Democracy and Human Rights in a Changing Constitution

David Feldman[1]

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Abstract: *It is a challenging time for both democracy and human rights. Democracy is threatened by foreign interference and domestic attacks on freedom of speech; human rights are politically contentious, and uncomfortable, politically inspired compromises are being made. In the UK, which used to have parliamentary democracy uncontroversially at the constitution's heart, international and domestic pressures are weakening power-centres and making it harder to give effect to important values. To overcome these problems, we need to be clear about core values and must be prepared to stand up to attacks on them. The talk will consider some of the issues which we, as academics and lawyers, have a special responsibility to address for the public good, and will stress the importance of civility to democracy and human rights.*

I. Why would a lawyer talk about human rights and democracy?

1. It is a great pleasure to be speaking under the auspices of the new Human Rights and Democracy Forum. The Forum is a fine initiative, gathering together scholars and practitioners to address some of the most important issues of our time. I congratulate the University, and the prime movers behind the Forum Dr Catherine Dupré (a long-standing friend and former colleague from our time in Birmingham together) and Dr Stephen Skinner, on their success in establishing the Forum. May it go from strength to strength.

2. For a lawyer to talk about democracy and human rights is rather like a political philosopher discussing rectification of the Land Register: there is no particular reason to expect either to

[1] QC (Hon), FBA. Rouse Ball Professor of English Law, University of Cambridge; Fellow of Downing College, Cambridge; Academic Associate, 39 Essex Chambers.

have anything especially useful to say. I have two pleas in mitigation of my arrogance in going off-piste in this way.

a. First, I have spent about four years working in the Houses of Parliament in Westminster which are devoted in large part to making democracy and human rights work in practice.

b. Secondly, human rights have become legally enforceable standards both in international law and, frequently, in domestic law. In international law this was thanks largely to developments in international relations since World War II. Eleanor Roosevelt, wife of US President Franklin D. Roosevelt, and the US Delegate to the General Assembly of the United Nations from 1945, drove the movement to reduce human rights to texts which could be the basis of systematic legal protection. The General Assembly's Universal Declaration of Human Rights inspired and helped to shape the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), a foundational treaty of the Council of Europe. The ECHR broke new ground by establishing international institutions authorised to adjudicate authoritatively on individuals' complaints that High Contracting Parties (i.e. states) had violated their rights under the Convention. This set a pattern for making human rights enforceable in international law and, frequently, also in domestic law. Some right sunder the ECHR have been legally enforceable in domestic law in the UK from 1999 for some purposes under devolution legislation, and more widely since 2000 under the Human Rights Act 1998. In one post-conflict state, Bosnia and Herzegovina, protection of a very large number of human rights was part of the settlement which brought the war in the country to an end in 1995. My experience as a Constitutional Court judge there for eight years equips me to speak about human rights.

3. What I have to say arises more from reflecting on those experiences than from any expertise in political philosophy.

II. What problems have precipitated this talk?

4. There are problems with democracy, human rights, and the UK's constitution.

    a. In relation to the constitution, the structure of the UK is under stress.

        i. Devolution inevitably weakens central authority by creating different political units in Scotland, Northern Ireland and Wales, each with its own, rather special, authority flowing from democracy and responsiveness to local needs. Among other problems, the arrangements appear to disadvantage England. In the absence of an English Parliament and English Government, we have a curious arrangement – an extra stage in the parliamentary process for "England only" provisions in Bills – introduced without public discussion by way of an amendment to House of Commons Standing Orders. Our constitution changes in mysterious ways.

        ii. At both devolved and central locations of government, there is a challenge to long-established representative democracy in which a Parliament has unlimited legislative power (which Rousseau refused to accept as a type of democracy at all) through the increasing use of referendums, which have an uncomfortable relationship with representative democracy. Does political sovereignty lie in the people or the Parliament? What are the responsibilities and powers of parliamentarians in the face of a referendum result? Are there any limits on the kinds of matters suitable for referendum? Can a referendum result properly be rejected on the ground (for example) that it seeks unconstitutional action?

b. Around the edges of individual constitutions, there are difficult contests concerning democracy; I would want to add at least one more (consociation and collective representation). In the 1980s David Held identified eight models of democracy. He pointed out that, while a claim to be democratic seems to confer an aura of legitimacy, all kinds of political regime now claim to be democratic, while meaning different things by the term. A general commitment to democracy is a very recent phenomenon, and little is to be found concerning it in official records between ancient Greece and eighteenth-century Europe. Indeed, "[t]he great majority of political thinkers from ancient Greece to the present day have been highly critical of the theory and practice of democracy." Moreover the history of the last century shows that "[d]emocracy is a remarkably difficult form of government to create and sustain".[2]

    i. It can be a claim (1) that everyone should participate in legislating, policy-making, and administering law and policy; or (2) that all should be involved in particularly important decisions; or (3) that rulers should be accountable to the people or their representatives; or (4) that rulers should be appointed by the people or their representatives; or (5) that rulers should act in the interests of the ruled;[3] or, of course, some combination of those. We are moving in the UK from a combination, to some degree, of (3), (4) and (5) to a combination of (2) to (5), and they do not always fit comfortably together.

