

GOOD GOVERNANCE AND DIRECT DEMOCRACY

Examples and Lessons from Past and Present¹

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1. Introduction

Since the 1990ies, the term “good governance” emerges fairly often as a demand on behalf of international financial institutions towards recipient countries concerning the structure and operation of their political institutions. Namely, neither concrete objectives of development policies nor general macroeconomic ideas can be realized without having an operational system of governance, regulation and implementation in a country’s political and economical units.² Nowadays, “good governance” sums up characteristics of a desirable regulating and governing system and represents a general reference framework for the evaluation of political governance. Although the term “good governance” has no generally accepted definition, its elements – the characteristics of a desirable governance – re-emerge in different descriptions: participative, equitable and inclusive, it is in line with the rule of law, transparent,

¹ Written version of a paper presented on the international conference “Good Government, Good Governance and Good State” (“Jó kormányzás, jó kormányzat, jó állam”) at Pázmány Péter Catholic University, Faculty of Law and Political Sciences (Budapest) on 19 December 2012. The title of the original paper was slightly modified.

² Uwe HOLTZ: *Entwicklungspolitisches Glossar*. (Complete revision and extension of the version of 2006.) University of Bonn, 2009. (Last update: 04. 11. 2011) 71–72. www.uni-bonn.de/~uholtz/virt_apparat/EP_Glossar.pdf (accessed: 17.12.2012). For the evolution of the term ‘Good Governance’ see further Rudolf DOLZER: Good Governance. Genese des Begriffs, konzeptionelle Grundüberlegungen und Stand der Forschung. In: Rudolf DOLZER – Matthias HERDEGEN – Bernhard VOGEL (eds.): *Good Governance. Gute Regierungsführung im 21. Jahrhundert*. Freiburg, Konrad-Adenauer-Stiftung e.V. – Herder Verlag, 2007. 13–23. www.kas.de/upload/dokumente/verlagspublikationen/Governance/governance_Dolzer.pdf (accessed: 17. 12. 2012).

responsive, effective and efficient, consensus oriented and accountable.³ These principles are general enough to say that their validity is not limited to present time governance; they can be found – although not always explicitly – in the political thought of the past as well.

What is or what can be the contribution of direct democracy to good governance?⁴ Direct democracy means here that citizens can decide public matters directly, without the medium of elected representatives. The institutional form of such direct decisions is diverse: it ranges from different kinds of referendums where citizens cast their vote on laws previously adopted by the parliament to popular initiatives where the question itself – either a general proposal or a detailed bill – comes from a group of citizens. The institutional framework of these instruments is a product of modern constitutionalism; the scope of this presentation therefore does not comprise medieval or ancient forms of direct democracy.

2. Participatory, equitable and inclusive

Participation is often considered a cornerstone of good governance. Direct participation does not only mean ‘with participation’: the key element is that the interests of almost every citizen, every class of society – including people with the lowest ability to promote their concerns – should be taken into account in course of political decision making. This requirement can be fulfilled by representative organisations as well. However, whether a direct or indirect decision is taken, those who cast their votes must be informed and organised.⁵

The fact that different forms of popular law-making bring closer the requirement of participation does not demand much explanation. The Pilgrim Fathers on board of the Mayflower certainly found it self-evident that their aim to “enact, constitute and frame” “just and equal Laws” shall be achieved “mutually” and therefore they formed a “covenant” and combined themselves “together into a civil Body Politick”, in which everyone has his part.⁶ This idea originates – on the one hand –

³ Kioe Sheng YAP: *What is Good Governance?* United Nations Economic and Social Commission for Asia and the Pacific (s. a.), www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.pdf (accessed: 17. 12. 2012).

