

Democracy in Decline: Steps in the Wrong Direction

James Allan

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*Reviewed by John D. Whyte**

This work is a highly critical examination of the positive response by five nations—Australia, Canada, New Zealand, the United Kingdom and the United States—to the challenges that face governments and their legitimacy when there is no legal protection of human rights.¹ The author, James Allan, opposes new regimes of political and legal accountability that limit the powers of governments, claiming the political space given to human rights in national and transnational law is contrary to democratic principles.

It is reasonable to be concerned over the state of democracy; however, making states subject to the ethical and moral requirements of human rights seems an unlikely starting point for understanding a weakening commitment to democracy. There are more obvious starting points. One of these might be the degree of failure by Western nations in their energetic attempts to develop democratic practices around the world during the last quarter century. The vacuum created by failed authoritarian regimes has been succeeded, not by liberal democracies, but by new, equally deadly, forms of unchecked power. While elections are now held almost everywhere, the broader democratic features of equal treatment, fairness and restraint remain absent in a great many nations.

Democracy's essential conditions of respect for regimes of accountability and reconciliation in the face of conflict have too often been abandoned. Partisanship has come to be practised so energetically that public confidence in the neutrality of governmental conduct has

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1. James Allan, *Democracy in Decline: Steps in the Wrong Direction* (Montreal: McGill-Queen's University Press, 2014).

evaporated, and exploitation of political opportunity has come to be expected. The democratic political virtues of sophistication, knowledge and judgement have been replaced by pandering to narrow constituencies. Confidence in democratic politics has declined in lockstep with the degradation of the ideal of political dignity.

Democracy's reputation has been eroded by an increasing failure of states to address the social condition of their citizens. Providing relief from the plights people face and the hard lives that many lead has moved well down the political agenda. Until recently, a dominant political ambition was to improve the life experience of all members and classes of society. The new political culture has instead made the equation between wealth and well-being its comprehensive guide. A sense of common destiny has been replaced by the search for comparative economic advantage by both the state and its individuals, and political success is measured by levels of investment and national wealth. The result of this narrowing political purpose is increased social disparity, the emergence of aging as a poverty trap and the denial of care (as well as mercy) to the broken and dysfunctional.

These political developments cause citizens to exit from the state's democratic processes. But Allan's diagnosis of democratic decline is not based on these shifts in political method and purpose. Allan is concerned with the lessening of the powers available to elected governments. His central claim is that the scope of the "letting-the-numbers-count majoritarian democracy approach to resolving... crucial social disagreements" must not be diminished.² The basis of his confidence in majoritarian governance is that it is "the least-bad option" available and is superior to having "the say of certain well-placed elites" determine state policies.³

Allan's belief in the superiority of majoritarianism fails to address the perennial challenge of identifying the essential moral conditions that need to be met in the state's exercise of its coercive powers. Understanding and meeting this challenge is at the core of liberal democratic theory and has produced elaborate structures for restricting exercises of political power. Constitutions, the rule of law administered through an independent judiciary, legislative processes, protection of minorities, establishing

2. *Ibid* at 4.

3. *Ibid*.

independent officers, and placing constraints against governmental bias have all been developed to ensure that governments act in ways that allow states to meet their fundamental goals of being just and hence, durable. In Allan's book, the only condition of political legitimacy specifically identified is that the holders of state powers must be determined by electoral majorities. For Allan, the legitimizing condition for state power is numerical, not teleological, and the requirement that governmental action conform to the state's basic principles becomes a perversion of democracy.

In truth, all five nations that Allan laments as democracies in decline have a strong culture of constitutional constraint on governmental power grounded in the foundational mechanism of the separation of powers. These are nations whose integrity has rested on the idea of just use of power by constitutionally empowered bodies that follow constitutionally identified standards for governmental action. Allan does not challenge the established conceptions of constitutional restraint. He expresses no misgivings about restraint on governmental powers arising from the federal structures that are in place in three of the nations he deals with. He implicitly accepts that governmental programs will be disallowed by courts where provincial or state regulations are detrimental to national jurisdictions or where national governments encroach on constitutionally guaranteed state or provincial jurisdiction. Allan also does not object to the rights granted to historic communities in order to protect their cultural or linguistic integrity. The nations in Allan's study have developed a range of restrictions on state power, not to fulfill anti-democratic purposes, but rather to preserve and strengthen democracy. He seems to recognize that the removal of limits on governmental powers would create unaccountable monster states.

