
Democracy, Human Rights and Migration

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Put bluntly, my argument is as follows. An unstated and uncritical assumption that improved/more democratic systems will help immigrants to obtain their human rights more quickly, should be approached warily (Davidson, 2012b). No “actually-existing” democracy, which, except in a tiny number of cases, has meant liberal representative democracy has not provided rights for all and nor can it do so.

For many, criticism of democracy smells of reaction and of a nostalgia for rule by elites. I therefore recall that there is a strong tradition of criticism of liberal representative democracy that runs through arch-democrats from Rousseau to Karl Marx. Into this century it has been coeval with its failure to ensure rights for all. In its place, progressives have sometimes proposed the replacement of actually-existing democracy by “true” democracy. I argue here, in a serious self-criticism,

This paper draws some conclusions about democracy and human rights from my recent book on universal human rights (Davidson 2012). I am obliged to paint a broad canvas that necessarily raises many questions. The research for my history of universal human rights from the point of view of victims of rights abuse led me to concur with the conclusion of Samuel Moyn (2010) that only when it became clear that the democratic project had *not* protected people did universal human rights win mass support. While he dates this turning point to 1977, I join his predecessor, Hannah Arendt (1946, 1951), in dating the failure from about 1945. Moyn does not acknowledge sufficiently Arendt’s contribution to the debate. Her argument is discussed below.

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that we should also submit to substantial, critical reconsideration any commitment to such solutions of “real”, “citizen”, “participatory” and other democratic forms that have been popular on the Left since Marx gave up on bourgeois democracy and suggested that only a “proletarian” democracy could be efficacious. Where they have existed (rarely), these too have denied rights to migrants and refugees, to those who do not belong.

This is not to deny that there are potentially fruitful theories for a new type of democracy. They do not yet exist as common practice or as “real”, but I discuss them elsewhere as potential openings (Davidson 2012, Epilogue; Davidson 1997, Conclusion). As theorised, for example in the work of Zolo (1992), they claim to provide more rights for all. While he rightly argues that the representative democratic model has failed and that a post-representative model is needed, Zolo drifts back to considering guided or elitist models that remind us of the “Singapore solution”, in the place of representative democracy (pp. 180 ff.). I do not join such a drift back to rule by experts.

1 Real Democracy

The starting point of the problem is that democracy is a form of rule whose main purpose is to provide rights for those who elect it and not for others. Unless perceived interests coincide, democracy not only has excluded, *but also must exclude*, non-citizens from rights. Today, with globalisation, first and foremost among the latter are the millions of migrants who try to get into existing “real” democracies.

The question is what to do about the very large numbers of economic, social and political victims that wash up today on the shores of nearly all states? The conflict of loyalties when facing the Other is great since the factors known as “scruples” vie with a majority “heritage”. Both have strong justifications and affective strength (see Duchesne 1997). Among such migrants, especially refugees, national attachments have become diluted. On the other hand, in resident, mostly sedentary, populations, still the global majority, nationalism that spills over into racism has become the characteristic of the age. The main targets can change and today, the epithet “Muslim” has replaced “Jew”.

So, I am arguing further that it is no longer (if it ever was) good policy to encourage more democracy within the majority populations—as I once did myself—because democracy today reinforces states whose Janus-faces are peoples who in the majority adhere to the “heritage” view, which has little space for cultural others.

The historical evidence is that actually-existing democracy has only made affairs worse for those who “do not belong”, that is, those who are not already citizens of the nation-state they seek to enter. Worse, that very endeavour has had the

effect of reducing rights already enjoyed by citizens within democracies. In sum, as a way to attain human rights for all humans, the democratic project has failed (for recent statements of this widely-held notion see Moyn 2010; Davidson 2012). However, this bleak story enables us to suggest possible alternatives in order to provide rights for all.

2 Procedural Democracy

Democracy as freedom that brings rights for all is a view that has been shared by practically all supporters of democracy since Rousseau. What they have disagreed on are the procedures required for people to exercise power “from below”. So what can democracy mean when we see its real procedures and consequent law-making, that is, see it as “real” existing practice rather than as a dream?

Democracy as the way to freedom has taken many procedural forms, from the “direct” democracy of Athens and Switzerland to the elaborate constitutionalism governed by complex procedures of indirect or representative rule and separation of the powers that we find today in Europe, the Americas, Asia and Australasia. In practice, only the latter is common or practical today, when we live in a world of nation-states, only a handful of which can practice direct democracy.

