



## Chapter 6

# Democracy & Voting

# Democracy & Voting

## Chapter 6

- 114 Introduction – Alecia Johns
- 116 The Not-so-Paramount Right to Vote
- 117 The Worrisome Casual Approach to (Dis)enfranchisement
- 118 UK vs ECtHR: The Prisoner Voting Saga Continues
- 119 Migrants’ Voting at the Local Level is a Human Right
- 120 Where Have All The Expatriates Gone?
- 121 Malawi’s Electoral Fiasco
- 122 A Watershed Case for African Human Rights: Mtikila and others v. Tanzania
- 123 McCutcheon v FEC: The Harvest of Pernicious Seeds
- 124 Contributions Caps and the First Amendment
- 125 Is An Obsession With Foreign Investment Eroding Democracy in Papua New Guinea?

# Democracy & Voting

## Chapter 6

### Introduction

By Dr Alecia Johns

The global political landscape now includes more electoral democracies than ever before. Notwithstanding this broad-based increase in popular sovereignty, as the posts in this chapter outline, there are still many issues which continue to affect the extent and quality of democracy enjoyed by citizens in a number of jurisdictions.

First, even though the right to vote represents the bedrock of democratic governance, its status in a number of polities remains less than fundamental. For example, in India, the world's largest democracy, the right has been deemed by the Supreme Court as merely 'statutory' as opposed to 'constitutional'. Vishwajith Sada highlights the extent to which this categorisation inadequately safeguards the right to vote and is out of touch with India's international obligations ('The Not-so-paramount Right to Vote' p 116). Similarly, Ruvy Ziegler laments the extent to which the UK Supreme Court has provided 'flimsy protection' of the right to vote within the UK constitutional order ('The worrisome casual approach to (dis)enfranchisement' p 117).

The classification and status given to the right to vote is not only of symbolic significance; it also colours the way in which decisions are made regarding who should receive this right and bases on which it may be denied. One recurring issue in this area is that of prisoner disenfranchisement. Ziegler explores this issue within the context of the UK's non-compliance with the 2005 European Court of Human Rights decision in *Hirst (no. 2)* [2005] ECHR 681, which held that the country's blanket disenfranchisement of all prisoners violated Article 3, Protocol 1 of the European Convention on Human Rights ('UK v ECtHR: The Prisoner Voting Saga Continues' p 118). Prisoner disenfranchisement also remains a central problem in the United States where over six million Americans are currently disqualified. In the US, these laws disproportionately affect African Americans, with some states denying the right to vote even after the individual has completed his sentence.

Another central issue pertaining to voting rights turns on the extent to which states often predicate political participation on some degree of nexus to the state. This is often expressed in the form of citizenship and/or residency requirements for voting and standing for office. However, with increased levels of migration in a globalised and inter-connected world, some of these traditional indices of 'closeness' have been increasingly challenged. For example, Nikolaos Sitaropoulos stridently argues that non-citizen migrants who are permanently residing in EU member states, ought to be given the rights to vote and stand for office at the local level ('Migrants' Voting at the Local Level is a Human Right' p 119). Quite similarly, Ziegler challenges the legitimacy of residency requirements, which serve to exclude UK expatriates who may still have a stake in local elections, in his post on the qualifications for voting in the Scottish independence referendum ('Where Have all the Expatriates Gone?' p 120).

While the formal conferral of the right to vote remains a necessary ingredient for successful democracy, it is by no means sufficient for that end. A great deal also turns on the substantive fairness of the electoral process, as well as the more general societal commitment to transparency, equality and the rule of law. As one anonymous post from Papua New Guinea highlights, corruption and unchecked power can serve to greatly undermine the free expression of the people's will ('Is an Obsession with Foreign Investment Eroding Democracy in Papua New Guinea?' p 125). The second half of the posts within this chapter address these important substantive issues as they have arisen in a number of jurisdictions.

Dan Chirwa's post illustrates the extent to which an inefficient and politically partial electoral commission greatly compromised the fairness of Malawi's 2014 general elections ('Malawi's Electoral Fiasco' p 121). Therefore, even if the right to vote is widely conferred to most citizens (and permanent residents), this means little if the rules and procedures surrounding the electoral process result in manifest unfairness. Rules regarding the participation of candidates and the funding of their campaigns are of particular significance in this sphere. Oliver Windridge highlights the landmark decision of the African Court of Human and People's Rights where the Court held that Tanzania's prohibition of independent candidacies was in breach of various articles of the African Charter of Human and People's Rights, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights ('A Watershed Case for African Human Rights: *Mtikila and others v Tanzania*' p 122). The Court highlighted the importance of the rights to freely associate and to participate in government, without having to belong to any given political party.

Rules regarding campaign finance also affect the citizen's ability to meaningfully seek political office and to engage in public debate. In my post within this chapter, I briefly explored the extent to which the abolition of certain contribution limits in the United States, could serve to deepen existing inequalities in influence enjoyed by wealthy donors ('*McCutcheon v FEC: The Harvest of Pernicious Seeds*' p 123). Claire Overman and Matthew Tyler then go on to take a closer look at the potential effects of removing these contribution limits in their post on the US Supreme Court's decision in *McCutcheon v Federal Election Commission* 572 U.S. \_\_\_ (2014) ('Contribution Caps and the First Amendment' p 124).