    ii. Whichever type or types of democracy one's state espouses, democracy in action is under attack in the UK and USA (and probably elsewhere) through fake news promulgated via social media, lying by politicians, and systematic manipulation of people's thought processes by way of carefully targeted

[2] David Held, *Models of Democracy* (Oxford: Polity Press, 1987), p. 1.
[3] Jack Lively, *Democracy* (Oxford: Basil Blackwell, 1975), p. 30.

advertising on the basis of psychological analysis of people's social media profiles. Democracy is further undermined by a loss of civility in public discussion, especially but not exclusively via social media. I shall say more about this later.

c. Human rights are under attack because, when in the form of international, binding norms, they appear sometimes to challenge national self-determination, while in the form of binding domestic law norms they sometimes appear to challenge whatever form of democracy is in play, and generate friction between judicial and executive institutions. On the international plane, the problem is exacerbated by resurgent nationalism within states accompanied by suspicion of the authority and judgement of international or supranational institutions. On the national plane, a growing intolerance of outsiders and minority opinions, reversing the dominant trend of the previous half-century, is making freedom of speech uncomfortable for people to cope with.

5. It is often observed that both democracy and human rights depend on, and seek to protect, human dignity, equality and autonomy. But the nature of human rights, like that of democracy, has always been contested, and the means and ends of the contest are changing. The pressures which afflict both democracy and human rights force those of us who want to defend both human rights and democracy to clarify what we think they are and why they are worth defending, in order to allow us to make the case for them. To contribute persuasively to the debate it is not enough to hold a philosophically sustainable view of the character of human rights and democracy respectively.

III. <u>The relationship between democracy and human rights</u>

A. Different societies, different conceptions of democracy and human rights

6. It is often said that democracy and human rights have common foundations in equality, dignity and autonomy, but the response to these values varies greatly between societies in accordance with social and moral views.

7. For nearly half a century after the end of World War II, the Cold War forced the people of Europe to take sides between two ways of pursuing dignity and equality. In the East, it was a collective, statist route: the state provided for the needs of the people through regulation, coordination and control, and defended the people against threats from both inside and outside the state. In Western Europe, it was prevailing orthodoxy that human rights and democracy together provided a basis for a good society, based on respect for human dignity, self-determination, and equality. Broadly speaking, and with significantly corporatist and collectivist elements, the West chose a version of individual autonomy as the heart of their vision of the good society: individual freedom supported by a social safety-net.

8. These were not the only visions of democracy and human rights. In the USA, where the Constitution' Bill of Rights was originally designed by states to limit the federal government's power to interfere with states' rights to decide whether and if so whom to repress, an increasingly libertarian strand developed, in line with the American tradition of desiring small government and rewarding individual enterprise. This was echoed in parts of the Far East, where free trade created huge economic opportunities, but with far more space for collective social values – "Asian values" – reinforced by relatively authoritarian state structures, most notably in Singapore. Economic liberalism was accompanied by social conservatism in deferential, authoritarian societies. In India, there was a complex mixture of all these trends and more. In Africa, the trend was increasingly towards authoritarian collectivism of one kind or another.

9. For people, and particularly rulers, in much of Asia and parts of Africa, as well as in the USSR and China, western notions of democracy and human rights were inimical to their values and

the structure of their societies, being too heavily influenced by liberal individualism. In much of the world, most notably perhaps in the People's Republic of China, democracy was an intra-party rather than an inter-party matter. The goal was to create consensus and reinforce social bonds by co-opting critical voices into the governing party, not to stimulate faction by allowing competing political power-centres to develop. The problem of faction was not new. It was at the forefront of discussions relating to the framing of the Constitution of the USA in the late 1780s. Article II of the Constitution, for example, dealing with the process for selecting the President and Vice-President was notoriously an attempt to design faction and populism out of the process, an aim defeated fairly quickly by the rise of both party-politics and ideas of popular democracy in the following decades. The result is that Article II operates today as an uncomfortable compromise between incompatible models for the allocation of governmental power.

10. In short, the content of ideas of democracy and human rights have never been globally agreed. In Europe, the apparent collapse of the Iron Curtain in 1989 and the 1990s created particular problems. Eastern European populations were quick to reject the repressive aspects of their states, but were less clear about what they wanted instead. The material prosperity which seemed to accompany the liberal-democratic values of Western Europe were popular, but were not quickly obtainable. Instead fairly small elites made huge profits while the rest of the population tended to be reduced to penury. Liberalism and democracy may create conditions in which prosperity can be shared, but they do not themselves create prosperity. Indeed the fragile resources and economies of Eastern European states were subject to widespread asset-stripping not only by their own elites but also by western corporations, aided, in those states which joined the EC/EU, but the states' inability to impose barriers to take-overs.

