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What has Become of the Emerging Right to Democratic Governance?

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Abstract

In 1992 the American Journal of International Law *published an article by Tom Franck entitled 'The Emerging Right to Democratic Governance'. The article inaugurated an important debate on the relationship between international law and democracy. Reviewing that debate, I examine four different ways of thinking about the contemporary significance of the emerging right to democratic governance. While not claiming that any is wrong, I consider some respects in which each is limited. I also discuss Haiti, as a country which inspired the thesis of the emerging democratic entitlement, and one which remains illuminating for it today.*

Eighteen years ago the *American Journal of International Law* published an article by Tom Franck entitled 'The Emerging Right to Democratic Governance'.[1] When you type Tom's name in conjunction with 'democratic governance' into Google, you get 116,000 hits. HeinOnline lists 313 articles in US law reviews citing the piece, and to that list could be added a hundred further texts, and perhaps substantially more, in non-US journals and in reports and other policy documents. But far be it from me to endorse such crude measures of academic impact; what are really striking are the epithets which have come routinely to be attached to this article: 'seminal', 'pioneering', 'path-breaking'. This is plainly a contribution to international legal scholarship which has inspired and provoked many people. I am among those who were inspired

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

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and provoked by it during the decade of its appearance, and here I revisit the topic for the first time since then, asking 'What has become of the emerging right to democratic governance?'.

Before suggesting some possible answers, let me recall the main lines of Tom's argument. He began by highlighting two events which had recently occurred at the time he was writing. In Russia, the attempted coup of August 1991, aimed at putting a stop to Gorbachev's reforms and preventing the break-up of the Soviet Union, was foiled. Then, the next month in Haiti, the successful overthrow of elected president Jean-Bertrand Aristide elicited an unprecedented response in international organizations. The UN General Assembly demanded that Aristide be returned to office, while the OAS recommended that its members impose sanctions on Haiti 'to bring about the isolation of those who hold power [there] illegally'.[2] In both these cases, Tom remarked, 'the leaders of states constituting the international community vigorously asserted that *only* democracy validates governance'.[3] He went on, 'This dramatic statement attains even more potency if, as in the Haitian case, it is transposed from political philosophy, where it is "mere" moral prescription, to law, where a newly recognized "democratic entitlement" was used in both the OAS and the UN General Assembly to impose new and important legal obligations on states.'[4]

As this already makes clear, Tom's thesis had to do with validation (and, with that, legitimacy), democracy, and entitlement. He claimed that the legitimacy of governments was becoming a matter not just of national arrangements, but of international law. Furthermore, under international law democracy was becoming the basis of governmental legitimacy. Indeed, democratic governance was becoming an enforceable entitlement. 'We are not quite there', he wrote, 'but we can see the outlines of this new world in which the citizens of each state will look to international law and organization to guarantee their democratic entitlement.'[5] What made the development so dramatic – such a 'sea change'[6] – was, of course, that international law had previously been understood as strictly agnostic with regard to the forms of government. In the divided world of the preceding decades, that had seemed not only inescapable, but also (and especially in the case of democracy) prudent: as early as 1946, George Orwell had complained that democracy was becoming meaningless – a feel-good word that was claimed by 'the defenders of every kind of régime . . . [who] fear that they might have to stop using the word if it were tied down to any one meaning'.[7]

But if the post-Cold War turn to liberal democracy was the watershed in Tom's account, he considered that the democratic norm had not suddenly materialized

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[2] OEA/Ser.F/V.1/MRE/RES.1/91, corr.1 (1991).
[3] Franck, *supra* note 1, at 47.
[4] *Ibid.*
[5] *Ibid.*, at 50.
[6] *Ibid.*
[7] G. Orwell, *Why I Write* (2004), at 109 (from 'Politics and the English Language', first published 1946). See, more recently, Nancy, 'On Democracy', available at: www.bbk.ac.uk/bih/news/ondemocracy.

from nothing. He identified three key 'building blocks' which had helped towards its construction. The first, going back to the interwar period, was the principle of self-determination. On his account, self-determination 'postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion'. It is linked to a 'long-evolving tradition of maintaining observers . . . at elections in colonies and trust territories'.[8] The second, originating in the 'anti-totalitarianism born of World War II', was the right to 'free political expression'.[9] Protected through a multiplicity of international and regional regimes, rights to freedom of expression, assembly, and opinion constitute 'the essential preconditions for an open electoral process'.[10] The third, and newest, building block was the emerging entitlement to periodic elections which are free and fair. As Tom explained, with a 'substantial new majority of states [now] actually practicing a reasonably credible version of electoral democracy', stipulations in human rights treaties for a right to genuine periodic elections begin 'to approximate prevailing practice and thus may be said to be stating what is becoming a customary legal norm applicable to all'.[11]

Although Tom well recognized that democracy is not synonymous with elections, his analysis placed considerable emphasis on this third and newest building block as the capstone of the edifice, and the latter part of his discussion was given over to the question of how to implement and enforce the democratic entitlement conceived as a right to free and fair elections. He was impressed with the election-monitoring activities and institutions which had burgeoned in the early 1990s, again highlighting Haiti as a case in point. The UN mission to oversee the elections in Haiti in 1990 'may be understood', he wrote, 'as the first instance in which the United Nations, acting at the request of a national government, intervened in the electoral process solely to validate the legitimacy of the outcome'.[12] At the same time, he noted the way '[m]onitoring by governmental and nongovernmental observers . . . became an important ad hoc part of the post-1989 transition from Communist to democratic regimes in Eastern Europe'.[13] He expected that international monitoring of national elections would become increasingly routine with time. At any rate, he thought it should do so, and he urged the 'older democracies' to take the lead in volunteering to have their elections observed and in establishing a permanent international election-monitoring service.[14] But he also believed that the right to free and fair elections needed to have teeth. Where it was violated because of a refusal to permit free and fair elections or to respect the outcome of them, consequences had to follow. He was insistent, however, that these consequences – whether in the form of 'sanctions, blockade or military intervention in limited circumstances' – had to be collectively, rather than unilaterally, imposed.[15]

