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Let the People Rule?

Direct Democracy in the Twenty-First Century

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Chapter Two

Between the 'Fiction' of Representation and the 'Faction' of Direct Democracy

Laurence Whitehead

> *Because [the] territory [of modern states] is much larger than that of the ancient republics, the mass of their inhabitants, whatever form of government they adopt, have no active part in it. They are called at most to exercise sovereignty through representation, that is to say in a fictitious manner*.
>
> Benjamin Constant, (1988 [1813])

> *[I]n a democracy the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, will be confined to a small spot. A republic may be extended over a large region … a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit no cure for the mischiefs of faction*.
>
> James Madison (1987 [1788])

The fiction of representation

Although this volume focuses on MDDs in Latin American, Europe, the former Soviet Union area and sub-Saharan Africa, the present chapter refers back to foundational issues in the emergence of the democratic tradition, as indicated by the opening quotations. And although John Keane has persuasively reconstructed the neglected non-canonical history of democracy, thus underscoring a richness and diversity that has been screened out in orthodox Western narrative, this chapter starts out from the conventional reference points of Athens and Philadelphia, since innovations are most clearly displayed by contrast with classical origins.

In the statement quoted above, Madison was, of course, seeking to promote his draft of a federal constitution for the thirteen states of what became the USA, so he needed to simplify the alternatives. The anti-federalists feared that the bottom-up and local-scale participatory politics of the revolutionary period would be swamped by the centralised powers that the proposed constitution would confer on a national government that was responsible for a territory already as large as Poland, and expected to become much larger still. Madison needed to persuade the American people that – as Montesquieu had argued half a century earlier – only very small units could be governed directly; and also that a territorially extensive republic could preserve liberty and respond to the will of the people, through the design of suitably 'representative' political institutions.

Among the design features in this scheme, public office would be open to all adult citizens (even though, in practice, a select stratum including many lawyers and merchants were expected to predominate; and, of course, women, slaves, and native Americans were not included). Various 'checks and balances' (including frequent elections, dual sovereignty and bicameralism) were included and a Bill of Rights was soon added, so that although the result was a large republic, the representatives of the people would not become tyrants.

In due course the formula of 'representative constitutional government' became the template for what we now regard as a modern democracy. Yet as the Madison quote indicates, the advocates of the 1787 constitution regarded it as an alternative to democracy rather than its embodiment. A century later James Bryce reiterated that interpretation of the document as follows:

> Had it been attempted four years earlier or four years later, at both which times the waves of democracy were running high, it must have failed. In 1783 the people, flushed with their victory over England, were full of confidence in themselves and in liberty, persuaded that the world was at their feet, disposed to think all authority tyranny. In 1791 their fervid sympathy with the Revolution in France had not yet been damped by the excesses of the Terror nor alienated by the insolence of the French government and its diplomatic agents in America. But in 1787 the first reaction from the War of Independence had set in. Wise men had come to discern the weak side of popular government; and the people themselves were in a comparatively humble and teachable mind. (Bryce 1891: 639)

Since the triumph of the federalists in 1787–8, Madison's stark and intuitively appealing contrast between compact (but impractical) direct democracy and large-scale representative democracy has become something of an axiom. But this contrast was always quite parochial and too schematic, and has now been further invalidated by the arrival of electronic means of communication, which abolishes the old barriers of time and distance. The parochialism is apparent when one compares it with article VI of the *Déclaration des Droits de l'Homme et du Citoyen* adopted by the French National Assembly in August 1789 (rights reaffirmed in the currently operative 1958 Constitution of the Fifth Republic): 'La Loi est l'expression de la volonté générale. Tous les citoyens ont droit de concourir *personnellement, ou par leurs représentants* à sa formation' (author's emphasis). The multiple inscriptions of direct democracy within the Swiss constitutional system offered a much stronger contrast with Madison's axiom over the course of the subsequent century. No doubt the contemporary Swiss Confederation is an extreme counter-example, but it is also a strikingly successful variant in a close-to-average scale modern democracy. Although influenced by the Federalist Papers the Swiss constitution-makers were not bound by all its doctrines, and they in turn went on to influence others-most notably in Uruguay, and less happily in Bosnia, but also (to a lesser degree) even in California.

