Populism: Democracy's Shadow

by Margaret Canovan

Democracy and populism are both in fashion. The collapse of Communism in the Soviet Union and Eastern Europe has given rise not only to triumphalist celebrations of the established Western model of liberal democracy, but also to a new focus on democracy within more dissident political thinking.

At the same time populist movements and ideas seem to be flourishing. Both the new democracies (such as Russia) and the established democracies of Europe have seen the increasing prominence of politicians and parties widely labelled 'populist'. These are usually of a recognizably right-wing kind, and are often regarded as potential threats to democracy. Meanwhile, following the emergence of Ross Perot in the USA and Pat Buchanan's challenge for the Republican presidential nomination, American politics seems to be undergoing an especially populist phase.

These developments bring into prominence a long-standing puzzle about the relation between political populism and democracy. 'Populism' is a notoriously imprecise and slippery concept, but its one undeniable feature is that any politician, movement or ideology that is to come under its heading must lay stress on appealing to and mobilizing 'the people'. But the principle of popular sovereignty has traditionally lain at the heart of democracy. The problem, therefore, is why populist appeals to the people should be distinguishable from democratic appeals. Since all democratic politicians seek to mobilize the people and to address their concerns, what is it that is distinctive about populism?

One short answer to this question is that political populism is simply an anti-establishment version of democratic politics, one that by-passes established parties and mobilizes those left out of 'normal politics'. But if so, why is this commonly considered to be dangerous to democracy? Furthermore, how is a *populist* challenge to a sclerotic democratic system (like that mounted by Ross Perot) related to the kind of *radical democratic* challenge to such systems which has been advocated by many political theorists who have little sympathy with populist programmes, particularly with their characteristic chauvinism?

Reflection on these paradoxes draws attention to a series of ambiguities intrinsic to democracy, tensions between the aspect of democracy that gives it its political legitimacy, and the side that makes it a feasible political system. There are at least three connected ambiguities involved, each of which offers an invitation to populist mobilization.

First, democracy is at one and the same time an ideal of popular sovereignty and a way of running a polity among other polities in a complex world. This gives rise to painful contradictions, for instance in economic affairs. Governments elected to represent the people's interests may be quite unable to ensure their economic well-being, leaving scope in bad times for a populist reaction against politicians and those who seem still to be prospering. Recent US politics offers many examples of this phenomenon.

Secondly, democracy has a 'romantic' side, invoking the living voice of the people and their spontaneous action. At the same time, it unavoidably consists of a set of solid, reified institutions and practices. For example, a legal system that will be democratic in the sense of securing to all citizens the equal protection of the laws can only be one in which popular will is mediated through the rambling byways of due process. Since it is often hard for the people to recognize this alienated structure as their own, there is always scope for populist appeals to direct popular justice, from *Sun* headlines to lynch law.

Thirdly, democracy functions as a redemptive ideology (one of the family of modern ideologies that promise secular redemption through politics), attracting support by means of the tacit promise to make the world a better place. However, democracy is at the same time just a set of contingent institutions and practices for 'attending to the arrangements' of a specific polity, and keeping Oakeshott's ship of state afloat. Conservative or postmodern theorists of democracy who try to lower expectations are liable to be outflanked by populist appeals to democratic hopes.

A further and particularly interesting ambiguity concerns the relation between populists and *radical* democrats. Not only populists but also theorists of participatory democracy have appealed away from the unglamorous institutional side of democracy to its legitimating ideals of popular sovereignty, direct popular action and the ideological promise secular redemption. However, there has been surprisingly little overlap between the challenge to established democracy mounted by populists and by radical democrats. One way of making sense of the difference is to suggest that when populists and radical democrats appeal past existing democratic structures to people at the grassroots, they imagine that 'people' in systematically different ways.

In particular, radical democrats have often aimed (more or less explicitly) at an *enlightened* people. This type of appeal, common from Mill to Habermas, involves more or less tacit assumptions about universal values, progress toward enlightenment and the role of the intellectuals as a vanguard of this process. By contrast, political populism is hostile to notions of this sort.

