

REVIEW ARTICLE

The Developing International Law of Democracy

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Gregory H. Fox and Brad R. Roth (eds), Democratic Governance and International Law. Cambridge: Cambridge University Press, 2000, 585 pp, pb £19.95.

I

Since the early 1990s democracy has become a topic of great interest in international law and relations. The end of communism in the Soviet Union and elsewhere has been described as the international victory of democracy.¹ This 'victory' of democracy across the world quickly led to claims that there now exists a right to democracy in international human rights law, as well as the existence of democracy as a guiding principle of general international law.²

These developments are welcomed as of positive benefit to the international system in the long-term. However, supporters of democracy as an international legal principle have shown a tendency towards an unquestionable acceptance of the existence of new legal rules that appeared almost overnight. This sudden appearance, and unquestioning acceptance, creates numerous difficulties. The most obvious is the lack of investigation into or discussion of what this idea of democracy contains, and the basis upon which any action in its name may be claimed. Before the collapse of the communist regimes in Europe most states in the world claimed to be democratic in one way or another, even though there were drastic and noticeable differences between the various forms of democracy. Owing to the variety of democratic practices and the fact that 'one word passed as common currency in several different languages', democracy was once an idea not taken seriously at the international level except in the context of ideological struggles.³ Now, it is claimed, the situation has changed and everyone is speaking the same democratic language allowing for a single notion of democracy to be seen as part of international law and relations. It is undeniable that there has been a shift towards democracy in the international system, yet what it means to be democratic or how democracy is manifested in law and practice are issues not adequately

* School of Law, University of Hull. Thanks to Richard Barnes and Rob Cryer for comments on an earlier draft. Numbers which appear in parenthesis in the text are references to the page numbers of the volume under review.

- 1 See Francis Fukuyama, *The End of History and the Last Man* (London: Hamilton, 1992).
- 2 Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.
- 3 See Susan Marks, 'The End of History? Reflections on Some International Legal Theses' (1997) 8 *European Journal of International Law* 449.

investigated by international lawyers.⁴ The few investigations that have been undertaken tend to be satisfied with the existence of elections as signifying the existence of democracy. This simplistic view of democracy fails to fully embrace the impact and potential democracy has for individuals and societies. The difference between unquestioned assumptions of the victory of democracy in the world and the real and actual events in the day-to-day lives of many individuals often means that 'the New World Order appears more like a boot in the face than a triumph of democracy and the rule of law.'⁵

A second difficulty that arises is the almost instantaneous creation and acceptance of international legal rules that embrace democracy. The emergence of this difficulty has resulted in a general lack of critical perspective concerning the creation and development of international legal principles of democracy.⁶ Apparently the content and impact of democracy as an international legal principle is self-evident. Worrying in this regard is the fact that claims for international legal principles of democracy are based on substantive treaty provisions and state practice, which instantly raises the question as to why discussion of such principles was not occurring sooner. No one laid claim to a right to democracy in 1980, but, based on the evidence provided by many, its status as a right can be dated to 1948.⁷ What has resulted is a retroactive emergence of a legal principle of democracy. It is significant that state practice has only recently allowed for discussions of democracy in international law. However, we must acknowledge that even though the basis for democracy as a principle in international law may have an established history, it has never been embraced to the extent it is today.

II

The recent global process of democratisation has fuelled the growth of democracy as a topic of international law.⁸ The current trend embracing democracy is differentiated from past developments in the extent to which there are 'political changes moving in a democratic direction' at all levels of society – locally, nationally, regionally and globally.⁹ The impact of democracy in the international system is widespread, as international institutions are becoming more active in requiring that their member states maintain democratic systems.¹⁰ At the local level, individuals and groups are calling for greater participation in the processes that impact on their lives.¹¹ Concerns about good governance based on democracy

4 David Held, *Models of Democracy*, 2nd ed (Oxford: Polity, 1996) 291.

5 Derek Spitz, 'Solidarity and Disaggregated Property Rights: Roberto Unger's Recasting of Democracy' (1991/2) 23 *Columbia Human Rights Law Review* 43, 47.

