To save democracy, reform it

The election just passed has made many people wonder about the continued value of democracy. If an election can still be won using the dark rhetorics of earlier, troubled times, then you can see their point. Indeed, ever since there have been democracies, there have been critics of democracy concerned about its tension with good governance and deliberation. Aristotle, and much later John Stewart Mill, for example, preferred rule by 'the best men' able to deliberate well 'about the ends of politics'. Today, in light of worldwide populist rage, there are many who share that view.

We are not among them. In Graeme Orr and my book, *The Law of Deliberative Democracy,* we ask, instead: How can we improve democracy? How can we make it more deliberative – more informed, reflective, and flexible? By what means can we make it more inclusive of different kinds of people, views and ideas? And can we ever make democratic decisions less impetuous, less divisive and less myopic?

If we could redesign the institutions of politics to accommodate, at once, both democracy and deliberation, we might be able to mitigate the current crisis in democracy. This so-called 'deliberative democracy' model has attracted many political scholars excited by its possibilities (and this is not normally a very excitable group). It is never easy to create more deliberative politics, and it cannot be done all at once; but we can improve deliberation by increments.

Consider some possibilities. These are real and proposed laws that might aid deliberation.

First, laws can control media reporting of opinion polls during the electoral campaign. That may mitigate some of the focus on the campaign as a horserace. In the US election well over 1000 polls were reported. Where did that leave reporting on issues of substance? Did it help breed the severe partisan competitiveness that tends to override open-minded consideration of policy?

Second, laws can regulate the release of prosecutorial information during campaigns – when allegations may be prejudicial and there is too little time to refute them. Anti-corruption commissions do not declare every referral they receive. Sitting US presidents are already immune from criminal prosecution, precisely due to the fear that prosecutors will use the powers of their office to undermine a duly-elected president. Why not extend this protection to the campaign itself?

Third, laws can impose 'open primaries' where everyone, regardless of party membership, can vote for party nominees – and not just the fired up partisan base that tends to select the most extreme candidate.

Fourth, laws can impose requirements of truth in political advertising. That much is done in parts of Australia without appreciably chilling speech.

Fifth, laws can create systems of free TV and radio slots, focused on the positive presentation of positions and not negative advertising, to allow the parties to get their messages out on a sustained basis.

Still, you may ask, how we can talk about deliberative democracy after the year democracy has just had: a year of craven acts of misinformation, partisanship and demagoguery, not only in the US but in the UK, the Philippines and beyond. Our answer is that it is especially *after* democratic failures that we need to talk about deliberation. If democracy is not yet deliberative enough, we need to ask – as an urgent matter – how it can be made so.

The main problem with the reform schemes we have listed, though, is that most either have been, or likely would be, stuck down by courts in most liberal democracies. Laws might try to promote better political deliberation. But the practice of law in the courts is another matter. Deliberative democratic schemes have fared poorly when judicial filters are imposed on them.

Back in 2000, after another traumatic US election, Ted Cruz was just a young lawyer working on the Florida recount. He said: *'One of the realities of the recount and life is that lawyers and political folks don't really speak the same language'*.

We wouldn't always agree with Ted Cruz, but we agree with him on this. Courts hearing cases in election law must decide whether to uphold high-minded deliberative democratic initiatives. They must judge such schemes based implicitly on the values that they think should drive politics. Unfortunately, deliberation is not – at least not yet – part of the pantheon of traditional political values recognised in law.

Deliberation is the dark matter of the law. It is overshadowed by a triad of traditional values: liberty, equality and integrity. A main argument in our book is that, in a *deliberatively thick* conception, each traditional value is not rival to, but is actually

compatible with, deliberation. Deliberation is even part-and-parcel of each of these values.

For example, deliberation is not a value to be balanced against, let alone trumped by, communicative liberty. After all, deliberation itself is a form of communication. Similarly, deliberation is not opposed to equality; realising deliberation actually requires a deep form of political equality and inclusion. Integrity, too, can be viewed as deliberative: as politics based on ideas rather than naked power.

These are abstract concepts. But they have important consequences, first for the outcome of legal cases, and ultimately, and most importantly, for the better conduct of elections. Courts have played spoilers to many of the best-laid schemes of deliberative democrats. That, we think, is because deliberative democracy has yet to penetrate legal consciousness, and because law has yet to be taken seriously by deliberative democrats. We think it's incumbent on both sides to bridge their two solitudes.

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