[8] Franck, *supra* note 1, at 52.
[9] *Ibid.*, at 61.
[10] *Ibid.*
[11] *Ibid.*, at 64.
[12] *Ibid.*, at 72–73.
[13] *Ibid.*, at 74.
[14] *Ibid.*, at 90.
[15] *Ibid.*, at 85.

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In bringing his article to a conclusion, Tom made reference to the well-known claim that liberal democracy is conducive to peace, not generally, but with other liberal democracies – the so-called 'liberal peace'. It follows from this, he wrote, that 'one way to promote universal and perpetual nonaggression – probably the best and, perhaps, the only way – is to make democracy an entitlement of all peoples'.[16] At the same time, he pointed to the links between democracy and human rights, the sense in which democracy supports the protection of human rights and hence also the restoration and maintenance of civil peace in post-conflict societies. 'The symbiotic linkage among democracy, human rights and peace is now widely recognized.'[17] Finally, in one of the article's most quoted passages, he highlighted the connection to economic liberalization: '[t]he entitlement now aborning is widely enough understood to be almost universally celebrated. It is welcomed from Malagache to Mongolia, in the streets, the universities and the legislatures, not only because it portends a new, global political culture . . . but also because it opens the stagnant political economies of states to economic, social and cultural, as well as political, development.'[18] '[A]s even the Chinese leadership must be discovering', he commented, economic development is 'linked inextricably with political freedom . . . An economic free market cannot long flourish without creating pressure for a free market of ideas.'[19]

That, then, was the emerging right to democratic governance, as conceptualized by Tom in 1992. In turning now to the present, I want to examine four different ways of answering the question what has become of it today – four different accounts of its contemporary significance and fate. Briefly to introduce these before proceeding, one focuses on the legal status and prospects of the democratic norm. A second foregrounds the relationship just mentioned between democracy and peace – or, as we may more commonly say today, security. A third follows the links between democracy and development or modernization. And a fourth picks up a theme to which Tom did not refer, but which was my own preoccupation in addressing this debate: ideology. I argued at the time that a democratic norm centring on elections served as ideology, diverting attention and energy away from elements of the democratic tradition with greater emancipatory promise.[20] However, what I failed to consider was how we are to account for that diversion (if that is what it was); I did not investigate the wider conditions in which the thesis of the emerging democratic norm took on its significance and appeal. At the end, then, I will go some way to repairing that omission by following up on one of the countries which interested Tom most. What can we reveal with hindsight about the democratic norm? What can we reveal, in particular, about its place within that phase of capitalist consolidation we now call neoliberalism?

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[16] *Ibid.*, at 88.

[17] *Ibid.*, at 89.

[18] *Ibid.*, at 90.

[19] *Ibid.*

[20] See Marks, 'The End of History? Reflections on Some International Legal Theses', 8 *EJIL* (1997) 449; S. Marks, *The Riddle of All Constitutions* (2000); and Marks, 'Big Brother is Bleeping Us – With the Message that Ideology Doesn't Matter', 12 *EJIL* (2001) 109.

1 Legitimacy

An initial way of answering the question 'what has become of the emerging right to democratic governance?' is to say that the idea of such a right has become accepted, even if still as a proposition about emerging international law, rather than as a settled norm. Greg Fox is among those who have written along these lines. In a recent entry in the *Max Planck Encyclopaedia of Public International Law* on the 'right to democracy', he highlights the developments since the early 1990s which lend further weight to the arguments Tom adduced.[21] International and regional organizations have created a range of mechanisms to promote and secure democratic governance in member states. Within the United Nations, there is now an Electoral Assistance Division, and democracy promotion is also part of the Organization's activities in the fields of post-conflict reconstruction, the rule of law, and conflict resolution. Within the European Union, the existence of stable institutions for guaranteeing democracy is among the criteria for admission to membership, while the Organization of American States explicitly proclaims democracy as an internationally guaranteed right and allows for the suspension of member states in which a democratically elected government is overthrown. In various forms, democracy promotion is likewise a feature of the work of the Organization for Security and Cooperation in Europe, the African Union, the Commonwealth, and Mercosur.

For Fox, these developments show strong support for the emergent norm of democratic governance, but they also make clear that it must continue to be regarded as emergent. As he sees it, two principal constraints have limited the progress of the democratic entitlement. First, there is a lack of consensus about the definition of democracy involved. International practice largely favours a 'procedural' definition, centred on periodic elections which are free and fair and associated rights of political participation. However, this definition has been criticized in the name of a 'substantive' conception which includes protection of minorities, equality guarantees, and economic and social rights. Fox observes that substantive definitions of democracy are reflected in some international documents, but the problem with them is that they are 'so broad as to become almost useless as standards of measurement capable of meaningfully evaluating state conduct'.[22] Secondly, there is significant variation in the extent to which a democratic norm is recognized across different regions of the world. European and Inter-American practice stands in sharp contrast to the absence of any regional framework for democracy promotion in Asia and the Middle East. Fox comments that '[t]his wide spectrum of commitment to democratic governance provides an uncertain foundation for a global norm'.[23] That said, his overall conclusion is that (as he puts it elsewhere) 'the legal door is now open to determined efforts to spur

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[21] Fox, 'Democracy, Right to, International Protection', *Max Planck Encyclopaedia of Public International Law*, available at: www.mpepil.com.