6 Notable exceptions are included in Part V of the volume under review: see below.

7 For example see Christina Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?' (1995) 27 *New York University Journal of International Law and Politics* 289, and W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866.

8 See 'Democratization and International Law: Building the Institutions of Civil Society' (1994) 88 *ASIL Proceedings* 197.

9 David Potter, 'Explaining Democratization' in Potter et al (eds), *Democratization*. (Cambridge: Polity, 1996) 3.

10 Membership requirements for democracy exist within the Council of Europe, Art 3 and 8 of the Charter; the European Union, Art 6 and 7 of the Treaty of European Union; and the Organisation of American States, Art 9 of the Charter.

11 David Held, 'Cosmopolitan Democracy and the Global Order: Reflections on the 200th Anniversary of Kant's "Perpetual Peace"' (1995) 20 *Alternatives* 427.

are taking a prominent place in the global economy, international development, issues of international trade, aid packages for developing societies and in the general conduct of inter-state relations.¹² Furthermore, non-governmental organisations (NGOs) have proliferated in the new resurgence of democracy playing a major role in the development of democracy at the international level. NGOs are able to act as forums for debate on a wide variety of issues and as pressure groups beyond the constraints of the state structure. Their presence and proliferation at a global level gives the impression of the development of an international civic society.

The widespread development of international legal principles of democracy is evidenced by the twenty essays that make up the present volume. Much of the work contained in *Democratic Governance and International Law* has been published elsewhere but the authors have, for the most part, updated or modified their pieces. The essays collected here represent the vanguard of discussions dealing with democracy as a legal principle. Some offer unwavering support for democracy, others are sceptical of the full range of claims being made in its name. The essays contained in the volume represent the foundation for the future development of and debate about democracy as an international legal principle. They show where problems or inconsistencies lie or where more work needs to be done.

The greatest weakness of the majority of approaches to democracy as an international legal principle is the belief in a limited view of democracy as elections. The belief at the international level that elections alone are satisfactory for the existence of democracy follows the same inadequate approach of democratic thinkers at the domestic level who see democracy as only a procedure. The favouring of a limited procedural view of democracy is attributable to the work of Joseph Schumpeter and has had a considerable influence on the bulk of modern democratic theory and practice.¹³ A procedural view of what democracy is or should be is perhaps the easiest approach to the subject as it provides a verifiable means of determining state practice. However, the desire of international law for the easiest way does not lead to the development of an international law of democracy that is effective or acceptable. Identifying specific practices as being democratic does not indicate the existence or even acceptance of an international legal principle of democracy. Within the international system there is a good deal of rhetoric in favour of democracy. This rhetoric is the product of the increased emphasis being placed on the existence of democracy along with human rights in the international system with an emphasis upon the issue of legitimacy of governments and institutions.¹⁴ In response to this rhetoric there has been an increase in electoral activity throughout the world. However elections alone do not provide for effective democracy, something many of the contributors to the present volume overlook. We cannot be satisfied with a procedural form of democracy without engaging in investigations and debate as to what the procedures mean or provide. The impact and significance of democracy extends beyond elections and

12 For the problems related to attaching democracy to good governance see Katarina Tomaševski, *Between Sanctions and Elections: Aid Donors and their Human Rights Performance* (London: Pinter, 1997).

13 For the influence of Schumpeter on democratic theory see David Ricci, 'Democracy Attenuated: Schumpeter, the Process Theory, and American Democratic Thought' (1970) 32 *Journal of Politics* 239–240; C.B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977) 77–78.

14 Tomaševski, 12 above, 7–14.

the political sphere of society. To ignore the larger impact democracy has on our lives will only lead to disillusionment and disempowerment, the inverse of democracy.

