

ELECTIONS - A GLOBAL RIGHT?

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At the outset, let me stress a democratic government or system implies more than participation in the political process or periodic and free elections. In addition to self-governance, democracy implies at least respect for human rights, the rule of law and an independent functioning judiciary. Some might also argue that democracy also requires adherence to a market economy. Indeed, in deciding whether a state is democratic or not and hence qualifies for admission to the European Union, the EU uses all of these indicators as a yardstick.¹

What is now clear, however, is that a government to be characterized as democratic must be based on the will of the people as expressed through free, open and fair elections. Clearly, for elections to be fair and free, other human rights are necessarily implicated. For example, there can be no election if freedom of expression and assembly or movement are not respected in the electoral process. We should keep in mind, however, that although free and fair elections are the *sine qua non* of a democratic society, recent events indicate that such elections do not necessarily result in democratic governance. Indeed governments that are repressive or corrupt sometimes are elected and indeed reelected.²

I have been asked, however, to focus on the international entitlement of self-governance as expressed through the electoral process as an element of democracy. The right to self-governance, or to use the term in its more limited sense, democracy, has ancient roots stretching back to the classical Athens. It implies the right of persons to be consulted in a meaningful way when political choices need to be made. What is new, however, is the emerging consensus that the right of persons to participate in self-governance is of concern to the entire international community. It is a right to be protected not only in national constitutions and laws, but by international law and institutions as well.

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¹ European Union, *Enlargement* (1993), available at <http://www.europa.eu.int/comm/enlargement/intro/criteria.htm>.

² See Gregory H. Fox & George Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 3 (1995); see also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

I. DEVELOPMENT OF AN INTERNATIONAL RIGHT TO FREE ELECTIONS

A. UNITED STATES EXPERIENCE

Until recently, the concept that self-governance was a human or basic right did not exist. If we look at our own Declaration of Independence of 1776, it suggested that all human beings are endowed with rights, including the right to institute a government that represents the people. Although the principle that people should be represented in their government was established, no particular form of representation was required. It was not necessary that all persons be represented equally or at all for that matter. Indeed when the Declaration of Independence stated "We hold these truths to be self evident that all men are created equal," equality did not extend to blacks or to women. Voting for the most part was restricted to white, male, property owners.³

The Amendments to the United States Constitution since the Civil War extended suffrage by prohibiting denial of the vote on account of race⁴, on account of sex⁵, and on account of age⁶. These Amendments prohibited discrimination in voting, but they did not grant anyone the right to vote. Other Western countries moved only slowly to universal suffrage and fully representative government prior to World War II.

B. THE EMERGING CONSENSUS CONCERNING VOTING AS A FUNDAMENTAL HUMAN RIGHT

Following World War II, the concept that human rights were of concern to the international community was accepted and international norms developed. Under the auspices of the United Nations and other international organizations, international human rights instruments were drafted to guarantee basic human rights such as speech, religion and freedom from torture. These human rights instruments also addressed the political system and guaranteed a right to suffrage and to representative government. These documents do not, however, guarantee a democratic form of government. The

³ MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, *WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA?* 5 (1987).

⁴ U.S. CONST. amend. XV, § 1.

⁵ U.S. CONST. amend. XIX, § 1.

⁶ U.S. CONST. amend. XXVI, § 1.

Universal Declaration of Human Rights⁷ and the Covenant on Civil and Political Rights⁸ expressed the right to political participation but neither indicated specifically how that right was to be achieved.

The first universal human rights instrument in the history of humankind is the Universal Declaration of Human Rights (UDHR).⁹ When it was adopted by the United Nations General Assembly in 1948, it was not intended to create binding legal obligations, but instead was to serve as a common standard of achievement for all states to aspire to. It has been characterized as a landmark in the development of human rights as important as the Magna Carta.¹⁰

Article 21 of The Universal Declaration of Human Rights states:

- 1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives...
- 2) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The UDHR is somewhat specific with respect to requirements for elections but there is no hint of what is implied by the "right to take part in government." The Declaration was influenced by the tradition of liberal democracy and emphasizes the role of the "will of the people" as the "basis of the authority of government" but it does not use the term democracy.

The only explicit reference to democracy in the UDHR appears in Article 29, the derogation clause, which declares rights and freedoms to be "subject only to such limitations as are determined by law solely for the purpose of ... meeting the just requirements of morality, public order and the general welfare in a democratic society." This language is similar to the language used in other regional human rights conventions such as the European Convention on Human Rights and Fundamental Freedoms.¹¹

The International Covenant on Civil and Political Rights (ICCPR)¹² is the principal treaty declaring a right to political participation. It creates

⁷ *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d. Sess., U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

⁸ *The Covenant on Civil and Political Rights*, G.A. Res. 2200A(XXI), U.N. GAOR, 21st, Sess., No. 16 at 1, U.N. Doc. A/6316 (1966).