[22] *Ibid.*, at para. 35.

[23] *Ibid.*, at para 36.

democratization, and . . . the failure to do good everywhere should not be seen as a bar to doing good anywhere'.[24]

Fox's analysis is plainly focused on the legal status and prospects of the emerging right to democratic governance. Others have similarly considered developments since the early 1990s with a view to weighing the evidence for the norm. On one account, evidence is lacking for a democratic norm in general international law, but the right to democratic governance has been established as a regional norm in Europe.[25] On another account, there is no international legal basis for a right to democratic governance, but states are obliged to move 'towards democracy', in the sense that regressive measures can and should be sanctioned and positive steps must be taken to put in place and consolidate democratic institutions.[26] From this perspective, democratization as a process is legally required, even if democratic governance as a state of affairs is not. Some analysts believe that we can 'look forward to a time in the near future when the universal applicability of the right to democratic governance will be as broadly accepted internationally as other human rights',[27] while others highlight the tenacity of criteria of governmental legitimacy which are tied to effectiveness, as distinct from democracy. Democratic legitimacy may be a more common factor in recognition practice in the 21st century than it was in previous times, but – so those latter argue – it remains 'just another policy element', rather than a legal imperative.[28]

For those doubtful about the emerging norm, a key concern has always been enforcement. What action is legitimated in the name of enforcement? Inasmuch as the democratic entitlement has been linked with a right of 'pro-democratic intervention', the worry has been expressed that it dangerously weakens the legal prohibition on the use of force. A new right of unilateral pro-democratic intervention drapes the 'arbitrary exercise of power . . . in the robes of dubious legality'.[29] Whatever the cogency of the liberal peace, 'assertions of a new, "democratic" legitimism endanger peace and security, and even democracy itself'.[30] But the misgivings also go further, and have to do with the question of what it means to license 'pro-democratic' interference, whether in the form of military action or non-military action, and whether unilaterally or collectively. As one author observes, in a 'typical case, all sides of a political struggle claim the democratic high ground'.[31] A right to democratic governance

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[24] Fox and Roth, 'Democracy and International Law', *Review of International Studies* (2001) 327, at 338.

[25] Wheatley, 'Democracy in International Law: A European Perspective', 51 *Int'l & Comparative LQ* (2002) 225.

[26] Petersen, 'The Principle of Teleology in International Law', 34 *Brooklyn J Int'l L* (2008–9) 33.

[27] Rich, 'Bringing Democracy into International Law', 12 *J Democracy* (2001) 20, at 33.

[28] Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', in G. Fox and B. Roth (eds), *Democratic Governance and International Law* (2000), at 123, 153.

[29] Byers and Chesterman, ' "You the People": Pro-Democratic Intervention in International Law', in *ibid.*, at 259, 292.

[30] Roth, 'Popular Sovereignty: The Elusive Norm', 91 *Am Soc Int'l L Proceedings* (1997) 363, at 364.

[31] *Ibid.*, at 367.

makes it possible for powerful outsiders to overrule that struggle and claim legal justification for doing so. If such a right 'has any determinacy, [it] entails what amounts to a liberal-democratic *jihad*, a drive to impose a specific liberal-democratic world view that has yet to find general acceptance'.[32] For the writer of these words, there is no evidence that international law endorses this, and nor should it. 'Until such time as a genuine consensus emerges as to the criteria of governmental legitimacy', he maintains that 'the principle of nonintervention will remain an enlightened one'.[33]

2 Security

A second way of answering the question 'what has become of the emerging right to democratic governance?' takes up and refocuses that last concern. On this analysis, far from carrying on in the direction Tom pointed, the democratic entitlement has collapsed under the weight of the post-9/11 security agenda. The impact of the 'war on terror' on activities in the field of democracy promotion is discussed by Thomas Carothers, long-standing head of the Democracy and Rule of Law programme at the Carnegie Endowment for International Peace and a leading practitioner of democracy promotion in the United States, in two articles in *Foreign Affairs*.[34] In the first, published in 2003, Carothers writes of the 'tradeoffs' between security and democracy which characterized prevailing US foreign policy.[35] He observes that the fact that democratic initiatives are limited by security needs is 'hardly a shocking new problem'.[36] However, the government was displaying contradictory policies – underplaying democracy concerns in some parts of the world (especially Central Asia), and overplaying regime change in other parts of the world (notably the Middle East). The 'Bush team must labor harder', he argues, 'to limit the tradeoffs caused by the new security imperatives and also not go overboard with the grandiose idea of trying to unleash a democratic tsunami in the Middle East.'[37]

By 2006, when the second article appeared, Carothers was clear that things were going badly wrong. There was a 'backlash against democracy promotion',[38] with governments in Russia and elsewhere expelling or harassing foreign NGOs and prohibiting local groups from receiving foreign funds. Western democracy assistance was being publicly denounced as 'illegitimate political meddling'.[39] Carothers explains that this can be understood, in part, as a consequence of changes in the nature and