A frequent starting point for discussion of the difference between “direct” and “indirect” or representative democracy is Benjamin Constant’s celebrated 1819 essay (1990) “Liberty among the ancients compared with the moderns”. Constant argued that direct democracy was possible only among the first because their small populations could decide all in the meeting place. Representative or “indirect” democracy was all that was possible in the large modern state for both practical and emotional reasons. In the latter “...lost in the multitude, the individual can almost never perceive the influence he exercises. Never does his will impress itself upon the whole; nothing confirms in his eyes his own cooperation”. So, while in ancient society life was politics, in modern society it is also economic and social; politics is only part of life (pp. 311 ff.).

This distinction is the starting point for most procedures of liberal representative democracy. Because of the numbers of citizens in a large state, in its real form democracy amounts at best or as an ideal goal to the minimal practice in which each citizen-individual exercises an equal vote of equal value in choosing representatives for a parliament that will decide policy for all those in the state. Then the citizen goes home to attend to her private affairs. The elected representatives in a parliament make the laws for all. It is the dominant form of political organisation in the world—although some autocracies and aristocracies still survive, mainly in the Middle East—and it is the reality of liberal democracy as we know it today. Power

but not decision-making comes “from below” in a model of democracy derived from Hans Kelsen by Norberto Bobbio—after 1945 the pre-eminent theoretician of liberal representative democracy, that is, democracy as minimalist and procedural (Bobbio 1976, pp. 42–43, 96).¹

An early procedural limitation which ensues in any polity in a large state is enounced in Edmund Burke’s speech to the electors of Bristol of 1774. Deputies in parliament are obliged make the laws according to their own conscience. The citizens are too many to do so either individually or collectively as a people. Constant (1991) was worried about the risk that representatives would become divorced from those who elected them and their particular wishes, but he nevertheless concurred with Burke in his enormous work on rule in any large state (pp. 30–34, 147–148, 310–311). He insisted that it was the context that imposes procedures—tiny communities permit “direct” democracy, while large populations require indirect democracies—with all the consequences for power and sovereignty.

Implicit in such an argument about the determining nature of the objective social contexts is that the numbers of individuals involved will affect all further developments in democracy. Just as direct democracy can work only in tiny enclaves, so it is that representative liberal democracy has not worked in spaces where populations were greater or more diverse than in the nation-state.

In practice, despite dreams, wider or transnational forms of democracy (i.e. greater than in nation-states) have proved impossible. They almost never exist in supra-national organs of governance such as the United Nations, which is no more than an agreement between nation-states. However, the failure of the European Union, made up of nation-states committed to democracy, is a more telling example of the limits of the liberal democratic model. In Europe there have been too many conflicting state interests for democracy as one person, one vote, one value to be established. For example, Alain Terrenoire (1994) calculated that an Irish or Danish citizen of Europe has twice the voting power of a British, Italian or French citizen. And, even if that were not the case, there would be too many deputies for parliamentary procedures to work. A more representative European parliament might have more than one thousand members, rendering democratic parliamentary procedures impossible. He wrote: “...any significant increase in the number of

¹ It is notable that late in life Bobbio himself gave up his belief in a democracy that could do everything and became a supporter of universal human rights against democracy. In this sense, he belongs with Moyn (2010) and Davidson (2012), but as the leading theorist of democracy, his change of heart carries much more weight (for my full assessment of Bobbio’s views and itinerary see Davidson (2011), “Norberto Bobbio: Populismo, Democracia y Derechos Humanos”).

deputies raises the problem of homogeneity in the Assembly, and this, of coherence and quality of the work done there" (1994, pp. 130–132).