11. This realisation was one of the factors which stimulated a return to paternalist authoritarianism across much of Eastern Europe, with a desire for strong state institutions

and rejection or reversal of international standards. For example, in a case now awaiting decision by the European Court of Human Rights a mother whose son died in hospital discovered that doctors had removed his kidneys for transplantation without consulting her. She claims that this violated her right to respect for her private or family life contrary to ECHR Article 8. Russia's response is that it would have been inhumane to ask for her consent, a form of authoritarian paternalism deployed to justify an interference with her right.[4] One might think that there are good reasons for allowing organs to be taken from deceased people without relatives' consent, in order to benefit the health of others; but the way in which it is reported that the Russian response has been phrased is, I think, significant. The coincidence between a resurgence of authoritarian paternalism and resurgent nationalism may help to explain Vladimir Putin's re-election this week for another term as President of the Russian Federation.

12. But the turn towards nationalism and popular authoritarianism is not limited to Eastern Europe. It may also have been a contributory factor (alongside social conservatism) in the electoral success of Donald Trump, in the UK's move towards departing from the EU, in the resurgent influence of Silvio Berlusconi in Italy following the recent general election there, and in Catalan separatism in Spain, as well as making it harder to form a government following the recent general election in Germany; and so on.

13. This renewed concern for national sovereignty, a desire to insulate states from control by international or supra-national institutions and norms, is partly stimulated by dissatisfaction within nations at the way in which international institutions have dealt with human-rights-based challenges to decisions and laws of states, made in accordance with national,

[4] *Valyushchenko v. Russia* App No 51283/14. On Russia's reply, see Maria Cheng, "Russia: Asking permission before taking organs is 'inhumane'", Associated Press, 21 March 2018, accessible at https://apnews.com/595b6e686e324b4caf80b796cf537af1 I am grateful to her lawyer, Dr Anton Burkov, for drawing this to my attention. See further *Petrova v. Latvia*, App. no. 4605/05, judgment of 24 June 2014, and *Elberte v. Latvia*, App. no. 61243/08, Eur. Ct. H.R.

democratic processes and given effect by administrators and courts in accordance with the domestic rule of law.

14. One well-known example is the series of decisions in which the European Court of Human Rights, loyally followed by domestic courts in the UK, holding that the obligation of states "to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" (ECHR Protocol 1, Article 3), conferred on nationals of the state a qualified right to vote, so that it was unlawful for the Representation of the People Act 1983 and related legislation to disenfranchise everyone serving a term of imprisonment following conviction of any criminal offence.[5] This was greeted almost with incredulity, and certainly with bathos, by most Westminster politicians and a significant body of popular opinion, and for over 12 years the Government has failed to put remedial legislation before Parliament.[6] Whilst the UK's Government has now, at last, undertaken to make administrative changes (without amending the incompatible legislation) to allow a small number of prisoners to vote when on temporary release,[7] and the Committee of Ministers of the Council of Europe accepted the action-plan in December 2017 as ending the UK's damaging refusal to implement judgments of the European Court of Human Rights, the refusal to legislate in response to the declaration of incompatibility is disappointing. The issue of prisoners' disenfranchisement

[5] *Hirst v. United Kingdom (No. 2)* App. No. 74025/01, [2005] ECHR 681, 42 EHRR 41, Eur. Ct. H.R. (Grand Chamber); *Smith v. Scott* [2007] CSIH 9, 2007 SC 345, Registration Appeal Court granting a declaration of incompatibility under s. 4 of the Human Rights Act 1998; *Greens and M.T. v. United* Kingdom Applications nos. 60041/08 and 60054/08, [2010] ECHR 1826, 53 EHRR 21, Eur. Ct. H.R. (Fourth Section), invoking the "pilot judgment" procedure.

[6] For example, the Rt Hon. David Cameron M.P., then Prime Minister, notoriously told the House of Commons in 2010, "It makes me physically ill even to contemplate having to give the vote to anyone who is in prison." (HC Deb, 3 November 2010, vol. 517, col. 921.)

