Human Rights, Political Representation and Democracy: Some reflections

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One of the many issues that arose in the context of the uprisings in North Africa refers to the relationship between human rights and democracy. It was suggested during and immediately after the uprisings that the authoritarian regimes that were displaced were not representative of the peoples over which they governed. The new dispensations that were to be established should follow the principles of representative government, democracy and human rights. However, the relationship between these concepts is not as straight forward as is, sometimes, imagined.

The nature of representative government is difficult to define precisely and the relation between such government and democracy is a complex one. The Universal Declaration of Human Rights seems to imply that all that is required in terms of representational rights is for all citizens to have the "right to take part in the government of his country, directly or through freely chosen representatives."[1] In terms of democracy it states that "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."

Article 25 of the International Covenant on Civil and Political Rights (ICCPR) essentially reiterates the right to take part in public life and the right to vote and to be elected in elections. The basic requisites for these elections according to this provision are that they be genuine, periodic, based on universal and equal suffrage and also that they be held by secret ballot. This right to political participation and right to political representation are held, like all the rights included in the ICCPR (except for self-determination), by individuals. Thus neither minorities -of whatever configuration- nor indeed other collectivities have political

rights in terms of the Universal Declaration or the ICCPR. It is only the individual members-of a minority or collectivity who possess these rights while it is clear that membership of such a minority should in no way impede the exercise of these rights. Hence if a state allows all its adult citizens, without distinction of any kind, full and unfettered exercise of the right to vote in free elections and the right to stand for office in such elections, that state would be fulfilling the requirements of the Universal Declaration and the ICCPR.

Thus there seems to be no clearly established right in international law to a minority (be it social, religious, ethnic, racial or any other) having a representation in government or even in legislative assemblies, although in discussions on the nature of democracy it has been argued that it is important for different sectors of society to have adequate political representation. In terms of the nature of democratic models of governance the most often assumed paradigm is that of majority rule. This has been the case since the earliest manifestations of democracy in ancient Greece. Decisions in democratic Greek city-states were taken on the basis that each citizen had one vote and that the will of the majority should prevail. In describing (unflatteringly) the democratic model Aristotle stated that "whatever the majority decides is final and constitutes justice"[2]. This conception of democratic decision making clearly leaves the minority unprotected from the excesses of the majority. This risk is higher in polarised societies were tension or animosity exist between the majority and minority groups. And it is a risk which has long been recognised. The Roman Republic for instance recognised the importance of institutions which were inclusive of all the main sectors of society; in particular republican Rome was concerned with its two major constituencies: the common people (plebeians) and the aristocracy (the patricians) and eventually fashioned its institutions to accommodate the interests of both. David Held in his comprehensive overview of democratic models refers to a number of concerns raised by different thinkers on the potential risks posed by the majoritarian basis of democratic rule. In this vein, Held refers to Madison's critique of what he terms pure democracy (as practised in ancient Greece) and its propensity to be "intolerant, unjust and unstable"[3]. In pure democracies, according to Madison, "a common

passion or interest, felt by the majority of citizens generally shapes political judgments, policies and actions" and furthermore the immediate nature of pure democracy means that there was no check on the sufferings that can be imposed on weaker parties[4]. Madison suggested that a large electoral body and representational politics as opposed to direct democracy were tools that would overcome the dangers of the 'tyranny of the majority'.

The great advocate of liberal democracy John Stuart Mill also recognised the potential dangers of the tyrannous majority operating within a democratic context and thus he conceived of a number of basic liberties pertaining to individuals which could not be denied or overridden by majority rule. In particular Mill considered freedom of speech, freedom of the press and freedom of assembly as important protections for the individuals and minorities against the excesses of the majority. Mill believed that these freedoms together with representative democracy[5] that controlled and monitored a competent bureaucracy would guarantee the benefits of democratic governance while avoiding its excesses.

Admittedly Mill's conception of fundamental freedoms was limited to a few liberties (of property, expression and association). However his emphasis on liberties which could not be overridden by government provides an essential requirement for democratic governance that does not prejudice the basic rights of individuals who do not form part of the majority. In this context it could be argued that Mill was essentially following Locke's general conception that "legitimate government based on consent, in which the majority rules but may not violate people's fundamental rights."[6] The fundamental rights Locke was referring to were the right to life, liberty and property. It is worth highlighting that Locke's and Mill's rights even when amplified by the advent of the International Bill of Rights were not intended to provide political representation in government or in the legislative to minority groupings.