⁹ *Universal Declaration*, *supra* note 7.

¹⁰ See *Universal Declaration*, *supra* note 7, 3d Sess., pt. 1, at 262.

¹¹ *Universal Declaration*, *supra* note 7.

¹² G.A. Res.2200A(XXI), *supra* note 8, at 29.

binding legal obligations with respect to signatory states and embodies the same norms as those found in UDHR.

Article 25 of the Universal Declaration of Human Rights states:
Every citizen shall have the right and the opportunity,
without...unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors...

The ICCPR has been ratified by 148 states.¹³ The Covenant permits both direct and representative participation. However, once again, the ICCPR does not indicate how citizens are to "take part in the conduct of public affairs," other than by identifying periodic and "genuine" elections as an ingredient of the right to participate.¹⁴

When we look at the debates on these documents, we see that the drafters intentionally left vague the articles dealing with governance and elections. For example, it does not address the legitimacy of proportional voting, or parliamentary versus presidential systems. Instead the documents were to set down fundamental principles, leaving each country to devise, within the framework of its national system, its own method of applying them.¹⁵

More controversial, however, was the omission of any reference to contested elections, plural political parties or the right to change the government through legal means. Indeed, references to all of these were introduced and were vigorously objected to by the Soviet Union since, in their view, no justification for a pluralist party system could be found in Soviet society. Moreover, the Soviet Union contended that more explicit provisions relating to the conduct of elections would constitute an unwarranted interference with the domestic affairs of the state.¹⁶ As a result, the documents are sufficiently vague so both democratic and non-democratic states could claim they conformed to international norms pertaining to political participation.

¹³ Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Principal International Human Rights Treaties* (Mar. 28, 2001).

¹⁴ *Id.*

¹⁵ Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. H.R. L. REV. 90 (1988).

¹⁶ *See id.* at 89-94.

C. ELECTIONS AND DEMOCRACY

With the end of the Cold War, "democracy" increasingly begins to appear explicitly in international instruments, not only as implied in the individual right to vote but as an overarching value in "constitutionalism" and the "rule of law." It was urged that democracy was necessary to ensure the protection of human rights. For example, Boutros-Ghali, then UN Secretary-General, stated at the opening of the World Conference on Human Rights in 1993, that the "process of democratization cannot be separated...from the protection of human rights."¹⁷

The Vienna Declaration and Programme of Action adopted at the Conference provides in Article 8 that:

Democracy, development and respect for human rights and fundamental freedoms are independent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social, and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels and should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development, and respect for human rights and fundamental freedoms in the entire world.¹⁸

In the 1990 Charter of Paris for a New Europe, members undertook "to build, consolidate and strengthen democracy as the only system of government of our nations."¹⁹

In the United States, the end of the cold war caused a reevaluation of foreign policy which sometimes simply equated democracy with anti-communism. The dubious distinction between authoritative regime and authoritarian regimes has been rejected.

For the former communist states, the commitment to democracy after the Cold War involved a radical change in the system of governance. Although those states had described themselves as "democratic," representation and universal suffrage by Western standards or by those of the

¹⁷ World Conference on Human Rights, *The Vienna Declaration and Programme of Action* (June, 1993) at 17.

¹⁸ *Id.* at 30.

¹⁹ Conference on Security and Cooperation in Europe, *Charter of Paris For A New Europe* (Nov. 1, 1990), available at www.hri.org/docs/Paris90.html.

international human rights instruments was lacking. As reform was implemented, democracies began to emerge.²⁰

D. ROLE OF INTERNATIONAL ORGANIZATIONS

The United Nations early on took the position that elections were at least one indicator of democratization. It takes a prominent role with respect to assisting democratization including technical assistance on elections.

U.N. Resolution 150, of December 18, 1990, stressed that: [P]eriodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms. These include embracing political, economic, and social and cultural rights.²¹

Furthermore, the resolution declared "determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others, as provided in national constitutions and laws."²²

However, as late as 1994, the Secretary General made clear, in his report to the General Assembly the United Nations system, in assisting and supporting the efforts of Governments to promote and consolidate new or restored democracies, did not endorse or promote any specific form of government. Democracy, he said, "is not a model to be copied from certain States, but a goal to be attained by all peoples and assimilated by all cultures."²³ It may take many forms, depending on the characteristics and circumstances of societies. Thus, rather than promote democracy as a goal, the aim of the United Nations was to further the process of democratization. Democratization, the Secretary-General elaborated, is a process by which an authoritarian society becomes increasingly participatory through such

²⁰ Louis Henkin, *Human Rights and Democracy*, in HUMAN RIGHTS 88-90 (Louis Henkin, et al. eds., 1999).