Precisely because traditional beliefs about progress, enlightenment and a corresponding role for radical intellectuals have recently come under critical scrutiny, the distinction between radical democracy and populism is becoming harder to sustain.

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The European Court of Justice: Guardian of Rights?

by Nicholas Grief

For over 25 years the Court of Justice of the European Communities has declared that fundamental rights form an integral part of the general principles of Community law. In safeguarding those rights it draws inspiration from constitutional traditions common to the Member States and international human rights treaties (especially the European Convention on Human Rights, or ECHR).

This case law has two important implications: (i) fundamental rights constrain the Community institutions; and (ii) fundamental rights constrain the Member States whenever they act within the framework of Community law: when a Member State implements, or derogates from, Community rules, the national measure must be consistent with fundamental rights.

The legal status of the ECHR in the UK (where it has not been enacted into domestic law) is quite different whenever rights derived from Community law are in issue, with far-reaching consequences. In *Johnston*, for example, in the context of a sex-discrimination dispute between a woman member of the RUC Reserve and the Chief Constable, the ECJ held that the requirement of 'effective judicial control' laid down in the Equal Treatment Directive, interpreted in the light of Articles 6 and 13 ECHR, meant that a certificate issued by the Secretary of State (to the effect that the refusal to offer Mrs Johnston employment was in the interests of public safety) was subject to judicial review, whereas under domestic law it could not be challenged.

Indeed, the right to an effective remedy underlies many of the ECJ's leading judgments, some of which have dramatic constitutional implications. In *Marshall (No 2)* it held that a woman who had suffered unlawful sex discrimination concerning retirement ages had an enforceable Community right to full compensation, despite a statutory limit of £6,250. Even more significantly, in the well-known *Factortame* affair (involving a challenge to a fishing vessel registration system introduced by the Merchant Shipping Act 1988) the Court ruled that national courts must be prepared to grant effective interim relief in order to protect putative Community rights. Empowered by the ECJ, the House of Lords affirmed the injunction

granted by the Divisional Court suspending the application of the Act's disputed provisions and restraining the Secretary of State from enforcing them in respect of the applicants. Although such relief was impossible under common law, it was available under Community law.

The ECJ eventually decided that the Act's nationality, residence and domicile conditions violated Community law. The case established a precedent in favour of recourse to judicial review for the purpose of securing a declaration that UK primary legislation is incompatible with Community law rights; as in *R v. Secretary of State for Employment, ex parte EOC*, where the House of Lords held that provisions of the Employment Protection (Consolidation) Act 1978 governing the rights to redundancy pay and unfair dismissal compensation infringed Community law because they discriminated against women. Meanwhile the *Factortame* affair continues with the applicants' claims for damages.

The recent example of how the ECJ can protect rights where no remedy is available in domestic law is *Gallagher*, where an Irish national objected to an exclusion order which had been made against him on grounds of public security. The case underlines the requirement of procedural fairness in the operation of exclusion orders, an area where legal constraints had been few and far between. In November 1995 the ECJ held that, save in cases of urgency, a Community directive prohibits the administrative authorities from ordering a person's expulsion on ground of public security before an independent competent authority has given its opinion.

The ECJ first declared its commitment to individual rights and freedoms in the *Van Gend en Loos* case (1963), where it stated that 'Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'. It went on to establish the concept of 'direct effect', according to which Community provisions which impose clear, unconditional obligations create corrective rights for individuals enforceable in national courts.

In the light of that judgment and subsequent developments, it is tempting to regard the Court as the 'guardian of fundamental rights'. However, the following points should be borne in mind: (a) individuals have no direct access to the ECJ to challenge the acts and omissions of national authorities, nor any right of appeal to it against the decisions of national courts; (b) the Court appears to subordinate the rights of the individual to the interests of the Community (Community accession to the ECHR might well alter its perspective); (c) above all, the ECJ can only protect rights within the framework of Community law. At present it has no jurisdiction over activities of the EU which fall within the sphere of foreign and security policy and of co-operation in the field of justice and home affairs. This should be addressed by the current IGC. The judicial protection of individuals affected by the Union's activities must be properly guaranteed.

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