⁴ For the relation of direct democracy and good governance see: Russell J. DALTON: *Direct Democracy and Good Governance: Does It Matter?* In: Shaun BOWLER – Amihai GLAZER (eds.): *Direct Democracy's Impact on American Political Institutions*. New York, Palgrave Macmillan, 2008. 149–167. Dalton examines the effect of direct democracy on three fields: the management of state governments (government processes), state education policies (policy output) and tax policy performance (tax inputs) based on the practice of US member states and comes to the ambivalent conclusion that “there are only weak relationships between initiative usage in a state and these three measures of performance” (op. cit. 165.).

⁵ YAP op. cit. 2.

⁶ The text of the Mayflower Compact is here cited after Charles BORGEAUD: *The Rise of Modern Democracy in Old and New England*. (Translated by Birkbeck Hill.) London – New York, Swan Sonnenschein & Co. – Charles Scribner's Sons, 1894. 108.

from protestant political legacy which protected universal human rights and public liberties as ‘fundamental laws’ and considered it necessary to confirm them by mutual covenants between God, rulers and subjects.⁷ On the other hand also the example of guilds shall be taken into consideration. The guilds worked as voluntary associations and passed their resolutions by ‘common assent’ of their members on a democratic basis.⁸ These two models played the main role later as well when the first towns of the New England colonies instituted the ‘town-meeting’ as a highest authority which decided public matters by the direct participation of the freemen. This practice was motivating for adopting basic rules of some colonies by popular votes, for example in 1638 in case of the ‘Fundamental Orders of Connecticut’ or later, during the American Revolution, when the citizens of Massachusetts demanded that for the elaboration of a new constitution a special convention shall be elected and the draft should be put to the town meetings for popular approval (1778/1780). The same happened in New Hampshire in 1783.⁹

The idea of popular participation in law- and constitutional-making was later transferred to revolutionary France. The popular veto on parliamentary statutes, the constitutional referendum and the constitutional initiative became part of the European tradition. In the 19th century Switzerland followed where forms and institutions of popular participation gradually developed through a long process. The Swiss example inspired a series of US member states at the turn of the 19th and 20th century and in Europe, the interwar period brought a first breakthrough of direct democratic institutions in the new democracies: in the Weimar Republic, the Republic of Estonia, Latvia and Lithuania, in Austria and in the Irish Free State. Although the details of popular rights differed, the idea was common: direct democracy offers effective tools for expressing and enforcing interests which would otherwise disappear in the labyrinth of parliamentary decision-making or would not even be added to the agenda.

Despite this positive expectation, the principle of participation is challenged three-fold in practice:

- 1) Firstly: although the door of this additional participation stands open to everyone, only a minority of the politically active citizens take the

⁷ David W. HALL: *Calvin in the Public Square. Liberal Democracies, Rights, and Civil Liberties*. Phillipsburg, N.J., P & R Publishing, 2009. 94–95. – based on Herbert D. FOSTER: *Collected Papers of Herbert D. Foster*. New York, privately printed, 1929. 163–174.

⁸ Charles BORGEAUD: *Premières constitutions de la démocratie Américaine*. Paris, Alcan, 1891. [Annales de l'École Libre des Sciences Politiques 6 (1891)] 8ff.; Charles Sumner LOBINGIER: *The people's law or popular participation in law-making from ancient folk-moot to modern referendum. A study in the evolution of democracy and direct legislation*. New York, Macmillan, 1909. 41–48.; Michel FRIDIEFF: *Les origines du referendum dans la Constitution de 1793. (l'introduction du vote individuel)*. Paris, Presses Universitaires de France, 1932. 45–46.