As noted above, in order for democracy to be truly meaningful, it must be taken to include not only thin conceptions of 'procedural democracy' but also matters of 'substantive democracy' such as civil liberties, equality and a commitment to the rule of law. In conceiving of 'democratic rights' it is therefore important to note that these go well beyond the rights to vote and stand for office. As the posts within this chapter have highlighted, the full enjoyment of democracy is invariably intertwined with issues concerning migrants' rights, criminal justice, associational rights and freedom of expression. This brief collection therefore serves to shed light

# Democracy & Voting

## Chapter 6

on some of the recent developments in these areas, with a wide jurisdictional coverage inclusive of the United States, the United Kingdom, India, Malawi, Tanzania, the EU and Papua New Guinea.

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# Democracy & Voting

## Chapter 6

### The Not-so-Paramount Right to Vote

By Vishwajith Sadananda | 14th March 2014

Last week, the Election Commission of India announced the time frame for the general elections to constitute the 16th *Lok Sabha* ('House of the People') of the Parliament of India. Widely considered to be an election comprising of the highest number of voters in the world, it follows that the nature of the right to vote in India should be analyzed.



Back in September 2013, while dealing with the question of whether a citizen is entitled to cast a negative vote in an election, thereby rejecting the candidates in contention, the Supreme Court also dealt with the status of the right to vote ('the NOTA judgment'). The Court sought to clarify the confusion caused by observations it made in its previous decisions in *Kuldip Nayar* (Writ Petition (civil) 217 of 2004), *Association for Democratic Reforms* (Civil Appeal No.7178 OF 2001) and *PUCL* (Writ Petition (civil) 196 of 2001) wherein, *apparently*, different positions were taken as to the nature of the right to vote. While reconciling the aforementioned decisions, it held that the right to elect is sourced from the Representation of the People Act, 1951 and hence merely a statutory right, neither a fundamental nor constitutional right.

The initial confusion might have arisen from the fact that though all three decisions follow a similar trajectory in understanding the meaning of elections and voting, a holistic reading of the three decisions led to a nebulous understanding as to the nature of the right to vote itself. In *Association for Democratic Reforms*, in the context of the right of the voter to get information on the background of the candidate, the Court was of the opinion that the voter's right to speech and expression would include casting of votes (Para. 46). Similarly, in *PUCL*, the Court was of the opinion that the freedom of voting by expressing a preference for a candidate is nothing but a freedom of expressing oneself (Para. 95). Even in the *NOTA* judgment, the Court equated the act of voting with freedom of speech and expression (Para. 21).

However, the Supreme Court, in the *NOTA* judgment, added that though the right to vote *per se* is a *pure and simple* statutory right (following *Kuldip Nayar* [Para. 151.1]), the way this right is exercised, being a form of expression, would fall within the ambit of the fundamental right to speech and expression. It is this distinction that highlights the Court's logical inconsistency. By holding that *the way the right is exercised* is a fundamental right, while claiming that the right *per se* is a statutory one, the Court has essentially made a fundamental right dependent on a statutory one. To take it to its logical conclusion, the expression of political will would then depend not on higher constitutional principles, but the whims and fancies of the legislature vested with the power of amending

# Democracy & Voting

## Chapter 6

and repealing statutes.

Furthermore, the Court, in all these decisions, has consistently ignored the purport of Articles 325 and 326 of the Indian Constitution. Both these provisions deal with the right to vote and the necessary qualifications required to vote in the elections for either the *Lok Sabha* or the State Assemblies. Therefore, even if, for the sake of argument, a case for voting being considered a fundamental right cannot be countenanced, there is definitely merit in claiming that the right to vote, at the least, is a constitutional right.

India is a party to both the UDHR as well as the ICCPR, instruments that highlight the paramount nature of the right to vote for proper and effective actualization of one's socio-political voice. However, by refusing to hold that voting *per se* is a fundamental right, and instead holding that the way an apparent statutory right is exercised is a fundamental right, the Court has not only shown highly questionable logic, but more importantly, has also lost an opportunity to raise the right to vote to a higher pedestal, in tune with India's constitutional as well international obligations. Considering India's disparate socio-political voices as well as the fact that universal suffrage in India is not truly universal, it is absolutely pertinent that the right to vote, an important tool to hold together the edifice of democracy, is solidified and given a higher protection.

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## The Worrisome Casual Approach to (Dis)enfranchisement

By Reuven (Ruvi) Ziegler | 24th February 2014

Lord Phillips' lecture at the University of Oxford (entitled 'The Elastic Jurisdiction of the European Court of Human Rights') critiqued, *inter alia*, the application by the Strasbourg court of its long-standing 'living instrument' (*Tyrer v UK* [1978] ECHR 2) European Convention on Human Rights interpretation to the treaty's jurisdiction clause, Article 1 (*Al Skeini and others v UK* (2011) 53 EHRR 18, *contra Bankovic* [2001] ECHR 890).

Lord Phillips highlighted the UK's 8.5 year breach of its binding international obligation to abide by the Grand Chamber's *Hirst* (No. 2) [2005] ECHR 681 judgment and amend section 3 of the Representation of the People Act 1983, which currently disenfranchises all serving prisoners in all types of elections, including this May's European Parliament and local elections.

Reflecting on his tenure as a member of the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Lord Phillips contended that, in the course of deliberations, it became apparent (to him) that 'the question of whether some prisoners should get to vote was of comparatively minor significance.' Describing the Committee's recommendations to amend UK legislation so that all prisoners serving sentences of 12 months or fewer should be entitled to vote, he opined: 'would it really be earth shaking to give some short term prisoners the right to vote, which most of them would not bother to exercise?' This blog addresses this seemingly casual approach to (dis)enfranchisement.

