The Right to Free Elections: Norms and Enforcement Procedures

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The UN system
Numerous international declarations and treaties have over the past 40 years attempted to define the form of government which individual states consider to be most desirable and legitimate. The United Nations cluster of declarations, covenants and resolutions set the tone for subsequent standard-setting multilateral agreements. With the assertion that the freely-expressed will of the people shall be the basis of a government’s authority and the legitimacy of the state, the United Nations Charter enshrines the right of all persons to take part — directly or indirectly, personally or by delegation — in the government of their country. The requirements for genuine elections, as spelled out in Article 21 of the United Nations Declaration on Human Rights and further entrenched in Article 25 of the International Covenant on Civil and Political Rights, were restated in a General Assembly Resolution of December 1991. This new assertiveness was the recent expression of world opinion which ensued from the emergence of a new consensus on democratic institutions across the old East-West divide.

The United Nations ‘family’ of norms on the conduct of elections is remarkably consistent in its emphasis on linking participative politics, access to public service and voting right (see the chart in the annex). Without the effective right of individuals to take part in the running of government affairs, elections, even periodic and genuine, might just be a mockery of democracy or a mere approval turned dubious plebiscite. Equally, a state whose public service would not be freely and universally accessible would render free and fair elections meaningless. Thus, a technically accurate election only makes sense if individuals enjoy the effective right to partake in government activities and make use of services made available by the state. A ‘closed’ or discriminatory state, in which individuals have little or no say and access, cannot possibly pretend to be a genuine election. An election held in such circumstances could best be described as manipulation of public opinion.

The United Nations Organisation as such has very few monitoring powers, let alone the ability to enforce commitments by states to implement the conditions of and rights to a genuine election. By ratifying or adhering to UN instruments, states declare themselves accountable for any violation of these rights in terms of international law. But this remains a lofty ideal seldom matched by states’ domestic jurisdiction for lack of universal consensus on the notion of humanity. The UN instruments essentially aimed at attracting as many states as possible to

1. The author has written this article in his personal capacity.
meet their aspiration to universality, often at the expense of effective implementa-
tion. Thus the UN international mechanism of protection and/or enforcement of
human rights is weak, as it often stalls where the state considers that it impinges
on its sovereignty or its internal affairs. UN involvement in elections has basically
been of two kinds: electoral verification, involving the presence of UN observers
in the territory or country concerned; and electoral assistance, encompassing the
 provision of a variety of technical and advisory services, but not including
verification functions. UN election observations or supervisions are operated
under special mandates from the Security Council and the General Assembly, as
part of an overall peace-keeping and peace-building role for the UN. These
operations in the past were often linked to claims by colonial territories to
elections or consultations as a result of the right to self-determination. In this
regard, the UN Declaration on Human Rights Article 21 and, later, the
International Covenant on Civil and Political Rights are to guarantee that the
people of a territory effectively exercise their choice as to their territory’s future
status in a free and unfettered manner.

Regional Regulations
Some regional conventions, chiefly inspired by the UN tradition, follow this
pattern. The American Convention on Human Rights is almost identical, as far
as election rights are concerned, whereas its protection mechanism bears a
striking resemblance to the Council of Europe procedures (see below). The
African Charter on Human and People Rights, while being one of the most
comprehensive human rights document in existence (covering the three
dimensions of human rights: civil and political rights, economic-social-cultural
rights and people’s rights), fails to include the right to vote and to be elected in
periodic elections by secret ballot. This shortcoming lies in the genesis of the
Charter shaped by an African leadership whose main concern was not the
protection of human rights but the continuation of its own rule.

The Council of Europe
The Council of Europe’s elaboration on election rights is one of the principal
instruments in Europe alongside the UN system. Article 3 of Protocol 1 (entry
into force 1954) constitutes another attempt to define and enforce the right to
elections, albeit in a distinctly legalistic way. This article, although extremely
conservatively worded, places a very specific obligation on governments. The
European Commission of Human Rights has been quite cautious, not to say
narrow, in its assessment of the scope of Article 3 of Protocol 1. Its case-law
reiterates that the Convention does not require any particular political system such
as majority voting with one or two ballots or proportional representation, nor
does it require that all votes must be accorded equal weight in the tallying
process or that all candidates should be guaranteed equal chances of victory; it
does not cover the people’s right of self-disposal; and it applies neither to
municipal elections nor to European Parliamentary elections. In the Mathieu-
Mohin and Clerfayt v. Belgium Case, the European Court of Human Rights