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[32] *Ibid.*, at 368.
[33] *Ibid.*, at 370.
[34] In addition to these two articles, cited below, see, more recently, Carothers, 'Repairing Democracy Promotion', *Washington Post*, 14 Sept. 2007.
[35] Carothers, 'Promoting Democracy and Fighting Terror', 82 *Foreign Affairs* (2003) 84.
[36] *Ibid.*, at 96.
[37] *Ibid.*, at 97.
[38] Carothers, 'The Backlash against Democracy Promotion', 85 *Foreign Affairs* (2006) 55.
[39] *Ibid.*

context of democracy promotion. Many of the countries which had welcomed democracy assistance in the early post-Cold War years had evolved into 'semiauthoritarian' states with the trappings of democracy but no serious commitment to electoral competition. This initially stymied pro-democratic organizations, but with time it led them to change the way they worked. They began to focus on building the capacity of local civic groups and political parties to challenge the government in elections. The results were evident in the various 'colour revolutions' of the former Eastern bloc. In this regard, Carothers comments that the motives of US and other foreign agencies range 'from the principled to the instrumental', though these 'subtleties are generally lost on the targets . . . who tend to view such efforts as concerted campaigns to oust them'.[40]

But while Carothers concedes that the backlash may be partly a matter of democracy promotion becoming a victim of its own success – 'autocrats feeling the heat'[41] – he emphasizes that there is also a wider unease. Autocrats are able to portray democracy assistance as illegitimate political meddling because, in many countries of the world, 'Washington's use of the term "democracy promotion" has come to be seen . . . as a code word for "regime change"', that is to say, 'the replacement of bothersome governments by military force or other means'.[42] Carothers adds that 'the Bush administration has also caused the term to be closely associated with U.S. military intervention and occupation by adopting democracy promotion as the principal rationale for the invasion of Iraq'.[43] At the same time, he points to the way counter-terrorism laws and practices instituted by the administration further undermine the work of US democracy advocates. Detention without trial, unwarranted interception of communications, and torture by or with the collusion of US officials made it 'all too easy for foreign autocrats to resist U.S. democracy promotion by providing them with an easy riposte: "How can a country that tortures people abroad and abuses rights at home tell other countries how to behave?"'.[44]

Carothers's analysis is not specifically directed to the emerging right to democratic governance,[45] but it is plain that, as a potential basis for democracy promotion, that right is implicated in his discussion. His worry that it has suffered a significant setback is echoed, at least with regard to domestic counter-terrorism, in the vast literature on the rise of the national security state. In this literature, the years since 11 September 2001 are associated not with an advance, but with a retreat of, democracy, both in the 'advanced' countries of the West and elsewhere. On issues ranging from arbitrary detention to infringement of privacy, and from restrictions on public protest to racial discrimination, security fears have been invoked to legitimate deep incursions into

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[40] *Ibid.*, at 62.
[41] *Ibid.*, at 63.
[42] *Ibid.*, at 64.
[43] *Ibid.*
[44] *Ibid.*, at 65.
[45] For an earlier, speculative discussion of the impact of 9/11 on the emerging right to democratic governance see Macdonald, 'International Law, Democratic Governance and September the 11th', 3(9) *German LJ* (2002).

established democratic practice. This has not just been a matter of national policy; through action of the UN Security Council, it has drawn support from international law. The result has been to reverse the trends that supposedly underpin the emergent democratic entitlement, or at any rate to confront us with the authoritarian counter-trends that accompany them. From this perspective, it is telling that, as Carothers reports, Russia's crackdown on NGOs has been characterized as a 'security' measure against foreign encirclement and subversion.[46]

3 Development

A third way of answering the question 'what has become of the emerging right to democratic governance?' differs again. Here what is proposed is that Tom's thesis has been neither accepted, nor undermined. Rather, the democratic norm he had in mind has mutated into something else. Whereas his vision was of a universal entitlement backed up by an institutionalized and ideally world-wide system of election-monitoring, today democracy promotion is a dimension of development work. In 2002 the United Nations Development Programme's *Human Development Report* took as its theme 'Deepening democracy in a fragmented world'.[47] Referring to the 'new consensus' that 'governance matters for development',[48] the report emphasizes that what matters for human development is not just effective governance – important though that is – but democratic governance. This is in part because political freedoms are aspects of human development in their own right, but it is also because democracy can trigger a virtuous cycle of development, as political freedoms empower people to press for policies and priorities which expand the well-being of all. At the same time, democratic governance contributes to defusing or resolving social tensions, helps to prevent crises such as famines, and promotes the dissemination of information about critical health-related and other issues.

In highlighting the links between human development and democratic governance, the report notes the 'sombre realities of 21st century politics'.[49] Although recent decades have seen a world-wide shift from authoritarian to democratic politics, '[m]ost attempts at democratization are fragmented, involving small steps and large, forward and back'.[50] As Carothers also observes, countries which held democratic elections for the first time in the 1980s and early 1990s have, in many cases, either returned to more authoritarian forms of rule or are 'stalled' between democracy and authoritarianism. Others still are blighted by extremism and persistent or recurrent conflict. This shows that democracy 'means more than elections. It requires the consolidation of democratic institutions and the strengthening of democratic practices,

[46] Carothers, *supra* note 38, at 57.

[47] *Human Development Report 2002: Deepening democracy in a fragmented world* (2002).

[48] *Ibid.*, at 51.

[49] *Ibid.*, at 1.