[7] Rt Hon David Lidington M.P., then Secretary of State for Justice and Lord Chancellor, House of Commons, 2 November 2017, HC Deb vol. 630, col. 1007. For the document submitted to the Committee of Ministers see https://rm.coe.int/1680763233

presents even more difficult challenges in the Russian Federation, where Constitution, not ordinary laws, mandates the disenfranchisement of prisoners.[8]

15. The issue of prisoners' voting rights brings into sharp focus the potential collision between national ideas about democracy and human-rights law and practice, and tests the relationship between national and international institutions in the context of national sovereignty. As the problems over prisoners show, there are several layers of contest and complexity which need to be address, including:

    a. the essence of the idea of democracy;

    b. content of human rights, including mode of interpretation;

    c. application of human rights, including how one evaluates the justifications which states advance for interfering with them;

    d. the relationship between human rights and general domestic law;

    e. the relationship between democracy (nationally) and human rights;

    f. the relationship between the authority of international institutions and acceptance by national institutions, whether legislative, executive or judicial.

16. I have written on several of these previously.[9] This evening I focus particularly on a), c) and e), including the conditions needed for making either democracy or human rights effective.

B. Are human rights inherent in democracy?

17. We should not underestimate the problem posed for democracy by notions of human rights. One of the important functions of enforceable human rights is to limit the ways in which representative institutions and social majorities can impose detriments on individuals and

[8] *Anchugov and Gladkov v. Russia*, Apps. nos. 11157/04 and 15162/05, 4 July 2013; *Isakov and others v. Russia* Applications nos. 54446/07 and 23 others, 4 July 2017, Eur. Ct. H.R. (Third Section).

[9] For example, David Feldman, "Sovereignties in Strasbourg", in Richard Rawlings, Peter Leyland and Alison L. Young (eds), *Sovereignty and the Law: Domestic, European, and International Perspectives* (Oxford: 2013), ch. 12.

social minorities. Philosophers and human-rights advocates have sought to resolve the tension between democracy and human rights, but the techniques seem to be to be of limited effectiveness.

18. One approach is via the meaning of democracy.[10] One can emphasise how democracy is more than majoritarianism. Equality is at the heart of democracy. If we allow majorities or their representatives to exclude minorities or disfavoured individuals from political fora, we undermine our own democracy. Some freedoms are essential for any democracy: freedom of expression (at least in relation to political and governmental matters) and freedom to obtain information about government. Other freedoms and rights are essential for particular forms of democracy. Freedom association and some measure of respect for private life are essential, allowing one to form, join and leave political parties, are essential if one has a party-based form of democracy. For representative democracies, the right reflected in Article 3 of Protocol 1 to the ECHR, to participate in regular elections for the legislature, is essential. In these ways human rights protected by the ECHR protect the conditions for democracy generally and for particular models of democracy.

19. But linking human rights to democracy does not resolve the tension between the two when, outside the core areas where human rights support democracy, a state's democratically accountable institutions seek to limit, or justify interfering with, people's human rights. What does one do if there is democratic support for placing unpopular people, such as suspected terrorists or illegal immigrants, in places where they are likely to suffer torture or inhuman or degrading treatment or punishment? In my view, it cannot be convincingly argued that the right to be free of torture or inhuman or degrading treatment or punishment is an essential part of democracy. Democracies may easily authorise or tolerate

[10] Held, above, identifies eight models of democracy: the classical democracy of Athens; protective democracy, coping with factions by way of the separation of powers; developmental democracy, with the development of liberty and a division between public and private spheres; direct democracy, entailing the end of politics; competitive elitism; corporatism, and polarised democratic ideals making participation, rather than decision-making power, the focus.

torture. To maintain that there is a necessary connection between democracy and a right to be free of torture, there are only two possible approaches.

a. One can try to give weights to democratic considerations on the one side and fundamental freedoms on the other, and argue that the rights and freedoms are (or are not) so important to civilised society that they outweigh any democratic considerations (although one is then afflicted by the problem of trying to balance incommensurables).

b. One can stigmatise the unpopular people as being "outside society", the "Other", enemies, and so not entitled to be accorded the benefits which a civilised society extends to its own people. There are theorists (notably Carl Schmitt, the legal and political theorist who served as apologist for the Third Reich in the 1930s and 1940s) who have recommended this approach. It allows "Us" to disregard the equal humanity of "Them". When politicians apprehend that the state is under attack from outsiders or insiders, this allows them to suspend legal and constitutional protections for "Them" on the basis that, in exceptional circumstances, the Constitution cannot apply; the protection of the state requires the suspension of the Constitution, and even the Constitution itself cannot say in advance when it needs to be suspended. When the state of exception arises, normal protections for "Others" can legitimately be removed. A constitution is not a suicide pact. The difficulty this creates is that the interests and rights of the "Others" are likely to be systematically ignored in the political process.

20. Decision-making in the "state of exception" is not necessarily undemocratic, because one could allow "Others" to participate in decisions but systematically override their views and interests. Such an approach can even become normalised over time, as in the case of prisoners' voting rights, when (without the need for a state of exception) the democratically

accountable institutions of the state can decide that "Others" are not entitled to participate in decision-making at all. Prisoners, migrants, suspected terrorists, Muslims, Jews, Roma: all come to be treated either as "Others" who can safely be excluded from participation in important benefits of society or whose protections can be lifted by invocation of a state of exception.