So Madison's polemic against direct democracy was context-bound and parochial. It was also always too schematic. In what sense? Here, for example, is what Thomas Jefferson wrote in 1816 (at the time of Madison's presidency):

> Divide the counties into wards of such size as that every citizen can attend, when called on, and act in person. Ascribe to them the government of their wards in all things relating to themselves exclusively. A justice chosen by themselves, in each, a constable, a military company, a patrol, a school, the care of their own poor, their own portion of public roads, the choice of one or more jurors … . by making every citizen an acting member of the government, and in the offices nearest and most interesting to him, will attach him by his strongest feelings to the independence of his country, and its republican Constitution. (Jefferson, 1977, 556–7)

Although this proposal was never adopted in the form stated, its spirit informed a variety of subsequent developments in various states. Moreover, although ratification of constitutional amendments by popular vote has never been allowed under the 1787 text, many of the state constitutions adopted in the following century require direct sanction by a majority of the electorate for any amendment to take effect.[1] In any case, these principles demonstrate the scope that exists for bridging the direct/representative democracy divide.

Just as direct forms of democracy were mixed in with the representative variant from the earliest days of the American Republic, so also in the supposedly pure city state democracies of ancient Greece, representative and direct variants also always coexisted. Aristotle's description of the Constitution of Athens in 325 BC makes the details clear: at periodic 'sovereign' assemblies 'the people must confirm in office those magistrates whom they consider to be performing their duties satisfactorily' (1959, Chapter 43); the King-Archon (responsible for cases of impiety and for first hearings of homicides) and four superintendents of mysteries 'are elected in the assembly by open vote' (Chapter 57); 'all military commands are filled by open vote' (Chapter 61); and most court hearings are decided by the vote of 500 jurors, or up to 1,500 in the most important cases (Chapter 68). Again the distinction between direct democracy and representative government is far too schematic to capture the really existing rules and procedures of this city state, even at its most 'purely' democratic (i.e. when many public duties were assigned by lot).

1. According to Bryce: 'As the republic went on working out both in theory and in practice those conceptions of democracy and popular sovereignty which had been only vaguely apprehended when enunciated at the Revolution, the faith of the average man in himself became stronger, his love of equality greater, his desire, not only to rule, but to rule directly in his own proper person, more constant. These sentiments … found large scope in local government' (1891: 450–1). Bryce also noted that in many state constitutions the method of amendment comes very close to the Swiss referendum, and adds: 'It is not uncommon for proposals submitted by the legislature in the form of constitutional amendments to be rejected by the people. Thus in Indiana, Nebraska, Ohio and Oregon, the legislature submitted amendments extending the suffrage to women, and the people in all four states refused the extension' (1891: 452–3).

More broadly, even when direct participation in 'assembly' style democracy is most strongly encouraged, there are evident practical limitations that impede the proceedings from acting as the unmediated expression of the popular will. Some citizens have flocks to herd; some doctors must be on call for their patients; some seamen must catch the tide. Some may arrive after the assembly has begun, others will have to leave before the end. Not everyone can speak at once, and the order of the agenda is also consequential. So whoever controls the timetable can influence the outcome. Decisions must be transcribed and recorded (not all can or will read, or be equally diligent in checking the minutes). In fact not everyone can speak: some will be shy, some deaf, some inarticulate.