In a speech delivered at Georgetown University the day before Lord Phillips' lecture, U.S. Attorney General Eric Holder stressed the fundamentality of the right to vote in the light of vestiges of racially motivated disenfranchisement legislation in some American states. Holder's call was echoed by a *New York Times* editorial, which noted that over six million Americans, more than two percent of the otherwise eligible voting population, is currently disenfranchised. Fortunately, the number of disenfranchised persons in England and Wales is far lower (65,963 on 30 September 2013); nonetheless, 'the vote of each and every citizen is a badge of dignity and of personhood.'

The fundamental nature of an individual prisoner's right to vote does not depend on its exercise by all right-holders; its significance lies in the knowledge and awareness that one is a right-holder. Indeed, the claim that prisoners are not interested in voting is reminiscent of arguments made in the nineteenth century against the extension of suffrage to women. In *Sauvé* (no. 2) v Canada 2002 SCC 68, the Canadian Supreme Court quashed legislation disenfranchising prisoners serving sentences of over two years. While justifying disenfranchisement, Justice Gonthier's powerful dissent acknowledged that 'being temporarily disenfranchised is clearly a significant measure, which is part of the reason why it carries such great symbolic weight.'

Even if serving prisoners are indeed less likely to vote than the general population (data from Israel suggests otherwise), prisoners will have probably developed their disinterest or disillusionment with the political system before entering prison. Rather than lead one to dismiss the significance of voting for prisoners, low turnout should mobilise political elites to assume responsibility for furthering civic engagement. Indeed, 'the right to elect legislators in a free and unimpaired fashion is a bedrock of the political system.'

The Scottish Independence Referendum (Franchise) Act gives rise to several franchise-based legal challenges, *inter alia*, the exclusion in section 3 of all serving prisoners from participation in the 18 September 2014 referendum. The provision has recently withstood judicial review in the Court of Session Outer House's judgment in *Moohan, Gibson, and Gillon* [2013] CSOH 199. Lord

# Democracy & Voting

## Chapter 6

Glennie's judgment relied, *inter alia*, on the ECtHR ruling in *McLean and Cole v. UK* (Application nos. 12626/13 and 2522/12), which interpreted Article 3 of Protocol 1 to the ECHR (A3P1) to be inapplicable to the exclusion of UK prisoners from participation in the 'Alternative Vote' referendum. A3P1 refers to 'free elections...which will ensure the free expression of the opinion of the people in the choice of the legislature.'

Notably, however, the ECtHR *has never considered a claim about denial of voting rights in an independence referendum*, which arguably concerns 'the choice of the legislature' in the sense of *which* parliament is to enjoy sovereign authority in Scotland in the post-referendum era. If and when the Court of Session judgment reaches Strasbourg, a 'living instrument' interpretation of A3P1 may plausibly ensue.

Elsewhere, I have made the case for letting prisoners vote; I have also lamented the flimsy protection that the recent Supreme Court judgment in *Chester and McGeoch* [2013] UKSC 63 provides for the right to vote in the UK constitutional order. It is high time to start taking the right to vote seriously.

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### UK vs ECtHR: The Prisoner Voting Saga Continues

By Reuven (Ruviziegler) | 14th August 2014

On 12 August 2014, the Fourth Section Chamber of the European Court of Human Rights in *Firth and others* [2014] ECHR 874 held yet again the UK's blanket disenfranchisement of prisoners, in accordance with Section 3 of the Representation of the People Act 1983, to be a violation of Article 3 of the First Protocol to the ECHR.



The case concerned prisoners in Scottish prisons denied the right to vote in elections to the European Parliament (EP) held on 4 June 2009. Indeed, this outcome was to be expected in view of the Grand Chamber judgments in *Hirst (No. 2)* [2005] ECHR 681 and *Scoppola (no. 3)* [2012] ECHR 868. Notably, in EP elections, the UK's disenfranchisement practices also affect the right to vote of EU nationals serving sentences in UK prisons (an issue which deserves jurisprudential attention).

I have previously critiqued the casual approach to the disenfranchisement of prisoners in the UK, manifested in the scant public

# Democracy & Voting

## Chapter 6

attention given to the rejection of a legal challenge to the blanket disenfranchisement of prisoners in the 18 September Scottish Independence Referendum (by the outer and inner houses of the Scottish Court of Session and, on 24 July 2014, by the UK Supreme Court, with reasons to be given at a later date). In this instance, the Scottish government has not even attempted to justify the disenfranchisement of all prisoners, including prisoners that will be released before 24 March 2016, when an independent Scotland is to be declared following a YES vote (according to the 'Scotland's Future' White Paper). Instead, the government is relying on a literal (rather than purposive) reading of the A3P1 stipulation, which refers to the 'choice of the legislature' to rule out its applicability to referendums (see the explanatory notes of the Scottish Independence Referendum (Franchise) Act). This is both disappointing and revealing because it manifests an unprincipled approach to determining the franchise for the most fundamental of choices in an independence referendum.

The UK Supreme Court in *Chester and McGeoch* [2013] UKSC 63 refrained from addressing the ramifications of the UK's continuous breach of the rule of law. In contrast, the Parliamentary Committee on the Draft Voting Eligibility (Prisoners) Bill, unequivocally asserted in its 18 December 2013 report, at [229], that 'the United Kingdom is under a binding international law obligation to comply with the Hirst judgment... it would be completely unprecedented for any state that has ratified the European Convention on Human Rights to enact legislation in defiance of a binding ruling of the European Court of Human Rights.'