²¹ *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, G. A. Res. 150/48, U.N. GAOR, 45th Sess., No. 110, at 1, U.N. Doc. A/RES/45/150 (1991).

²² *Id.*

²³ *Report of the Secretary-General on Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, U.N. GAOR, 50th Sess., No. 41, at 1, U.N. Doc. A/50/332 (1995).

mechanism as periodic elections to representative bodies, the accountability of public officials, a transparent public administration, an independent judiciary and free press.²⁴

The United Nations assists states in this process of democratization when requested to do so by a Member State. It assists in ways agreed to by the Government of that state. The United Nations Electoral Assistance Division (EAD) was established to handle requests by member states for assistance in organizing conducting and monitoring national elections. Major activities of EAD include: evaluating government requests for electoral assistance, conducting needs assessment missions, collaborating in the design of electoral assistance project activities, with other U.N. system agencies, and in developing the electoral components of peace-keeping operations.²⁵ Assistance must be requested by the member states before it is given and can include civic education, assistance to political parties, and the media.²⁶

Regional organizations have taken a leadership in promoting democracy and developing international standards for elections. The Organization for Security and Cooperation in Europe²⁷ (OSCE) has been most specific in developing such standards. The OSCE was formed during the Cold War in 1975 to primarily enhance security and economic cooperation. Only peripherally did it pertain to Human Rights.²⁸ Its members are European countries, the Soviet Union, the United States and Canada.²⁹ Today, the former Soviet republics as well as the states of the former

²⁴ *Id.*

²⁵ United Nations Department of Political Affairs, *Main Types of Assistance Activities* 10 (1992), available at <http://www.un.org/Depts/dpa/ead/website3.htm>.

²⁶ *Id.*

²⁷ The OSCE was known as the Conference on Security and Cooperation in Europe. Its name was changed in 1995. The reliance on free and fair elections has been criticized. Rather, some argue that emphasis should be placed on developing procedures to help countries form and nurture stable, democratic forms of government. See Susan S. Gibson, *The Misplaced Reliance on Free and Fair Elections: The Role of Constitutional Democracy and the Rule of Law*, 21 HOUS. J. INT'L L 1 (1998).

²⁸ Conference on Security and Cooperation in Europe, Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), reprinted in 14 I.L.M. 1292 (1975) [hereinafter Final Act].

²⁹ The following states participated in the initial meeting of the Conference on Security and Cooperation in Europe (CSCE): Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States, and Yugoslavia. *Id.* Since then, the Vatican has joined the CSCE; Albania recently joined (1991); Estonia, Latvia, and Lithuania have joined (1991); Russia replaced the Soviet Union's seat; the other ten members of the Commonwealth of Independent States and the Central Asian republics (Azerbaijan, Belarus, Estonia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan) joined (1992); Yugoslavia was suspended and Croatia, Georgia, Slovenia, Bosnia and Herzegovina also joined in (1992), bringing the total membership to fifty-two. POLITICAL HANDBOOK OF THE WORLD: 1992 912-13 (Arthur S. Banks ed., 1992).

Yugoslavia are members. Through an ongoing process, known as the Helsinki Process, members commit to principles but this commitment does not create a binding legal obligation. However, the commitments have been characterized as one of the new forms of international instruments that result in legal effect upon the participating states to conform to the Act or be subject to international pressure.³⁰ Moreover, the commitments contribute to the development of regional customary international law.

The Helsinki Final Act, the document creating the organization understandably does not refer to democracy since it was drafted during the Cold War. Subsequent documents and commitments are more explicit. In the Copenhagen document of 1990,³¹ the OSCE affirmed that "democracy is an inherent element of the rule of law" and recognized "the importance of pluralism with regard to political organizations."³²

The OSCE then spelled out in greater detail than has the international system, the inalienable democratic rights of every citizen. These include the right to participate in "free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives."³³ The citizen is accorded a right to a government "representative in character, in which the executive is accountable to the elected legislature or the electorate" and to political parties which are clearly independent of the state³⁴.

The OSCE declaration goes much further than the Covenant on Civil and Political Rights in defining the parameters of the right to governance. It requires "free elections at reasonable intervals," for each national legislature. At least one chamber must be "freely contested in a popular vote," there must be freely formed political parties and freely nominated candidates for public office. The election must be conducted in accordance with universal and equal adult suffrage, a secret ballot or its equivalent, after a fair and free campaign. There must be "no legal or administrative obstacle" to media access. Elected officials must be permitted to take and hold office "until their term expires or is otherwise terminated in accordance with law."³⁵

³⁰ Thomas Buergenthal, *CSCE Human Dimension: The Birth of a System*, in 1 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, BOOK 2, 163, 200 (1990); see also Alexander Charles Kiss & Mary Frances Dominick, *The International Legal Significance of the Human Rights Provisions of the Helsinki Final Act*, 13 VAND. J. TRANSNAT'L L. 293, 297 (1980).