21. The exclusion of the "Other" from political power and influence has been a frequent tactic in inter-group hostility. In Northern Ireland from 1922 until 1974, in-built Unionist, Protestant majorities ensured that the Northern Ireland Parliament at Stormont, and majorities on local councils and in the Royal Ulster Constabulary and other state bodies, could systematically exclude Nationalists and Roman Catholics from offices in Northern Ireland and allow anti-Catholic discrimination to operate in employment, education, and other services. The state lost its legitimacy among a significant part of the population, regarded by the Unionists as "Others", enemies within. Direct rule from London between 1974 and 1998 had as one of its goals the establishment of a functioning state based on equality of opportunity, but (as will happen when the legitimacy of state institutions is undermined) the main effort had to be devoted to combatting the paramilitaries on both sides whose rule supplanted that of civilian authorities.

22. When negotiations towards a settlement reached a sort of success in the Good Friday Agreement in 1998, they depended on all parties accepting institutional guarantees for the safety and equal treatment of the other parties. This was achieved in three ways:

    a. first, making the legal protection of human rights and fundamental freedoms of all into central restraints on the powers of state institutions, by making rights under the ECHR, and on membership of the EU, part of Northern Ireland constitutional law)

    b. secondly, ensuring that the minority Nationalist, Catholic community would be able to participate on equal terms with the Unionist, Protestant majority through an

arrangement for power-sharing in the new, devolved Northern Ireland Legislative Assembly and the executive offices of First Minister and Deputy First Minister; and

c. thirdly, maintaining external oversight by the Governments of Ireland and the UK, with power for the UK Government to suspend the devolved institutions and re-impose direct rule from London should arrangements fall apart (as they have done, several times, since 1998).

23. In other words, the settlement involved (among other things) replacing an England-style representative democracy with a system of political power-sharing based on equal representation of groups rather than of individuals (a system sometimes called "consociational" democracy), buttressed by strong protection for human rights.

24. This approach has become fairly common when international mediators are trying to end conflicts and put in place sufficient guarantees to persuade warring groups to lay down their weapons and try to work together through a political system rather than against each other on battlefields. Experience shows that it can work as a first step towards allowing a peaceful society to develop. For example, the settlement of the 1992-95 war in Bosnia and Herzegovina by the Dayton Agreement of December 1995, already mentioned, was founded on three pillars.

a. First, the conflict between the three previously warring "Constituent Peoples", the Croats, Bosniaks (Muslims) and Serbs, was ended by an international military presence.

b. Secondly, the country divided by their front lines was turned into a state with two sub-state "Entities", one being a federation between ten cantons mainly containing majorities of Bosniaks and Croats, the other being the "Serb Republic" from which almost all Croats and Bosniaks had been systematically cleared. Each Entity was to have a significant level of self-government, as were (at a lower level) the cantons in

the Federation. This created serious problems, because the relationship between the Entities and the overarching State was unclear and remains contested, particularly by the Serbs in the Serb Republic. Each Entity was protected against having legislation or policies imposed at State level to its detriment by a series of what came to be called "vital interest vetoes" in decisions of the State's Parliamentary Assembly and the Presidency.

c. Thirdly, each of the Constituent Peoples was also protected against each other by equal membership of the State's three-member Presidency and the second chamber of the Parliamentary Assembly, the House of Peoples, and further bolstered by "vital interest vetoes" in each of those institutions.

d. Fourthly, the Constitution entrenched, directly or by reference, perhaps the most extensive set of human rights of any constitution in the world. They include the classic civil and political rights – despite (or perhaps because of) not yet being a member of the Council of Europe in 1995, Bosnia and Herzegovina's Constitution provided that the ECHR and all its Protocols were to apply directly in the state, and to have priority over 'all other law'. The state was required to become party to 15 other rights-related treaties including those protecting social, economic and cultural rights,[11] which are to secured to everyone in the country without discrimination (Constitution, Article II.4, a provision which the Constitutional Court has treated as

[11] 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto; 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 1957 Convention on the Nationality of Married Women; 1961 Convention on the Reduction of Statelessness; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 1966 Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination against Women 10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 1992 European Charter for Regional or Minority Languages; 1994 Framework Convention for the Protection of National Minorities

requiring a degree of direct applicability of the rights regardless of whether any discrimination is involved in the case).

e. Finally, there was to be continuing international supervision of the nation-building process by the international community, led by a High Representative exercising very extensive powers within the State under UN Security Council Chapter VII resolutions and under the Dayton peace agreement. Within judicial institutions of the State, there was a sufficient presence of judges and prosecutors from outside the country to provide a check on the ability of any one of the Constituent Peoples, or either of the Entities, to gang up successfully on each other.

