Protecting electoral rights: is there a role for the international courts?

PRELIMINARY DRAFT

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Abstract

Public international law entrenches a right to free and fair vote among other human rights, enumerated in global and regional instruments[1]. This makes it enforceable by a variety of international judicial bodies. However, those have not been particularly active in electoral issues. This paper explores potential explanations for such behaviour. I will argue that potential political backlash affects the behaviour of international judiciary. Judges take it into account and seek to minimize the potential backlash by adopting risk-adverse strategies, which focus on particular dimensions of democracy at the expense of others.

Introduction

Public international law defines 'people' as the only form of collective identity for a sovereign and as such the ultimate source of political power[2]. Free and fair periodical and equal elections are the expected basis for the formation of bodies of public authority. At the same time, the right to a free and fair vote became increasingly viewed as empowering not only collectives, but individuals as well. It means that every citizen as a member of body politic should be entitled to participate in an election as a voter or a candidate[3]. Even the distinction between citizens and non-citizens became more somewhat more blurred with the advent of supranational citizenship and granting of limited electoral rights to non-citizens. Perhaps the most prominent statement in support of electoral

[1] Among others, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms

[2] See e.g. R.Rich *Bringing democracy into international law*, Journal of Democracy, Vol.12, No.3 (2001), pp.20-34
A.Davis-Roberts, D.Carroll *Using international law to assess elections*, Democratization, Vol.17, No.3 (2010), pp.416–441

[3] R.L. Hasen , The Supreme Court and Election Law: Judging Equality from Baker v Carr to Bush v Gore (New York: NewYork University Press, 2003
Y.Dawood *Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review*, University of Toronto Law Journal, Vol.62, No.4 (2012), pp. 499-561
K.Nootens, *Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory*, Global Constitutionalism, Vol.4, No.2 (2015), pp.137-156

rights as human rights came with the declaration of "a right to democracy" by the UN Human Rights Committee in April 1999[4]. This processes took place against the background of the global spread of democracy. The 'third wave democratization' of late 1980s and 1990s has led to democracies outnumbering autocracies for the first in history[5].

However, the subsequent decades have produced much less reasons for optimism. Many of the new democracies now populate the expanding grey area between 'pure' democracy and authoritarianism[6]. One of the key distinctions of such regimes is their ability and will to rig the elections. In this regard, effective enforcement of electoral rights in those countries would be tantamount to upending one of the regime's pillars and potentially helping to set the course for democratic consolidation. This, however, means that such countries would be willing to go to great lengths to preclude such an outcome. But not only them. The reaction to the judgment of the European Court of Human Rights in the *Hirst II*[7] case and its progeny was illustrative of this trend. The United Kingdom, by all metrics an advanced democracy, explicitly refused to enforce repeated calls from Strasbourg to give British prisoners a right to vote. The broad cross-party support for the standoff was emblematic of unwillingness to allow international courts to interfere in questions of democracy. The Strasbourg court on its part was forced to change course and to limit the scope of prisoners' right to vote.

Part A. Courts and elections: an uneasy relationship

Judiciary's involvement in electoral matters is inherently problematic in several regards. Courts are by the nature counter-majoritarian institutions. Democracy, on the other hand, is explicitly premised on the will of the majority. The possible role for the judiciary is to protect that will, but how deep should the judiciary go in challenging the set rules of the game. Different constitutional and political systems give different answers to that question. Institutionally, electoral disputes are sometimes placed wholly outside of the purview of the judiciary. Many parliamentary systems place the responsibility for judging the validity of the elections and qualifications of elected person with the parliament itself. Such examples would include, among others, Denmark, Germany[8], The Netherlands and the United States[9]. In cases when the electoral dispute would concern the presidency, a special

[4] Promotion of the right to democracy, Commission on Human Rights resolution 1999/57 (E/CN.4/RES/1999/57)
[5] See e.g. S.Huntington (1991), The Third Wave: Democratization in the Late Twentieth Century. Norman, OK:University of Oklahoma Press
POLITY IV Project, available at: http://www.systemicpeace.org/polity/polity1.htm
[6] See e.g. W.Merkel *Embedded and Defective Democracies*, Democratization Vol.11, No.1 (2004), pp. 33-58.
[7] Hirst v. United Kingdom (No.2) (
[8] Basic Law of the Federal Republic of Germany, Article 41, Part 1, available at URL: https://www.btg-bestellservice.de/pdf/80201000.pdf
9 See e.g. Tibbetts, Donn. The Closest U.S. Senate Race in History, Durkin v. Wyman. [Manchester ?, N.H.]: J.W. Cummings Enterprises, 1976