³¹ Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, reprinted in 29 I.L.M. 1305, 1308, ¶ 3 (1990).

³² *Id.* ¶ 5.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* ¶ 7.

The Copenhagen document commits OSCE member states to invite "observers from...OSCE participating States and any appropriate private institutions" to observe all national elections, and to "endeavor to facilitate similar access for election proceedings held below the national level."³⁶ Later in 1990, these expansive but precise principles were further developed by the OSCE in the Charter of Paris in which the leaders pledged to "co-operate and support each other with the aim of making democratic gains irreversible."³⁷

The OSCE commitments make clear "that issues relating to human rights, fundamental freedoms, democracy and the rule of law were matters of international concern. Respect for these rights and freedoms constitutes one of the foundations of the international order."³⁸ Further, they "categorically and irrevocably" declared "that the commitments undertaken in the field of the human dimension of the OSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned."³⁹

The OSCE Commitments pertaining to elections can be summed up in seven key words central to Democratic tradition: "universal, equal, fair, secret, free, transparent and accountable."⁴⁰ Indeed the role of the OSCE has been pivotal in organizing, monitoring and providing technical assistance to the democratization process central Europe, the former Yugoslavia and the former Soviet Union.

II. ARMENIA'S EFFORTS TO IMPLEMENT FREE ELECTIONS

The struggle in Armenia to comply with the international standards on free elections is indicative of the progress that has been made. What it demonstrates is that the process of democratization is a gradual one and that the conduct of free and fair election, and the willingness to abide by the result are an important step in that process.

I was first invited to go to Armenia in 1992 to help with the drafting of a new constitution and was there several times in connection with the

³⁶ *Id.* ¶ 8.

³⁷ An extensive and carefully developed methodology for election observation has been developed by the OSCE. It fields extensive teams of experts to observe the entire electoral process before, during, and after election days and issues reports. In 1999, more than 1900 observers were sent to monitor elections in 11 participating states; see OSCE, Office for Democratic Institutions and Human Rights, *Election Observation* (1999), available at www.osce.org/odihr/elections.htm.

³⁸ Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, Oct. 3, 1991, reprinted in 12 HUM.RTS. L.J. 472 (1991).

³⁹ *Id.* at 86.

⁴⁰ *Election Observation*, supra note 37, at 1.

constitutional drafting process. In 1997, after a highly contested Presidential election, I returned to chair a delegation of the OSCE that was to review the electoral process and electoral code and to make suggestions for electoral reform. The following year I served as the legal expert for the OSCE electoral monitoring unit in Armenia observing the 1998 presidential elections. In 1999, I was asked to review the Legal education system in Armenia and make recommendations for reform. I am pleased to say, despite some setbacks in the democratization process, Armenia has embarked on a path that might ultimately result in a truly democratic society.

Armenia has been characterized as an "island of democratic reform" among the former Soviet republics.⁴¹ Nevertheless, the international community expressed concerns following each election and, as recently as the 2000 elections, OSCE observers concluded that such elections had not met international standards although they show a steady progression towards meeting that goal.⁴² The 2000 elections showed continued improvement over past elections with respect to voting practice and vote-counting, as well as the ability of candidates to campaign freely.⁴³

From Armenia's initial movement towards independence, the nation's leadership was committed to establishing, through existing legal norms, a new republic based upon the rule of law. The movement for independence was based on several factors including: corruption in government and the bureaucracy, dissatisfaction with the environmental policy of the Soviet Union, and status of Nagorno-Karabach, an ethnic Armenian enclave in Azerbaijan that had been part of the Soviet Republic of Armenia until Stalin transferred it to Azerbaijan in 1921.⁴⁴

⁴¹ Daniel Sneider, *Democracy Teeters in Three Ex-Soviet States*, CHRISTIAN SCI. MONITOR, May 30, 1995, at 6. The United States has recognized Armenia's progress toward democracy, and Armenia is the third-largest recipient of foreign aid per capita in the world. See *Armenia and Karabakh*, BBC Broadcast, Aug. 19, 1993, available at LEXIS, World Library, BBCSWB File (acknowledging United States offer of assistance to aid in Armenia with its "democratic and economic development"); Fred Hiatt, *Even for Armenia, Democracy Has Some Limits*, INT'L HERALD TRIB., June 9, 1995. In addition, U.N. Secretary-General Boutros Boutros-Ghali said that Armenia's 30 political parties "are contributing to the deepening of democracy." *UN Chief Praises Armenia, Warns of Hard Road Ahead*, AGENCE FRANCE PRESSE, Nov. 3, 1994, available at LEXIS, News Library, AFP File.