Discussions of democracy as an international legal principle cover a wide variety of international legal topics. Democracy has been conceptualised as an entitlement all societies possess, as a human right individuals are able to exercise through accepted procedures, as a criterion for the recognition of legitimate governance, as a justification for intervention and the use of force, and as an overriding principle upon which the international system is ordered. What is clear is that democracy does not exist as a discrete idea in international law. It has become part of a wide range of activities involving individuals, states and international organisations. Therefore the essays in this volume do not address a single principle of democracy. The various roles democracy has in the international system enable us to speak of the development of an 'international law of democracy'. This international law of democracy contains a variety of principles and ideas that have the purpose of regulating distinct areas of action. As the essays in this volume demonstrate the development of an international law of democracy is undoubtedly in its formative stage.

III

Underlying these various perspectives on democracy is the implicit belief that democracy will provide a path to peace in the international system. Owen provides an in-depth treatment of the democratic peace proposition, a topic that is heavily debated.¹⁵ The idea of a democratic peace in the international system is not new, as its foundations may be traced to Kant's work, *The Perpetual Peace*. Supporters of the notion of democratic peace normally fail to take account of the limits of democracy in creating a more peaceful world. The democratic peace idea holds that democratic states will not go to war with one another. It fails to account for the fact they have no difficulty in going to war with states they deem to be undemocratic. Owen concedes this point when he observes that democracies promote good relations with other democracies but confrontation with states considered undemocratic (p 344). The question then becomes: should we engage in violent confrontational relationships in order to push states towards democracy so that in the long-term a more peaceful world might prevail? Such a position appears untenable and Owen properly points out the pitfalls involved in actively imposing democracy in the name of international peace. He notes that the use of force or intervention to promote or protect democracy has often been undertaken by individual states in an inconsistent manner. Furthermore, as he observes, 'States generally do not do charity work: they always want power or wealth in return for intervening' (p 383). The result is that democracy becomes an excuse for self-interested power politics.

A second problem confronting democracy as a means to peace is evidenced by the violent nature of some of the new democracies, most notably Russia and South Africa. Ethnic conflicts within states have increased dramatically since the so-called victory of democracy. This leads not only to a general feeling of disillusionment with democracy particular societies but also shows the limits of

15 Owen's essay provides a substantial guide to the vast literature. See also S. Chan, 'In Search of Democratic Peace: Problems and Promise' 41 (1997) *Mershon International Studies Review* 59.

democracy in guaranteeing a more peaceful world. Marks points out that the democratic peace argument depends largely on an out-dated conception of geopolitical conflicts between defined nation-states, something which just does not happen very much in the world today (p 560). Franck notes that democracy is no guarantee against the outbreak of civil war or internal conflict. But, furthermore, democracy does provide a means for a society to come together and resolve issues in a non-violent way. Decisions, negotiations and discussion can all occur without democracy '[b]ut there can never be a genuine social convergence' (p 25). The need to look at the impact that democracy has on individuals within the domestic society is crucial to the development of an international law of democracy. Ignoring broader social issues overlooks the wider role democracy has to play something that many discussions of democracy do not fully take into account.¹⁶ While this may appear self-evident, the limited procedural approach that has been taken with regard to an international law of democracy has, for the most part, not considered the impact democracy has on individuals and societies. A common assumption prevails which believes that elections bring democracy and democracy brings improvements to society, which is not always the case, underlying the need to look beyond elections in order to fully understand the development of democracy as an international legal principle.

IV

Thomas Franck was one of the first to put forward the idea of a right, or entitlement as he termed it, to democracy. His position is grounded in democratic thought and practice as defined by western industrialised nations, primarily the United States of America. He began his enquiry into democracy in international law with the US Declaration of Independence (p 1776) and from there described the development of western industrialised nations and the democracy they created as a 'hard-won tradition that most of the world now seeks to emulate' and argued that 'people almost everywhere now demand that government be validated by western-style parliamentary, multi-party democratic process.'¹⁷ In his essay here, the origins of the democratic entitlement are traced to the adoption of the Charter of the United Nations and its provisions regarding the role of the organisations in assisting former colonial territories in obtaining self-rule through the Trusteeship system (p 32). Chapters XI and XII of the UN Charter set out a process whereby a number of former colonial territories were assisted in achieving independence. Franck calls the process 'democratic' but since it often only entailed a single vote for determining the status of a territory it has also been described as 'an exercise in legitimised colonial paternalism.'¹⁸