body may be set up. An example of such a construction is the Electoral Commission, set up by the US Congress in 1876 to determine the outcome of the disputed presidential election. The rationale for entrusting political bodies with such kinds of decisions is one of respect for the autonomy of political process. Another approach, which is gaining traction in Latin America[10], is to constitutionalize electoral authorities as a separate branch within the divisions of power (as an 'electoral power' or *poder electoral*). Arrangements may be less explicit. For example, an independent system of electoral authorities may be set up with courts given only limited powers of review over their decision. A different option may be to designate a specific body within the judiciary as the final authority on electoral matters. Often such a role would be given to a constitutional court or a similar body. It can either be empowered to resolve complaints, brought by participants of the election, or obligated to pronounce the opinion on legality of an election as a whole. In latter case the judiciary is obviously forced to look into the larger picture, rather than fine details. The legislator can also limit access to the court by granting it only to some parties with a vested interest in elections. In particular, it could be claimed that voters have no stake in the electoral outcome and hence only participating candidates and (or) parties should be able to challenge the official tally. Or, going further, that only candidates or parties with a probable chance of success, should be able to.

If electoral disputes are not explicitly excluded from judiciary purview by the legislator, courts themselves may seek to avoid such involvement. The wisdom of such avoidance was at center of the deliberations of the US Supreme Court in *Baker v. Carr*, where faced with a dispute over the size of electoral districts, ended up with settling the doctrine of what constitutes a 'political question' and thus should be non-justiciable. Forty years later in *Vieth v. Jubilier*, America's highest court came to the conclusion that partisan antics in drawing the borders of the same electoral districts (provided that it is not motivated by race) would indeed constitute a 'political question'.

Even more dramatically, when the US Supreme Court did decide for practical purposes the outcome of the 2000 presidential contest between George W.Bush and Albert Gore. Judicial resolution of the case drew fire from both parties. Those associated with the 'liberal' ideological camp would claim that the judiciary did too little to resolve the electoral dispute and that the US Supreme Court had overstepped its bounds in interfering into that resolution[11]. Their 'conservative' counterparts on the contrary argued that lower-level courts already did too much by immersing themselves into the dispute without adequate means to resolve it and that the US Supreme

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House votes for Republican Tullos, unseats Eaton, Clarion Ledger, 21.01.2016 URL:
http://www.clarionledger.com/story/news/2016/01/20/rep-bo-eaton-says-he-lose-seat/79055200/

[10] For example, Nicaragua, Costa Rica and Venezuela

[11] See e.g. Ronald Dworkin, *A Badly Flawed Election*, NY Review of Books, January 10, 2001, URL:
http://www.nybooks.com/articles/2001/01/11/a-badly-flawed-election/
Lawrence Tribe, *The Unbearable Wrongness of Bush v. Gore*,
Constitutional Commentary, Vol. 19, No.3 (2002), pages 571-607

Court did the right thing to bring the process to the halt[12]. Taking a numbers-driven approach, however, shows the limits of any judicial involvement or non-involvement in such a case. Absent a malign intent, simple measurement errors make a result of a very close election a practical coin toss[13]. Against such odds, any quest to correctly establish the will of the electorate can seem futile. This does not mean that courts can't play a role in determining the cases, where the malign intent is indeed present. Foremost of these, would be instances of electoral fraud. As noted before, ability and willingness to rig the elections is one of the defining features of many 'flawed democracies', which have emerged since 1990s. At the same time, such regimes often display a degree of (notional) transparency and commitment to the rule of law. With this in mind, bringing lawsuits against electoral administrations engaged in fraud can be a more promising path for democracy activists than taking to the streets. International courts, given their wide-ranging mandate, would seem a particularly important avenue. Evidence shows that they can be credited with improvement of human rights standards[14]. Nonetheless, recourse to international courts in an inherently political setting is fraught with dangers of backlash.

Part B. International courts and political rights

Different scholars come up with different explanations of the role that international courts play vis-à-vis their founding states. Some claim that states are interested in having courts that would be dependent on them[15]. Absent the high level of political and economic integration, the argument goes, international courts serve only a limited purpose in providing states information on facts and rules of conduct[16]. Others argue that, on the contrary, judicial independence holds the key to successful development of international courts[17]. Such an outcome is premised on their ability to independently engage stakeholders within the domestic judicial and political systems.

