



## The Death Throes Of Democracy

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A 2012 Lowy Institute poll revealed only 60 per cent of Australians believed 'democracy is preferable to any other kind of government'. Of the younger generation—those aged between eighteen and 29 years—this figure was only 39 per cent. Professor James Allan's *Democracy in Decline* serves as a 'part lament and part call to arms' for those of us who still believe that democracy is the best process we have to resolve disputed social policy issues. People, though, are losing faith in their fellow citizens, giving rise to the undemocratic age of the 'expert'. We are looking to government and bureaucrats to solve all our problems, irrespective of the values and processes we destroy along the way.

For Allan, it is a simple question of the value we place on process versus outcome: does democracy refer simply to the process of majoritarian decisionmaking? Or does it refer to the quality of these decisions? Today's orthodoxy holds that decision-making must reflect some level



of 'goodness' or meet a moral threshold, even if it is at the expense of the democratic process.

Allan explores the primary causes and threats to majoritarian democracy in five of the world's oldest democracies —the United States of America, the United Kingdom, Canada, Australia, and New Zealand. His conclusion is that all these countries are less inclined to use democratic means today to resolve contested social, political and moral issues than they were previously.

The first cause of decline is the increasing willingness of the judiciary to override, circumvent, and reinterpret legislation. Allan demonstrates how this threatens democracy by exploring the hypothetical situation of a country looking to adopt a bill of rights. His approach is persuasive because it exposes the undemocratic implications of a bill of rights. That is, it empowers unelected judges because it makes them responsible for interpreting the vague language and amorphous rights in the document. By looking at the adoption of a bill of rights from the view of a jurisdiction without one, Allan reveals the instrument for what it really is: an abdication of power to the judiciary.

Allan is scathing and convincing in his opposition to a bill of rights, both the constitutionally-entrenched and statutory models. It is a dangerous fallacy that a statutory bill of rights causes less damage and is not as harmful to democracy as a constitutionally-entrenched one. In practice, both reduce the scope for democratic decision-making and increase the power of unelected judges.

Allan contends that a bill of rights, more so than the political system, has the unbridled potential to lead to the judgements of the minority of voters transcending those of the majority. Judges have embraced an interpretive approach giving them the power to overrule the democratic branches. Parliament was once supreme, yes. But judges now see themselves as the protectors of people's rights. They are political actors. They expect the legislature to defer and respond to them not the other way round, as it should be.

The second major cause of decline is international law, the quality of which is substandard and the process of making it lacks accountability, transparency and democratic legitimacy. Allan discusses in detail the democratic deficiencies of treaties, the legal academics who construct customary international law, and the highly politicised and murky process of judicial appointments to the International Court of Justice.

Allan illustrates his argument with a case study on the United Nations Convention of the Rights of the Child (CRC). Although written ambiguously and not explicitly stated, the United Nations (UN) argues that spanking a child, for example, violates the CRC. So should a country outsource its opinion on the acceptability of spanking to the CRC committee and 'experts', despite the fact that UN committees are not democratically appointed and often consist of non-democracies? This proposition is laughable at best and dangerous at worst. Allan is more convincing still when discussing how judges wrongly use international law to interpret statutes and constitutional provisions, even when it is not a part of domestic law. This practice is grossly illegitimate and invalid.

The third threat to democracy is the rise of supranational organisations such as the United Nations

(UN) and the European Union (EU). Allan's analysis here is especially powerful as exemplified in his attack on the United Nations Human Rights Council (UNHRC), a key source of democratic decline:

It is widely seen to be ... ineffective, overly politicised, controlled by voting blocs from the world's despotic regimes, anti-Israel, anti-American, or some combination of all of the above.

It is ludicrous that authoritarian and repressive states such as Libya have served on the Council, charged with assessing the human rights situation in all UN member states. Since the Council's creation in 2006, Israel has been condemned in 50 resolutions—more than the rest of the world combined. The fact is that democracies, like Israel, accord citizens more freedom and human rights than non-democracies. The 'democratic' credentials and moral intelligence of the UNHRC are completely inferior to the elected representatives in any democracy.

Allan's critique of the EU is especially compelling. He argues it is a bureaucratic, top-down, elitist organisation that lacks democratic legitimacy. More than that, the EU has destroyed the UK's sovereignty. It takes decisions out of the hands of the elected legislature and places them with the EU, essentially an unelected civil service. The reality is that UK law is trumped by EU law whenever the two are inconsistent, creating a massive democratic deficiency.

Allan's final reason for democratic decline is the growing number of 'undemocratic elites' who look to bypass democratic institutions, like parliament, in favour of courts and supranational bodies to get their desired outcome. These are the lawyers, the human rights activists, the bureaucrats, and the special interest groups. It is these people, Allan argues, that have lost faith in democracy and their peers. They have contempt for democratic process, instead working to impose their preference on their fellow citizens without convincing a majority that it is the best one. For Allan, they are a key driver of democratic decay.

Allan concludes his analysis by succinctly debunking opposing arguments and detailing the challenges threatening more decline. His destruction of the 'hate speech' movement is particularly enjoyable. For democratic decision making to be possible, people must be free to speak their minds and debate issues openly. Any attempt to stifle free speech, as does Section 18C of the Racial Discrimination Act, poses a significant threat to democracy.

Ultimately, Allan argues, the traditional concept of democracy has been hijacked: it is no longer about how decisions are made, but the goodness of these decisions. We place too little faith and confidence in the capacity and opinions of our fellow citizens. Sometimes in a democracy, you will lose. You may be right and still not win in the court of public opinion. Allan's argument is that this is no reason to change the process.

*Democracy in Decline* is a timely reminder that democracy is not about what is good, or right, or fair. It is about the value we place on the process, and the rights of all citizens to have a say in



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