In brief, even in the most compact and participatory polis citizen engagement will always be uneven and selective: and no public assembly can dispense with at least informal reliance on the leadership of a few who may claim to 'represent' the collective opinion, but who in practice also shape – and may well capture – it. Here enters the theme of 'faction'. According to Madison:

> By faction I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community … the smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently the majority will be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and exercise their plans of oppression. (Madison et al. 1987 [1788], X)

Although the Federalist Papers have captured the mainstream Western political imagination, and thus entrenched an extremely negative image of the intolerance, instability and irresponsibility of faction-dominated assembly government in the ancient world,[2] that is not the only possible reading of the available evidence. Machiavelli used Livy to underscore the relative absence of factional 'ingratitude' in Rome as compared to Athens: 'the city was never deprived of its liberty by any of its citizens, so that there was no great reason to suspect them, or, consequently, to offend them in a thoughtless way' (1997, Chapter 28). And as Aristotle's account of the restoration of Athenian democracy in 403 BC reads:

> The Athenians appear, in fact, both publicly and privately, to have behaved with unsurpassed moderation and fairness to those who shared the guilt of earlier misfortunes. They not only abstained from any form of victimisation, but actually drew on state funds to repay Sparta … (1959, Chapter XIV)

2. According to Madison, 'such democracies have ever been spectacles of turbulence and contention,' and 'have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths' (Madison et al. 1788 [1987], X).

Afterword on Brexit Referendum, 23 June 2016

The 'People Ruled' that the UK Should Quit the European Union

Laurence Whitehead

On a turnout of 72 per cent the British electorate voted by 51.9 per cent to leave the European Union after almost 44 years of membership. The majority of over one and a quarter million votes was sufficiently large to eliminate any doubt or ambiguity, and the turnout was the highest in a British election for over two decades, reconfirming the legitimacy of the decision. The vote set in motion UK disengagement from the EU, precipitated the premature resignation of a prime minister who had won a single-party five-year term only thirteen months earlier, unleashed unprecedented turmoil at the apex of the British party system, and brought to the surface deep social cleavages between regions, classes, generations and ethnicities within the national polity. In strictly constitutional terms only 'the Queen in parliament' is sovereign, and so the referendum was not legally binding. But although it was only advisory, and a clear majority of MPs in Westminster would not in other circumstances have chosen to leave, this mandate of the people carries such moral force that it is said to be virtually unthinkable for the major parties and their leaders to defy the express will of the electorate.

However, the meaning of the decision 'to leave' is open to many diverse interpretations, both concerning the process and timetable, and the alternative arrangements. In legal terms, is Parliament required to repeal the European Communities Act of 1972? Will the government that emerges from the immediate turmoil (the immediate resignation of the pro-remain prime minister, David Cameron) be obliged to trigger the exit process specified in Article 50 of the Lisbon Treaty? Will it be the parliament elected in 2015 that takes these decisions, or might they be preceded by a new parliamentary election, possibly generating a different mandate? In the UK system not only is parliament theoretically sovereign, it is also not able to bind its successor. Therefore in legal terms a further election could produce a new parliament that is not obliged to uphold the referendum commitment. These are the immediate post-referendum constitutional imponderables. There is even the theoretical possibility that the Article 50 notification might be so delayed that parliament could invoke 'unforeseen developments' to justify a second referendum (despite the chorus of leadership voices denying any such possibility and the obvious insult to the electorate involved in such a tortuous manoeuvre). Two weeks after the Brexit vote the government rejected a petition signed by four million citizens calling for a second referendum (although not ruling out a parliamentary debate on the issue).

Those who promoted the 'leave' campaign were clear about what they were against, but divided, opaque and inconsistent about what would take its place, let alone the critical questions of sequencing and compensatory measures. But it is in the nature of a plebiscitary process to pose a stark binary choice at a single predetermined date, so that (depending upon how the campaign is conducted) the people can indeed decide to say no without necessarily agreeing in advance about the nature of the alternative. In the case of the June 2016 vote, the established status quo with Europe was destroyed, but everything about its replacement remains to be decided through non-plebiscitary political negotiations that have yet to be defined.

In due course this might even lead to a further referendum on the independence of Scotland (which voted uniformly and strongly to 'remain' in Europe), or on the eventual terms of a renegotiated deal with Brussels. But if so that would be a new political decision, not a legally required consequence of the June 2016 referendum.

