

AN OUTSIDER'S WAY IN: THE USE OF COMPARATIVE ELECTION LAW

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COMING to the job of the law school dean from outside the legal academy can be both an exhilarating and a humbling experience. The exhilaration arises from the daily interaction with students and faculty who are engaged in the discussion of important ideas about the law and its impact on societies around the world. What is humbling is the interaction with those same constituencies as you try to affect their conduct to produce results which you view as being in the best interest of the law school.

I pursued a non-traditional path to the position of dean of the Howard University School of Law. The overwhelming majority of my predecessors had been members of the faculty and/or associate deans for academic affairs prior to being selected as dean. This appears the traditional path for the majority of my colleagues in law schools around the country. For most of my career I served in government as an appointed prosecutor, then the elected States Attorney, then the Mayor of my hometown. Interspersed in those jobs were stints in private law practice. So this is my first full-time job in a law school.

Soon after assuming my new duties I recognized the wisdom of the advice that I received from a veteran dean to be seen by the faculty as identifying with the academic enterprise in which they are involved. To me this meant finding a way, in addition to my administrative and fundraising duties, to engage in the key activities of their profession: teaching, scholarship and service. As I contemplated my role as teacher, I again relied on age-old advice—play to your strength. Having been an elected official and having advised candidates as a private attorney, I decided to teach a seminar entitled American Election Law and Policy.

Several decades ago a former dean of Howard Law School, Charles Hamilton Houston, stated in his opening address to first year students that it was his view that a lawyer is “either a social engineer or a parasite on society.” Since he made that statement it has been the mission of Howard to produce lawyers as social engineers dedicated to seeking social justice and becoming leaders in the law for America and the global community. My goal in teaching this seminar was to adapt the Houston vision to the area of election law. It was my hope to generate excitement about the intricacies of our election laws and possibly inspire some of these students to become involved in this area of the law professionally as private or public counsel or as elected officials. A big question for me was how to

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capture their interest and help them understand the relationship between social engineering and election law.

I discovered that one way of developing a true appreciation and understanding of American election law is to compare it with a country that lacks the checks and balances many of us take for granted. Because of my personal knowledge of events related to these elections, I highlighted the way in which two different societies responded to recent election crises—the United States in 2000 and the Republic of Madagascar in 2002. The former is very familiar to most Americans with even a casual interest in politics, but the latter is not.

THE MADAGASCAR PRESIDENTIAL ELECTION

Few Americans know very much about Madagascar. It is an island nation (in fact, the fourth largest island in the world) lying in the Indian Ocean just off the east coast of Africa. The country attracts a great deal of attention from the scientific community because it is home to thousands of species of plants and animals not found anywhere else in the world. It is a place of great contrasts. On one hand, there are beautiful foothills and fabulous beaches. On the other hand, there is grinding poverty that has led the United Nations to classify it as one of the poorest countries in the world. From 1896 until 1960, Madagascar was the colony or protectorate of France. For most of the time since gaining its independence, Madagascar has been an ally of the United States.

An election important to the future of Madagascar was held in December, 2001. I paid particular attention to this election because one of the candidates was someone with whom I had worked and because my colleague, University of Maryland law professor Larry Gibson, was one of the international election law experts serving as a consultant in this election.

By law Madagascar is a constitutional democracy. However, by 2001 its President, Didier Ratsiraka, had assumed almost dictatorial control. Originally he came to power as a Marxist strongman professing his support for Libyan leader Qaddafi and for Soviet socialism. Later, he changed his political stripes and became a staunch ally of the United States, especially during the administration of the first President Bush. Unfortunately, while Ratsiraka professed allegiance to democratic governments abroad, he was undermining democracy at home. Ratsiraka tolerated corruption among his appointed government officials. He put his children in charge of state-owned corporations and appointed other family members to important government posts to make sure that foreign financial aid would be siphoned off to support his family. Public dissatisfaction with Ratsiraka's rule was high, but his control of the government apparatus from central government to the provinces was firm.

Six candidates entered the Presidential elections in December, 2001. The opposition candidate who drew most attention was the Mayor of the capital city (Antananarivo), Marc Ravalomanana. He was a successful businessman who was elected mayor in 1999. During his brief tenure, he brought a level of sanitation and safety to the city that was unparalleled. Few people outside the city knew him as a politician. Many knew him because his company was the

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largest Malagasy-owned dairy products company in the country, and he was a national officer in Madagascar's largest council of Protestant churches.