⁹ Silvano MÖCKLI: *Direkte Demokratie. Ein Vergleich der Einrichtungen und Verfahren in der Schweiz und Kalifornien, unter Berücksichtigung von Frankreich, Italien, Dänemark, Irland, Österreich, Liechtenstein und Australien*. Bern–Stuttgart–Wien, Paul Haupt, 1994. 65–67.

opportunity to carry out their political influence.¹⁰ In Switzerland the participation showed a decreasing tendency in direct popular votes until the 1990ies; around 40–50% of the electorate takes part in federal referendums. The same can be stated concerning the US member states.¹¹ If a minimum threshold of participation is not required for the validity of the referendum, the apathy of voters can be exploited by aggressive interest groups who mobilize their relatively few partisans and reach a ‘false majority’. However, it must also be clear that different strategies are available for increasing participation levels, maximising the benefits and minimising the costs of voting.¹²

- 2) Secondly: the proportion of the ‘lower classes’ in popular votes is smaller than their real proportion in the total electorate. Even those who are weak in enforcing their interests seem to be less active in direct democratic processes. The reason for this is probably not in their lack of interest but rather in their disability to understand the proposals.¹³ As for *equity and inclusiveness*, this fact may lead to a negative judgement. However, the possibility of enforcing interests and setting problems on the political agenda is offered to the most vulnerable classes as well and this may be an advantage compared to political systems without direct democratic instruments.
- 3) Thirdly: high participation rates do not always express a real interest of citizens. Authoritarian regimes often use plebiscites to gain popularity or to demonstrate their power. Hitler’s plebiscite on the approval of the Nazi government’s policies (the withdrawal from the League of Nations and the abandonment of the Geneva Disarmament Conference) in 1933 with a turnout of 96% and a proportion of 95% of yes-votes can certainly be ascribed to strong manipulations and intimidation. The same is true for Ceausescu’s plebiscite on the reduction of the army and of armaments expenditure in 1986, with a turnout of 99,99% and a proportion of 100% of yes-votes.¹⁴

¹⁰ Silvano MÖCKLI: *Stärken und Schwächen der direkten Demokratie in der Schweiz*. (Beiträge und Berichte 202/1993.) St. Gallen, Hochschule St. Gallen, Institut für Politikwissenschaft, 1993. 16.

¹¹ Theo SCHILLER: *Direkte Demokratie. Eine Einführung*. Frankfurt am Main, Campus Verlag, 2002. 105., 123–124.

¹² The greater control over the subject matters of referendums is given the citizens (only few subjects are excluded and popular initiatives are provided), the more citizens are inclined to vote. The costs of voting can be reduced by means of mail-in and internet voting, 2–3 day voting periods, by providing information and short explanation on the issues. For details see: Kris W. KOBACH: Lessons Learned in the Participation Game. In: Andreas AUER – Michael BÜTZER (eds.): *Direct Democracy. The Eastern and Central European Experience*. Aldershot, Ashgate, 2001, esp. 294., 301–303.

¹³ Hermann K. HEUSSNER: Mehr als ein Jahrhundert Volksgesetzgebung in den USA. In: Hermann K. HEUSSNER – Otmár JUNG (eds.): *Mehr direkte Demokratie wagen. Volksentscheid und Bürgerentscheid: Geschichte / Praxis / Vorschläge*. (2nd ed.) München, Ollzog Verlag, 2009. 154.

¹⁴ For data see Beat MÜLLER: Search Engine for Direct Democracy (www.sudd.ch) and the database of the Centre for Research on Direct Democracy (www.c2d.ch).

Therefore, beyond the participation itself a well-organised civic society and the free exchange of ideas are also required for good governance.

3. Rule of law

‘Fair legal frameworks’, ‘protection of human rights’ and ‘impartial enforcement of laws’ are also usually considered important factors of good governance. The whole practice of state power shall be bound to legal regulations and respect of the *rule of law*.¹⁵

The contrast is striking. How can human rights, minorities and constitutional principles be protected if the citizens express their will as supreme power? Which last resort can oppose the people if they exercise their popular sovereignty, even if this highest authority contravenes the fundamentals of the constitutional order?

Contrary to radical theorists of democracy, like Rousseau or Sieyès, the experience with absolute democratic rights led to safety regulations and practices in many countries in order to avoid unlawful popular decisions: the exclusion of specific subjects – especially constitutional matters – from referendums, the preliminary review of initiatives, the subsequent control of laws adopted by means of referendum – all these means are intended to avoid or dissolve conflicts between rule of law and direct democracy.