Assuming that Article 50 of the Lisbon Treaty is eventually triggered, the resulting manifold repercussions and further political choices will branch out in all directions and could generate a great array of consequences, many (but not all) harmful, with some unmistakably attributable to the referendum vote, but many more that are at present highly under-determined, so that intermediating factors could have more causal weight. Such indirect 'knock-on' effects could include a second independence referendum in Scotland, destabilisation of the EU-backed peace settlement in Northern Ireland, and centrifugal consequences including demands for secessionist referendums in other European states. The EU's capacity to buffer historically entrenched nationalist rivalries, both within the British Isles, and in Europe more widely, has been significantly impaired.

Opinions about whether, on balance, the outcome brought benefits or did harm will therefore be contested and subject to interpretation. In fact, some parties in the referendum debate are already positioning themselves to deflect criticism by arguing that underlying long-term trends merely crystallised on 23 June, which should not be seen in isolation (and still less as an unintended accident, or self-inflicted wound).

In reality, there was a major fork in the road, and the close-fought vote set the country on a very different path from that in prospect had just 2 per cent of the voters decided otherwise. It seems probable that many of those campaigning for 'leave' did not really expect to succeed, and at least some of those who followed their lead may have believed that they were only registering a protest vote, rather than redirecting the entire course of national history (UKIP described 23 June as 'independence day', but did all 17.4 million voters view it that way?). On the other side, the 'remain' camp had lukewarm leadership (almost no one on either side had much positive to say about the EU, barring John Major and Sadiq Khan). A positive message about the merits of the Union – e.g. playing up its achievements in peaceful dispute resolution and co-operative institution building – was ruled out for fear of reigniting internal battles within the Conservative Party as much as because of its disappointing performance over Greece, refugees, etc. 'Remain' might have mobilised more supporters if the young, and the beneficiaries of EU

largesse, had been better instructed on what was really at stake, and how close they were to defeat. Complacency was probably reinforced by Prime Minister Cameron's 'lucky escape' in the Scottish referendum of 2014, and by his general aura of overconfidence.

From a comparative perspective, this cautions against a casual approach to the convening of referendums on momentous issues of meta-political (constitutional) importance. Before the event it was common to assert that the Conservative government only authorised the referendum as a device to manage inner party tensions. But even if one accepts Cameron's claim that the referendum was held for strong and necessary reasons of profound public interest (and not as just a slick device to circumvent purely contingent divisions within a single political party), comparative evidence shows that on such a consequential matter more care could have been taken to protect against accidents and unintended consequences. As indicated in this volume, much forethought is essential concerning the precise scope of the *demos*; the wording, timing, legal force and other procedural aspects of the consultation; the quality of the ensuing debate; the political fall-out from both possible outcomes; and the task of harmonising the referendum decision with the normal flow of representative politics. Arguably Westminster paid due attention to the first two of these requirements, but fell short on the last three.

But there were lacunae also with regard to the *demos*. For example, in Australia when constitutional matters of fundamental importance to the Federation (such as monarchy or republic) are up for a vote, the status quo is preserved unless there is a majority in all six of the federated states. Likewise, in Swiss national referendums not only a popular majority, but also a qualified majority of cantons is required to approve a constitutional change. By contrast, the United Kingdom of Great Britain and Northern Ireland has four component units – each with their own democratic legislative assemblies and first ministers – two of which (Northern Ireland and Scotland) voted clearly in favour of the status quo. But they are to be dragged out of the EU against their will because a small balance of opinion in the majority unit (England) swamped their clear preferences. This feature of the referendum was questioned in advance (notably by the Scottish National Party), but no federal-style precautions were enacted. Other precautionary principles might equally well have been considered. After the event millions rallied to the view that such a major decision might have required a supermajority – say 60 per cent rather than just 50 per cent plus one; and/or that the turnout could have been set at an exacting threshold – say 75 per cent.[1] If such conditions were not met the decision would be regarded as provisional until reconfirmed with a simple majority in a second round. But although with hindsight such protective and legitimising rules might seem justified no consideration was given to them in advance.

1. A handful of voters signed such a petition to parliament before 23 June. Two weeks after the vote it had attracted 4.1 million signatures and became the most well supported petition ever. That triggers a debate, but cannot overturn a law.