Franck's original work developed an argument whereby the entitlement to democracy is grounded in the practice of self-determination in the international system.¹⁹ For Franck, '[s]elf-determination postulates the right of a people organised in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.'²⁰

16 See discussion in Part IV, below.

17 Franck, n 2 above, 48–49.

18 Gerry Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 266.

19 Franck, n 2 above, 52.

20 *ibid.*

Franck's attempt to place the process of self-determination at the centre of the democratic entitlement must ultimately be rejected. In most of the cases he presented, the holding of a single vote determined the status of a territory, but did not guarantee the continual exercise of self-determination or an ongoing right of a people to determine their destiny. The limited number of plebiscites and referenda sponsored by the League of Nations were rarely if ever followed by regular elections or other forms of participation by individuals in their collective destiny. The same holds true in the practices of the United Nations, as many of the former colonial territories soon saw authoritarian regimes in place with a full-scale denial of self-determination, or at Roth terms it 'one man, one vote, one time' (p 508). Even under the Trusteeship system that Franck identifies as the beginning of international practice regarding democracy has, according to some critics, been accorded a greater sense of importance in the development of democracy than it actually possessed.²¹ It is difficult to sustain self-determination as exemplifying or acting as a basis for a democratic entitlement if its actual application only provides for isolated instances of territorial determination.

Franck's contribution to the present volume keeps with the notion of the democratic entitlement but offers a scaled-down treatment of democracy in the international system. The essay focuses on the holding of elections and the use of election monitoring in an effort to demonstrate how states participate in both processes in order to confirm their legitimacy. Governments will believe that they may stand as the proper representatives of a society by holding elections, and by participating in election monitoring, governments in turn recognise the validity of democracy as an international legal principle (p 29). As stated above elections alone provide only a partial picture that does not necessarily investigate any of the substantive elements involved with democracy. Franck overcomes this by viewing the election monitoring process as a means for addressing substantive issues through ensuring that elections are free and fair. Like elections, giving legitimacy to the overall process without fully investigating the consequences that may exist.²²

Fox also focuses on the existence of elections to determine whether or not international law possesses a right to political participation. For him the essence of democracy is the existence of popular sovereignty and popular sovereignty is determined by elections (p 49). He adopts a process-orientated procedural conception of participation rights with adequate participation being voting in elections even though he recognises that a wide range of rights are necessary for democracy. His work exemplifies the tendency of some to accept the sudden appearance of democracy as an international legal principle post-1990 by making use of state practice and treaty provisions that date back to 1948 or earlier. He believes that all of the major human rights conventions have established clear rights of political participation (p 90) but does not necessarily address why these rights have only been recognised recently in both rhetoric and practice. It is clear that the changing ideological environment of the international system has allowed for democracy to be discussed more openly and practised more widely. One gets the impression reading authors like Fox that international law has long embraced democracy as a legal principle even though there has only been limited international practice.

21 See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 111–112.

22 In the recent elections in Cambodia international observers were quick to declare the elections free and fair in the face of obvious irregularities, with the domestic population far from convinced that democracy in practice had actually occurred, see 'EU Loses Face for Cambodia Poll Verdict' *The Guardian* (5 August 1998) 10.

For international law, reliance upon procedure as indicative of democracy makes life easier by associating democracy with an identifiable process. If the process is carried out and deemed to be acceptable then governments which engage in the process are seen to be legitimate holders of power. The process of recognition in international law has taken on the requirement of democracy for determining the legitimacy of states and governments. Traditionally international law only required 'effective control' to be exercised over a population for a government to be seen as legitimate. How control was established or maintained was not a concern for international law.²³ The emerging requirement of democracy for recognising a legitimate government is limited to the holding of elections and the use of election monitoring. In his chapter on democratic recognition, Murphy examines a great deal of state practice in this regard only to conclude that there remains a significant degree of indeterminacy in using democracy as a criterion for recognition. Even when democracy is reduced to a procedural element other values and preferences continue to guide the process of recognition and determinations of legitimacy. This is due to the fact that recognition remains the preserve of individual states, so, even though there is talk of the importance of democracy, it is far from a guiding light that all states embrace (pp 152–153).