What is not stressed enough in the discussion and advocacy of liberal representative democracy as the only democratic form possible in the real world of modern nation-states, is that until late in the nineteenth century the *raison d'être* aim of this tradition was to critique the Jean-Jacques Rousseau deemed responsible for attempts to reintroduce direct or low level democracy into the modern politics of large states, *not* the Jean-Jacques Rousseau who thought all power came from the nation. Starting with Constant himself, these advocates considered Rousseau the inspiration for Jacobin policies of "loosing the mob". Constant had seen the mob in action and like all Girondins, he feared it. He thus detested the "direct" democracy that Robespierre promoted in his short reign. Constant did not disagree with the Rousseauian proposition that all power must emanate from a general will. Like Burke, he condemned all direct procedural expressions of popular power, notably representatives as delegates and a legislature that was all-powerful. Rather, marrying the conservative views of Montesquieu with those of Rousseau, Constant (1997) argued for a system of checks and balances. Because the "nation" was so nebulous a notion, despite the general will being the driving force underpinning a democracy, he wanted power to reside in a system that separated powers, and provided checks and balances against the direct expression of a putative national wish by legislators (pp. 31–32, 1991, pp. 254–256, 295, 300, 318–319). The understanding of liberal representative democracy as procedures able to curb direct democratic power was strong until late in the nineteenth century. It drew particular strength from Tocqueville's observation of "real" democracy in the United States in the early 1830s. For both Tocqueville and Constant, limited government or "social authority" had to be constitutionally imposed, reserving a large realm for individual rights or civil liberties of citizens. Similar positions were held by the English utilitarians, especially John Stuart Mill, and dominated the British view of any system based on universal suffrage.

Democracy based on fear of the people was only replaced by a renewed commitment to belief in the people after Napoleon came to power in 1851 with a popular mandate. This revived one of the theories of the decried Rousseau. Where Girondin theorists like Constant were men of the Enlightenment, who believed in the abstract or universal human being, whose lack of passion for any community they regarded as a reality and an asset, Rousseau had notoriously stated that universal man was nonsense, there were Frenchman and Poles and so on, each had their national heritage and identity. He saw love of patrie, directly expressed, as a good, not a danger, as his critics saw it. Procedures of democracy should encourage any passionate popular interest in politics. This view re-emerged with the rise of radical and socialist parties. Typically, Georges Clemenceau, leader of French

radicalism and socialism until 1918, pushed for a change to the French constitution based on checks and balances in favour of an all-powerful legislature. This policy became the marker of the French Left thereafter. It cannot be emphasised too much that where, after the French Revolution, the major sentiment among supporters of liberal representative democracy had been fear of the people, after the Restoration, a romantic belief in the virtues of the people, often the “folk” or national peasantry, again became important in moderate and socialist national progressive parties as well as radical groups.

Despite this change in attitude, overall, the drive for sovereign legislatures with mandated members subject to recall if they depart from party policy never became the rule in actually-existing democracy. Rather, in the period 1920–1960, an allegedly Rousseauian-inspired privileging of “mob” popular power was made responsible for the “totalitarian democracies” of Fascism and Communism. Condemnation of democracy for its pusillanimity in the face of the rise of “totalitarian democracy” after 1927, expressed notably by Leon Blum and the anti-Nazi Resistance in Europe, did not overturn it.

We might sum up by saying that, by the twentieth century, whether they feared the people or loved it, both sides in the democratic debate supported the system, or at least accepted that all forms of government exist at the whim of the people, whether monarchy, tyranny or democracy. Thereafter, the debate turned on not whether power came from the people but on how best to turn it into a positive force for the whole people.

The hostility of protagonists of indirect against direct democracy must be underlined. For the protagonists of the former, in conditions requiring representative liberal democracy, other forms are considered harmful. In Bobbio’s recent formulations (1990), direct democracy is impossible even as workers’ democracy in factories. Even then, there must be delegation to representatives. Indeed, to attempt direct democracy in modernity is harmful (pp. 29–54, esp. 44–45). While not sharing the order of the argument, which ends by extolling liberal representative democracy, I agree that in this world, direct democracy could make matters worse for “those who do not belong”. This is discussed below.

3 The Nation in History

Historically, the liberal representative democratic tradition started within already-existing autocratic or aristocratic states. After 1789, large states that already existed, mainly autocratic, ruled either by one person or the few, evolved under popular pressure into representative democracies, or rule by the many, following the Aristotelian tripartite classification. Popular pressure was understood as that of the

people as a nation, a putatively united homogeneous group that—as in the celebrated French formulation of 1791—created by force a national democratic state “one and indivisible”. The privilege given to the nation is often attributed to Rousseau but it was more generally held, even by anti-Rousseauians. So, Burke affirms that when elected to parliament, he cannot represent his constituents, only the nation or the national interest. Almost without exception, until the middle of the nineteenth century supporters of democracy understood the people as the nation.