25. This multi-faceted consociational arrangement and international involvement have been in place, with limited changes, for over 22 years. They have succeeded in preventing a slide back into military conflict, which was the main point of the Dayton Agreement and the associated Constitution of Bosnia and Herzegovina of 1995. But it has not shown any sign of facilitating development towards a more normal kind of political and legal structures. Why?

a. The Constitution itself is perceived by some people as lacking legitimacy, having been imposed by treaty without ever having been approved by any institution or process within the country. But the Rule of Law is necessary to give effect to protections for freedoms and rights lying at the heart of democracy. People's obligations, freedoms and rights be must regulated by regularly enacted, accessible and generally applicable rules of law, and independent tribunals must be able to enforce the rules by finally determining disputes over the impact of those rules on particular cases. In Bosnia and Herzegovina after the war of 1992-95, the international community through its institutions (notably the High Representative) tried to hurry towards democracy without having first established the necessary conditions for the Rule of Law in the country. The result was systemic failure.

Neither democracy nor human rights can be protected if the Rule of Law is weak. Democracy is dependent on, and cannot be allowed to undermine, the establishment of the conditions for its own operation as a prominent High Representative, Lord Ashdown, subsequently recognised.

b. The political parties are mainly ethnically based, so there is no incentive for them to make any concessions in the political process to their opponents.

c. The special protections for the Constituent Peoples leaves Others disadvantaged, and (for reasons I can explain if necessary) also disenfranchises Serbs in the Federation of Bosnia and Herzegovina and Croats and Bosniaks in the Serb Republic, leading to an adverse judgment of the European Court of Human Rights in *Sejdić and Finci v. Bosnia and Herzegovina*.[12]

d. In consequence, despite having probably more elections and more governmental and judicial bodies per thousand of the population than anywhere else in the world, the political system is largely ineffective to repair the divisions in society.

26. Democracy thus demands more than elections, more than equality of access to the political arena, and more than protection of important rights. It also requires a particular, and rather peculiar, attitude of mind. People must care enough about the government and politics of their country to get involved, at least to the extent of being prepared to vote when opportunities arise. But they must not care too much about having their own way on any one issue, for then they would fail to engage with opposing views, or to respect the outcome of political processes when they do not agree with them. Democracy, when it works well, is an expression and result of a common commitment to the peaceful government of the country. It is a way of bringing together people who disagree in a shared enterprise of

[12] Apps. nos. 27996/06 and 34836/06, judgment of 22 December 2009, Eur. Ct. H.R. (Grand Chamber). For critique, see Christopher McCrudden and Brendan O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (Oxford: Oxford University Press, 2013), *passim*.

governance, a shared belief in the value of maintaining the unity and integrity of the state. This is impossible where the people are so deeply divided, either on particular issues or on the system of governance as a whole, that the process of political engagement drives them further apart rather than closer together.

27. In Northern Ireland after 1998, there were signs that the process of political engagement was reducing the inter-community strife which had blighted life in the province for many decades. Militants on both sides achieved a level of assent to cohabitation, and even began to accept the guarantees of human rights which the Unionists initially regarded as unacceptably pro-Nationalist and anti-Unionist. More recently, however, divisions have been deepening to the point at which devolution is currently suspended, and the process of resolving the disputes has not been helped by the fact that, since 2017, the UK Government, instead of being able to act as a neutral mediator and arbitrator in disputes, has depended on the DUP, a Unionist party, for its House of Commons majority. It seems that, in Northern Ireland, too many people still feel too strongly about things for democratic government based on power-sharing, collective equality and rights to become firmly embedded, despite the best efforts of many people.

28. In Bosnia and Herzegovina, there was never any general, cross-community acceptance of the existence of the state, so the deep divisions between Constituent Peoples continued to affect politics and law even after the immediate risk of a resumption of military conflict receded. Constitutional litigation and political action between a proxy for war, without much common ground developing as to the how the institutions of the state should work as between the Serbs, Croats and Bosniaks. Trust is limited, and tolerance is skin-deep in several areas. People care too much, and feel their existence threatened too much, for them to develop the kind of confidence in future security which would allow them to accept the existence of a political structure with coercive power over them, and to tolerate views

(including opinions about the fundamental existence and nature of the state) which are very different from their own.

29. Anger, of the kind that still lingers in Bosnia and Herzegovina and Northern Ireland, is the enemy of democracy. Democracy requires a degree of gentleness, civility, courtesy and respect to make the contests and oppositions survivable. "Civility" is important in political theory, being linked semantically to *civis*, citizen, and *civitas*, polity or state. Civility is a duty of citizens in discharging their political responsibilities and exercising political rights. "Civilisation" is a social condition in which people can conduct political arguments in a civilised way. Human rights do not guarantee civilisation or civility. They can protect against the worst effects of a lack of civility, but they cannot provide the respect and courtesy which democracy requires if there is no willingness to give up historic antagonisms.