Tied to the issue of recognition and legitimacy is the situation whereby the democratic process of free and fair elections occurs but it produces a result that is deemed unfavourable. Recent elections in Austria have brought this issue to the forefront of international relations, as it is feared that the newly constituted government that includes the Freedom Party could lead to a throwback to the ways of the Nazi party in Germany. The fear is that, like the Nazi Party, the Freedom Party will control the government through the democratic process only to destroy or undermine the very same.²⁴ Algeria has also faced the dilemma of destroying democracy in order to save it when in 1991 the Islamic Salvation Front was poised to gain control of the government and had already pledged an end to the democratic process leading to elections being cancelled and a state of emergency declared.²⁵

Fox and Nolte dealt with this issue at length in an earlier piece²⁶ and their essay in the present volume presents the main points of their research. Democracy is about debate and solving differences through non-violent means. It depends upon the expression of opinions; as the European Court of Human Rights has stated, democracy is about pluralism, open-mindedness and tolerance.²⁷ However, Fox and Nolte believe that it ought to be permissible for a domestic political system based on democratic ideas to silence and prevent expressions that support the ending of the democratic system itself. The question they pose is how tolerant should democracies be with regard to groups who hold beliefs that are detrimental to the democratic system. They take the Rawlsian position that it is not necessary

23 See M.J. Peterson *Recognition of Governments: Legal Doctrine and State Practice, 1815–1995* (Basingstoke: Macmillan, 1997).

24 On the Austrian situation see Roger Morgan, 'Austria and Europe: Rights and Wrongs' (2000) 56 *World Today* 4.

25 See Ahmed Ben Bella, 'A Time for Peace in Algeria' (1995) 51 *World Today* 268.

26 Gregory Fox and George Nolte, 'Intolerant Democracies' (1995) 35 *Harvard International Law Journal* 1. In a subsequent issue Roth and Koskenniemi responded to Fox and Nolte: see 'Responses' (1996) 37 *Harvard International Law Journal* 231. Roth and Koskenniemi's responses are reprinted in the present volume as chs 13 and 14 respectively, with Fox and Nolte's rejoinder as Ch 15.

27 *Handyside v UK*, Series A No. 24 (1979/80) para 49; *Jersild v Denmark* Series A No. 298 (1994) para 37.

to tolerate the intolerant. Rawls' belief is that if a group makes it clear that it will suppress others and not allow for any differing opinions to be expressed, then it is legitimate to suppress them (p 403). Fox and Nolte present a number of limitations to their position, the most important being an acknowledgement that international law will only allow for the suppression of democracy in order to save democracy in the most extreme cases, without clearly defining what could be considered extreme. They suggest that the better way forward would be for the underlying social problems to be addressed in order to remove support from radical parties that promise change. They also recognise that the practice of intolerance can easily lead to a great deal of abuse and indeterminacy as to what constitutes a threat to democracy (p 431).

In response to Fox and Nolte's work, both Koskeniemi and Roth raise a number of concerns, especially with regard to what is an acceptable level of suppression of perceived threats to democracy. Koskeniemi's concern is that while Fox and Nolte strive to achieve a balanced approach, there is something about their argument that shows a tendency for tolerance only to the extent that democracy is understood in established western industrialised societies. He is worried that they fail to consider the meaning of democracy held by individuals in a variety of domestic settings, who in turn are bound to have differing conceptions of democracy (p 436). Roth voices concerns along the same lines, demonstrating that the development of an international law of democracy can also easily lead to an 'Us and Them' polarisation in the conduct of international relations, with 'accepted' democracies being on the winning side and all others being labelled as lost souls that must be converted at any cost.