[50] *Ibid.*, at 15.

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with democratic values and norms embedded in all parts of society.'[51] In particular, the report underlines the need for democratic values and norms to be embedded in the work of the military and police. Human development depends on personal security and civil peace, and, in turn, personal security and civil peace depend on bringing the security sector under democratic civilian control. From a human development perspective, it follows that peace-building in conflict-prone and post-conflict societies must be 'democratic peacebuilding'.[52]

This recharacterization of democracy as a development issue is reflected institutionally in the fact that the UNDP is currently the lead agency on democratic governance within the United Nations system. According to the UNDP website, a third of the Programme's annual budget goes to projects, programmes, and initiatives relating to democratic governance, and more than 130 UNDP offices around the world promote democratic governance as part of the activities they undertake at the request of governments.[53] This work is said to support efforts to advance democratic governance in four main areas: expanding participation in political decision-making, particularly by women and the poor; fostering the rule of law and making public institutions more transparent, accountable, and responsive; promoting anti-corruption, equal opportunity, and the empowerment of marginalized groups; and facilitating country-led assessments of democratic governance. Through its Oslo Democratic Governance Centre, the UNDP publishes a reference guide on democratic governance, with information about best practice and relevant indicators.[54] Although these indicators are not among the indicators laid down to monitor progress on the Millennium Development Goals, the UNDP regards democratic governance as a crucial concomitant to the equitable and sustainable realization of the MDGs, and it occupies a central place in the organization's strategic goals for 2008–2013.[55]

Considered from this angle, democratic governance is not so much a criterion of governmental legitimacy or an enforceable entitlement as a part of the project of international development. It names the form of 'good governance' which is today promoted alike by development agencies, aid workers, and peace-building authorities. Many analysts have highlighted the shift whereby the post-Cold War enthusiasm for election-monitoring gave way to a much wider range of interventions to reform the state and strengthen civil society. At issue, for scholars of development, is the difference between 'democratic transition' and 'democratic consolidation'. As one author puts it, while the 'transition process is critical, experience has shown that the more difficult battle is that for democratic consolidation'. And 'democratic consolidation is a

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[51] *Ibid.*, at 14.
[52] *Ibid.*, at 99.
[53] See www.undp.org/governance/about_us.shtml.
[54] See www.undp.org/oslocentre/.
[55] See further *A Guide to UNDP Democratic Governance Practice* (2010), available at: www.undp.org/governance/.

difficult, long-term process' which calls for wide-ranging 'investment in democracy'.[56] Even in relation to elections, another author points out that the focus of assistance has moved, from simple monitoring to more refined operations concerned with the design of electoral systems and the organization of electoral processes.[57] At the same time, this 'second generation democracy aid' – aid for the consolidation of democracy – is recognized to demand greater national 'ownership' of initiatives, and he proposes the idea of 'pacts for democratic development' as a way of fostering and structuring that ownership.[58]

4 Ideology

I have discussed the idea that Tom's claim has moved, respectively, forward, backwards, and sideways, so to speak. Logically, of course, there is only one further possibility. So let me turn now to a fourth and final way of answering the question 'What has become of the emerging right to democratic governance', in which the focus is not on what has changed, but instead on what has stayed the same, what has remained in place. Here, then, the question of the right's current significance and fate becomes a question about what it is and always was. In the writings we have considered so far, the general assumption is that our political hopes are appropriately expressed as aspirations to democracy, even if the consolidation of democracy is difficult to achieve, even if democratic practice has come under pressure from the 'prevention of terrorism', and even if there is no agreement on how democracy should be defined in the context of a democratic entitlement. For the political theorist Jodi Dean, however, it is not at all clear that we should continue to treat democracy as the cure for contemporary political problems, rather than 'symptomatic of them'.[59] Of course, we may treat it as both, but what is important for Dean is the elementary point that democracy as we know it sustains inequality. While the concept of democracy brings with it ideas of self-rule and political equality, '[r]eal existing constitutional democracies privilege the wealthy. As they install, extend, and protect neoliberal capitalism, they exclude, exploit, and oppress the poor, all the while promising that everybody wins.'[60]

To highlight the contradiction between reproducing social inequality and promising mutual gain is to assert the ideological character of democracy. In Dean's analysis, moreover, the ideology of democracy goes hand in hand with the ideology of neoliberal capitalism. She wants us to see how democracy sets parameters which place 'growth, investment, and profit . . . politically off-limits',[61] and how in the

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56 Rich, *supra* note 27, at 26–27.

57 Santiso, 'Development Cooperation and the Promotion of Democratic Governance: Promises and Dilemmas', *Internationale Politik und Gesellschaft* (2001) 386, at 391.

58 *Ibid.*, at 395, 386.