Since no amending legislation was included in the June 2014 Queen's speech, it now looks highly likely that the May 2015 general election will be held in continuous and defiant breach of the UK's international obligations. While, as the parliamentary committee submitted, the UK has a 'long tradition of respect for and attachment to the rule of law,' the almost nine-year refusal to comply with the 2005 ruling of the Grand Chamber in *Hirst* (no. 2) has tarnished its record. It is a sad testament to the current standing of the ECHR in the UK public discourse that none of the main political parties (nor indeed any of the main figures in any party) seem to mind.

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## Migrants' Voting at the Local Level is a Human Right

By Nikolaos Sitaropoulos | 12th July 2014

According to a recent study by the Bundeszentrale für politische Bildung, only 15 of the 28 EU member states allow categories of resident migrants ('third country nationals') to participate in local elections. Four of these states only allow migrants to vote but not to stand for election. The results of the latest European Parliament elections, which were characterised by a boost of extreme, anti-migrant parties, have made it even more difficult to publicly debate issues relating to migrants' human rights, including voting, even if these rights are enshrined in European law.

States' reluctance to recognise migrants' voting rights in their host countries is exemplified in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which only provides for migrants' rights to participate in public affairs, vote and run for office in their state of origin.

However, the Convention on the Participation of Foreigners in Public Life at Local Level, drawn up in the Council of Europe in 1992, expressly provides for, *inter alia*, migrants' rights to vote and stand for election at the local level. The basic prerequisite set by Article 6 of this treaty is migrants' lawful and habitual residence in the host state for five years preceding the election. To date, this treaty, in force since 1997, has been ratified by only eight member states (though five other states have signed but not ratified it). It is difficult to comprehend European states' cautiousness *vis-à-vis* this convention, given that it is a flexible treaty. For example, it allows contracting states to be bound, if they wish, by only the first of the three chapters (entitled, 'Freedoms of expression, assembly and association'), which corresponds to classic freedoms that were long ago enshrined in international and European human rights treaties. Also, two of the contracting states, Albania and Italy, have opted out of the third chapter, which concerns the rights to vote and to stand for election in local authority elections.

Migrants' effective integration into European host states is not really possible if they are excluded from the most important process of a state's democracy, that is, elections. A recent report on migrants' integration in Europe by the Parliamentary Assembly of the Council of Europe (PACE) actually stressed that 'most immigrants want to vote, want more diversity in politics and would be ready to vote to back this up.' In a subsequent resolution, PACE reiterated its earlier recommendation that member states 'ensure that migrants have a say in the democratic process by granting them, in particular, the right to vote at [the] local level.'

Despite these debates and recommendations, migrants' rights to vote and to stand for election, at least at the local level, have not yet attained a high profile and recognition in many European states. Arguably, this is due to the fact that established methods of evaluating migrant integration in Europe tend to place democratic participation behind participation in the labour market and education in terms of importance.

In a 2011 communication by the European Commission on the European agenda for the integration of non-EU nationals, migrants'



# Democracy & Voting

## Chapter 6

democratic participation appeared as a completely peripheral issue. This position is also reflected in developments in certain European states. In Malta, for example, the country's president reportedly stated last month that allowing migrants to vote in local elections would be 'jumping the gun.' In Greece, in February 2013, the supreme administrative court found unconstitutional a 2010 law that had provided, *inter alia*, for migrants' rights to vote and stand for election at the local level.

Political and institutional actors in Europe should do their utmost to counter the current trend of viewing migrants who live, work and contribute to the development of ageing European societies as a threat. Migrants' voting rights are not just an indicator of but also a prerequisite to their integration therein. Without voting rights, migrants cannot influence and fully participate in the democratic societies in which they live nor effectively exercise their other human rights.

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### Where Have All The Expatriates Gone?

By Reuven (Ruvi) Ziegler | 11th March 2014

Participants in the 18 September 2014 Scottish independence referendum will be asked whether Scotland should become an independent country. The UK Chancellor of the Exchequer's pronouncement that Scotland will not be able to keep the pound, and the EU Commission President's observation that 'it would be extremely difficult, if not impossible' for Scotland to join the EU (following Crawford and Boyle's paper on, *inter alia*, the likely conditions for Scottish accession) have received great attention. Conversely, the question who will and should participate in the referendum, determined by the Scottish Independence Referendum (Franchise) Act, has hardly been debated. I have previously considered some challenges arising from the decision to impose a blanket ban on electoral participation of prisoners in Scottish jails. Here, I wish to draw attention to the disenfranchisement of United Kingdom citizens, formerly resident in Scotland, pursuant to Section 2 of the Act.

All democratic states set eligibility criteria for participation in elections of their institutions of government. Broadly speaking, these criteria fall into two categories: individual competence and membership of the state's political community. The latter criterion is manifested by ubiquitous exclusion of non-citizen residents from national (and often also sub- or supra-national) elections. Concurrently, some states impose residency requirements, which disqualify their expatriates during part or all of their period of

# Democracy & Voting

## Chapter 6

absence.

Elsewhere, I critiqued the reasoning employed by the European Court of Human Rights in its *Shindler* [2013] ECHR 423 judgment regarding the disqualification of UK expatriates from participation in UK parliamentary elections after fifteen years of residence abroad, pursuant to the Representation of the People Act 1985. Crucially, eligibility for participation in the forthcoming referendum does not mirror these criteria but, rather, those employed to determine eligibility for *local government* elections. Hence, Scottish expatriates who have left Scotland in the last fifteen years are eligible to vote in UK parliamentary elections *wherever they currently reside*, but will be excluded from the referendum.