30. South Africa shows what is needed to emerge from conflict and division with a chance of achieving a democratic polity: leaders who are prepared to insist on mutual respect and risk compromise even when respect and compromise are unpopular with followers because they make it more difficult to achieve the aims of any of the factions. Leaders must be prepared to say to their followers, "We must surrender hatred, and embrace civilisation and our enemies." This may open the path to a democratic constitution and guarantees of basic (and perhaps less basic) rights for all. That was the remarkable achievement of Nelson Mandela, F. W. de Klerk and their colleagues when Mandela was released from imprisonment on 11 February 1990. The result was a constitutional settlement reached by way of the most deliberative process, with widest consultation, ever attempted in a divided society (or, probably, any society at all). Do we have leaders with that sort of moral and political courage?

31. In the UK at present, we seem to have lost such people. I do not use social media, but understand that much of the communication which takes place on political issues, and many

others, is rebarbative in the extreme. Courtesy seems to have deserted politicians. People care too much, and contempt and hate have crept into the open in political discourse where previous generations managed to keep a lid on them, maintaining at least the appearance of respect in the absence of agreement. The Brexit referendum and its aftermath are responsible for bringing a great deal of nastiness into the open, but the underlying disrespect must have been there beforehand, covered by a thin veneer of civilisation. Perhaps the relative novelty of electronic media allows some people to feel that they occupy a space in which people do not have normal, social responsibilities towards each other. If so, they should really be thought of as asocial or even anti-social media.

32. I said that human rights cannot supply the basis of respect and courtesy. At one level that is surprising. Are human rights not founded on ideas of human dignity, equality and respect? But that is the problem. For human rights to be effective, they rely, like democracy, on people being prepared to put other people's interests alongside, if not ahead of, their own. There is a debate about the nature of human rights. Are they guiding values? Only, I think, if people are willing to be guided by them. Where that is lacking, we can try to enforce human rights, but that requires coercion against governments and against powerful interests, including self-interest. We need to train ourselves to accept the free expression by other people of ideas which outrage, offend or disgust us, in order to train ourselves in the tolerance required for democracy to work. The limit to this is that we are not required to tolerate expression aimed at the destruction of our *civitas* in which civilised political discourse takes place. In Bosnia and Herzegovina, where the Serb Republic's nationalist, separatist government is pursuing a policy of undermining the state, the Electoral Commission announced that any party contesting a general election which campaigned for a referendum on independence for the Serb Republic would be disqualified from the election. That raised eyebrows as a potential violation of the right to freedom of expression, but was justified by the state's legitimate interest in preserving its own existence. Similarly in Israel,

the Central Elections Committee is allowed to disqualify candidates whose platforms aim at the destruction of the state of Israel, but not those whose manifestos are in other ways critical of the state's government.[13] The response to secessionist claims can vary, from absolute prohibition in Spain in relation to Catalonia to a measured, principled, judicially developed criteria for orderly negotiations in Canada in respect of Quebec, or legislative provision for a referendum on Scottish independence in the UK.

33. Human rights do not really help in deciding how to respond to claims to secession, but courts at international, supranational and national levels can restrain violations of rights to freedom of expression and association in political areas. They face the problem, however, that, in order to enforce rights, they have to define them. And the institution which defines rights to limit the power of states and governments may be regarded by the governments and their supporters as acting illegitimately, challenging the allocation of power achieved through ballot-boxes and preventing peoples who see themselves as entitled to self-determination from subjecting groups or individuals whom they regard as morally inferior to disabilities which seem to the governments, and their supporters, as being in the best interests of the country (from which the Others are seen as being excluded).

34. This problem is recognised by courts themselves. The European Court of Human Rights faces every day the dilemma of deciding how broadly it can interpret the right to be free of torture or inhuman or degrading treatment or punishment, or the right to respect for private and family life, without running into direct opposition from the governments who are subject to their decisions. Interpretation is controversial; we saw that earlier, in connection with the question whether convicted prisoners should be able to vote.