⁴² See *Armenian Country Report on Human Rights Practices for 2000*, BUR. OF DEMOCRACY, HUMAN RIGHTS AND LABOR (U.S. Dept. State), Feb. 2001, at 15 [hereinafter *Country Report 2000*].

⁴³ *Id.* at 1.

⁴⁴ Nagorno-Karabakh is a mountainous territory that lies inside the borders of Azerbaijan. Nagorno-Karabakh was once part of the Soviet Republic of Armenia. The communist regime in the Soviet Union kept ethnic rivalry at bay. However, in the late 1980's when Gorbachev came into power, his policies of political openness brought ethnic claims into the open. Subsequently, the Karabakh movement, which demanded unification with Armenia, was created. U.S. INSTITUTE OF PEACE, *Conference Summary Armenia, Azerbaijan and Nagorno Karabakh State*

A. ADOPTION OF A PARLIAMENTARY CONSTITUTION

In 1990, by a vote of 183 to 2, the Armenian Supreme Soviet adopted the Declaration on Armenia's Independence as the basis for a new Constitution.⁴⁵ In 1991, in full compliance with the Soviet Constitution, ninety-nine percent of the voters adopted a referendum for secession and Levon Ter-Petrossian was overwhelmingly elected President.⁴⁶ The President then established a Constitutional Commission to draft a new constitution, that would create efficient power structures, based on the rule of law, that would guarantee individual rights and freedoms, and would promote the prosperity of the country's economy.⁴⁷

Following the collapse of the Soviet Union, we have seen that in the struggle for independence, there is generally a consensus on the need for reform and constitutionalism among the people who participated in the movement for independence.⁴⁸ Unless this window of opportunity is grasped, unity breaks down and factionalism and bickering ensue.⁴⁹ Indeed, this is precisely what happened in Armenia. Following independence, numerous political parties that had previously bonded together defected and some previously banned parties, including the Armenian Revolutionary Party, Dashnak, returned and formed an opposition to the government.

These parties debated both the substance of a new constitution and the process by which it was to be adopted, arguing for a constitutional commission. After acrimonious debate, the constitution adopted by the Presidential commission was submitted for referendum in 1995 and parliamentary elections were held.

Sovereignty v. Self-Determination, 42 IN BRIEF (1992). See also Liz Thurgood, *Enclave That Has Armenia in Thrall*, GUARDIAN (LONDON), Oct. 1, 1992, at 10; see also Michael Parks, *Nationalism in Armenia Form New Movement*, L.A. TIMES, Nov. 6, 1989, at 1; U.S. Dept. of State, *Armenia Report on Human Rights Practices* (1994). Subsequently, the Karabakh movement transformed from a struggle focused on reunification with Armenia to a struggle for self-determination.

⁴⁵ *Declaration on Armenia's Independence by the Parliament of Armenia*, reprinted in *ARMENIA AT THE CROSSROADS DEMOCRACY AND NATIONHOOD IN THE POST-SOVIET ERA* 107, 110 (Gerard J. Libaridian ed., 1991).

⁴⁶ See *Armenia: Tiny Republic in Unfriendly Neighborhood*, REUTERS, Sept. 23, 1991, at 16 (stating that 99% of the participants voted in favor of independence); see also Carol Williams, *Armenia Declares Independence*, L.A. TIMES, Sept. 24, 1991, at A11 (stating that over 99% of the voters "endorsed a free Armenia in Saturday's referendum").

⁴⁷ See Arden Sarkisian, *Armenia: Building a Democracy*, ARMENIAN INT'L MAG., Sept. 30, 1992, at 16. Sarkisian provides a thorough analysis of the Armenian governmental and political power structure, and observes that "Armenia's body politic has embraced the best and sometimes worst values of Western democracy." *Id.*

⁴⁸ See BRUCE ACKERMAN, *THE FUTURE OF THE LIBERAL REVOLUTION* 66 (1992).

⁴⁹ *Id.* This phenomenon is widely noted; Wiktor Osiatynski, *Special Report Poland's Constitutional Ordeal*, 3 E. EUR. CONST. REV. 29 (1994).

