
The Trajectory of the Democratic Entitlement Thesis in International Legal Scholarship: A Reply to Akbar Rasulov

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Abstract

Akbar Rasulov's provocative discussion of the 'The Curious Case of the International Law of Democracy and the Politics of International Legal Scholarship' makes two remarkable assertions: i) that the critics of the democratic entitlement thesis won a decisive victory in the contest to influence 'the conventional wisdom' within international legal scholarship; and ii) that the critiques objectively served 'a fundamentally reactionary political agenda'. Beyond overstating both the critiques' harshness and their impact, Rasulov is too quick to associate their methodological orthodoxy with 'right-wing' outcomes, neglecting to appreciate that their authors' primary objective was to resist neo-colonialist tendencies. Whereas departures from standard source doctrines may in an earlier era have been directed towards redress of power imbalances inherited from colonialism, the 'pro-democratic' departures of the post-Cold War era tended to license impositions on the self-government of the poorer and weaker states. The democratic entitlement's critics sought precisely to conserve gains that had earlier been won by sectors of the international community resistant to neo-colonialism.

1 Introduction

In 1992, Thomas M. Franck mapped out, in characteristically visionary terms, what he dubbed an 'emerging right to democratic governance' in international law.¹ Contemporaneously, his protégé, Gregory H. Fox, published a methodologically rigorous exploration of the development of the human right to political

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¹ Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law (AJIL)* (1992) 46.

participation.² Thus was inaugurated a literature on what is most often called the ‘democratic entitlement’ thesis or, in alternative terminology, the international law of democracy (ILD) narrative.³

This thesis predictably drew a range of responses – some critical, including the work of this author.⁴ The discourse on this range of matters has nonetheless persisted and deepened. Although some commentators persist in resisting aspects of the ILD narrative, its continued influence in the international legal literature would seem difficult to deny.⁵

Akbar Rasulov’s provocative discussion of the ‘The Curious Case of the International Law of Democracy and the Politics of International Legal Scholarship’ proclaims that the critics of the ILD narrative have won a decisive victory in the contest to influence ‘the conventional wisdom’.⁶ Those critics might receive his verdict as a welcome surprise, were it not for his substantive evaluation of their critique: ‘nakedly ideological in terms of its immediate effects’ and ‘in bad faith in terms of its motivation’.⁷ Moreover, according to Rasulov, ‘the anti-ILD camp had ended up re-entrenching within the discipline’s internal socio-cultural arena an ideology of knowledge production whose general political bias, *from the standpoint of its broader implications for the organization of the academic labour process*, seems to be not only alienating and hierarchical but also essentially right-wing’.⁸

Tempted though this author is to ‘quit while ahead’, there are reasons to counter Rasulov’s assessments. First, contrary to the claim that ‘the concept of ILD sank into oblivion’ some two decades ago,⁹ the ILD narrative has largely become integrated into the fabric of mainstream international legal scholarship. Accordingly, much of the critique, far from attributing that narrative to ‘a general failure of critical reason and professional standards’,¹⁰ has been of the ‘yes, but’ variety.¹¹ Second, whereas critics

² Fox, ‘The Right to Political Participation in International Law’, 17 *Yale Journal of International Law* (1992) 539.

³ For a range of approaches to the questions raised in the 1990s, see G.H. Fox and B.R. Roth (eds), *Democratic Governance and International Law* (2000).

⁴ See, e.g., B.R. Roth, *Governmental Illegitimacy in International Law* (1999); Roth, ‘Sovereign Equality and Non-Liberal Regimes’, 43 *Netherlands Yearbook of International Law* (2012) 25; Roth, ‘Advancing Peaceful Settlement and Democratization: The Doubtful Usefulness of International Electoral Norms’, in M. Weller, M. Retter, and A. Varga (eds), *International Law and Peace Settlements* (2021) 333.

⁵ For a collection of some of the most prominent published work on the topic over the past two decades, with an introductory essay assessing the present state of the sub-field, see G.H. Fox and B.R. Roth (eds), *Democracy and International Law* (2020).

⁶ Rasulov, ‘“From the Wells of Disappointment”: The Curious Case of the International Law of Democracy and the Politics of International Legal Scholarship’, 31 *European Journal of International Law (Eur. J. Int’l L.)* (2021) 17.