59 J. Dean, *Democracy and Other Neoliberal Fantasies* (2009), at 76.

60 *Ibid.*

61 *Ibid.*

process alternative ways of organizing collective life are systematically occluded. The appeal to democracy 'incorporates in advance any hope things might be otherwise';[62] it absorbs transformative energies by lodging politics 'in a field of already given possibilities'.[63] If she calls that field neoliberal capitalism, the name given to it in Tom's article is 'the economic free market', and it is evoked too in the language of 'investment', 'ownership', and 'pacts' used in connection with the mutation – the third account of the democratic norm as an aspect of development work – I have just described. Under these conditions, Dean maintains that democracy is less a signpost than an impasse. Since the key ideological move is not to conceal the contradictory character of democratic politics but instead to acknowledge and deflect it ('Look, democracy isn't perfect'), there is, on the one hand, an evasion of responsibility for 'current failures'; on the other hand, there is also an evasion of responsibility 'for envisioning [a different] politics in the future'.[64]

Liberal democracy is a system of representation, and in another recent intervention in debates about democracy the philosopher Alain Badiou reflects on what it is that gets represented.[65] To be sure, liberal democracy represents – in the sense of registering and measuring – the variety of opinions electors have about candidates, parties, policies, and programmes. But at a deeper level it also represents – in the sense of instantiating and upholding – a particular form of society and politics.[66] In his words, democracy is 'first of all the representation of the general system that bears its forms . . . [that is to say, it is] the consensual representation of capitalism, or of what today has been renamed the "market economy"'.[67] The book from which this passage is taken is a meditation on the 'meaning' in French politics of Nicolas Sarkozy. In a review of the book, a journalist asks the same question of the figures which dominate British politics.[68] What, in the general election which was held in the United Kingdom in 2010, was the meaning of Gordon Brown, David Cameron, and Nick Clegg? What did these men, with their colour-coded ties, stand for? 'Their strategies, their movements, their rhetoric were all variations on a theme of liberal, free-market capitalism', the journalist writes. And when election day came, '[s]uddenly the music stopped and, like children in a party game, they were caught striking meaningless poses'.[69] Meaningless in what sense? Not, it seems clear, in the sense George Orwell had in mind when he argued that democracy had come to mean everything and therefore nothing – not, that is to say, in the sense that too much was encompassed; rather, in

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[62] *Ibid.*, at 94.
[63] *Ibid.*, at 76.
[64] *Ibid.*, at 94.
[65] A. Badiou, *The Meaning of Sarkozy* (trans. D. Fernbach, 2008).
[66] I draw here on Slavoj Žižek, who elaborates these points with reference to Badiou. See S. Žižek, *First as Tragedy, Then as Farce* (2009), at 136.
[67] Badiou, *supra* note 64, at 91.
[68] Behr, 'A Denunciation of the "Rat Man"', *The Observer*, 1 Mar. 2009.
[69] *Ibid.* Behr's article was, of course, written before the general election. I adapt it slightly to bring that event into focus.

the sense that too little was encompassed. Democracy had become meaningless in the sense that all the really important questions were out of contention; all that was on offer was, with (major and minor) variations, 'more of the same'[70] – more transparency, more accountability, more diversity, more inclusion within the current framework which was not itself in question.

Like Carothers and the UNDP, Dean and Badiou are not specifically concerned in their writing with the emerging right to democratic governance. Yet, again, their assessments have implications for that right, suggesting a different kind of critique from the one that focuses on the dangers of pro-democratic intervention. From their perspective, the issue is not simply the prospect of a liberal democratic 'tsunami' or 'jihad'. It is not even liberal democracy as a 'specific world view that has yet to find general acceptance'. Rather, it is the character of democracy as part of the ideology of neoliberalism. The institutions of democratic governance have indeed spread around the world; democracy promotion constitutes today a huge industry; and pacts for democratic development open up a new frontier in contractarian practice and thought. But – so these critics invite us to ask – have those phenomena brought emancipation to the world's exploited and oppressed? Have they contributed positively to the reduction of poverty and helped efforts to redress the massive disparities of wealth and opportunity within and between countries? Have they improved the lives of the vast majority of the inhabitants of this planet to any significant extent at all? The fourth and final way of responding to the question 'What has become of the emerging right to democratic governance?' returns not with an answer, but with these questions.

5 Haiti

The idea of the emerging right to democratic governance drew its immediate inspiration, as we have seen, from events which occurred in the late 1980s and early 1990s. One of the countries on which Tom particularly focused was Haiti, and it will be instructive, before concluding, to consider the more recent history of that country.[71] How does the Haitian case stand with respect to the analyses we have just reviewed? What can we learn from it about the new departure in political and legal affairs it once seemed to epitomize? The starting-point for Tom's analysis is the international response to the military coup which occurred in the country in 1991. Noting the 'sudden and violent interruption of the democratic process' in Haiti, the UN General Assembly 'strongly [condemned] the illegal replacement of the constitutional president', affirmed 'as unacceptable any entity resulting from that illegal situation',

[70] Dean, *supra* note 59, at 93.

[71] For an excellent study of Haitian history, focusing on the period 1991–2006, see P. Hallward, *Damming the Flood: Haiti, Aristide and the Politics of Containment* (2007). (The 'flood' refers to Lavalas, the popular movement first established to fight the Duvalier regime and more recently associated with Jean-Bertrand Aristide.)

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and demanded the 'immediate restoration of the legitimate Government of President Jean-Bertrand Aristide'.[72] By way of enforcement, sanctions were imposed by the OAS and later also by the UN. The two organizations brokered an agreement for Aristide's return in 1993. After enlisting US military assistance, he was finally able to resume office under the terms of this agreement the following year.