The EU Commission is justifiably concerned about the effective disenfranchisement of EU citizens who exercise their treaty right to freedom of movement and of residence. In its 29 January recommendations to member states, the Commission noted that '[EU] citizens residing in another Member State can maintain lifelong and close ties with their country of origin and may continue to be directly affected by acts adopted by the legislature elected there' and advised that 'the rationale of policies that disenfranchise citizens should be re-assessed in the light of current socio-economic and technological realities.'

The ECtHR jurisprudence and the EU Commission's recommendation address, in the main, electoral processes that affect the governance of an existing political unit to which expatriates *qua* citizens retain the internationally recognised right to return. In such circumstances, it is assumed that most of the state's citizens reside therein and that the geographical boundaries of the state are not affected. *Independence referenda are different*: they may lead to the creation of successor State(s), with ensuing ramifications for citizenship-contingent privileges of expatriates. I argue that putative *ab initio* citizens of a putative State (pursuant to internationally accepted criteria) are significant stakeholders in a transformative referendum that may bring that putative State into being. Hence, the rationales for external voting in routine electoral processes apply *a fortiori* to a transformative referendum in light of its fundamental nature and its long-term impact.

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## Malawi's Electoral Fiasco

By Danwood M Chirwa | 20th July 2014

Close to midnight on 30 May 2014, Prof Peter Mutharika was declared the winner of the fifth presidential elections in Malawi since 1994. This electoral contest was unusual in Malawi's democratic era in at least two respects.

Firstly, the Electoral Commission took eight days and had to wait until the last hour of that period to declare the results. Secondly, the declaration of the winner turned on the outcome of a court application pertaining to the interpretation of the power of the Electoral Commission to audit the electoral results and, if necessary, to recount the votes, and the power of the courts to allow the Electoral Commission an extension of time, beyond the statutorily-prescribed eight days, to continue its work of auditing the results.

These unusual events occurred due to the ineffectiveness of the Electoral Commission. In the run-up-to the elections, it was accused of having failed to carry out the voter registration exercise properly. On election day, many polling centres did not have electoral materials such as ink, ballot papers and voter registers. It was also widely reported that many centres did not have secure ballot boxes.

In the days that followed, the Electoral Commission itself became conspicuously divided, with some Commissioners insisting that the elections had not been tampered with and others admitting to the existence of substantial irregularities. These admissions sparked the submission of a flurry of further electoral complaints before the commission and a series of court applications.

The growing constitutional crisis could be decomposed into the following: firstly, it related to the integrity of the electoral process in so far as respect for whatever outcome the commission would sanction was concerned; secondly, the crisis related to the absence of constitutional and other legal mechanisms regulating the conduct of government in the context of disputed electoral results, as the Malawian Constitution has very tenuous transitional provisions.

The consolidated court case took a day to be heard, and the judge was left with a few hours to consider the arguments. The ruling focussed on two issues. The first was whether the Electoral Commission had the power to embark on a vote recounting exercise before declaring the final national results and without obtaining a court order. There was little to be said for the view that the Commission did not have such power, given the broad constitutional powers that the Commission is entrusted with.

The holding that the Electoral Commission had the power to conduct a vote recount suggested that, on the second issue, the court would decide in favour of an extension of time. It did not. Here, the issue was whether the Commission could, by a court order, be allowed more time than the eight-day statutory period to consider all complaints pertaining to the results of the elections. The court held that the electoral statute was clear that the results had to be declared within that period.

# Democracy & Voting

## Chapter 6

In one sense, this judgment came across as a mockery to justice, as it appeared to give with one hand and take with another. It held that the Commission had the power to conduct a vote recount but also that the Commission could not conduct the vote recount because time had run out. Assuming that the results were fraudulent, the court was, in effect, allowing a statute to be used as an instrument for perpetrating fraud.

The fundamental question the judge eschewed was whether a statutory provision which imposes a duty on a constitutional body to fulfill its constitutional duties within a period that is unreasonable in a particular set of circumstances could be considered to be valid. There is merit in requiring the Commission to declare results within eight days. However, it is not impossible to imagine a situation in which the Commission may justifiably need more time to ensure free and fair elections.

Overall, this electoral fiasco underlined the importance of an independent, impartial and competent commission. To date, the appointment process for the commissioners of the Commission remains highly political, dominated by the incumbent president. More significantly, this disputed electoral process regrettably obscured the fundamental gains that Malawi has made since embracing democracy in 1994.

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### A Watershed Case for African Human Rights: Mtikila and Others v. Tanzania

By Oliver Windridge | 17th February 2015

Mtikila and others v. Tanzania was a watershed case heard before the African Court on Human and Peoples' Rights. The Court rendered its judgment on 14 June 2013, with a further ruling on reparations on 13 June 2014. The case concerns three applicants: two Tanzanian NGOs, the Tanganyika Law Society and Human Rights Centre and Reverend Christopher R. Mtikila. The Applicant's cases were broadly the same—that current Tanzanian election laws prohibiting independent candidates from running for public office are in breach of various articles of the African Charter on Human and Peoples' Rights, the International Convention of Civil and Political Rights, the Universal Declaration on Human Rights and the rule of law.

The case is a watershed moment for African human rights, as it is the first case considered by the Court on its merits. It is also significant that the Court found in favour of the applicants. In addition, the Court's subsequent Reparations Ruling was the first time the Court considered the issue of compensation and reparations.

