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

THE DUAL LIVES OF "THE EMERGING RIGHT TO DEMOCRATIC GOVERNANCE"

Gregory H. Fox* and Brad R. Roth†

Thomas M. Franck's *The Emerging Right to Democratic Governance* has lived a dual existence.¹ On the one hand, it is almost universally cited as having brought international lawyers into the freewheeling debate of the early 1990s among scholars of international relations, comparative politics, and political theory about the so-called "Third Wave" of democratization.² On the other hand, the article is not infrequently described as a legal avatar of post-Cold War Western triumphalism, often sharing a sentence or a footnote with Francis Fukuyama's *The End of History and the Last Man*. From the standpoint of the two authors of this essay—one a long-time defender of Franck's thesis and the other a long-time critic³—both of these broad-brush characterizations of the article contain elements of truth, but both are also woefully incomplete.

Franck's Article

There can be no question that Franck's 1992 article fundamentally changed the scholarly conversation about the relationship between international legal norms and governmental legitimacy. Although human rights instruments had long acknowledged a right to political participation, this right had for most of its history attracted little interest from international organizations and human rights bodies,⁴ and consequently had been largely ignored by academics.⁵ The political participation norm had been: (1) open-textured as to the character of elections that could, in an ideologically pluralistic international community, be deemed "genuine"; (2) indeterminate as to the requisite relationship between electoral outcomes and the effective exercise of political authority; and (3) lacking in any

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

² See, e.g., SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991); see generally Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 542 n.12 (1992) (reviewing the already extensive political science literature on transnational democracy issues).

³ See *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* (Gregory H. Fox & Brad R. Roth eds., 2000) (containing various contributions reflecting the controversy).

⁴ A major exception was the suspension of Greece from the Council of Europe following the 1967 *coup d'état*. See *The Greek Case*, 12 Y.B. EUR. CONV. HUM. RTS. (1969).

⁵ A rare and telling exception was Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988) ("For a right regarded as foundational, political participation suffers from serious infirmities. The norms defining it are either vague or, when explicit, bear sharply disputed meanings.").

authorization of coercive (let alone forcible) measures, unilateral or collective, to redress violations. Notwithstanding nominal consensus in the international system on the principle that “[t]he will of the people shall be the basis of the authority of government,”⁶ a government’s legal capacity to assert rights, incur obligations, confer immunities, and exercise powers on a sovereign state’s behalf stemmed from its ability to establish and maintain “effective control through internal processes,” not from its electoral pedigree.⁷

The end of the Cold War augured a potential shift in the very foundations of the international order, and Franck’s article was emblematic of the prevailing sense of anticipation. International organizations, no longer systematically prone to deadlock or allergic to matters once thought to be “essentially within the domestic jurisdiction,” became increasingly active in brokering solutions to internal crises of governmental legitimacy. In so doing, they began to serve by invitation as arbiters of “free and fair elections” within sovereign states, assuming an essentially supervisory role in the Nicaraguan and Haitian elections of 1990.⁸ Meanwhile, the Conference on Security and Co-operation in Europe (CSCE) issued proclamations committing its membership, including the newly-democratized East-Central European states, to the maintenance of liberal-democratic processes as the exclusive bases for establishing governance.⁹ Even the UN General Assembly, albeit somewhat equivocally, overcame its ideological heterogeneity to speak up for international assistance in upholding “the principle of periodic and genuine elections.”¹⁰

Franck’s *The Emerging Right* exhaustively adduced the collective practice and *opinio juris* relating to international promotion of democratic processes. Franck extrapolated from that accumulated material his famous assertion that democracy “is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.”¹¹ Yet for all the rigor of its analysis, the article did not engage with a series of critical and vexing questions that follow from its central contention.

Limitations of the Article

First, the article contains no clear definition of “democracy,” let alone a discussion of the competing definitions that have preoccupied scholars. It derives components of a “democratic entitlement” from antecedents such as the right of peoples to self-determination and the right of individuals to freedom of expression, and heavily emphasizes electoral rights. But one looks in vain for a comprehensive definition that can resolve conflicts of values that surface among putative “democrats” in fraught circumstances. This gap leaves the democratic entitlement thesis vulnerable to the charge of indeterminacy, on the ground that democracy remains “an essentially contested

⁶ Universal Declaration of Human Rights, G.A. Res. 217 art. 21(3) (Dec. 10, 1948).