Allan believes, however, that there are new restraining forces that have brought about democracy's decline. These forces are as follows: constitutional and legislative bills of rights, obligations under international law (chiefly human rights obligations), regulatory initiatives of transnational organizations (chiefly human rights and employment regulation), and the unaccountable influence of experts and intellectuals who have urged the adoption of standards of justice and respect for vulnerable individuals. Expressly excluded from his indictment, and indeed celebrated in this work, are the international agencies and rules

that have attacked national monopolies, guaranteed open channels of trade and promoted investment mobility.

In illustrating his case, Allan expresses particular antipathy toward Canadian elites who have promoted the statutory regulation of hate speech through which minority communities have been able to resist vilification. His criticism is directed specifically at intellectuals who analyze the attitudes and social expression that lead to social vulnerability. He sees an intolerable degree of free speech suppression in the shift from a purely political response to speech that harms minorities to legally prescribed restrictions imposed through agency adjudication. Surprisingly, he does not give credit to legislatures that have decided to place controls on hate speech or to courts that have upheld limitations on hate speech regulation based on constitutionally entrenched liberties.

Since World War II, there has indeed been a growth of constitutional and international human rights regimes. These regimes are enforced against governmental policies and administration by domestic courts and international tribunals. This development, however, does not necessarily represent a decline for democracy. Day-to-day majoritarian politics is not what makes up the entirety of a democratic government or even of majoritarian democracy. In the single-voice-form of democracy that Allan seems to prefer, a nation would be unable to sustain its democratic practices against an elected tyranny.⁴ Nor can majoritarianism easily sustain political stability that is based on state action that is just. It is for this reason that in democracies the political preferences of citizens are frequently expressed in the form of higher law; laws that, while not immutable, are extraordinarily long lasting.⁵ Most often, higher law's formal expression is found in a nation's constitution, setting out limits on governmental power and, as a result, placing limits on what electoral majorities can license the government to do. The limits are varied and extensive, impacting the structure of legislatures, the jurisdiction of superior courts to hold governments to legal limits, federal division of legislative power and guarantees to distinct communities. Other implied

4. For a discussion on the treatment of factional majority tyranny by James Madison, see Robert A Dahl, *How Democratic is the American Constitution?* (New Haven, Conn: Yale University Press, 2001) at 29–36.

5. See Bruce Ackerman, *We the People: Foundations*, vol 1 (Cambridge, Mass: Belknap Press, 1991) at 3–33.

limits arising from convention also preserve the integrity of governmental structures.⁶

Limits based on rights have recently been added to this list. In Canada, for instance, the creation of the *Canadian Charter of Rights and Freedoms*⁷ in 1982 gave courts responsibility (although not absolute authority⁸) for protecting against governmental encroachments on core liberties, due process and, in 1985, equality rights.⁹ These restraining conditions are the result of majoritarian consent; they were approved, or accepted, by national majorities through special political representative processes. Allan argues against the democratic provenance of constitutions, stating that popular engagement with constitution making and revision is a myth. While popular consent to a nation's constitutional order can be a historical reconstruction, in the case of the adoption of the *Charter*, it was approved by a clear majority of Canadians through their elected federal and provincial representatives and has been consistently supported in opinion polls ever since.

It is a narrow-minded conception of democratic practice to take the position that the peoples' will should be limited to immediate political dispositions and that there can be no scope for the people to express their approval for long-term arrangements and rules that will govern future exercises of political power. There is no good democratic argument against letting a national population adopt a constitution that includes the political ideas of guaranteed rights for individuals and minority communities as the nation's basic law.

