may be such that the society's politics, even if nominally democratic, tends toward the plutocratic and therefore resists all but relatively small redistributive efforts to lift the poor out of poverty. (2) A society's social immobility may be such that most persons raised in poverty are destined to remain poor, or relatively poor, for the rest of their lives." Michael J. Perry, A Global Political Morality: Human Rights, Democracy, And Constitutionalism 166 (2017).

[12] Sibyl A. Schwarzenbach, On Civic Friendship: Including Women In The State 227 (2009).

[13] Philip Allott, Eutopia: New Philosophy And New Law For A Troubled World 220 (2016).

https://doi.org/10.1017/aju.2018.37 Published online by Cambridge University Press

Conclusion

The right to good governance should be understood as complementary to the norms of contemporary international human rights law. Its main function is to establish a proper standard of rule within domestic conditions and to enable the population to make claims for the proper conduct of public authorities. The required conduct is connected to respect for human rights provisions, which are settled within the international human rights treaties.

The right to good governance is inextricably connected to the traditional principle of self-determination and the right to democratic governance in international law. The main message of this right is encapsulated in the idea that self-governance should be good governance. The pursuit of the practice of good governance may be supplemented with the inclusion of the feminist perspective in the process of governance, paying due respect of such values as care, civic friendship, and solidarity.

https://doi.org/10.1017/aju.2018.37 Published online by Cambridge University Press