The political representation of minority groups remained a matter for states to regulate. In some jurisdictions different minorities are given quotas in parliament while in others, due to the concentration of a minority in a particular area, it acquired parliamentary representation in

competition with other groups. The problem of minorities and political representation is of special salience where political parties are organised around ethnic, religious or linguistic lines. In such scenarios citizens vote their caste rather than casting their vote[7]. This means that unless there are significant demographic shifts the likelihood is that a political party representing the majority ethnic/linguistic/religious group will maintain a permanent monopoly over government. Thus one-party rule may come about as a result of democratic governance.

The limits of majoritarian democratic systems in terms of the danger of a tyrannous majority were dealt with, to an extent, by classical pluralism. This school of thought claims that in democracies decision making is based on the mediation of different interests pursued by a number of diverse groups rather than on majority-decision making. The key aspect of this school of thought focuses on the following characteristics of democratic states, namely that there exist "multiple power-centres, diverse and fragmented interests, the marked propensity of one group to offset the power of another, a 'transcendent' consensus which bounds state and society, the state as judge and arbitrator between factions."[8] The idea of the pluralist democratic state is that in any given society there exist multiple interest groups which vie with each other to shape public policy and that governments have to mediate these different interests. Furthermore individuals usually "enjoy multiple memberships among groups with diverse –and even incompatible- interests" which means that each group will normally remain too weak and divided to possess excessive power. [9]

Nevertheless in states where there is a strong ethnic/religious/linguistic-based identity the normal patterns of democratic governance described by pluralists disintegrate. The power centres solidify around majority and minority identities and individuals tend to think in items of monochromatic identities rather than multiple ones. In such states (Northern Ireland or Lebanon are examples thereof) decision making does not conform to the pluralist conception of democratic governance.

In the context of states deeply divided along ethnic/religious/linguistic

lines the importance of guarding against the 'tyrannous majority' is even more salient as the minority/ies is/are likely to interpret all decisions taken by the majority from a sectarian perspective. Thus all decisions taken by the majority representatives (in parliament and in government) are usually interpreted as 'attacks' on the minority communities even where no sectarian motivation animated the majority decision-makers. Within such a scenario attempts at mitigating the impact of a 'tyrannous majority' has attracted two major approaches; one revolves around an involvement of the minority in government while the other maintains the simple majoritarian democratic model with strong minority guarantees in the form of constitutionally protected rights.

The concept of involving, in a structured manner, minorities in governance through the proportional allocation of seats in parliament and in government is referred to in contemporary democratic discourse as consociationalism and is particularly associated with the work of Arend Lijphart[10]. In consociational systems, power is shared among the various groups that obtain parliamentary representation and government is not conducted on the basis of a simple parliamentary majority. Lijphart argues that while most people associate democracy with majoritarian systems there are other systems which he refers to as consensus democracies[11]. In fact, Lijphart suggests that in heterogeneous societies, especially those within which there are deep fissures along ethnic, religious, linguistic or other lines, majoritarian rule is likely to be dangerous. Within such societies "majority rule is not only undemocratic but also dangerous, because minorities that are continually denied access to power will feel excluded and discriminated against and they may lose allegiance to the regime... In the most deeply divided societies, like Northern Ireland, majority rule spells majority dictatorship and civil strife rather than democracy."[12]

The consensus or consociational model attempts to avoid the dangers that majoritarianism poses in deeply divided societies by focusing on inclusiveness. In the consensus model executive power is not concentrated in the hands of the majority but is instead shared and dispersed. The most evident feature of the consensus model is that the executive is formed not

by the majority but by all or most of the important parties in a broad coalition. This consensus model is adopted in a number of jurisdictions both via informal agreements (such as the case in Switzerland) as well as through formal constitutional arrangements (such as is the case in Belgium and Northern Ireland). In the context of minority protection the consensus model offers not only a passive protection of their key interests by the state but an active involvement by the minority in shaping the policies by which they are to be governed and in this sense a role in shaping their own future.[13] Conversely, divided societies adopting the majoritarian system may offer the minority rights and guarantees as protection against any encroachment against the minority's most fundamental needs and interests.