⁷ *Ibid.*, at 37.

⁸ *Ibid.*, at 47 (emphasis in original).

⁹ *Ibid.*, at 20.

¹⁰ *Ibid.*, at 20.

¹¹ The contestation is also far more cordial than Rasulov’s account might imply, as reflected in the volumes that have been co-edited by a pair of individuals identified by Rasulov as leading figures on the respective sides. Indeed, that pair of scholars has co-authored work that compares and contrasts approaches that lead to accord on some points and to divergence on others. See, e.g., Fox and Roth, ‘Democracy and International Law’, 27 *Review of International Studies* (2001) 327.

of the ILD narrative from outside international law circles often represent the political Right (and are often more broadly dismissive of international law), such a characterization of the internal critics matches neither the substance of the critique nor the political orientations of the scholars responsible for the critique. Of course, it remains open to Rasulov to argue that the critique, irrespective of its motivation, is objectively 'right-wing' in its operation. The question is whether Rasulov has met his burden of proof in this regard.

2 Reports of the ILD Narrative's Demise Have Been Greatly Exaggerated

The grounding premise of Rasulov's attack on the democratic entitlement's critics is that they have scored a sweeping triumph. Of the narrative, he states,

it all just went away. Almost as quickly as it had inflated, the ILD bubble burst. By the middle of the second post-Cold War decade, the narrative of international law's democratic revolution had all but disappeared from the pages of the leading international law publications. By the end of the third decade, only a small handful of legal historians and self-declared neo-Rawl-sians seemed to retain any degree of interest in ILD.¹²

Rasulov makes this assertion as though he were merely articulating a fact that his readers have all surely noticed. Since the editors of a recent compendium of highlights of the past two decades of scholarship on the topic had the greatest difficulty in limiting the number of representative articles to the 34 that the publisher would allow,¹³ the assertion could be regarded as curious. If icons of the field such as James Crawford did not return to the subject after having initially pronounced upon it,¹⁴ a second wave of scholars produced a great body of work that drilled down further into the specifics of the associated claims. Even prominent articles that have indicated some level of scepticism about the democratic entitlement have taken the continued relevance of the thesis as a given.¹⁵

The reasons for this are not far to seek. Both the United Nations system and regional organizations have embraced the idea of a liberal-democratic governance norm to a greater or lesser extent, in terms not only of general proclamation but also of support for 'pro-democratic' measures taken by states and inter-governmental organizations against regimes seizing or holding power in defiance of an electoral mandate. Consequently, numerous respected scholars have concluded that 'the principle that the will of the people, as expressed in periodic and genuine elections, shall be the basis of government authority' is well grounded in state practice and *opinio juris*.¹⁶

¹² Rasulov, *supra* note 6, at 25.

¹³ Fox and Roth, *supra* note 5.

¹⁴ Crawford, 'Democracy and International Law', 64 *British Yearbook of International Law* (1993) 113.

¹⁵ See, e.g., Marks, 'What Has Become of the Emerging Right to Democratic Governance?', 22 *Eur. J. Int'l L.* (2011) 507; d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks', 22 *Eur. J. Int'l L.* (2011) 549; de Wet, 'From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition', 108 *American Journal of International Law Unbound (Am. J. Int'l L. Unbound)* (2015) 208.

¹⁶ Pippan, 'Democracy as a Global Norm: Has It Finally Emerged?', in Matthew Happold (ed.), *International Law in a Multipolar World* (2012) 203, at 222.

It has lately been advanced that ‘there is significant evidence that – at least in treaty international law – the ouster of a democratically elected regime may now be widely regarded as unlawful in international law’,¹⁷ and that ‘democratic legitimacy as a criterion to recognize a government, although not universally accepted yet, has gained special momentum in the framework of the Organization of American States (OAS) to such an extent that one may validly contend that we are in the process of formation of a regional customary international law rule’.¹⁸

Critics may assert that there is less to these developments than meets the eye. They may further caution that an overreading of these developments is susceptible to being invoked for nefarious purposes and therefore should be resisted. But they almost uniformly accept the thesis that the international legal conversation about governmental legitimacy has fundamentally changed since the waning days of the Cold War. However confident of their own conclusions, the critics are hardly congratulating themselves about having achieved a rout of the ILD narrative’s proponents.