⁷ BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT (2011).

⁸ Thereafter, international electoral assistance from all quarters exploded, becoming a constant in both newly democratizing states and in some stable democracies. See Christina Binder, *Two Decades of International Electoral Support: Challenges and Added Value*, 13 MAX PLANCK Y.B. U.N.L. 213 (2009).

⁹ Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, 29 ILM 1305 (1990); Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, Nov. 21, 1990, 30 ILM 190, 193 (1991); Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Oct. 3, 1991, 30 ILM 1670 (1991).

¹⁰ G.A. Res. 45/150 (Dec. 18, 1990) (129-8-9) (on “Enhancing the effectiveness of the principle of periodic and genuine elections”); *but see* G.A. Res. 45/151 (Dec. 18, 1990) (111-29-11) (on “Respect for the principle of national sovereignty and non-interference in the internal affairs of States in their electoral processes”).

¹¹ Franck, *supra* note 1, at 46.

concept” that by its nature is not susceptible of a single agreed meaning.¹² In response, some scholars suggest that it is enough for international practice—particularly that of UN postconflict peacekeeping missions and international territorial administrations—to reflect a minimalist conception of democracy centered on elections and their honest run-up and administration.¹³

Related problems can immediately be identified. Assuming that we can often, as a practical matter, identify a state as “democratic” with reasonable confidence, how do we know when developments within a state have eroded its “democratic” nature? This problem has become evident within the so-called democracy protection regimes that arose in Latin America, Africa, and elsewhere in the years following Franck’s article. The easy case is a coup replacing an elected regime with a military junta, but what of executive usurpation of legislative functions, or a dubious legislative impeachment of an elected president, or extreme politicization of the judiciary, or some other impairment of “democratic performance”?¹⁴ What about states that act preemptively against antidemocratic actors in their midst, perhaps by banning particular parties in the name of preserving democracy?¹⁵

Even more troublingly, *The Emerging Right* does not explore the implications of a democratic entitlement for the agency relationship between states and their governments.¹⁶ Given the continued presence in the international community of nondemocratic political orders, it seems impractical to deny to all regimes lacking a free and fair electoral mandate the capacity to represent their respective states for legal purposes. Yet this consequence seems logically to follow if “*only* democracy validates governance.”¹⁷ Accordingly, regimes not chosen democratically should have their ambassadors’ credentials rejected by both international organizations and foreign states that accept the democratic entitlement. Such regimes’ designated heads of state, heads of government, and foreign ministers travelling abroad should be denied immunity *ratione personae*, and their officials operating domestically should be stripped (at least presumptively) of immunity *ratione materiae* for acts committed in an official capacity. Such regimes should not be entitled to undertake treaty obligations, or to provide diplomatic protection for the state’s citizens. Most critically, the regime should have no standing to assert the state’s territorial inviolability against a military intervention aimed at installing a rival government possessed of an electoral mandate, as Michael Reisman argued in support of the U.S. invasion of Panama in 1989.¹⁸ In each such instance, the agency relationship normally assumed to exist between a state and a regime that is in effective control of it should be wholly severed. Does the democratic entitlement compel such results?

A further unanswered question concerns the balance between the promotion of democratic processes and other, sometimes conflicting goals of international institutions, particularly with respect to multilateral efforts at democracy promotion in postconflict states.¹⁹ Some political scientists have argued that holding elections in such states immediately after conflicts can reinforce the ethnic, religious, or other divisions that spurred the

¹² See, e.g., Brad R. Roth, *Evaluating Democratic Progress: A Normative Theoretical Perspective*, 9 ETHICS & INT’L AFF. 55 (1995).

¹³ See, e.g., GREGORY H. FOX, *HUMANITARIAN OCCUPATION* 157-62 (2008).

¹⁴ See David Landau, *Democratic Erosion and Constitution-Making Moments: The Role of International Law*, 2 U.C. IRVINE J. INT’L, TRANSNAT’L & COMP. L. 87, 99-108 (2017).