For periodization purposes, let us treat this as a first phase of international efforts to 'promote democratic governance' in Haiti. A second phase relates to the period after Aristide was re-elected president in 2000. Again his presidency was violently challenged, but this time the 'pro-democratic' intervention was to remove, rather than reinstate, him. In February 2004, Aristide was put onto a plane by US officials and taken to the Central African Republic. (He subsequently moved in exile to South Africa.) Later that same day, the UN Security Council took note of his 'resignation', and authorized the deployment to Haiti of a 'multinational interim force' led by the United States and France to restore order, facilitate humanitarian assistance, and 'promote the rebuilding of democratic institutions' in the country.[73] The interim force was replaced shortly afterwards by the UN Stabilization Mission in Haiti (MINUSTAH), still in place today. MINUSTAH's mandate is to 'ensure a secure and stable environment within which the constitutional and political process in Haiti can take place', to support that process and 'foster principles [of] democratic governance and institutional development', and to 'promote and protect human rights, and ensure accountability for abuses.[74]

A third phase of this history differs from the first two, in that it was initiated not by a political insurgency, but by the catastrophic earthquake which struck Haiti in January 2010. Within days United States forces were again deployed to the country, and, alongside emergency relief, the discussion was again of security, humanitarian assistance, and the promotion of democratic governance. Opening a donors' conference two months after the disaster, the UN Secretary-General evoked a vision of 'wholesale national renewal' in Haiti: '[i]n partnership with the United Nations, Haiti's leaders are committing to a new social contract with the people'.[75] By this is meant, he said, a fully democratic government, along with economic and social policies to combat extreme poverty and redress entrenched disparities of wealth. In June of the same year, the Security Council highlighted the critical role of MINUSTAH in ensuring 'stability and security in Haiti', and authorized the deployment of additional police as part of the contingent. The Council also encouraged MINUSTAH to continue its work in helping to build the capacity of local rule of law institutions, and requested the force to assist in the preparation and conduct of the impending elections and to

[72] UN GA Res. 46/7, 11 Oct. 1991.

[73] UN SC Res. 1529 (2004), 29 Feb. 2004. On this and related developments see Miéville, 'Multilateralism as Terror: International Law, Haiti and Imperialism', 19 *Finnish Yrbk Int'l L* (2008) 63.

[74] See UN SC Res. 1542 (2004), 30 Apr. 2004.

[75] Ban Ki-moon, Opening Remarks to the Haiti Donors Conference, 31 Mar. 2010, available at: www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=768.

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coordinate international electoral assistance in cooperation with other stakeholders, including the OAS.[76]

Returning now to the question of the emerging right to democratic governance, the most obvious conclusion we can draw from these events is that democracy promotion has remained vivid in the work of the UN and other international organizations, and that it continues to be associated with elections, even if it is also closely linked to security, development, and reconstruction. The removal of Aristide in 2004, after US support for him had evaporated, likewise confirms the idea that regime change and democracy promotion may not be so far apart. Beyond those points, however, Haiti helps to bring into focus some further important aspects, to do with the context, effect, and premise of democracy promotion. Let us begin with the *context* in which democracy promotion occurs. The Secretary-General referred in his remarks after the 2010 earthquake to Haiti's extreme poverty, and emphasized the responsibility of the international community to help the local authorities in overcoming it. In welcoming the government's commitment to a new social contract, he also stressed the country's immediate need for food, water, and shelter. But why was there that need? Why was there that poverty? If international intervention belongs with the solution to Haiti's troubles, what is missing here is any sense that it may also be part of their cause.

Take the moment in 1994 when Aristide won the US military support upon which his reinstatement depended. The condition for that support was structural adjustment. Aristide was forced, when he returned to Haiti, to reduce government spending, privatize public services, and remove import tariffs. Haiti had previously been self-sufficient in its staple of rice, but opening the market to subsidized American grain meant that local production virtually ceased. And while the country's agricultural collapse was supposed to be offset by an expansion in manufacturing, the new factories did not last long, and the slums just grew and grew. This prompts reflection on the *effect* of democracy promotion. As Peter Hallward observes in a thoughtful study of recent Haitian history, '[r]ather than strengthen Haiti's capacity to resist the [long-standing] foreign manipulation of its economy', international initiatives undertaken within the framework of democratic governance programmes have tended to weaken the prospects for democratic control of economic life. These initiatives 'combine with IMF-driven structural adjustment to enhance US penetration of the local market'.[77] The worst of the social devastation caused by this is then mitigated (though often in the process also intensified) by 'secondary' measures – for example, the distribution of food aid. Hallward remarks that these are mostly channelled through NGOs, themselves less interested in 'helping to enhance what may be strong and assertive in Haitian society than in offering services to the vulnerable and the weak'.[78] Of course, such humanitarian services are vital, and never more so than since the 2010 earthquake,

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[76] UN SC Res. 1927 (2010), 4 June 2010.

[77] Hallward, *supra* note 71, at 179.

[78] *Ibid.*, at 180.

but his point is that 'the way they are provided reinforces the prevailing balance of political power'.[79]

In turn, this directs attention to the *premise* of democracy promotion. We have recalled the UN Security Council's authorization for armed, 'pro-democratic' intervention in Haiti in 2004. In giving this authorization, the Council expressed concern at the deteriorating humanitarian situation, and announced its determination to support a 'peaceful and constitutional solution to the current crisis'. It further demanded that 'all the parties to the conflict . . . cease using violent means and . . . respect international law, including . . . human rights'.[80] In what sense, however, was this a 'humanitarian' situation? How did it come to be labelled a 'crisis'? And had 'all parties to the conflict' simply fallen into a condition of generalized lawlessness and abuse, in which Aristide's supporters and opponents were each equally to blame? One is left to imagine that what is involved here is too confused or too confusing to explain: it has nothing to do with power and the abolition and defence of privilege, nor anything do with wealth and the struggle over distributive principles, nor yet anything to do with the economy and the persistence or supersession of exploitative arrangements in Haiti and beyond. For all the emphasis on political reconstruction, the thrust of an international project which proceeds from this idea is to reduce, rather than enlarge, understanding of the political dimensions of social change. Hallward goes further. For all the talk of democratic governance, the thrust, he writes, is to reaffirm 'perhaps the most consistent theme of Western commentary on the island: that poor black people remain incapable of governing themselves'.[81]