Constant, while aware of the dangers and limitations of representative democracy that resulted from making parliament rather than “the people” sovereign, in fact and in theory lined up with the anti-Rousseauian Burkean tradition in British political history. He and his companion, Madame de Stael, built up personal and theoretical contact with Joseph le Maistre, who argued that indelible national qualities had to be the basis of any political arrangement. Even radical national liberationists confused people and nation, as did conservatives like Burke, Constant and de Maistre. In his 1850 consideration of 1848, Carlo Cattaneo (1972) wrote: “The *new* and typical reality in this century is the explicit and solemn awareness of communal and national life; it awoke...in Germany during the French wars and it awoke, indeed, in Italy under the cold shower of Austrian opportunism” (vol. III, p. 285). National liberation in Europe during the nineteenth century marked the triumph of the belief that the source of power should be the people, not necessarily that the people itself should make the laws. As an aside, we note that this suggests that, from the outset, spokespeople for liberal representative democracy were at least as responsible for the national-populisms that led to totalitarianism as any protagonists of a lopsided Jacobin position.

How a people was defined as a nation took different forms depending on previous state history. Whether there really exist national characteristics does not concern us, but the elision of rule by the people and rule by the nation as deliberate policy does. Following the logic of Burke’s 1774 speech, the representatives of the people in parliament would decide what the nation was, not “the people” itself. To be part of a democratic people that, from 1789, made the laws under which it lived and was therefore free, an individual had to be a national citizen. Representatives decided what that was in the laws they made. Until very recently, in order to have that status, a person had to be of the same “blood” or have been born on the national soil. No-one else could be a citizen unless the independent representatives decided by democratic law that they could be.

Limiting democracy to a nation meant that democratic power and its benefits, rights for “the people”, did not extend beyond national citizen-individuals. The individual who was not a citizen—however defined—had no rights within that democracy other than those conceded by the citizens’ parliament. So, liberal demo-

cracies simultaneously are able to create rights for all citizens and, ipso facto, can limit them to such citizens. Rights are made and unmade by the laws of the parliament. Within the empires of liberal democratic states, existing rights for nationals did not extend automatically (constitutionally) to colonial subjects. If we stick to the nation-state world, which is all we have known since 1789, with some caveats, we see that this assertion was regarded as so self-evident by the mid-nineteenth century, that the national context was never really challenged in discussions about possibilities for democracy. After 1789, the procedures of liberal representative democracy were increasingly adopted or imposed in most states in the world despite Tocqueville's prescient warnings (I discuss this extensively in Davidson 2012, Chap. 10). This ensured a universalisation of the nation-state and its international procedures and norms by 1945. Today, other forms of "democracy", such as those obtaining in China and Cuba, tend to be characterised as "rogue".

Up until 1835, when Tocqueville sowed seeds of doubt in his *Democracy in America*, many theorists of representative democracy believed that a national people, once having democratic power and thus owning its state, would be free and also, in time, become virtuous. Above all, it would be generous by bringing the boon of representative democracy and the rights that ensued to all other peoples. The seeds of doubt did not really take root. Tocqueville's warnings about the democracy he had seen in the United States were rejected in the triumph of Louis Napoleon in 1851. This revealed that a democratic people could be conservative to the point of being repressive towards those who were different. Before 1945, nowhere did any liberal democratic system automatically or constitutionally guarantee rights for those outside the nation-state. It is arguable that some post-war European constitutions then did so by allowing automatic entry to refugees. That right has since been abrogated (see e.g., Rapoport 1998, pp. 179 ff.; Legoux 1996; Teitgen-Colly 1996, pp. 69–86).

Perhaps, as conservative theorists of nationalism argue, there are deep ties between peoples which precede the nation state. However, what is important for our argument is that the states that first created the liberal democratic nation-state were in fact made up of quite different ethnic, linguistic and other groups. So states had to create a feeling of primary loyalty to the nation "one and indivisible". Throughout the nineteenth century most core "white" states did this in a hegemonic programme that combined internal indoctrination, mainly through the imposition of a national language by stick or carrot, or, as proved more successful, through wars against other nation-states defined as "outsiders". The histories of nationalism reiterate ad nauseam the importance of the lead-up to and experience of World War I in completing the hegemonic enterprise of forging the nation. Thus, while the notion of one nation was a fiction at the outset of the history of "real" democracy,

after one hundred years it had become an undeniable reality in the core western countries. Whatever local loyalties were left were trumped by loyalty to the nation.