Over six hundred observers from foreign countries and international organizations monitored the referendum and election. The observers were stationed in Armenia for six weeks preceding the election and were drawn from eighteen governments and several governmental and non-governmental organizations. The observers included a joint delegation of over ninety members of the Organization for Security and Cooperation in Europe (OSCE)/United Nations (OSCE/UN) Joint Operation on Election Monitoring, as well as journalists and representatives of independent media.⁵⁰

Nineteen political parties and two thousand candidates competed in the election. Although women played a marginal role in Armenian politics, a new women's party, Shamiram, emerged. Finally, despite a constitutional process that extended for five years and characterized by mistrust, bitterness and suspicions on the part of most of the political factions involved, the constitution was adopted and approved by sixty-eight percent of the votes cast.⁵¹

B. FLAWS IN THE 1995 PARLIAMENTARY ELECTION

Unfortunately, the election process itself was deeply flawed. Both the timing of the election and referendum, and the rules pertaining thereto, were criticized by the international observers. The primary criticism related to the suspension imposed on the activities of the largest opposition party, the Dashnak Party.⁵² In December 1994, President Ter-Petrosian announced the banning of the Dashnak party and closed the party's newspaper. The President accused the Dashnaks of operating a secret terrorist organization. The Dashnak party denied all government charges. In January 1995, the Armenian Supreme Court reduced the ban on the Dashnak party to a six-month suspension.⁵³ The ban, however, expired on July 6, 1995, one day after the date set for the election, preventing the party from participating in the elections as a group, although the members were allowed to participate as individuals.

⁵⁰ See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, ARMENIA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1986 4 (1997); see also Tigran Liloyan, *Elections and Referendum to be held in Armenia Today*, TASS, July 5, 1995, available at LEXIS, World Library, TASS File [hereinafter *Country Report*]. Before monitoring the elections, the observers met with representatives of the authorities, the opposition, and electoral commissions.

⁵¹ See *68 Percent Back New Constitution for Armenia*, AGENCE FRANCE PRESSE, July 8, 1995, available at LEXIS, AFP File.

⁵² Press Release, OSCE Parliamentary Assembly, *Parliamentary Elections in Armenia* (June 7, 1995) [hereinafter *Osce Press Release*]; see also Alan Philps, *Polls Pave the Way for Armenian Dictatorship*, THE DAILY TELEGRAPH, July 5, 1995, at 13.

⁵³ *Dashnak Party Suspended for Six Months by Supreme Court*, BBC Summary of World Broadcasts, Jan. 16, 1995, available at LEXIS, News Library, BCCSWB File.

International observers, such as the OSCE, reported that while the elections were free, they were not fair and, indeed, the banning of the party and the subsequent Supreme Court decision seriously eroded the confidence that the people had in the elected government. However, the Report of the OSCE/UN Joint Operation concluded that the parliamentary elections constituted an important first step in the establishment of the democratic process in Armenia. The report noted that there was a plurality in the public debate, multiple parties and candidates were competing, and Armenian civic society and national NGOs actively participated in the process. At the same time, the report noted that some candidates encountered difficulties in qualifying for the election and that voters confronted confusion at the polls due to a lack of clear and uniform guidelines.⁵⁴

C. 1996 PRESIDENTIAL ELECTIONS TROUBLED

While criticism of the 1995 Parliamentary election and referendum centered primarily on the banning of the opposition party, the criticism of the 1996 Presidential election focused on ballot tampering, voter calculation discrepancies and subsequent repression of opposition leaders.⁵⁵ The 1996 Presidential election was bitterly contested. Observers noted that voter lists were often not displayed, polling stations were inadequate, and voters registered on Election Day without proper identification.⁵⁶ In addition, the Electoral Commissions, especially at the regional level, became more partisan in favor of the incumbent as election day approached.⁵⁷ Furthermore, although the Presidential Election Law provide equal access for candidates to free television and radio advertising, the incumbent President had a clear advantage because the other candidates were not allowed to use their remaining free television rights during the week immediately preceding the elections.⁵⁸

⁵⁴ Press Release, Permanent Mission of the Republic of Armenia to the United Nations, First Free Elections and Referendum Held Successfully in Armenia (July 7, 1995) [hereinafter *UN Press Release*]; Press Release, OSCE and United Nations, Joint Operation on Election Monitoring in Armenia (July 7, 1995).

⁵⁵ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE: REVIEW OF THE U.S. DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 1996 36 (1997) [hereinafter *Critique*]. "Observers noted significant breaches of international election standards during the elections, including harassment and intimidation of voters, non-secret voting in one-third of its observations, stolen ballot-boxes, ballot-box stuffing, ballot tampering and irregularities in vote calculations at polling stations and election offices." *Id.*

⁵⁶ See SIMON OSBORN, ARMENIAN PRESIDENTIAL ELECTIONS SEPTEMBER 24, 1996 FINAL REPORT (1996).