The level of protection varies from country to country. The one extreme is a practice where fundamental questions of a society which were formulated by direct democratic processes will in the end be decided by judges. In California, ten initiatives were approved by the people between 1960 and 1980 and six of them were subsequently declared unconstitutional by the State Supreme Court and the U. S. Supreme Court. “Direct democracy means judicial rule” – pronounced Eugene C. Lee, professor at the University in California in Berkeley.¹⁶

The other extreme is Switzerland. The Federal Assembly can only reject initiatives which violate mandatory provisions (*jus cogens*) of international law; judges are further entitled to refuse to apply such constitutional regulations which contrast with

¹⁵ For the tension between direct democracy and rule of law see: Andreas AUER: Direkte Demokratie und Rechtsstaat. In: Giovanni BIAGGINI – Georg MÜLLER – Jörg Paul MÜLLER – Felix UHLMANN (eds.): *Demokratie – Regierungsreform – Verfassungsbildung. Schwerpunkte aus dem wissenschaftlichen Werk von René Rhinow dargestellt von Schülern, kommentiert von Freunden und Kollegen.* (Symposium für René Rhinow zum 65. Geburtstag.) Basel, Helbing Lichtenhahn Verlag, 2009. 31–42. From earlier literature see further Werner Kägi’s basically theoretical paper preferring ‘demokratischer Rechtsstaat’ rather than ‘rechtsstaatliche Demokratie’: Werner KÄGI: Rechtsstaat und Demokratie (Antinomie und Synthese). In: *Demokratie und Rechtsstaat. Festgabe zum 60. Geburtstag von Zaccaria Giacometti (26. September 1953).* Zürich, Poligraphischer Verlag, 1953. 107–142.; and Hans Schneiders work which comes to a negative evaluation of direct democracy on the basis of practical experience: Hans SCHNEIDER: Volksabstimmungen in der rechtsstaatlichen Demokratie. In: Otto BACHOF – Martin DRATH – Otto GÖNNENWEIN – Ernst WALZ (eds.): *Gedächtnisschrift für Walter Jellinek (12. Juli 1885 – 9. Juni 1955).* (Forschungen und Berichte aus dem öffentlichen Recht, Band 6) München, Günter Olzog Verlag, 1955. 155–174.

¹⁶ MÖCKLI (1994) op. cit. 228–229.

fundamental rights.¹⁷ An interesting case which recently demonstrated the conflict of direct democracy and rule of law was the ‘minaret controversy’ in Switzerland. In 2007, a federal popular initiative was launched against the building of minarets. Although the initiative violated the freedom of religion, it was debatable whether it infringed mandatory provisions of international law. The initiative was not stopped by the Federal Assembly and finally, in 2009, it was approved by the Swiss citizens.¹⁸

It would be desirable to find a balance between these extremes. Popular rights shouldn’t be neutralized by means of an over-zealous protection of the constitution, however, referendums should not touch upon essential contents of human rights. Also such laws and institutions which originate from the nature of humans shouldn’t be subject to majority decisions.

4. Transparent and responsive

Transparency requires decision-making processes which follow clear regulations. Information concerning the process should be freely available for citizens affected. Further, not only must the decision-making be transparent: the enforcement of the decision is also subject to open procedural rules.¹⁹

Direct democratic decision-making processes can enhance transparency from many aspects but convenient procedural norms are needed. Popular initiatives must be registered and announced. The campaign evolves before the very eyes of the public both in course of the gathering of signatures and in the subsequent discussions. The implementation of the decision taken by referendum is also traceable by the public.

Compared to representative decision-making, where a significant part of the process runs behind the scenes – in hidden debates of party boards, members of the coalition, experts, interest groups and commissions – the steps of direct democratic actions are much more transparent.²⁰ Moreover, not only popular initiatives which were already launched but also the possibility to question parliamentary decisions and to set a veto on them, can increase the transparency of political decision-making. In Switzerland, the facultative referendum is a constant threat which motivates governments to draw affected groups capable of launching referendums into the

¹⁷ AUER (2009) op. cit. 40.