V

The consequence of democracy leading to an 'Us and Them' division of the international system is a major issue in the context of intervention into the affairs of other states. Interventionist action, including the use of force, to promote and protect democracy is nothing new to the international system.²⁸ Discussion on the use of force in international law to promote or protect democracy is limited by virtue of the few cases/examples that exist in modern times. The essays in this volume look to the few instances, Haiti, Sierra Leone, Grenada, and Panama, where force has been used to promote or protect democracy. Analysis of these cases is primarily limited to the doctrine established by the International Court of Justice's decision in the *Nicaragua* case.²⁹ Based on such sparse evidence, it is no surprise that differing conclusions are reached.

Reisman leads the way in justifying a democratic crusade that includes the use of force if necessary. His position on this issue has not changed since he first aired his views on the use of force in support of democracy in 1984.³⁰ He feels that international law has moved away from traditional conceptions of state sovereignty to embrace a conception of sovereignty that characterises a society where individuals are freely able to choose their leaders (p 249). He criticises a static

28 Brad Roth, 'Governmental Illegitimacy Revisited: 'Pro-Democratic' Armed Intervention in the Post-Bipolar World' (1993) 3 *Transnational Law and Contemporary Problems* 481.

29 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua. (Nicaragua v United States of America)* (Judgment) ICJ Reports 1986.

30 W. Michael Reisman, 'Coercion and Self-Determination: Construing Charter Art 2(4)' (1984) 78 *American Journal of International Law* 642.

view of international law that does not look to what he feels is a great deal of progress in support of democracy (p 251). Reisman appears to believe that since international human rights have become widely accepted, democracy too has become one of constitutive elements of the international system. Any claims to the contrary are, in his view, anachronistic (p 254). Looking to progress is beneficial, but it should not be overstated in order to formulate new rules that allow for arbitrary behaviour as demonstrated by the US action in Panama in 1989.

While Reisman recognises that the use of force in support of democracy is complicated, he concludes: 'If complexity of decision is the price for increased human dignity on the planet, it is worth it' (p 258). His position on the ability, if not the duty, of states to intervene unilaterally to preserve or restore democratic governance is brought into question by Byers and Chesterman. They feel Reisman's position relies on 'simple premises and forceful rhetoric' to support unilateral action in support of democracy since multilateral efforts have not proved successful (p 262). They take the view that unilateral action is not favourable under any circumstances and that collective action is only advisable in the more extreme cases (p 291). Byers and Chesterman point out a major flaw in the thinking of those who support unilateral action as a legal response which they feel will lead to the 'Us and Them' division of international society. They express the need for supporters of the use of force to keep in mind that not every state in the world is democratic, or as democratic as some may wish. Under international law, however, regardless of the form of government every state is an accepted international actor. The belief that force may be used to ensure the existence of democracy is justified from a position of ideological superiority. This belief holds that that some international actors have a greater degree of rights than others and this in turn justifies forcible measures being used against those who do not meet accepted standards (p 270). The alternative put forth by Byers and Chesterman is to follow an accepted legal method whereby disruption of a democratic regime is deemed by the UN Security Council to be a threat to peace and security allowing for collective action to be taken to end that threat. They limit the ability to act even further by claiming that a disruption to democracy itself could rarely be seen as a threat; instead it would have to be accompanied by other events, such as refugee flows or mass killings, to constitute a threat to international peace and security (p 283).

The issue will remain contentious whether the use of force is unilateral, collective, based on specific treaty provisions (discussed by Roth) or even by invitation (discussed by Wippman). Roth points out in his discussion of the illegal nature of pro-democratic invasion pacts that 'the meaning of democracy remains inherently contestable, and never more so than in moments of actual crisis' (p 337). Placing the responsibility for democratic government on external third parties is, he feels, a complete negation of the idea of self-determination (p 342). The most worrying aspect of arguments that favour the use of force to protect or promote democracy is the division of the world into 'Us and Them'. Such attitudes are based on the idea of the victory of democracy and the belief that no other alternatives are possible – or, if they are possible, they are not tolerable.