⁵⁷ *Id.*

⁵⁸ *Id.*

The election results were further stigmatized by the brutal crackdown on opposition leaders, who were arrested and detained following demonstrations protesting the election results. Seventeen prominent opposition leaders and over 100 participants in the 1996 elections were arrested or detained for "participating in mass disorder."⁵⁹ The State Department's Armenian Country Report on Human Rights Practices for 1996 notes that "international observers reported that serious breaches of the election law and numerous irregularities resulted in a lack of confidence in the integrity of the overall election process."⁶⁰

Two presidential candidates challenged the results of the 1996 election in the Constitutional Court in an attempt to invalidate the results.⁶¹ The plaintiffs contended that the right to direct elections by secret ballot was violated. To support their claim, documents evidencing numerical discrepancies, testimony of eyewitnesses and foreign observers as well as the final report of the OSCE and the Observer's mission of October 15, 1996 were submitted.⁶²

In a key ruling, Armenia's Constitutional Court held that allegations of voting infringement should have been presented to the Electoral Commission itself or to the court of general jurisdiction as prescribed by law rather than directly to the Constitutional Court.⁶³ Since the Plaintiffs did not follow this procedure, the Court did not consider the evidence and dismissed the case.⁶⁴ However, the Court recommended that changes be made in the electoral laws.

The U.S. State Department Reports stated that "the Court's handling of the case did not dispel doubts about the credibility of the official election results."⁶⁵ Further, it noted that international observers reported that serious breaches of the election law and numerous irregularities contaminated the

⁵⁹ *Country Report, supra* note 50, at 4.

⁶⁰ *Id.*

⁶¹ *See Critique, supra* note 55.

⁶² *See generally* OSBORN, *supra* note 56.

⁶³ *See Country Report, supra* note 50, at 11.

⁶⁴ *See* The Decision of the Constitutional Court of the Republic of Armenia regarding the case on the litigation of the results of the September 22, 1996, election of the President of the Republic of Armenia. The decision provides:

The investigation of the concrete arguments of the appealing parties on the facts of infringements during the preparation, implementation, and summarizing of the results of the election of the President of the Republic are beyond the scope of jurisdiction of the Constitutional Court. The Constitutional Court considers, that the opportunities given by the law regarding the solution of disputes connected with the preparation, implementation and summarizing of the elections had not been sufficiently used by the candidates for the President of the Republic and their proxies.

Id.

⁶⁵ *Country Report, supra* note 50, at 11.

overall integrity of the electoral process.⁶⁶ The Armenian Government was urged to employ international experts and recommendations to address the flaws and rebuild public confidence in the electoral process.⁶⁷

D. OSCE RECOMMENDED GUIDELINES FOR UPCOMING ELECTIONS

On September 24, 1996, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) released its Final Report of the Armenian Presidential Election, and cited several recommendations for future Armenian elections including an overhaul of the entire electoral process.⁶⁸

In accordance with the suggestions of the OSCE, Armenia began the process of reforming the electoral code and process. Comprehensive proposals to address the concerns and irregularities noted in the previous elections were debated in the National Assembly. However, in February 1998, before the Assembly was able to act on the proposals, President Levon Ter-Petrossian, weakened by allegations and suspicions that the 1996 election victory was achieved through fraud, resigned.⁶⁹

E. RECURRENCE OF PROBLEMS IN 1998 ELECTION

As provided by the Constitution, elections took place on March 18, 1998, within forty days of the resignation. Twelve candidates stood for election, including acting President Robert Kocharian.⁷⁰ Once again, foreign observers led by the OSCE and Council of Europe⁷¹ monitored the election and once again found the results less than satisfactory.⁷² Despite the ban on advertising in government buildings or facilities, campaign literature for the acting President proliferated in government buildings and were placed on seats of Armenian Airlines, a state owned airline carrying many Armenians returning to vote in the election. Serious irregularities were also recorded in

⁶⁶ *Report on Armenia's Presidential Election Of September 22, 1996*, Comm'n on Sec. and Coop. in Eur., at 5, U.N. Doc. AR 5/2 (1996)[hereinafter *Presidential Report*].

⁶⁷ *Id.*

⁶⁸ *Country Report*, *supra* note 50, at 10.

⁶⁹ *Turkey--Internal Problems*, 25 APS DIPLOMAT REDRAWING THE ISLMAC MAP (APSRIM), Mar. 1, 1993, available at 1993 WL 2498733.

⁷⁰ *Five Candidates Say Vote Not Free and Fair*, BBC BROADCAST, Mar. 19, 1998, available at LEXIS, World Library, BBCSWB File (listing the candidates and their respective parties).

⁷¹ The Council of Europe is an intergovernmental organization, which focuses on protecting human rights and all other major issues concerning European society other than defense.