Nation-building was a viable policy where the component “people” were not very different in culture or language, or where the ratio of the majority to the minority allowed the absorption of the latter over a short time, as in the core nations. The latter was also the reality in the United States, Canada and Australia. It was not where, as in the Austro-Hungarian empire, the different nations were of similar strength and often had been millennially separate. While all required federal polities, in the latter, admission of the outsiders to citizenship had to follow their assimilation to the majority identity, at least when facing outwards towards other nation-states. Where that was not the case, mainly in areas of vast extent with dispersed populations under a weak state, the Janus face of nation/liberal representative democracy and its necessary procedures had to be modified. In such places, the nation was no longer seen as one and indivisible. It could only remain almost democratic by devolving some powers to lower representative houses while keeping the unifying national matters for the “federal” parliament. Disputes about law-making were resolved by leaving the last say in the hands of an unelected judiciary. In such states, the same rights for all were replaced by different rights for different groups of the nation.

Consequently, in 1861 in Mill’s famous book on representative government, he proposed a federal devolution of democratic power in certain contexts. As we know, Mill (1964) was not happy with this because of its potentially conflictual and fracturing tendencies. He and his avatars regarded any attempt to extend liberal representative democracy beyond a nation united by blood and culture as at best a compromise where rights would be constitutionally unequal and disputes decided by unelected judges. So, he insisted on hegemonic educative policies. Any groups outside the core nation (or national identity) should have the vote only once they had been educated into the basic shared national ethic and not before (pp. 359 ff. esp. 362–366, 279–280).

The inequality of rights that comes with the federal solution resulted from a context in which the initial notion of liberal representative democracy could no longer hold; the spaces and the populations were too great. Huge new states like Australia, the United States, or Canada, were settler societies, made up mainly of immigrating, conquering, whites who bore with them the dream of democracy, based on the premise that a nation had to be built for a continent. This portended an even greater problem than that of great states that incorporated many fundamentally different groups. By the end of the 1800s, mass migration by millions to places where they seemed “different” from the national model, had become a problem for democracy. It continued to develop until a century later it had become the

“problem of our time” by the mid-1900s, when the world had become one of mass migration. By the end of that century, multi-ethnicity at least on a par with that in Mill’s Austro-Hungarian empire was typical rather than exceptional within states. In some countries, up to a quarter of the population comprised peoples who were not united by any major characteristic at all. Indeed, because the rate of migration flows had become vast and rapid, there was no longer any hope of hegemonic “nationalising” policies working easily to create a nation “one and indivisible”.

In order to empower immigrants, I used to propose extension of existing citizenship almost on demand to “those who do not belong” (see Davidson 1994, pp. 111–129; 1996, pp. 53–75, 2001, pp. 158–176, 2003, pp. 35–55, 2007; Davidson and Castles 2000), following the French revolutionary solution for reconciling national interests and migration in 1791 and 1793, as well as in Frances’s Leftish 1946 constitution (see Davidson 1998, pp. 337–353). This would have given the newcomers the vote and thus the benefits of democracy. There were reasons to believe that this was possible up to the demise of the Communist bloc in 1989, whose disregard for rights had functioned to keep “real” democracies clean or observant of human rights (MacPherson 1965, pp. 56 ff.). But, once there was no need to make a parade of democratic concern for the universal human rights of individuals in face of Communist subordination of the individual to the totality/community, open frontiers rapidly became dead letters and national respect for the rights of refugees started to disappear. A new nationalism became a feature of the 1990s.

Any widening of access to citizenship in the 20 years since has not worked to provide rights for all. We must look for other solutions to empower migrants.

4 Dreams and Democracy Under Globalisation

Liberal representative democracy is a system that has and does enjoy widespread support from those that have it and those that do not. When “the people” come out in “revolution” they constitute an amazing transformative force, as we saw in Eastern Europe a generation ago and in north Africa more recently. So, mine seems a strange argument to make in the aftermath of the Arab Spring and with people dying in Syria, apparently in a struggle for democracy. When demonstrating Arabs are interviewed in Tahrir Square or in Tunis, they often claim that democracy will bring them “freedom” both “from” tyranny and “to” happiness. The notion goes back to Rousseau’s assertion that freedom comes from living under laws of our own making and it has dominated the political history of humanity since 1789. The United States, its greatest contemporary protagonist, is so committed to the idea that it imposes democracy by force whenever it can as a solution to world prob-

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