Minority rights and guarantees

Numerous definitions of minorities may be found in the literature but a definition which has been widely used is the definition drafted by the UN Special-Rapporteur Capotorti who defines minorities as:
"a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members -being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[14]

Such minorities are, and have been, an inevitable characteristic of most states. States are rarely constituted of mono-ethnic, mono-religious and mono-linguistic communities. While a few states may be so constituted, most states contain within their borders minorities as defined by Capotorti. From an international law point of view, the concern with such minorities was one of the earliest indicators of a shift in international law from a purely state-centric legal system to a legal system concerned with entities other than states. In fact most legal scholars identify the post-World War One creation of a minorities' regime as prefiguring the human rights era that was eventually ushered by the end of the Second World War.

The essential characteristics of the legal framework for the protection of

minorities that was put in place in the aftermath of World War One was constructed on the basis of a series of treaties between the victorious powers and a number of European states which contained within their borders numerically significant minorities. The post-war minorities' regime however was confined to Europe (except for the inclusion of Iraq) and focused essentially on Central and Eastern Europe (including the Balkans).[15] The system for the protection of minorities was predicated on two principles: that of ensuring equality and that of protecting peculiarities. This was confirmed by the Permanent Court of International Justice in the Minority Schools in Albania case of 1935. It stated that the purpose of the system was to secure for minorities "the possibility of living peaceably...while at the same time preserving the characteristics which distinguish them from the majority". [16] The Court then proceeded to explain that in order for this purpose to be achieved what was required was:

"first...to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State...second...to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions, and their national characteristics."[17]

The system for the protection of minorities disintegrated with the advent of the Second World War and in the post-war era the attention of international law shifted onto the broader concept of individual human rights. This is evidenced in the UN Charter where human rights are referred to abundantly whereas the concept of minority is absent. The Charter however does refer to the principles of equality and non-discrimination which were highlighted above as an essential element of minority protection. Equally there is no reference to minority rights within the Universal Declaration of Human Rights and it has been suggested that this omission is unsurprising in the post-war context given that "to a majority of States, individualistic human rights without any special concession to particular groups of society seemed a sensible, modern, and democratic programme"[18]. The only concession to minority rights in the early history of the UN was a call, made in a General Assembly

Resolution adopted together with the Universal Declaration, for the "thorough study of the problem of minorities"[19].

The emphasis on individual rights as opposed to group rights seemed to be the right way forward given the perceived failure of the minority rights regimes established in the wake of World War One. While it may be argued that a basic 'right to existence' for national, ethnic, racial and religious groups was affirmed through the 1948 Genocide Convention, the same convention did not protect such groups from 'cultural destruction' but only from 'physical destruction'. Thus the post-war legal infrastructure while guaranteeing physical existence for certain groups did not protect their right to cultural existence or more broadly their 'right to identity'. The emphasis was on equal treatment and non-discrimination; the protection of peculiarities went on the back-burner within the international community.

Eventually though there was a reappraisal of this position and the necessity for both individual rights as well as group rights became apparent. This reappraisal is evidenced in the inclusion of a minority rights clause in the International Covenant on Civil and Political Rights. In this context Article 27 of the Covenant is the relevant provision which is "the conventional and customary law recognising" the rights of minorities in international law:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

This provision seeks to protect the cultural life of ethnic, religious and linguistic minorities which even in democratic states may be at risk of assimilation into the majority culture. It also attempts to realise the 'right to identity' which John Burton identifies, in its human needs form, as an essential need which when denied may lead to violent conflict. The importance of identity in fuelling conflict is clearly stated by Burton:

"Needs that are frustrated by institutions and norms require satisfaction. They will be pursued in one way or another. These needs would seem to be even more fundamental than food and shelter... Denial by society of recognition and identity would lead, at all social levels, to alternative behaviours designed to satisfy such needs, be it ethnic wars, street gangs or domestic violence."[20]