Political rights stand out from the usual case-load of international courts. As noted before, such issues can be problematic even for domestic courts. This has led both to the limitation of their role by the legislator to the establishment of various models of judicial avoidance such as 'political question' doctrine. In the context of international courts such a solution may be introduced both at the stage of drafting international instruments,

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[12] See e.g. Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 Cardozo Law Review 1219 (2002)
[13] See, e.g., Lawrence M. Krauss, *Analyze This: A Physicist on Applied Politics*, New York Times, Nov. 21, 2000, at F4
[14] See e.g. Pamela A. Jordan, *Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms*, Human Rights Quarterly, Vol.25, No.3 (2003), pp.660-688, Mikael Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, Law & Social Inquiry, Vol. 32, No. 1 (2007), pp. 137-159
[15] Eric Posner, John Yoo, *Judicial Independence in International Tribunals*, California Law Review, Vol.93, No.1, pp.1-74
[16] Ibid
[17] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, *Yale Law Journal*, Vol.107 (1997), pp.273-391

establishing a particular court, or by judicial decision-making when such a court is already functional. In case of the European Court of Human Rights both options were explored during different stages of its development.

As evident from *travaux preparatoires* of the European Convention for Protection of Human Rights, the inclusion of political rights such as the right to free and fair vote was initially problematic for drafters. While countries with experience of authoritarianism were generally more enthusiastic of inclusion of political rights in the Convention, established democracies (such as the United Kingdom and Scandinavian countries) were much more skeptical. This tendency would seem to confirm the theory that new democracies would generally seek stronger international human rights bodies to protect their nascent institutions[18]. A similar rationale would drive the 'anti-coup' declarations and actions of new democracies in Latin America and Africa[19]. However, recent developments and the rise of 'flawed democracies'[20] would change the equation, creating a much less favourable environment for the introduction and enforcement of democratic rights.

The principal judicial avoidance mechanism in the system of the institutions of the European Convention on Human Rights is the doctrine of the 'margin of appreciation'[21]. Initially developed as purely judge-made devise for ascertaining the scope of possible judicial intervention, it is now being included in the Convention itself. Protocol No.15, which is currently undergoing ratification by the Council of Europe member states, stipulates that they have 'the primary responsibility to secure the rights and freedoms'[22] and in doing so 'enjoy a margin of appreciation'[23]. The principle allows the European Court of Human Rights to exercise flexibility in resolving the disputes at hand. By taking into account the unique exigencies of individual states, the international judges can show deference to states, when they find them in a better position to resolve a particular issue[24]. The political process also plays a role. The US Supreme Court in its famous footnote to the judgment in *Carolene Products* has singled out 'discrete and insular minorities' that can not take advantage of usual political process to protect

[18] Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, International Organization, Vol. 54, No. 2 (2000), pp. 217-252
[19] See e.g. Tanja Börzel, *Governance Transfer by Regional Organizations: Patching Together a Global Script* (Palgrave: 2015), pp.51-67
[20] Oisín Tansey, *The Fading of the Anti-Coup Norm, Journal of Democracy*, Vol.28, No. 1 (2017), pp. 144-156
[21] See e.g. Howard Yourow, The Margin Of Appreciation Doctrine In The Dynamics Of European Human Rights Jurisprudence (1996)
[22] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, URL: http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf
[23] Ibid
[24] Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality,* (2012), pp.27-31

their rights. Similar rationale can be applied in deciding to what extent shall the margin of appreciation be applied at the international level[25].

What approach should be taken then to the *political process itself* and to accompanying democratic rights? The story of the case-law regarding the prisoners' right to vote can be illustrative in this regard.

The right was established by the European Court of Human Rights in *Hirst II* judgment against the United Kingdom. However, more than 10 years later the right remains unenforced in Britain due to fierce resistance within the country's political system. The extent of political backlash was so severe that the court was eventually forced to change course and backtrack. Rather than grant all prisoners a right to vote as per *Hirst II* rationale (Mr.Hirst himself was serving a life sentence), the Court would now permit a ban on prisoners voting as long as it was not a blanket one[26]. In case of Russia, where the ban was effectively enshrined in non-amendable provisions of the country's constitution, the European court would effectively invite its colleagues at the national constitutional court to creatively interpret the charter. Instead, the Russian Constitutional Court took advantage of a new law, which essentially reverse-engineers the margin of appreciation, allowing the country to be selective in enforcing the European judgments. According to the Russian court's rationale[27], the contradiction with the national constitution was precisely the reason not to enforce the European judgment. If the dissenting judges at the Constitutional Court saw the conflict between two human rights regimes with a different degree of permissibility[28], the majority of the judges saw the conflict between the autonomous political system and the external source of rule-making.