VI

One of the more worthy attributes of this volume is that it includes contributors who are critical or more accurately, sceptical of claims of a clearly defined existence of a principle of democracy in international law. Part V contains five

essays which do not follow the optimism of Frank or the zealotry of Reisman regarding democracy as an international legal principle. What is significant about the position of the sceptics is that none of them claims that democracy is unfavourable or a bad thing for the international system or domestic society. However, they do raise a number of concerns regarding the development of democracy in international law. Much of the scepticism comes from the fact that democracy has gone from a practical non-issue in the international system (outside of the Cold War environment) to a guiding legal principle in less than ten years.

For the most part, the majority of essays outside of the section dedicated to critical perspectives give little consideration to normative issues that are central to democracy. The existence of elections and the presence of some form of external monitors to declare them free and fair are taken to be enough.³¹ Roth points out that '[i]n the exuberance of the moment, issues become conflated, and differences regarding crucial principles obscured' (p 493). Roth deals with the issue of evaluating the existence of democracy beyond the holding of elections. He views it as problematic that only a few criteria are set out as necessary so the issue of ends and goals in a particular social context are ignored, or deemed inconsequential (p 494). The majority of writers who support an international law of democracy believe that so long as an identifiable democratic procedure (elections) is being followed, the rest will work itself out in time. This is extremely problematic as struggles for democracy are pursued because individuals believe that democracy will bring certain benefits. No one desires democracy just so they can tick a ballot paper. Individuals believe that in ticking the ballot paper things will get better. Reliance upon democracy as procedure only provides a picture that is opaque at best, for it does not deal with the 'substantive social purposes for which one values the procedures' (p 496). Roth feels that for most, democracy is not just institutions and procedures but 'a normative orientation that requires creative application to the distinct problems of individual countries' (p 498). He looks to the history of democratic thought that shows democracy being much more than just procedures with attention being given to issues that are described as the 'democratic social reality' (p 502). To understand the social reality of democracy he feels that it is necessary to look at issues of substantive democracy, popular sovereignty and constitutionalism – these being the phenomena which tell us whether or not the problems facing a society have been addressed.

The same theme of the inadequacy of relying on elections is taken by Black who sees the development of democracy as providing new opportunities but also uncovers a number of new vulnerabilities that need to be addressed (p 517). Black, like Roth, sees elections as only a means, and one that does not always adequately address desired ends. Black's concern is that the emphasis on elections means various major issues facing society are left untouched. He points out three areas with specific regard to the societies of Latin America: legacies of violence, the increasing socio-economic disparities in society and the fact that chosen leaders have less and less influence over decisions being made in a globalising world. The crux of his position is that individuals may participate in elections that result in leaders for a society, but these leaders do not necessarily have the power or ability to pursue what society desires. He makes it clear that he is not speaking of conspiracy governance but the actual reality of who really holds power in a globalised capitalist economy. His point is that to figure out where power lies

31 Mélida Hodgson, 'When to Accept, When to Abstain: A Framework for UN Election Monitoring' (1992) *New York University Journal of International Law and Politics* 137, 146–147.

elections do not give an adequate picture, and he suggests 'following the money' to find out where real power lies (p 529).

Marks completes the collection with a sceptical review of the leading writers who have enthusiastically embraced democracy as the guiding light of the international system in such a short time frame. She takes the work of Fukuyama as a clear example of the belief democracy and market based economies are the logical progression of the development of the international system and that a victory for democracy has been assured through the collapse of communism.³² This belief she terms 'liberal millenarianism' (p 538). She goes on to examine the influence liberal millenarianism has on international law and the development of democracy as a legal principle. The belief in democracy as the end we have been striving for, and that elections are indicative of the victory of democracy, results in numerous essential issues being sidelined. Focusing on democracy as only elections overlooks the diversity of values, ideas and principles that exist in a particular society (p 558). Marks feels that belief in democracy as the end of history means that issues of citizenship, accountability and equality are not adequately dealt with (p 559). There also are issues of globalisation and the real exercise of power, and the truth about the democratic peace that are removed from the discussion (p 560). One might easily respond to such scepticism that at least elections show that movement in the right direction is taking place, so let us be satisfied without confusing the issues any further. Marks takes on this objection by pointing to the need to look more deeply at the actual impact that democracy has upon the individual and society. If the exercise of power remains essentially unchanged then the façade of democracy is no better than unmitigated repression (p 566).