In 1992, amendments to the Tanzanian Constitution required all candidates for presidential, parliamentary and local government elections to be members of and sponsored by a political party, effectively banning independent candidates from running for public office. Mtikila spent the next 18 years pursuing cases through the Tanzanian domestic courts to have the ban overturned.

On 14 June 2013, the Court delivered the Judgement and unanimously found that Tanzania's ban on independent candidates had violated Mtikila's Article 10 (free association) and Article 13(1) (right to participate freely in government) Charter rights and, by majority, that the same ban violated Mtikila's Article 2 (right to enjoy rights in the Charter) and Article 3 (equality before the law) Charter rights. In the Judgement, recalling its power to make orders of compensation or reparation, the Court noted that Mtikila had reserved his right to elaborate on his claim for compensation or reparation but had not done so. The Court therefore did not make a finding on the issue but did call upon Mtikila, if he so wished, to exercise this right.

On 13 June 2014, following written submissions from Mtikila and Tanzania, the Court considered the issue of compensation and costs and rendered its Reparations Ruling. The Court found that despite having the power to make orders for compensation or reparation, Mtikila had failed to provide adequate evidence of the losses and expenses claimed and therefore rejected his claims.

The Court also noted that Tanzania continued to maintain that the Judgement was wrong. The Court expressed its 'concern' at this position, especially since it was compounded by Tanzania's failure to report to the Court on the measures it is taking to comply with the Judgement. The Court ordered Tanzania to report to the Court within six months from the date of the ruling on the implementation of the Judgment (around January 2015).

This case contains many firsts – it is the first case to be considered on its merits, the first finding in favour of the applicant and the first matter to consider the issue of compensation and reparations. Achievement in this case must be put in context of the restrictive rules on direct access for individuals and NGOs to the Court, meaning only seven African Union member states currently allow their citizens direct access to the Court.

However, through this case the Court demonstrated that once a case is admissible, the Court is willing to consider it in detail and is unafraid to find in favour of the applicant. The Court's clear position on its power to award damages should be also be welcomed. Of most concern going forward in the new era of compliance is Tanzania's apparent unwillingness to acknowledge its requirement

# Democracy & Voting

## Chapter 6

to comply with the Judgement. Clearly, in view of Tanzania's responses so far, the issue of compliance should be of serious concern to the Court, and changes to Tanzania's electoral laws appear a while off.

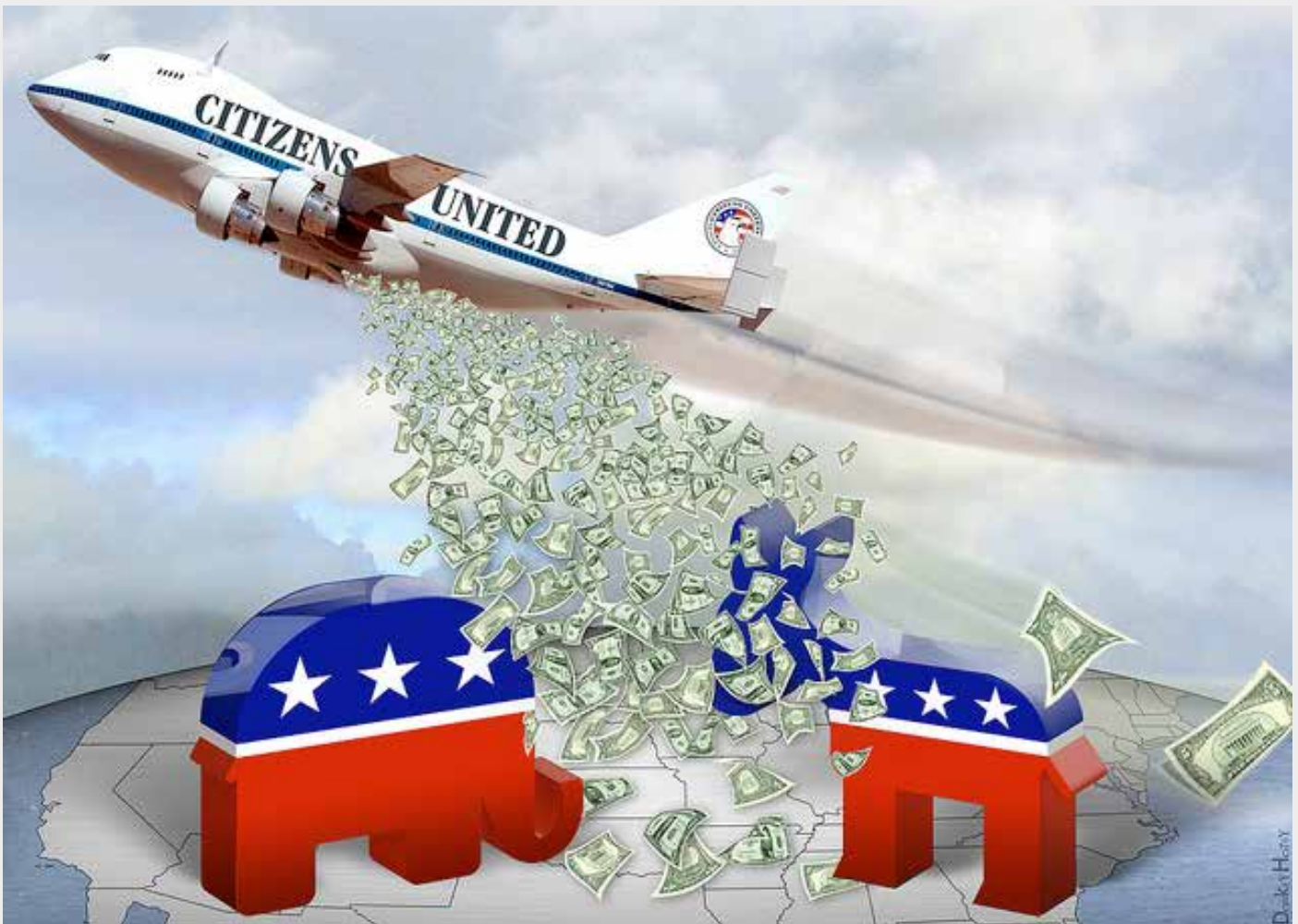
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### McCutcheon v FEC: The Harvest of Pernicious Seeds