¹⁸ For a detailed analysis with historical antecedents see Adrian VATTER (ed.): *Vom Schächt- zum Minarettverbot. Religiöse Minderheiten in der direkten Demokratie*. Zürich, Verlag Neue Zürcher Zeitung, 2011.

¹⁹ YAP op. cit. 2.

²⁰ Cf. Peter MÜLLER: Elemente direkter Beteiligung auf Bundesebene. Ein Plädoyer für mehr Demokratie in der aktiven Bürgergesellschaft. In: Stefan BRINK – Heinrich Amadeus WOLFF (eds.): *Gemeinwohl und Verantwortung. Festschrift für Hans Herbert von Arnim zum 65. Geburtstag*. Berlin, Duncker & Humblot, 2004. 733–744., esp. 736.

decision-making process.²¹ Accordingly, they have access to information and to the views and arguments of the government.

On the other hand, the direct democratic process itself must be subject to rules which reveal contending parties and conflicting opinions. They must be provided convenient access to media, furthermore, they have to disclose their financial background. In US member states the ‘initiative industry’ had especially shown the importance of transparency in the field of referendum campaigns and led to disclosure obligations in order to inform voters about the amount and origin of financial means spent on advertising and propaganda.²²

Responsiveness means that state authorities and institutions endeavour to react upon the demands of concerned groups and individuals, moreover, within a reasonable time.²³

Direct democracy makes state authorities responsive. The popular movement – if it is strong enough – forces governments to act. The question is in this respect, whether governments and parliaments have formalized ways to react upon popular initiatives. *Direct initiatives* which are common in US member states allow very few possibilities to answer. Once an initiative has been launched, it is under the control of the initiators and finally is in the hands of the electorate. The whole process avoids the representative power; it can only take notice of the result which is binding.

Indirect initiatives – as it is in general in Switzerland and in German member states – have a different approach. The parliament can react upon the initiative here: it either accepts the proposal or refuses it. In Switzerland it can formulate a counter-proposal as well which will be put to the vote with the question of the initiative. This counter-proposal is hardly ever the opposite of the initiative: it is rather a refined, moderate version of the initiator’s proposal which expresses that the government has heard the voice of the people and offers an acceptable solution.

Furthermore the timeframe of popular decision-making is questionable. In this respect, direct democracy is not a quick process. Launching the initiative, registering the question, preliminary decision on its admissibility, gathering signatures, ordering and organising the referendum, verifying the result, possible appeals against it at judicial authorities, and finally, the implementation of the decision. It usually takes years or at least more than a year. On the one hand it must be clear that democratic decision-making processes are not always fast. The discussion, deliberation and conviction take time but these activities belong to the essence of democracy.²⁴ On the other hand it is also beyond question that direct democratic instruments should not

²¹ Cf. Alexander H. TRECHSEL – Hanspeter KRIESI: Switzerland: the referendum and initiative as a centrepiece of the political system. In: Michael GALLAGHER – Pier Vincenzo ULERI (eds.): *The Referendum Experience in Europe*. Basingstoke, Macmillan, 1996. 192., 202.

²² SCHILLER op. cit. 124.

²³ YAP op. cit. 2.

²⁴ For more detailed argumentation see Otmar JUNG: Grundsatzfragen der direkten Demokratie. In: Andreas KOST (ed.): *Direkte Demokratie in den deutschen Ländern*. Eine Einführung. Wiesbaden, VS Verlag für Sozialwissenschaften – GWV Fachverlage GmbH, 2005. 330–332.

be means of obstruction against important decisions. This problem leads further to the question of efficiency.