Conclusion

It is common among those writing about democracy from an international legal perspective to begin with the observation that this has been a neglected topic.[82] Tom Franck altered that. With his article on the emerging right to democratic governance, he inaugurated a large and wide-ranging debate on the relationship between democracy and international law. We have considered that debate from four different standpoints. These do not, of course, enable us to capture the entirety of what has been, or might be, said, but they do reveal some notable facets of the emerging right to democratic governance as it may appear today.

According to the first analysis, the emerging right to democratic governance is supported by developments within international organizations, though still as an entitlement which is emergent rather than fully established. The norm's further progress is hampered by the variations that exist in regional practice, and also by a lack of consensus over how democracy should be defined. In this regard, Greg Fox distinguishes

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[79] *Ibid.*

[80] UN SC Res. 1529 (2004), *supra* note 73.

[81] Hallward, 'Option Zero in Haiti', 27 *New Left Review* (2004) 23, at 25.

[82] See, e.g., Wheatley, *supra* note 25, at 225.

between procedural definitions and substantive ones, and explains that the problem with the latter is that they are so broad as to become almost useless as standards of measurement capable of meaningfully evaluating conduct. What he does not explain, however, is why we should be more interested in meaningful evaluation than meaningful democracy. He assumes that the democratic entitlement is a matter of 'doing good', but puts measurement before the improvement of social conditions.

To note this is not to suggest that Fox's analysis is wrong, just that it is limited. The same applies to the other analyses. According to the second, the emerging right to democratic governance has been seriously undermined by the counter-terrorist agenda of the period since 9/11. In foreign and domestic policy, security has eclipsed democracy, and democracy promotion has become identified with regime change. Thomas Carothers lays particular blame at the feet of George W. Bush, arguing that his administration is responsible for fuelling anti-Americanism and producing a backlash against efforts to promote democratic governance abroad. But Carothers does not consider the possibility that what is at stake may not be a simple matter of anti-Americanism; equally, it may not be a 'backlash', in the sense of a reflex motion in reverse. He wants us to think of the work of democracy promotion as an essential good, sometimes travestied though 'instrumentalism', and puts to one side the idea that there may be sound reasons for questioning that.

According to the third analysis, the emerging right to democratic governance has been neither supported by recent history, nor undermined by it. Rather, the most significant change affecting it is that it has become part of the project of international development. And in this context, the focus has shifted from democratic transition to democratic consolidation. Democracy means more than elections, it is said; what is needed as well is the strengthening of democratic institutions, values, and norms. On the other hand, this is not a linear path. Most attempts at democratization are 'fragmented, involving small steps and large, forward and back'. The UNDP directs valuable attention here to the complexity of democratic processes. Yet again, something important may be missed. For to speak in those terms is to make the problems seem endogenous to the country concerned, rather than also caught up in the dynamics of a larger system which needs itself to be placed under scrutiny.

The fourth and final analysis sidesteps the issue of changes affecting the emerging right to democratic governance, to concentrate instead on its historical significance and future potential. Central to this analysis is a critique of democracy as ideology. If democratic politics hold out the promise of self-rule and equality, they also sustain the conditions which privilege the wealthy and marginalize the poor. One way they currently do that is by fostering resignation to democracy's 'imperfection'. Another way is by absorbing and neutralizing transformative energies. What follows from this critique? To Jodi Dean, it is not obvious that we should continue to express our emancipatory aspirations in democratic terms; democracy may be more of an impasse in liberatory politics than a signpost to them. And what holds for democracy presumably holds too for the emerging right to democratic governance. That delivers a fascinating challenge to all three of the other analyses. But in contemplating it, there is one further perspective we will do well to take into account.

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In an interview conducted in 2006, Jean-Bertrand Aristide speaks from his South African exile about democracy in Haiti.[83] His country is characterized by dramatic inequality, with power and wealth concentrated in the hands of a tiny elite and the vast majority of the population surviving on less than $2 a day. He explains that, throughout Haitian history, the elite has 'done everything in its power to keep the masses at bay, on the other side of the walls that protect their privilege'. 'This is what any genuinely democratic project is up against', he says.[84] A 'hollow version of democracy' has been instituted by this privileged class, and is maintained inasmuch as they control the means of repression. Any genuinely democratic project has to contend with the fact that those who stand to lose 'will do everything necessary to protect the system of exploitation upon which [their] power depends'.[85] Aristide clearly retains the belief that liberatory politics can be democratic politics. Equally clearly, however, he refuses the UNDP's tranquil vision of 'small steps and large, forward and back'. To him, democracy is not just a matter of procedures and institutions, values and norms, transition and consolidation. It is a matter of struggle against determined, protracted, and highly organized resistance.[86]

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[83] 'One Step at a Time' (trans. and ed. P. Hallward), in Hallward, *supra* note 71, at 317.
[84] *Ibid.*, at 321.
[85] *Ibid.*
[86] For a recent philosophical investigation into resistance to – 'hatred of' – democracy see J. Rancière, *Hatred of Democracy* (2006).