It would be unfair, however, to treat Allan's concerns as coming from an unsophisticated understanding of constitutions. It is clear that in the last half century, in both senior courts and the legal academy, constitutional law has moved from a peripheral position, with domestic private law then occupying the centre of law's empire, to the position

6. Breaches of conventional limits on governmental and legislative power to modify the structure and operation of government are not generally considered subject to judicial remedy, but can be subject to judicial declaration of unconstitutionality. See e.g. *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

7. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

8. *Ibid*, s 33.

9. *Ibid*, s 32(2).

of being the foundational feature of law.¹⁰ This shift changes the scope of the exercise of political autonomy within the narrower time frame of day-to-day politics and is undoubtedly due to the political dynamics behind the elevation of human rights as politics' strongest claim. What is true for the shifting place of constitutional law has also become true for the place of international law, at least in many of the world's nations. The question is whether this globalization of human rights norms, through both the creation of numerous international conventions relating to human rights and their widespread domestic adoption (as well as the adoption of transnational commercial and governance standards, especially for the United Kingdom as a member of the European Community), represents a degradation of the democratic practices of the nations reviewed in this work. Insofar as both developments arise out of policies of democratically elected governments, there is no doubt that these values have arrived with democratic legitimacy.

Allan also claims that although governments may have adopted international policies under conditions of democratic consent, this should be seen as a form of temporal imperialism in which a current generation of voters and leaders constitute legal regimes that act to reduce the range of political self-determination for future generations. However, as has been examined, the restriction of political power is an inevitable feature of democratic states and cannot be taken as intrinsically undemocratic. Nevertheless, the question remains: Have the nations in this study gone too far and adopted standards that will restrict political discretion and defeat the political capacity to respond to dynamic conditions such as conditions of fiscal restraint, anxiety over national security and public safety, and other sources of national vulnerability? The appropriate range of restraints on governmental power is always a troubling question for which there is no formula. It might be observed, for example, that the restraints found in recent constitutional developments, international human rights law and transnational regulatory measures are for the most part reflective of the risks individuals and groups experience when they hold a weaker hand in market activity and social dynamics. If national populations wish to adopt restrictions on political and commercial power

10. See Armin von Bogdandy, "Comparative Constitutional Law: A Continental Perspective" in Michael Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 25.

for the benefit of those who stand in positions of political and market vulnerability, this seems to be neither a regressive nor anti-democratic development in the formation of national citizenship. The limitation within Allan's criticism of trends in constitutional and international law is that any restriction on day-to-day exercises of state power is taken as a self-evident denial of democracy. That would only be true under a relentlessly majoritarian and value-free theory of statecraft.

Allan has a special distaste for courts drawing on the norms of customary international law since they arise from international practice and consensus, not from specific domestic adoption of international law. A precondition for the enforcement of customary international law—unlike international conventions, treaties and agreements, which gain their effect through formal state-by-state adoption—is proof that the standard in question has actually been recognized as customary within the international community. While such practices as mutilation, torture and slavery have been identified as violating customary international standards, the range of customary international law is hardly expansive. For instance, a 1987 Inter-American Commission on Human Rights decision did not recognize a prohibition on the execution of persons who committed a crime while less than eighteen years of age.¹¹ By 2002, this minimum standard was recognized as customary international law.¹² In a case that same year, the Ontario Court of Appeal rejected the claim that customary international law was violated by the early twentieth-century head tax on Chinese immigrants.¹³ Checks and balances available to domestic courts in the application of customary international law are plentiful, the most significant one being the judicial search for congruence between national legal values and international law. Customary international law reflects the widespread aspiration of many public governments not to adopt inhumane practices. The lesson of our era is that political power can be

11. *Roach and Pinkerton v United States* (1987), Inter-Am Comm HR, No 9647, *Annual Report of the Inter-American Commission on Human Rights: 1986–87*, OEA/Ser.L/V/II.71/doc. 9 rev. 1.