VII

A major force behind the development of an international law of democracy is the activities of international organisations and the support they have given to democracy, a point made by a number of the contributors. International organisations do have a limited role in the development of an international law of democracy. As Slaughter points out they will, for the most part, 'remain servants of their member States more than masters' (p 199). In their introductory essay Fox and Roth speak of the 'limited carrots and sticks' available to international organisations when attempting to promote and protect democracy (p 8–9) but they recognise that the efforts of international organisations have been substantial. When democracy has been an issue in international law it has usually been on the basis of individual state action. This resulted in a large degree of indeterminacy and never developed into any coherent set of principles. The activities of international organisations have been and will continue to be essential to the development of an international law of democracy, providing a great deal of coherence and stability in the development of principles. However, as Schnably's essay demonstrates, international organisations will have difficulty in developing an international law of democracy, for the more active an organisation becomes in supporting democracy, the more numerous and complex the problems it faces (p 198).

International organisations, both regional and universal, will have a primary role to play in the further development of an international law of democracy.

32 Fukuyama, n 1 above.

Unfortunately, international organisations have a tendency to focus on the procedural version of democracy. Their activities in a wide variety of areas such as human rights, economics and social welfare do mean they look beyond elections to determine if democracy is effective. As Crawford notes international law has pursued, and continues to pursue, a number of goals inconsistent with democracy and there remains disagreement over the details (p 115–117). This factor will limit the ability of international organisations to develop an international law of democracy beyond the idea of elections.

As Roth warns, the present approach to democracy in international law ignores behaviour beyond elections that work to further democratic values, thereby exaggerating democratic progress (lots of elections means lots of progress), resulting in an ‘unjustified triumphalism’ that is both messianic and complacent (p 494). Democracy is commonly seen as a term with no determinate content; a definitional difficulty which has not been overcome with the recent resurgence in support for democracy. Presently, democracy as an international legal principle is commonly equated to the existence of elections leading to a ‘credibility gap’ where there is a stark difference ‘between the standards [that] governments proclaim, or accept, or at least pay lip-service to, and the reality of their practice’.³³ The critical views presented in Part V make it clear that an international law of democracy concerned only with elections will not be sufficient. Elections are central to the democratic process. They are a means by which individuals and societies can express their views. By limiting democracy to a procedure, an understanding of what democracy is or should be becomes limited. It also allows for claims that democracy exists when in reality the will of the people has no impact, as individuals are not part of the processes surrounding their lives.

International law has made a great deal of progress in the improvement of human welfare, most notably through international human rights law. An international law of democracy will aid in the progress of international law only if it develops beyond elections, regardless of the difficulties inherent in taking such an approach. As an international law of democracy develops it must be premised on the ability of individuals and societies to determine their own form of social ordering and how best to pursue social needs. An international law of democracy must be constructed from the position of the individual addressing the issues as to how international law can be effective for the individual and society, not just in terms of inter-state relations. This may appear obvious but international law continues to focus on the needs and desires of states, being less concerned with non-state actors. An international law of democracy that develops according to the interests of states will remain rooted to the idea that elections automatically equate to effective democracy. An international law of democracy that develops with the needs and interests of individuals in mind will see the necessity of looking beyond elections to ensure the democracy that exist is effective and not illusory.

33 Niall MacDermot, ‘The Credibility Gap in Human Rights’ (1976) 3 *Dalhousie Law Journal* 262.