⁷² *OSCE Observers Condemn Election Irregularities*, BBC SUMMARY OF WORLD BROADCASTING, Mar. 20, 1998, available at LEXIS, World Library, BBCSWB File (quoting an OSCE statement: "The electoral reforms put off because these elections must continue.")

fifteen percent of the eight hundred polling stations including "problems with the voting process, voting by the military, the use of state resources, the presence of police and other unauthorized personnel at polling stations, media bias, and campaign violence."⁷³ Overall, the election was once again characterized as "deeply flawed" by the OSCE and did not meet the OSCE standards in the Copenhagen document to which Armenia had committed.⁷⁴

Five candidates for the presidency issued a statement declaring "that the extraordinary elections for the post of president of the republic of Armenia, regardless of the results cannot be considered free and fair."⁷⁵ Because none of the candidates received a majority of the votes, a second round of elections involving the two candidates who received the highest vote was scheduled for March 30, 1998.⁷⁶

Once again, substantial irregularities were observed including ballot box stuffing, discrepancies in vote counts, unauthorized people at polling stations.⁷⁷ An unusually high voter turnout occurred in areas that corresponded to high percentages for the acting President, Robert Kocharian and inflated the number of votes for President Kocharian by 100,000.⁷⁸ Although voters did hear from all candidates, state television was biased in favor of the President.⁷⁹

F. STEADY PROGRESS TOWARDS FREE ELECTIONS PROVEN IN 1999

The OSCE concluded that although elections of March 16, 1998 and March 30, 1999 did not meet the OSCE standards, they "showed improvement in some respects over the 1998 election."⁸⁰ The OSCE, however, recommended a "thorough, impartial and vigorous investigation"

⁷³ David Stern, *CIS: OSCE Slams "Deeply Flawed" Armenia Poll*, AAP NEWSFEED, Mar. 19, 1998, at 1.

⁷⁴ *Id.*

⁷⁵ *Five Candidates Say Vote Not Free and Fair*, *supra* note 70.

⁷⁶ See Stern, *supra* note 73, at 1; see also *Kocharyan Wins Round of Armenia Vote by 8 Per Cent*, DEUTSCHE PRESS AGENTUR, Mar. 19, 1998 (the "runoff," set for Mar. 30, was necessary because none of the 12 candidates received more than 50 per cent of the ballots cast).

⁷⁷ See *Country Report 2000*, *supra* note 42, at 15.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Republic of Armenia Presidential Election March 16 and March 30, 1998, Final Report (Office of Democratic Institutions and Human Rights, 1998), available at http://www.osce.org/odihr/documents/reports/election_reports/am/arm2-4.pdf.

of any irregularities and made further recommendations concerning the Armenian election law.⁸¹

The May 1999 election showed much progress toward compliance with OSCE standards.⁸² The elections took place under a new electoral code that substantially improved the prior process, improvements and implemented recommendations from international organizations.⁸³ For example, the new code abolishes one level of election bureaucracy and allows courts to settle electoral issues during the election, instead of only after the results are issued.⁸⁴ In the 1999 elections, disputes were taken to the courts and the courts appeared to resolve the disputes in an independent and fair fashion.

However, the elections were still plagued by problems. The areas of most concern were the poor quality of voter lists, mistakes in registration, voting by military personnel, problems in the formation of election commissions, and the presence of unauthorized people during the voting and counting procedures.⁸⁵ Thousands of voters had to appeal to local courts on election day in order to cast their votes, after not finding their names registered. These irregularities, however, appear not to be related to fraud or corruption, but rather a lack of resources and to an inept electoral system, which the government is committed to remedy.⁸⁶

Council of Europe observers described the election as free and fair, but noted there were minor irregularities. The main problems were use of old seals and defects in the voter lists. The OSCE also noted improvements over the four previous elections and made fourteen specific recommendations for improving the process. The last of the fourteen recommendations is interesting. Armenia has a process in its balloting which allows the voter to vote, not for any candidate, but to mark "against all."⁸⁷ OSCE recommended this option be eliminated.

III. CONCLUSION

Armenia as a case study indicates that democratization is an ongoing process. Elections that are free, open and fair have become a human rights norm, at least of regional customary international law. The challenges facing these new states are enormous and corruption that infects the electoral process

⁸¹ *Id.*

⁸² See *Country Report 2000*, *supra* note 42, at 16.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ This might be analogous to the Ralph Nader vote in the 2000 U.S. Presidential election.

is a danger to the survival of the state. Resources and technical assistance from global, regional and non-governmental organizations are available to assist in the electoral process and systems of reform and are able to be effective and instrumental in the reform process.

First and foremost, however, there must exist a political will, both at the governmental level and in civil society, to move toward a more democratic approach to government. I think that we have witnessed, in some states at least, the evidence of that political will and Armenia is moving in that direction. Armenia has learned from the electoral process that one thing is sure: the whole world is watching and emerging democracies will be held accountable.