

## Human rights and democracy promotion: The exception or the rule?

Gelson Fonseca has highlighted the tensions that exist between the aim of creating multilateral game rules for global management in a context of the universalisation of certain values, and between regionalism.

I would like to take his discussion a step further, and discuss two key interrelated tensions that manifests themselves in the area of democracy and human rights promotion. First, the tension between routinisation and institutionalisation of rules and responses, and flexibility. The institutionalisation of responses to specific situations requiring concerted action by states implies more predictability. But it also implies a greater rigidity. It is necessary to maintain a flexibility of response in a world of multiple exceptionalities. Second, the tension between the need to create rules that institutionalise and routinise relations and the 'curse' of exceptionalism.

I use the word curse quite deliberately. Plurality, diversity, individuality are qualities prized by those who find in democracy the best expression yet to administer power. At the same time, the myriad exceptional situations that arise from such a plural universe is the nightmare of policy-makers. New situations require new rules which seem to be rendered obsolete or turn out to be useful only once, as a new situation with new requirements emerges. Thus, instead of truly regulating the world, of making it more predictable with the routinised application of new and clearly defined rules, what we appear to do is to run after reality with *post-facto* rules that appear to serve only for very few cases. Administering diversity with tolerance, the only acceptable administrative philosophy for democratic nations, is no easy task.

Perhaps the Cold War accustomed us to too much predictability, too easy a routine. It was a predictability based on the threat of total destruction, but in hindsight many have found that it was a more comforting reality than the one faced today. Conflict used to be contained and the rules of the game were clear; now conflicts proliferate and the UN more acts as the belated fireman that Gelson refers to, more often than not arriving at the scene of the fire when the buildings are nearly beyond saving.

Nostalgia, however, is not a recipe to face new realities. The old order cannot hope to reorganise the new disorder. Yet, in seeking how to formulate new responses, policy-makers have to keep the essential between unique situations and institutionalised responses. The tension between law and exceptionalism is not new. Aquinas debated this question in his treatise on law. To quote him, as he argues against himself in order to make his final point in favour of the law making of men: "Every law is framed for the direction of human actions... But since human actions are about singulars, which are infinite in number, matters pertaining to the direction of human actions cannot be taken into sufficient consideration except by a wise man, who looks into each one of them. Therefore it would have been better for human acts to be directed by the judgement of wise men, than by the framing of laws. Therefore there was no need for human laws."

Aquinas goes on to add that, yes, in some instances that are so particular, judges will be required, rather than laws. But he ends up arguing in favour of law-making. As he says, judges do not always judge right, and it is easier to find men once who will make the right laws than to find men often who will always judge well. Laws are made with forethought and judgements on a case by case basis are reached the heat of the moment. The scope for mistakes is greater. Further, as judges are only men, they may act with other interests in mind or with cupidity. And the law is more impartial and cold.

If one can readily agree then, with the need for rule-making or laws to govern a new world, one must also be careful not to confuse the practical reality of multilateral action and universal values and the ideal of universalism and multilateralism. The former are obtainable and useful. The latter are ideals

and should remain so. As Sartori states, "ideals always smack of hybris, they are always excessive. This is as it should be, since ideals are designed to overcome resistances.... To be sure, from the vantage point of effectiveness, the actor is required to perceive his ideals as if they were meant for realisation. But from the vantage point of the observer, the function of ideals is to challenge facts."

Further, expecting too much can generate disillusionment. As Sartori notes about democracy, "the ingratitude typical of the man of our time and his disillusionment with democracy are also, and in no small part, the reaction to promised goals that cannot possibly be reached. And to the extent that this is so, the danger threatening a democracy that officially has no enemies left, is above everything else, perfectionism."

I would like to take two cases to show how these reflections are pertinent today: the Pinochet and the Haider cases. The arrest and still possible if increasingly remote extradition of General Augusto Pinochet is an exceptional case. Yet it has raised hopes of a new age of universal jurisdiction and expectations of a more equal meting out of justice in the future. The balance here between exceptionalism and the possibility of universalism is a fine one indeed. Surrendering entirely to exceptionalism is self-defeating, as it means that the case is not really a precedent. Yet making too high a claim for universalism may lead to disappointment and disillusionment with the aim of new global human rights law-making. Further, when one follows the story of the arrest to date, it is hard not to see just how exceptional the circumstances surrounding it and just how un-universal and un-multilateral the kind of resolution to the case that seems to be emerging.