¹⁵ See Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007); Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1 (1995); Brad R. Roth, *Democratic Intolerance: Observations on Fox and Nolte*, 37 HARV. INT’L L.J. 235 (1996); Martti Koskenniemi, *Whose Intolerance, Which Democracy?*, 37 HARV. INT’L L.J. 231 (1996); Gur Bligh, *Defending Democracy: A New Understanding of the Party-Banning Phenomenon*, 46 VAND. J. TRANSNAT’L L. 1321 (2013).

¹⁶ See generally BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* (1999).

¹⁷ Franck, *supra* note 1, at 47.

¹⁸ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AJIL 866, 871 (1990).

¹⁹ See Gregory H. Fox et al., *The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law*, 67 AM. U. L. REV. 649, 679-83 (2018) (collecting citations).

conflict in the first place and functions to undermine popular trust in the new democratic institutions, however well-crafted they may be.²⁰ Others have argued that if democratic institutions are not established immediately, formerly warring factions denied the opportunity to seek a popular electoral mandate for their agendas will feel cheated, will come to see the promise of “democracy” as hollow and, frustrated, will return to fighting.²¹ Should the international community prioritize immediate democratization or mid-term stability?

These reflections on the first “life” of Franck’s thesis address implications not explored in the article. The second life—the persistent claim that *The Emerging Right* dresses up in universalist garb an historically and politically contingent theory of governance—is a challenge to the validity of the article’s central thesis.

A Cover for Imperialism?

Skepticism about “free and fair elections” as the universal touchstone of governmental legitimacy takes many forms. One can accept standard liberal premises about the ends of political life and yet regard electoral mandates as potentially orthogonal to considerations of legitimacy or good governance. Liberian President Charles Taylor and Ukrainian President Viktor Yanukovich were both democratically elected (the former overwhelmingly so, under the peacemaking auspices of a regional organization), and yet few democrats lamented the forcible overthrows of their administrations. Likewise, the international community High Representative’s 1999 removal of Nikola Poplasen, the duly elected Serb representative on Bosnia’s collective presidency, and its 2001 removal of Ante Jelavic, the elected Croat representative, met with little “democratic” objection from those who champion electoral solutions to civil conflict. Procedures are designated as democratic because they are associated, under standard conditions, with social outcomes identifiable as democratic; a perceived chronic or acute failure to achieve those outcomes in practice will almost inevitably vitiate adherence to electoral mandates.

In real-world contexts, especially those marked by the polarization associated with internal armed conflict, the societal conditions needed for the procedures to produce meaningfully democratic outcomes—e.g., conditions that constituents might recognize as genuine political equality—are frequently absent. Even worse, armed conflict within a state may reflect clashing interpretations of democratic ends, at least as applied to local conditions. We do not know what democracy *is* until we know what democracy is *for*, and partisans of the conflicting sides may disagree on precisely this.

Where interpretations of democracy’s purposes clash with respect to a given country’s circumstances, the international imperative of adherence to an electoral mandate can be “turned on or off,” at the discretion of powerful actors. A coup against an elected government in Egypt (2013) or Thailand (2014) can thus be quietly applauded or ignored by the same actors who may trumpet the democratic entitlement in more convenient cases.

Irrespective of the seriousness of these challenges, it would be a mistake to regard *The Emerging Right* as a cover for imperialist domination. Indeed, Franck dedicated much of his career to advocating for the interests of non-Western peoples and states.²² Franck was acutely aware of how a Western-led advocacy of democratic norms could be both misused by its proponents and misperceived in the global South. The article reflects the pains he took to preempt these dangers.

First, Franck presented the democracy norm as an example of the theory of normative legitimacy he had set out two years earlier in his important book, *The Power of Legitimacy Among Nations*.²³ The legitimacy thesis sought to avoid the stale formalism of asking whether international law is really “law” in favor of examining traits in a rule

²⁰ See, e.g., JACK L. SNYDER, *FROM VOTING TO VIOLENCE: DEMOCRATIZATION AND NATIONALIST CONFLICT* (2000).

²¹ See, e.g., Gregory H. Fox, *International Law and the Entitlement to Democracy After War*, 9 GLOBAL GOV. 179 (2003).