3 The ILD Narrative’s Critics Sought to Resist, Not to Perpetuate, Neo-Colonialism

Rasulov’s core contention is that the scepticism of critics of the democratic entitlement bears a resemblance to the scepticism advanced by an earlier generation of scholars against claims for the emergence of a New International Economic Order (NIEO). Based on what seems to be little more than a metaphor, he draws the following remarkable conclusion:

*The ideological content of the actual arguments they put forward about international law as a legal system leaned unmistakably in a direction that most international lawyers who had been brought up against the background of the Cold War and the post-decolonization debates about neo-colonialism would readily recognize as a fundamentally reactionary political agenda.*¹⁹

The superficial similarity in the two scholarly trends that Rasulov compares is that each sought to bolster the international legal order’s default position against a claim that a new norm was not only desirable in moral and policy terms, but actually emerging as positive law in accordance with broadly accepted source doctrines. In the era of decolonization and with the advent of the Non-Aligned Movement as a crucial third voice in interstate fora previously dominated by the traditional Western powers and the Soviet bloc, the principal efforts to reform fundamental norms of international law comprised a project to bolster the sovereign equality of weak states in the global

¹⁷ Okafor, ‘Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response To Professor Erika De Wet’, 108 *Am. J. Int’l L. Unbound* (2015) 228, at 232.

¹⁸ Saranti, ‘Democratic Legitimacy as a Criterion for Recognizing a Government: Towards the Emergence of a Regional Customary Rule in the Americas? A Reply to Professor Erika De Wet’, 108 *Am. J. Int’l L. Unbound* (2015) 233, at 234.

¹⁹ Rasulov, *supra* note 6, at 46 (emphasis in original).

order.²⁰ Whatever might be said in favour of drawing a hard distinction between *lex lata* and *lex ferenda* as a general matter, it is certainly understandable that an insistence on methodological orthodoxy in that context would be associated with ‘a fundamentally reactionary political agenda’.²¹

But events at the turn of the 1990s occasioned a fundamentally different era. Over the previous decades, the Non-Aligned Movement had succeeded, if not in establishing the NIEO, at least in strengthening the sovereign inviolabilities of the poorer and weaker states, including especially those emerging from colonialism. Emblematic of this achievement was the International Court of Justice decision in *Nicaragua v. United States*,²² which exalted the UN declarations on non-intervention in internal affairs that insisted, *inter alia*, that ‘Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State’, and that ‘No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind’.²³ Yet by the 1990s, disappointment with post-colonial state governance had set in, and many liberal-internationalist scholars were looking for opportunities to make the boundaries of weak states more permeable, so as to license external impositions in the name of democratization and good governance (not to mention, as subsequently articulated, ‘the responsibility to protect’).

The pivotal, if typically only implicit, ILD claim was as follows:

²⁰ See, e.g., GA Res. 1803 (XVII) (1962) (acknowledging the principle of ‘permanent sovereignty over natural resources’); Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX) (1974) (120-6-10), Art. 2(2)(c) (‘Each State has the right [to] nationalize, expropriate, or transfer ownership of foreign property, in which appropriate case compensation should be paid’ as determined according to ‘the domestic law of the nationalizing State’ unless otherwise ‘freely and mutually agreed’; the domestic law provision drew the objection of capital-exporting states).

²¹ Rasulov insists on holding out for ‘a vision of an *international legal discipline* freed not only from the shackles of the old formalist doctrine of sources but also the broader project of classical positivist reason’. Rasulov, *supra* note 6 at 47 (emphasis in original). Yet law’s capacity to constrain or impel conduct depends on its being grounded in an existing social accord, in turn signified by formal sources of legal authority that are manifestly accepted across the international community of states. If those purporting to interpret exiting law, as delegates of the legal order, ‘exceed the discretion inherent in the delegation, they act *ultra vires* and are prone to lose not only their legal authority but also their practical influence’. Simma and Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’, 93 *Am. J. Int L.* (1999) 302, at 307. For a recent defence of a methodologically conservative approach in service of a left-of-centre political agenda, see Roth, ‘Legitimacy in the International Order: The Continuing Relevance of Sovereign States’, 11 *Notre Dame Journal of International and Comparative Law* (2021) 60.

²² *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, judgment of 27 June 1986 ICJ Reports (1986), 14.