The International Criminal Tribunal has been held up as the institutional expression of the routinisation of an equal meting out of justice for the future. Yet even this is difficult to accept without reservations. Criminals can only be tried if the state they belong to acquiesces in their trial. And some states have a greater capacity for resistance than others.

This brings us to a key ingredient in this tension between exceptionalism and universalism: uneven power relations. Multilateralists implicitly or explicitly advocate it as a method that can best equalise power relations in an unequal world. Yet, they as much as anyone else are aware of the difficulties in treating all nations as equals. As Gelson points out, the US exerts a powerful pull in the international system. Its power is one of the reasons that the ICC is not to have more 'teeth'. Its resistance to ratifying universalist treaties of all kinds is well known. The more we multilateralise, the more we minimise the importance of exceptionalism, be it in terms of arresting a single tyrant or in dealing with a superpower. In part we are right. Multilateral action does reduce exceptionalism, by making it a part of routinised and predictable negotiations. Yet, we also run the risk of generating too-high expectations of a multilateral rule system. There is no such system that can ever hope to do away with disequilibrium and the 'unique case'. Pinochet may fall, but Suharto may not. Hence, it is to be expected that universal justice will remain an ideal and that, at best, we can hope to see more, rather than less, exceptional cases becoming the rule. To hope for anything else may be self-defeating.

The Haider case, on the other hand, may yet teach us some lessons about the dangers of routinisation of rules and the institutionalisation of practises. In this case, all states reacted to the coming to power of an open Nazi sympathiser and xenophobe by adopting a very strong critical posture towards the new Austrian government.

Thus far, Haider and his cohorts have not actually violated any of the rules and codes that subject a country to possible expulsion. But let us imagine for a moment that he does. If his party were to act in a way that contradicts the vital democratic interests of the Union, as a last resort, Austria can be expelled from the EU.

An exceptional case; does it set a precedent? If so, is it a good one. On one level, yes. It sends a strong democratic signal to all member states, to all aspiring member states (many of which have serious problems in terms of the quality of democratic governance), as well as to all allies around the world. In terms of relations with the Mercosur the case is exemplary. For the first time in a long time, these countries can tell Europeans what is wrong with their democracies. For the first time since the signature of the 1995 Cooperation Agreement with the democratic clause, the threat of 'conditionality' can be applied the other way around.

However, seen from another perspective, expelling a member state may not bring about the results one hopes. It may isolate and increase the power of precisely those groups that one wants to limit. The rationale for allowing Russia into the Council of Europe was that it is better to deal with an undemocratic nation from the inside than to leave it on the outside and isolated. To put it more

colloquially, it is good to have your friends close to you, but it is vital to have your enemies closest of all. Following the rules logically means predictability of response, but it also means lesser flexibility of response and further, less control over the direction that politics may take in Austria once she is no longer in the democratic fold. The Mercosur faced this challenge before Europe, when it had to deal with the Oviedo coup. Perhaps we can learn something from the way in which they deal with that exceptional circumstance.

I cannot argue here in favour of one of the other response. In some ways, there is not much of a choice. A Nazi in power must elicit strong reactions from any self-respecting European with a historical memory. Doing nothing is not an option. The question is whether the institutionalised form that has been elaborated to defend democracy is the best way to actually defend that good, given that, in the end the spectre of exceptionalism and unpredictability never goes away.

Where human rights and democracy are concerned, multilateralism and rule-making are positive steps, and the ideal of universalism a necessary one to guide our actions. The ICC is a positive creation, as are the structures for inclusion and exclusion created by the EU. However, they must always co-exist with the world of exception and uniqueness. And if they are to retain their strength, they must refer to themselves as steps towards an ideal and not as the ideal itself. To quote Sartori, "Ideals better reality precisely when they are not meant as a reality."

We are essentially astride two worlds that partially complement one another, but also seriously challenge each other. The same kind of relationship that Gelson Fonseca describes between regionalism and multilateralism. One is the world of uniqueness, diversity of interest, ideals, hopes and power. It is unpredictable and expectations and almost always the rule. The other is the world of the rule of law. One can only govern the other partially. Were it not so, there would be no need for the concept of law.

Alexandra Barahona de Brito