By Alecia Johns | 20th April 2014

The US Supreme Court very recently handed down its decision in *McCutcheon v Federal Election Commission* 572 U.S. \_\_\_\_ (2014), undoubtedly the most important campaign finance ruling since its controversial 2010 judgment in *Citizens United* 58 U.S. \_\_\_\_ (2010).



In a 5-4 decision, the Court ruled to abolish aggregate contribution limits, which restricted how much an individual donor may contribute in total to all candidates or committees within a given election cycle. However, the Court left intact base limits, which restrict the amount a donor may contribute to a single candidate or committee. Therefore, provided that contributions to single candidates and committees respect the requisite base limits, an individual donor may potentially contribute millions in aggregate support for a particular party.

Not surprisingly, many have decried the decision as exacerbating the already unequal influence and power possessed by wealthy donors. In a powerful dissent, Breyer J lamented that the decision 'eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.'

# Democracy & Voting

## Chapter 6

The plurality's highly contested decision is partly grounded on two premises, drawn in great measure from the Court's previous rulings in *Buckley v Valeo* 424 U.S. 1 (1976) and *Citizens United*. As long as these two premises remain intact, future attempts to uphold campaign finance regulations will prove equally Sisyphean in nature:

### [1] The relative equalisation of political speech and influence among citizens is *not* deemed to be a legitimate state interest

In *Buckley* the Court held that: 'The concept that the government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.' Following *Buckley*, the Court in *McCutcheon* noted that Congress may not seek to regulate contributions in an attempt to restrict the political participation of some in order to enhance the relative influence of others. The only legitimate state interest was therefore held to be the prevention of corruption.

By deeming any equalisation rationale an impermissible state objective, the Court ignores the First Amendment rights of those whose voices are drowned out in the wake of the undue influence exerted by wealthy donors. The dissent sought to take the rights of such persons into consideration by arguing, quite circuitously, that the state interest in anti-corruption is itself rooted in the First Amendment, given the public interest in collective speech. This argument was, of course, rejected by the plurality. The fact is, until the equalisation of influence is explicitly deemed a legitimate state interest, the Court remains at liberty to further the First Amendment interests of wealthy donors, without taking into account the corresponding, diminishing effect on the political influence of those less fortunate.

### [2] The narrow definition of corruption as limited to *quid pro quo* and excluding general influence and access

In limiting the State's objective to the prevention of corruption, following *Citizens United*, the Court further circumscribed the kind of corruption which the State may seek to prevent: *quid pro quo* agreements, defined as the exchange of an official act for money. The Court held that this is to be distinguished from the permissible 'general influence and access' which a donor may receive on account of his contribution. The Court therefore held that the main mischief to be prevented was the contribution of large amounts of money to individual candidates. On the other hand, the broad-based support of a political party, by giving within the base limit to a large number of its candidates, was remarkably held *not* to possess a potentially corrupting influence. The dissent objected to this narrow definition of corruption, noting that in the Court's previous rulings (with the exception of *Citizens United*), corruption was understood 'not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgement.'

The plurality's untenably narrow definition of corruption paves the way for future successful challenges to the constitutionality of other campaign finance regulations. This is underscored when one considers the Court's holding that, in drawing the admittedly vague line between general influence and *quid pro quo*, the Court will 'err on the side of protecting political speech rather than suppressing it.' However, the irony is that, in its rejection of the equalisation rationale, the Court's approach to 'protecting political speech,' invariably suppresses the voices of those unable to match the financial resources of wealthy, well-connected donors.

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## Contributions Caps and the First Amendment

By Matthew Tyler and Claire Overman | 5th May 2014

On April 2, 2014, the United States Supreme Court struck down aggregate campaign contribution limits in federal elections in their ruling on *McCutcheon v. Federal Election Commission*.

While it will likely be years before the ramifications of *McCutcheon* are fully understood, the media's reaction to the decision has generally been negative, with predictions of increased influence by the wealthiest Americans – especially in favour of business-friendly Republican candidates. Moreover, many have found the Court's association of political free speech with spending to be troubling, especially as it could potentially undermine the influence of the least well-off.

There are, however, reasons to believe that the decision's *marginal* effect – the changes in the political landscape from the status quo – may be less drastic than they have been portrayed. In 2012, only 646 people reached the federal aggregate spending cap. And, in any case, it is possible that political donors with money to spare may choose to use super political action committees, rather than direct contributions to gain political influence. These super PACs are organizations that can collect and spend unlimited amounts of money from individuals but which must operate completely independently from political campaigns.