²³ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (the ‘Friendly Relations Declaration’), GA Res. 2625 (1970) (adopted without a vote). The *Nicaragua* decision, *supra* note 22, insisted that to disallow a state’s adherence to any particular governmental doctrine ‘would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests’ (¶ 263).

The sovereignty affirmed by the international legal system belongs to the people, and can be cognizably asserted on the people's behalf only where the government conforms to the right to political participation; therefore, measures to implement democratic rights, undertaken by foreign states collectively and/or individually, need not respect the sovereign prerogatives of governments that violate those rights. This is especially so where a 'free and fair election' has actually taken place, and those elected have been denied, or ousted from, office by force of arms.²⁴

Franck, Fox and other first-tier democratic entitlement advocates never took their contention the full distance to this conclusion, but their thesis provided a crucial pathway to it.²⁵

Critics of the democratic entitlement were unquestionably motivated to put a brake on this development. They believed the question of democratic legitimacy within actual societies to be much more complicated than the ILD blueprint suggests, and regarded interested external forces as both untrusted and untrustworthy implementers of any universal principle of democratic governance. An international legal 'entitlement', the critics feared, might be invoked at the discretion of external powers in service of their own interests and values, authorizing them to demarcate arbitrarily and conveniently the high ground in internal conflicts within weak states.²⁶ Critics also focused on how the supposed democratic right, in emphasizing electoral competition among elites at the expense of mass participation and genuine popular influence, could confer unearned international legitimacy on systems that maintained vast disparities of wealth and power.²⁷ Particular commentators were therefore, by virtue of their own aspirations for international law's contribution to good order, inclined to characterize the ILD's methodological glass as half empty, rather than as half full.

Rasulov himself ultimately seems to appreciate these scholars' motivation 'to limit the democratic turn's potentially reactionary impact in the external dimension'.²⁸

²⁴ Fox and Roth, 'Democracy and International Law', *supra* note 11, at 336.

²⁵ See T. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (2000), at 272–273 (asserting Security Council authority to licence 'military rescue of democracy' but insisting that international law does not 'permit any state, or any regional organization, to take enforcement of the democratic entitlement exclusively into its own hands'); Fox, *supra* note 2, at 595 ('regimes that thwart the will of the people lack legitimacy' to claim that the international community's insistence on participatory rights implementation violates national sovereignty, but 'it is still an open question as to how far this principle should be extended'); but see, e.g., Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *Am. J. Int'l L.* (1990) 866 (advocating unilateral forcible measures); Fielding, 'Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy', 5 *Duke Journal of Comparative and International Law* (1995) 329; Halberstam, 'The Copenhagen Document: Intervention in Support of Democracy', 34 *Harvard Journal of International Law* (1993) 143; D'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny', 84 *Am. J. Int'l L.* (1990) 516.

²⁶ The history of Cold War politics, and especially of United States' interference in political processes in Central America in the 1980s, furnished ample grounds for such suspicions. See Roth, *Governmental Illegitimacy in International Law*, *supra* note 4, at 344–357.

²⁷ See S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (2000), at 50–75 (examining the shortcomings of 'low-intensity democracy').

²⁸ Rasulov, *supra* note 6, at 47.

But that, for him, is no excuse for their reaffirmation of a methodological conservatism. Given the variability of historical developments within recent experience, however, what methodological approach actually serves progressive substantive values in the long run is a far more open question than he admits.

4 Conclusion

Rasulov's attack on the critics of the democratic entitlement thesis is remarkable for its fixation on form at the expense of substance. He is unquestionably correct that these critics invoked orthodox methodological standards as a check on their opponents' claims (though he is incorrect in ascribing to those critics a disdain for their opponents' scholarly acumen). He insists that such invocation is inherently reactionary, irrespective of the substantive stakes of the particular controversy. He is entitled to the view that methodological orthodoxy has a long-term tendency to serve the ends of political conservatism; that contention is far more difficult to substantiate than he imagines, but it is equally difficult to disprove. But his likening of the critics of the ILD to apologists for neo-colonialism needs to be answered sharply, for the political end that animated those critics was nothing other than vigilance against what they feared (rightly or wrongly) to be neo-colonialism in a new guise.

The debate continues on our EJIL: Talk! blog.