35. In relation to qualified rights, those which (unlike freedom from torture) are capable of justified interference, the courts have to decide whether a state's justification for

[13] E.A. 1/65, *Yeredor v. Chairman of the Central Elections Committee for the Sixth Knesset* 19 P.D. (3) 365; E.A. 2/83 and 3/84, *Neiman v. Central Elections Committee for the Eleventh Knesset* (1985).

interference are sufficient in particular circumstances. The European Court of Human Rights has taken the textual tests for evaluating claims to justification – typically that the interference be prescribed by domestic law, be adopted in pursuit of a legitimate aim, and be "necessary in a democratic society" for that purpose – and given them substance. "Necessary in a democratic society" is treated as requiring a state to show that the interference with a qualified right responds to a pressing social need and is rationally related to that need, goes no further than necessary for that purpose, and does not deprive the victim of the very essence of the right, and that the seriousness of the interference for the victim is proportionate to the importance of the aim pursued on the facts of the case. In developing these tests, the Court said, relatively early in its history, "Freedom of expression...is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[14] As I suggested earlier, we need to be shocked and offended in order to learn the tolerance which is at the heart of democracy, and of any civilised politics. In a classic monograph in the USA, Professor Lee C. Bollinger argued that strong protection for freedom of speech is necessary in a democracy in order to train people to exercise the tolerance of hateful speech which is necessary to democracy.[15]

36. Fine words. But the European Court of Human Rights has been too willing to allow states to interfere with freedom of expression in order to protect moral, political or religious groups against outrage. There is no human right not to be outraged; indeed, any such right would be incompatible with the practice of democracy itself. Citizens have a duty to tolerate outrage. For this reason, the current move towards demanding safe spaces and trigger warnings in lectures is dangerous. If we react to people's conclusions by denying them a platform, we undermine democracy and fail in our duty as citizens. We must engage (in

[14] *Handyside v. United Kingdom* App No 5493/72, judgment of 7 December 1976, at para. 49.
[15] Lee C. Bollinger, *The Tolerant Society: Free Speech and Extremist Speech in America* (New York: Oxford University Press, 1988).

academic settings above all) with objectionable arguments, publicly and privately. As academics, that is the basis of any moral or intellectual authority we may have.

37. At the same time, freedom of expression is far from absolute. It is fundamental to a democracy, so one needs a compelling moral justification to justify a state in interfering with it. As ECHR Article 10.2 puts it, the exercise of freedom of expression "carries with it duties and responsibilities". (Freedom of expression is the only one of the ECHR rights and freedoms to be expressly subject to rights and responsibilities in this way.) One responsibility is not to abuse the right. Article 17 states that nothing in the Convention "may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in this Convention or at their limitation to a greater extent than is provided for in the Convention". Article 10.2 allows restrictions to be "prescribed by law … in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary", but only if the restriction is "necessary in a democratic society" for that purpose; that is, it is rationally related to the aim, responds to a pressing social need, goes no further than necessary for the purpose, does not deprive anyone of the essence of the freedom, and does not inflict on anyone a burden which is not proportionate to the importance of the aim.

38. Each of these criteria calls for judgement. They do not apply themselves mechanically. In different places and at different times the judgements may fall out differently. In a country emerging from internecine war, such as Bosnia and Herzegovina, where there is deep distrust and a cautious, fragile cooperation in building political and social institutions may require greater restrictions by law on incivilities between peoples than in a well-established states which are sufficiently self-confident to feel safe from immediate disintegration, and

where there is a long-standing tradition of robust political debate within a framework of mutual respect. In assessing states' justifications for interfering with rights and freedoms, courts have to bear in mind the impact of the exercise of a freedom in a particular way on the sustainability of the political structures of the state. At a lower level, private institutions need to make decisions about interfering with freedom in the light of their own social functions and responsibilities. All decision-makers work within the limits imposed by the need to preserve their societies from a break-down of civility. The need for proportionality applies both to the extent of restrictions on people in their particular social setting and the severity of any sanction for going beyond the restriction. Judges and others try to offer the best possible chance of maintaining a civil social environment, but the willingness to be civil must be there if society is to work.

39. All these challenges are made more difficult by globalisation, fragility of economies, inequalities between regions and individuals, terrorism, war, and the collapse of international trust (if there ever really was any trust). But we must try to make democracy work despite that. International and domestic human rights, if we interpret and implement them properly to foster democracy, can help, but only by limiting the extent to which people can exercise their freedom to disrupt civil discourse. Respect for civility must come first, and that depends on family up-bringing, education and socialisation, which make possible both democracy and the working of law, including human-rights law.

IV. Conclusion

40. I suggest that this leads us to three tentative conclusions.

a. Democracy is difficult and demanding at a personal and a social level. It calls for both civility and intellectual rigour in evaluating opposing arguments ad evidence, and we need to train ourselves for it just as we would train for a sporting event.

b. Arguments for the importance and democratic usefulness of human rights as legal standards must recognise that there are competing sources and locations of authority and legitimacy within and outside states.

c. We must recognise that democracy and human rights take different forms, and are more or less important for different reasons, in different societies. Many kinds of norms and authorities may help to bolster civilised societies and governments. They include the Rule of Law, democracy and human rights. But the Rule of Law, democracy and human rights cannot guarantee or bring about civilised society. Civilisation and civility must precede everything if democracy is to work. In the absence of civility, the most that human rights can do is to provide a basis for limiting the harm done by uncivil society.