The issue of minority protection is, in fact linked to both self-determination and political representation. In states where minorities participate in government through consensus models of democracy or are allowed a degree of internal self-determination through federal structures or other forms of decentralisation, minorities may have a modicum of decision making powers and control over aspects of governance. However minorities in centralised states, where societies are sharply divided along ethnic, linguistic, religious or other fissures, may lack any form of effective political representation that translates in some form of decision making powers. In the latter scenario, the adoption of national democratic and electoral models based on a winner-takes-all concept may permanently exclude a minority from participation in government. An excellent example of such a state was pre-direct rule Northern Ireland where the Unionist Party governed uninterruptedly for five decades while the minority community remained in opposition throughout. Minorities, barred from exercising internal self-determination, within a centralised state and excluded from decision making processes are likely to interpret this exclusion as an attack on their identity. In these societies which follow a majoritarian electoral system where citizens vote along sectarian lines the decisions of the elected government are likely to be interpreted (rightly or wrongly) through a prism of discrimination. Furthermore, once a democratic model is being maintained and followed the governments in these societies can claim a certain moral legitimacy. In these cases minority rights in the form of equality legislation and protection of peculiarities are the essential and unique guarantees to ensure they retain their identity and are not subject to discrimination at the state or local level.

In the context of democratic transitions some of the above reflections may be useful to consider in determining ways forward. In Tunisia following

the relative success of Nhadha in the elections to the constituent assembly concerns were expressed by secular civil society (in particular women's groups) on the potential prejudicial impact on them of Nhadha's policies. A strong dose of entrenched, constitutionally protected rights could prove useful in such a context to allay fears and ensure that acquired rights are not negated. In the case of Libya where tribal divisions seem to be emerging in the post-Ghaddafi era, thoughts about consensus models of democracy may be useful to ensure an inclusive democratic process. The overriding principle in every case should be that of limiting the possibilities of majorities riding rough-shod over minorities of whatever hue and composition. If democratic transitions are to be successful they have to provide stable, accountable and efficient government but also guarantee the internationally recognised rights of individuals and groups. Should the latter be ignored the risk of a cyclical resort to uprisings and revolutions is greatly increased.

(Endnotes)

1 Universal Declaration of Human Rights, Article 21

2 Aristotle (1983): The Politics, Harmondsworth, Penguin, p. 362

3 Held, D. (1996): Models of Democracy, Polity Press, p. 89

4 ibid.

5 Held explores the limits of Mill's representative government which is however not immediately relevant for this study.

6 Sandel, M. (2007): Justice: A Reader, Oxford University Press, p. 83

7 Darbly, J. (1997): Scorpions in a Bottle, Minority Rights Publications, p. 58

8 Held (1996), p. 204

9 ibid.

10 Lijphart himself states that he merely described systems which political practitioners had developed over the years. See Lijphart, A. (2004): Constitutional Design for Divided Societies, Journal of Democracy, Vol. 15, no. 2, April

11 Lijphart, A. (1999): Patterns of Democracy, Yale University Press, p. 31

12 ibid. pp. 32-33

13 Incidentally such a politically active citizen is what the ancient Athenian democracy required of its citizens.

14 Monograph 23 prepared by Special Rapporteur Capotorti towards his Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities for the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/384/Add.1-7

15 The states which were included in the League of Nations' minority protection system were: Poland, Austria, Yugoslavia, Czechoslovakia, Bulgaria, Romania, Hungary, Greece, the Free City of Danzig, Albania, Lithuania, Latvia, Estonia, Iraq, Turkey, the territory of Memel and the territory of Upper Silesia.

16 Permanent Court of International Justice, Advisory Opinion 26, PCIJ, Ser.A./B., No.64, 1935

17 ibid.

18 Thornberry, (P.): International Law and the Rights of Minorities, Clarendon Press, p. 137

19 G. A. Res 217 (III) C, UN Doc. A/RES/3/217 C (10 Dec. 1948)

20 Burton, J. W.: Conflict Resolution: The Human Dimension, International Journal of Peace Studies, vol. 3. No.1, January available at http://www.gmu.edu/programs/icar/ijps/vol3_1/burton.htm