Most presidential elections in Madagascar had been decided by two rounds of voting because the law required the ultimate winner to receive more than 50% of the popular vote. The government of Ratsiraka had a great deal of control over the mechanism for conducting a runoff election. Therefore, it became the goal of Ravalomanana to win a clear majority in the first round. When the votes in the first round of this election were tallied, three monitoring organizations reported these results: the "official" government declared Ravalomanana led with 46% of the vote; Ravalomanana's organization announced he received 52% of the vote; and the international observer group stated that Ravalomanana received 51% of the vote.

When the incumbent President Ratsiraka refused to acknowledge that Ravalomanana won a clear majority, the country was plunged into turmoil. Both sides initially turned to the courts. Under the constitution of Madagascar, the entity empowered to resolve national election disputes is called the High Constitutional Court. Concerns had been raised about the impartiality of this body because shortly before the presidential elections were held Ratsiraka appointed three new judges to that Court. His action was viewed by many as a "court packing" maneuver designed to assure the incumbent's control over the court. The High Constitutional Court at first supported the official government results and thus called for a runoff. Upon further review of the returns, the Court reversed its decision and declared Ravalomanana the winner. Again Ratsiraka refused to accept the decision, so the country descended into chaos. Supporters of Ravalomanana staged general strikes in the capital and in other major cities. Ratsiraka fled the capital and set up operations in his home province. His supporters blockaded roads into the major cities and later blew up the bridges leading into the capital. For a country known for peaceful coexistence, Madagascar found itself nearing civil war. A consensus developed that only the intervention of the international community would break the stalemate that had settled into that country with such disastrous economic effects.

In the first few weeks of the Madagascar crisis, major international powers seemed indifferent to the situation. Later they took the position of deferring to the leaders of the Organization of African Unity (OAU). However, the ability of the OAU to judge the fairness of an election was called into serious question after they declared the last election in Zimbabwe "free and fair" when just about every organization in the world observing that election considered it tainted by fraud and corruption. The government of the United States at the outset of the Madagascar election crisis joined other Western nations in deferring to the OAU. Representatives of the Bush administration urged Ravalomanana to participate in a runoff, and they objected after he declared himself president after the second ruling of the High Constitutional Court.

Then something happened. Without announcing his reasons for doing so, President Bush instructed United States' officials to take a fresh look at the Madagascar situation. They went beyond traditional diplomatic protocols to investigate "the facts on the ground." They determined for themselves based on all the evidence that could be collected that the vote process was fair and that the

results announced by the High Constitutional Court reflected the will of the Malagasy people. A decision was made by President Bush to take the lead role and not to defer to the OAU or to the French, the former colonial power in Madagascar. On June 26, 2002, Madagascar's traditional Independence Day, President Bush instructed the U.S. Ambassador to Madagascar to deliver a letter to Marc Ravalomanana informing him that the United States recognized him as the legitimately elected President of Madagascar.

The impact of the Bush action was immediate and profound. The formal recognition by the United States was followed within a week by recognition from Japan, Germany, Great Britain and, eventually, France. After the Bush decision, Ratsiraka fled the country, the leaders of the army and police departments declared their support of Ravalomanana, the blockades were lifted, and civil war was averted.

Because of this non-military, but important, intervention by the government of the United States, the fifteen million people who inhabit the island nation of Madagascar received the opportunity to pursue their dreams of freedom and democracy.

THE COMPARATIVE PERSPECTIVE

Viewed in relationship to the events that occurred in Madagascar, one might hesitate to refer to events in the United States immediately following the 2000 Presidential election as a crisis. However, a review of those days in November and December 2000 suggest that "crisis" is the appropriate term to use. A brief history refreshes the recollection of those tumultuous days.

The closely and hotly contested 2000 Presidential election resulted in a victory for George W. Bush, who won the Electoral College vote but lost the popular vote to Al Gore. The key to victory was the outcome of the voting in the State of Florida. In the final analysis, officials in that state declared that Bush won by five hundred thirty seven votes out of nearly six million votes cast. But before that outcome was accepted by the contestants, challenges to the election process were brought. These challenges were heard in administrative agencies (primarily Boards of Election), state trial courts, state appellate courts, federal courts, and the United States Supreme Court. Legislative bodies also became involved, with Florida's legislature contemplating sending competing slates of electors to Congress, allowing that body to exercise its constitutional power to declare the winner of the Presidential election.

Notably during the thirty-six day period following the Presidential election, one part of the United States government that never became involved in the resolution of the disputed election was the military. In contrast, during the Madagascar election dispute, the action and inaction of the military was a crucial factor affecting the outcome of the crisis. Both Ratsiraka and Ravalomanana attempted to influence senior military commanders. Ratsiraka wanted the military to intervene on his behalf to stop the strikes and demonstrations occurring in major cities. Ravalomanana wanted the military to remain neutral initially, then to declare their support for him as their commander-in-chief once he was recognized by the international community as the president of

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Madagascar. What occurred was a split in the ranks. Some followed Ratsiraka and helped lead militaries that destroyed transportation routes and shot anti-Ratsiraka demonstrators in some cities. Most of the military leaders decided to remain neutral. In fact, in an act of defiance the senior military commander publicly refused an order by Ratsiraka to intervene. His declaration that the military should remain neutral in election disputes was a turning point in this crisis and an important moment in the history of Madagascar.