Both in the British and Russian case, the effect of potential prisoner vote on the size electorate would be negligible (especially considering the fact that remand prisoners already do vote, in Russian case with a near 100 per cent turnout). This leads to the conclusion that the reason for backlash was the very fact of intrusion into the political autonomy. To understand it, the backlash has to be placed in the general context of democracy-related issues before the international courts.

Part C. Towards an operational model of international courts' (non-) involvement in electoral issues

[25] Eyal Benevesti, *Margin of Appreciation, Consensus and Universal Standards*, New York University Journal of International Law and Politics, Vol.31 (1999), p.849
[26] See Scoppola v. Italy (No.3) (2012, Application no. 126/05)
[27] Judgment of 19th April, 2016 No. 12-П/2016, Available at http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf
[28] Postanovlenie ot 19 Aprelya 2016 goda No.12-П/2016 (in Russian), Available at http://doc.ksrf.ru/decision/KSRFDecision230222.pdf

To gauge the role of international courts in democracy-related issues, a tri-dimensional model of democracy is used, comprising (a) deliberation, (b) participation and (c) competition. The deliberative dimension would mostly involve issues connected with freedom of speech and assembly. The participatory one would evolve around freedom of association and ballot access. Competitive dimension, in turn, would be about concrete rules, which define winners and losers of a particular election.

Analyzing the case-law of the European Court of Human Rights, the most activist positions would be found in the deliberative dimension. For example, the standard of a 'public persona' developed in Strasbourg gives politicians less protection against libel even in cases when they are called 'assholes'. The court also would include the assessment of electoral fairness in evaluating whether the state had a legitimate interest to intervene in a post-election demonstration. It also noticeable that in this dimension the court rarely encounters political backlash.

In the participatory dimension the backlash is profound. Apart from the prisoner vote cases, a striking example is the *Seidic and Finci* judgment[29], where the government of Bosnia-Herzegovina explicitly refused to enforce it despite the pressure from the European Union. Here the possible explanation is that the court is engaged in 'brinkmanship' strategy. By deliberately provoking the reaction from states, the court tests their reaction. However, the states are acutely sensitive of any possible encroachment on their political autonomy.

In competitive dimension the backlash does not even occur as the court shows extra deference to the states' position on how they frame electoral rules and administer election. The margin of appreciation provided to the states in such cases is explicitly wider than under other articles of the Convention. As stated by the European Court of Human Rights in *Mathieu-Morin and Clerfayt v. Belgium*, 'any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another'[30]. This essentially gives states a free hand to construct their electoral systems. Even explicit electoral fraud would be implied, rather than acknowledged by the court[31].

In order to interpret such judicial behaviour, the following model is proposed. It is premised on the idea that in order to avoid political backlash, the court seeks the course that would avoid creating explicit winners and losers within the particular state.

[29] Sejdić and Finci v. Bosnia and Herzegovina (2009, Applications No.27996/06 and 34836/06)
[30] Mathieu-Morin and Clerfayt v. Belgium (1987, Application No.9267/81)
[31] Case of Davydov and Others. v. Russia (2017, Application No.75947/11)

Dimension	*Beneficiaries*	*Room for domestic interpretation*	*Impact on the distribution of power*
Deliberation	All participants of the political process	Wide	Negligible
Participation	Some participants of the political process, but not always at the expense of the others	Narrow	Unknown
Competition	Some participants of the political process and always at expense of the others (zero-sum game)	Narrow	Profound

Conclusion

In spite of the optimism, generated by successful transitions to democracy and inclusion of democracy-related rights into major human-rights instruments, the potential role of international courts in protecting free and fair vote remains questionable. Judiciary in general is constrained in dealing with exercises of majoritarian will. In case of international courts, they are further constrained by the nature of their relations with states, many of which are vary of external encroachment of their political autonomy. The following concerns about the role of international courts can lead to political backlash:

a) Potential to change electoral rules, which will directly impact the allocation of power between different political actors.
b) Impact on the franchise and access to political competition, challenging the domestic limitations.
c) Second-guessing the electoral outcomes, thus externalizing the source of legitimacy.

Political backlash can manifest itself in the following forms:

a) Non-referral of electoral disputes to international courts.
b) Refusal to implement the judgments of international courts (e.g. via specific domestic procedures)
c) Changing the jurisdiction of international courts.

Judging by the case-law of the European Court of Human Rights, the real or potential political backlash is taken into account by the judges. They would seek such outcomes that would avoid the creation of explicit winners and losers, especially in a zero-sum situation (such as an outcome of a particular election). Thus, states are

granted more deference in cases, involving competition between parties and candidates, and less in cases on democratic participation and public deliberation.