5. Efficient, consensus oriented and accountable

Efficiency or effectiveness requires that institutions and processes achieve their goals while making the best use of resources.²⁵ In this regard the majority of scholars are of the opinion that direct democratic processes may reduce the efficiency of a political system in the short run. Popular rights can restrict the government's scope of action. The more participants have a share in decision-making, the more information, opinion-forming, co-ordination, conflict-regulation, mobilisation etc. are required.²⁶

However, these additional costs may be recovered in the long run. Profoundly elaborated laws are lasting. The wider acceptance and the stronger legitimacy of decisions contribute to a stable political system. Direct democratic decisions are easier to enforce, the costs of resistance decrease.²⁷

A precondition for this seems to be a *consensus oriented* society which accepts decisions which were made collectively. This is also an element of good governance. From this point of view direct democracy can be an effective tool. Not only because questions decided by the people as highest instance are hardly ever doubted. The possibility itself that people can launch bottom-up initiatives against governmental decisions can promote efforts to reach consensus in an earlier stage of the process. The constant threat on behalf of affected groups which are capable of launching referendums do not only have an effect in singular cases when actual governments respect the attitude of such groups and accept their proposals. In Switzerland, popular rights resulted in a negotiated democracy, in a system of concordance or consensus democracy.²⁸ Its mechanism can promote consensus in the opposite direction as well: an adequate response of the representative power can also induce interest groups to accept the government's solution. Between 1974 and 1986 44 initiatives were registered. They triggered 8 counter-proposals and 14 other proposals of the parliament. As a consequence one-third of the initiatives were withdrawn.²⁹

And finally: *accountability*. One could say: the more participants in the decision-making, the less responsibility and accountability. Who can hold the electorate itself or citizens responsible whose votes turn out to be harmful to society?

However: this objection would be valid for parliamentary decisions as well. How many electors consider singular decisions of the parliament when they cast their vote

²⁵ YAP op. cit. 3.

²⁶ MÖCKLI (1994) op. cit. 350. – partly based on Leonhard NEIDHART: Regierbarkeitsfragen in der direkten Demokratie. *Schweizerisches Jahrbuch für Politische Wissenschaft*, 1983. 28.

²⁷ MÖCKLI (1994) op. cit. 350.

²⁸ TRECHSEL – KRIESI op. cit. 202.

²⁹ SCHILLER op. cit. 108.; Kris W. KOBACH: Switzerland. In: David BUTLER – Austin RANNEY (eds.): *Referendums Around the World. The Growing Use of Direct Democracy*. Washington, AEI Press, 1994. 147.

in the general election? And who can call to account the elector if it turns out that their preferred party governed the country horribly?

Direct democracy does not offer a special tool for calling the electorate to account, but it can contribute to a more responsible attitude of citizens. In the 1960's, many Italian guest-workers immigrated to Stein, a village situated along the Rhine. As members of the Catholic Church they could take part in the matters of the parish. They gradually obtained majority in the parish assembly and reduced the church tax to zero percent. As a result of this, the Swiss members of the catholic community explained to the Italians that without church tax there will be no priest, no divine service, no baptism, church wedding and Christian burial. Some months later the Italians voted for the re-establishment of a reduced church tax.³⁰ They will certainly not abolish church tax the next time. Open debates and the fact that they felt the consequences of their own decision made them responsive.

The learning process of democracy can last long but in the end it may contribute to good governance.

³⁰ Hugo BÜTLER: Direkte Demokratie – aus schweizerischer Sicht. Dinner Speech am Speyerer Demokratieforum, Schloss Hambach, 28. Oktober 1999. In: Hans Herbert von ARNIM (ed.): *Direkte Demokratie. Beiträge auf dem 3. Speyerer Demokratieforum vom 27. bis 29. Oktober 1999 an der Deutschen Hochschule für Verwaltungswissenschaften*. Berlin, Duncker & Humblot, 1999. 178. (See also in Hungarian: Hugo BÜTLER: Közvetlen demokrácia és globalizáció. Svájci tapasztalatok. *Európai Szemle*, 2000/2. 88. Translated by Glavina Zsuzsa.)