²² See David Kennedy, *Tom Franck and the Manhattan School*, 35 N.Y.U. J. INT’L L. & POL. 397 (2003).

²³ THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

that, in practice, make it more likely to exert a “compliance pull.” Above all, these traits prized an inclusive and fair process. *The Emerging Right* asked whether in its early days the democratic entitlement exhibited these traits and concluded that it did. Because the entitlement had not yet been fully integrated into the work of international organizations, the article warned that its continued legitimacy depended upon its equal and transparent application, including by international monitors. “Older democracies,” Franck urged, should be the first to open their territories to international election observers “in the hope that this will lead the way to near-universal voluntary compliance.”²⁴

Second, the democratic entitlement, in Franck’s view, had its genesis in the right to self-determination, an idea championed most prominently in the post-World War II era by anticolonial movements. The prominence of a right to self-determination in the UN Charter and the later success of the decolonization movement meant that the right “had been both universalized and internationalized, for it could now be said to portend a duty owed by all governments to their peoples and by each government to all members of the international community.”²⁵ That democratic norms could emerge from a set of procedures the developing world had asserted *against* the dominant Western powers is presented as central to the norm’s legitimacy.

Third, and perhaps most importantly in light of subsequent developments, the article contained an extended warning about the dangers of prodemocratic intervention. This concern stemmed not so much from the logical consequences of severing the agency relationship between nondemocratic regimes and the states whose territorial integrity they would otherwise be entitled to defend—the Reisman claim noted above—as from a simple fear of pretextual claims. In Franck’s view, this fear was entirely justified. To retain legitimacy, he argued, the regular monitoring of elections “will have to be uncoupled, in the clearest fashion, from a long history of unilateral enforcement of a tainted, colonialist ‘civilizing’ mission.”²⁶ This would require that all states “unambiguously renounce the use of unilateral or even regional, *military* force to compel compliance with the democratic entitlement in the absence of prior Security Council approval.”²⁷ He underlined the point one page later: “the principal enemy” of the new rule “is fear of its vigilante enforcement.”²⁸

Finally, whatever qualms one might have about the practical implications of *The Emerging Right* for the global South, the critique of Franck’s view as culturally particular has not stood the test of time. The most highly developed “democracy protection” regimes have emerged not at the United Nations or in Europe, but within intergovernmental organizations in Africa and Latin America. The 1999 Economic Community of West African States Lomé Protocol, the 2001 Organization of American States Inter-American Democratic Charter, and the 2007 African Union African Charter on Democracy, Elections and Governance all preauthorize a range of remedial actions against member states whose democratic institutions are disrupted.²⁹ Empirical investigations of the African regime suggest that it has had moderate success in decreasing the incidence of antidemocratic coups.³⁰

²⁴ Franck, *supra* note 1, at 90.

²⁵ *Id.* at 54.

²⁶ *Id.* at 84.

²⁷ *Id.* at 84 (emphasis in original).

²⁸ *Id.* at 85.

²⁹ See the discussions of these instruments in Enrique Lagos & Timothy D. Rudy, *In Defense of Democracy*, 35 U. MIAMI INTER-AM. L. REV. 283 (2004); Patrick J. Glen, *Institutionalizing Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance*, 5 AFR. J. LEGAL STUD. 119 (2012); Eliav Leiblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT’L L. J. 337 (2011) (discussing the Economic Community of West African States).

³⁰ Jacob Wobig, *Defending Democracy with International Law: Preventing Coup Attempts with Democracy Clauses*, 22 DEMOCRATIZATION 631 (2015); Issaka K. Souaré, *The African Union as a Norm Entrepreneur on Military Coups d’état in Africa (1952–2012): An Empirical Assessment*, 52 J. MOD. AFRICAN STUD. 69 (2014).

Conclusion

The Emerging Right left critical questions about the democratic entitlement unanswered. It also precipitated a fierce debate about the capacity of general international law to assimilate notions of democratic legitimacy without sacrificing other essential values. But a quarter-century on, Franck's foundational work on the democratic entitlement remains as trenchant and as relevant as it was in 1992, and continues to be the indispensable starting point for inquiry in this area.