It has been suggested that the judgment's ruling that levelling political influence did not fall within the ambit of the First Amendment is troubling, as it effectively marginalises the right to political expression of the less well-off. However, UC San Diego political scientist Gary Jacobson has argued that because political incumbents already have much of the visibility that money buys, spending and contribution caps may actually hurt challengers, who get much higher marginal returns on campaign spending. Given

# Democracy & Voting

## Chapter 6

that the re-election rate of incumbents in the U.S. House and Senate in 2012 was 90%, despite abysmally low approval ratings, opening up challengers to a broader national base of big-spending political contributors may allow for more electoral competition. The argument that spending caps necessarily ensure that an individual's First Amendment right is protected, regardless of means, is not therefore self-evident.

Further, the participation of Americans in political spending has already been very narrow – only one half of one per cent of Americans gave more than \$200 to political campaigns in 2012. In this regard, it is clear that, whilst campaign contributions *per se* constitute the type of activity that falls within the scope of the First Amendment, they are not necessarily a core example of the type of expression that this right normally engages. That being said, candidates' donor bases appear to comprise an array of Americans, and campaign donations do follow certain political lines: in 2012, 57% of President Obama's donors contributed less than \$200, although only 24% of Mitt Romney's donors contributed under \$200. It would therefore be wrong to suggest that there is no connection whatsoever between political influence and means.

Finally, many potential big donors may chose to stay out of the political arena to avoid jeopardizing their business with public discontent. Indeed, the recent ouster of Brendan Eich, the CEO of Mozilla who came under public scrutiny after his contribution to an anti-same sex marriage campaign surfaced, may scare away big would-be political donors. This again serves to undermine the argument that the Court's decision in *McCutcheon* will have the negative effect on First Amendment rights, as some fear.

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## Is An Obsession With Foreign Investment Eroding Democracy in Papua New Guinea?

By M P | 29th September 2014

Often described as 'an island of gold floating on a sea of oil,' Papua New Guinea (PNG) is one of **the** top ten resource-dependent economies in the world. But robust economic growth rates have not led to any decrease in PNG's poverty rate over the last 20 years.

Although the benefits of economic growth are not reaching the vast majority of the population, Prime Minister Peter O'Neill has repeatedly cited the need to create a stable political environment to boost foreign investor confidence. Since ascending to power, O'Neill has endlessly promoted 'political stability' to justify a daunting array of anti-democratic measures which cynics perceive as a thinly veiled attempt to prolong his own leadership.

# Democracy & Voting

## Chapter 6

First, he has amended the Constitution to extend the period, during which any vote of no confidence against the Prime Minister is prohibited, from 30 months previously to now a total of 43 months out of the 60-month (five-year) term between elections. A second change has been to reduce the minimum number of parliamentary sitting days to just 40 days per year and to increase the number of MPs who must sponsor any motion for a vote of no confidence. A further proposed constitutional amendment would require that, in the event of a vote of no confidence against a Prime Minister, the subsequent Prime Minister must be a member of the same political party as the outgoing Prime Minister.

Further measures include sacking the Treasurer and Attorney-General, as well as Ministers for Petroleum & Resources, Higher Education and Industrial Relations, all within the last three months. Although such action could be perceived as undermining political stability, the reason given in each case was the need for stability. In the case of the Treasurer, his sacking followed his opposition to a proposed loan that would raise national debt to a level he felt to be irresponsibly high. In response, O'Neill appointed himself Acting Treasurer and unilaterally approved the loan. The Ombudsman has since referred O'Neill to the Public Prosecutor for alleged misconduct in bypassing proper parliamentary processes for approving the loan. The Attorney-General was sacked for opposing O'Neill's proposed Constitutional amendment relating to votes of no confidence. Just days earlier, O'Neill had commended the Attorney-General as one of the best-performing Ministers.

More worryingly, O'Neill has also disbanded the anti-corruption Task Force he had himself set up. This occurred immediately after it recommended police action on evidence that O'Neill had improperly authorised approximately USD30 million in payments to a law firm. O'Neill further sacked the Police Commissioner and Deputy Commissioner who signed the arrest warrant against him. The National Court recently granted a permanent stay against the disbandment of the Task Force.

O'Neill's fixation on political stability is all the more curious given that he took power in controversial circumstances, which precipitated a constitutional crisis. The Supreme Court ruled in *re Reference to Constitution section 19(1) by East Sepik Provincial Executive* [2011] PGSC 41 that O'Neill had failed to meet constitutional requirements when claiming the Prime Ministership. In response to this decision, O'Neill imperilled the separation of powers by increasing parliamentary power to remove members of the judiciary. However, he repealed this legislation after a public outcry and the resolution of the constitutional crisis at the 2012 election.

In any event, O'Neill now enjoys unprecedented support on the floor of Parliament, and the Opposition retains only three seats out of the total 111. Several former Opposition members have crossed the floor since the election, stating that it was necessary because O'Neill made it difficult for opposition MPs to access funds for their constituencies.

By punishing any traces of dissent within the ranks of government, dismissing senior officers exercising independent oversight of prime ministerial action and removing any effective voice of Opposition on the floor of Parliament, O'Neill has seriously curtailed the public's right to information, which could properly influence their vote. In the words of Article 25 of the International Covenant on Civil and Political Rights, each of these measures appears to be an 'unreasonable restriction' on the right to 'free expression of the will of the electors.' Adhering to human rights principles of transparency and accountability is particularly crucial in a young and fragile democracy seeking to strengthen the rule of law.

Foreign investors have responded to this ongoing corrosion of democracy by continuing to call for 'stability' – no doubt music to the Prime Minister's ears, but a setback for the country's adherence to human rights.

*The author of this piece wishes to remain anonymous, but can be contacted through our site ([oxfordhumanrightshub@law.ox.ac.uk](mailto:oxfordhumanrightshub@law.ox.ac.uk))*