12. William A Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3rd ed (Toronto: Thomson Carswell, 2007) at 70–71.

13. *Mack v Canada (Attorney General)* (2002), 60 OR (3d) 737, 217 DLR (4th) 583 (CA). For a discussion on the legal force of customary international law in domestic law, see generally Schabas & Beaulac, *supra* note 12 at 49–112.

ruthless, and the practice of civilian disorder against states across the globe grows as populations experience this. While customary international law has not been notably successful in controlling this, it is nevertheless a sensible democratic response for a nation and its courts to accept the legal force of customary international standards.¹⁴

The fiercest attack in this book is directed at restraints on government that are based on human rights. The attack focuses on those “elites” who have promoted substantive notions of human justice and on courts that have, in Allan’s view, given excessive scope to these norms. While intellectual elites can fend for themselves, the judiciary deserves a word of defence. Time and again, Allan objects to the dominance of “invention” in the judicial interpretation of the constitution. He states that citizens would never have agreed to the adoption of rights-based laws had they known the degree to which constitutional interpretation does not adopt a “locked-in approach” with “locked-in answers” prescribed in the written text.¹⁵ Of course, interpretive discretion did not arrive with the entrenchment of rights. While constitutions can be very specific, they inevitably contain language that expresses basic ideas and general purposes. For example, the *Constitution Act, 1867* confers legislative authority on the federal order in the highly general terms of “Peace, Order and good Government of Canada”.¹⁶ The *Charter* adopts both precise definitions¹⁷ and very open-ended language.¹⁸ When it comes to what form of constitutional interpretation citizens actually prefer, I suspect they have more of a preference for the constitutional adoption of broader concepts such as fundamental justice to be given application in specific circumstances by a court with full access to the context of the term’s application, than they do for a more narrow prescriptive approach.

14. For a discussion on the relationship between international right-based discourse and domestic law, see Wen-Chen Chang & Jiunn-Rong Yeh, “Internationalization of Constitutional Law” in Rosenfeld & Sajó, *supra* note 10, 1165.

15. Allan, *supra* note 1 (he also condemns judges for giving “changing answers over time” at 60).

16. (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

17. See e.g. *supra* note 7 (provides that mobility rights can be limited in a province when “the rate of employment in that province is below the rate of employment in Canada”, s 6(4)).

18. See e.g. *ibid* (guarantees that “security of the person [is not to be abridged] except in accordance with the principles of fundamental justice”, s 7).

In any event, it is in the nature of constitutions to attempt to speak to the values that government should seek to fulfill and to identify general principles for the exercise of the state's power. Their purpose is not to be specifically dispositive with respect to tensions that arise over the exercise of political authority. Judges are constrained by what they believe they ought to do as a matter of received principles and, to a considerable extent, the body of decided cases; however, personal values and ideas of public and private virtues will shape their views just as they shape a nation's law of constitutional restraints.¹⁹ This is both a reality of human judgment and an inevitable feature of placing structural restraints on governmental power. This is the bargain for national stability and political justice that has been in place for a very long time. It is not a calculation that is designed to produce the tyranny of the few, but an arrangement chosen in order to sustain democratic societies, including the societies that are discussed in this book.²⁰

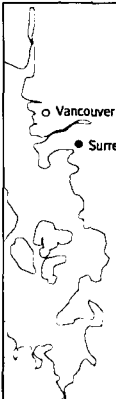
19. See Bob Tarantino, "Court Politics: How Justices' Upbringing, Education and Proclivities Shape Their Rulings", *Literary Review of Canada* 22:1 (2014) 8, online: <www.reviewcanada.ca>.

20. There is, furthermore, the restraint of the underlying value behind the rule of law—that law's ambition is the primacy of due process over pure force and will, and that due process rests on a moral understanding of what humanity requires; it hinges on a just appreciation of the human condition and not the instrumentalization of citizens as subjects of the state. See Mark D Walters, "Histories of Colonialism, Legality and Aboriginality" (2007) 57:4 UTLJ 819 at 827–28.

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