In the U.S. election crisis, there were many days of tension and high drama, but there was never any serious concern that the military would become involved in this matter. Emotion ran very high during this period. Charges of fraud, theft and corruption were hurled from many quarters. Through it all, even when the resolution of the crisis seemed unclear, there was never any doubt that the civilian side of government was the primary authority and final arbiter of the crisis.

Obviously there are shortcomings in comparing the elections of two very different countries in order to derive valuable lessons. However, comparisons, even with certain flaws, can provide important insights. What the people of Madagascar endured after their election is something that our students and our citizens would never want to experience. Viewing those experiences gives a greater appreciation of the strength of the U.S. federal system, of the importance of an independent judiciary, and of the idea of civilian control of the military.

Yet, while the Madagascar experience demonstrates what we don't want to occur in this country, it goes further to challenge us to ask questions about our own election processes. Questions about our commitment to fundamental fairness are raised when it is shown that in Florida thousands of votes in inner cities were discarded because of technical deficiencies while thousands of absentee ballots from Americans living abroad (many in the military) were accepted with technical deficiencies. One wonders how impartiality of treatment is rendered in an election dispute when the chief election official, the state Secretary of State, is a co-chair of the campaign of one of the parties to the dispute. Also, serious questions are raised by this comparative perspective about the influence of politics on the courts in addressing election law matters. As noted earlier, many in Madagascar were skeptical about the impartiality of the High Constitutional Court because of the appointments that were made just before the presidential election was held. It has been pointed out that the majority of the judges on the Florida Supreme Court were appointed by Democrats while the majority of the justices of the U.S. Supreme Court were appointed by Republicans. Could those facts have anything at all to do with the opposing conclusions these courts reached on the question of whether there should be a statewide recount of votes? Fundamentally, an entire examination of the interrelatedness of state and federal institutions with respect to the conduct of elections is triggered by this comparison of elections in Madagascar and the United States.

CONVERGENCE

Although few would have anticipated this at the time Madagascar and the United States were working through their respective election crises, a convergence of national interests has brought the presidents of these two countries together in a new economic development partnership.

President Bush decided to make a major policy change in the way the United States provides foreign aid to developing nations. He created a quasi-public corporation called the Millennium Challenge Corporation. The goal of that entity was to identify developing nations whose leaders are committed to democratic reform, to combating government corruption, and to using foreign aid to produce measurable progress for their citizens. This policy shift required the presentation of a realistic development plan and proof that policies were in place that promote democracy in fact, not just in symbols.

This new approach of the United States was endorsed enthusiastically by the President of Madagascar. As the leader of one of the poorest countries in the world, he knew that it was time for a different approach to economic development. In his campaign he talked about building new roads to link his countrymen. He also talked about promoting land ownership, micro-lending to small business, and improving education to allow his citizens to take advantage of the positive aspects of economic globalization.

President Bush and President Ravalomanana spoke to one another about their plans for the future. In addition, to the similarity of views on such issues as entrepreneurship, economic development and international security, the two men learned they shared strong Christian beliefs. President Bush's religious conversion has been well documented in the American press. What Bush discovered about Ravalomanana was that the latter is a devout Christian who at one time had served as vice president of the main Protestant church Council in Madagascar. Whether their shared religious views have had an impact on recent developments concerning these two countries is a matter of speculation. However, this does provide another reminder to consider an important issue in election law, the role of religion in the electoral process.

On April 18, 2005, in a ceremony at the U.S. State Department attended by Secretary of State Rice, President Ravalomanana and the President of the Millennium Challenge Corporation, Paul Applegarth, Madagascar was awarded one hundred million dollars, the first of the challenge grants awarded by this corporation, and the first tangible sign of the shift in foreign aid policy of the Bush administration.

CONCLUSION

Teaching a course in election law and policy was this outsider's way inside a fundamental activity of the legal academy. This experience was more profound than I had anticipated. I was reintroduced to the complex set of issues presented by elections: districting, voter eligibility, campaign financing, judicial intervention, etc. More broadly, my students and I were reminded of the

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enormous role of elections in defining the quality of life in a society. Fidelity to democracy requires the conduct of free and fair elections. Where those elections are tainted, the national commitment to democratic principles is undermined. Furthering an interest in election law seems an important contribution that law schools can make to the legal profession and to the structure of society as a whole.