

Remote Voting by Electronic Means – Some Legal and Political Objections.*

Introduction.

In this paper I am going to discuss Remote Voting by Electronic Means (RVEM) This is the process whereby voters cast their ballots for their representatives in supranational (e.g., for the European Parliament) national, or regional/local elections via the workplace or other site unsupervised by an election official who is charged with ensuring the secrecy of the vote. It is this lack of appropriate supervision that characterises electronic voting as ‘remote’; no objection is raised to the use of terminals in polling booths in supervised polling stations, whilst strong objections are raised to remote voting. The main focus of this paper is upon remote voting in the home or in other social settings.

Legal Provisions.

Elsewhere I have argued that there are strong legal objections to the practice of remote electronic voting.¹ Here I will briefly summarise the argument. Remote electronic voting carries with it grave risks to the secrecy of the ballot. If a person votes in the workplace by means of the Internet, his or her employer can easily intercept the vote or simply watch the voter. Voting in the home by Internet, digital interactive television or telephone may easily degenerate into a group activity in which the vote is not secret. Secrecy of the ballot is a fundamental principle of democracy. The secrecy of the ballot has been guaranteed under English law since the nineteenth century, it has also been enshrined in a number of international human rights instruments, notably Article 21(3) of the Universal Declaration of Human Rights,² Article 25 of the 1966 International Covenant on Civil and Political Rights,³ and most importantly into Article Three of the First Protocol of the European Convention of Human Rights. This has been incorporated into English law by virtue of the Human Rights Act 1998. The relevant provision of the Protocol states:

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¹ See Watt, *Legal Issues concerning the Implementation of Electronic Voting*, published at <http://www.local-regions.odpm.gov.uk/egov/e-voting/01/index.htm>, Watt and Birch ‘Electronic Voting: Free, Fair and Secret?’ delivered at the Robert Schuman Centre for advanced studies, European University Institute, Florence 10-11 May 2002, and Watt, *Human Rights and Remote Voting by Electronic Means*, Representation (forthcoming)

² General Assembly Resolution 217A (III) of 1948. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

³ Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

...

To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

...

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The precise legal meaning of the term ‘secret ballot’ has not been defined and there have been no cases in the European Court of Human Rights. However, some national decisions do point towards its meaning. Firstly, there is a leading Irish case, *McMahon v The Attorney General*.⁴ This case stemmed from two combined challenges to Irish election law and raised, furthermore, an interesting constitutional point from the liberation from Ireland’s colonial past. The first challenge was to the practice, common in many countries, of keeping a separate record of the characteristic number of the ballot paper issued to a particular voter. It is possible by combining this list with the actual ballot papers to determine how an identified voter cast his or her vote. Clearly there are safeguards to prevent this happening.⁵ Nonetheless the Irish Supreme Court held, affirming the ruling of Pringle J below, ‘that the words "secret ballot" in s1, subs4, of Art.16 of the Constitution of Ireland 1937 mean a ballot in which there is complete and inviolable secrecy. Clearly, the words ‘secret ballot’ in the 1937 Constitution are those of Article 3 of the First Protocol to the European Convention of Human Rights. Furthermore, the Court held that that any provisions of the 1923 Ballot Act that enable a voter’s completed ballot paper to be identified are inconsistent with the provisions of the 1937 Constitution. However, in making this ruling the Court recorded a strong view that fraudulent ballot papers could be scrutinised. Furthermore, in the second part of the challenge, which again raised the issue of the rights afforded to disabled voters, the Supreme Court held that there were circumstances in which secrecy could be restricted in order to assist the disabled voter. However, in this part of the ruling Ó Dálaigh CJ disapproved Pringle J’s ruling below where he held that a blind voter using the services of a companion to record his vote was waiving his right to secrecy. Ó Dálaigh CJ held that the Irish Constitution regarded the use of a companion’s services as a minimal derogation from the strict secrecy of the ballot required by the Constitution caused by the circumstances of the voter and that the Constitutional provision guaranteeing secrecy of the ballot remained intact. The words of the judgment are unambiguous. Referring to the fact that the limited secrecy enjoyed by disabled voters is not secrecy Ó Dálaigh CJ said ‘A law which contained provisions which enabled (a disabled person) to vote with the maximum degree of secrecy compatible with his incapacity would not only be desirable but would be necessary to implement the right to vote conferred on such person by the Constitution. I do not look upon the exercise, with less than full secrecy, of the incapacitated voter’s franchise as being based on the principle of waiver by the voter; willy-nilly⁶ and of necessity his vote cannot be cast otherwise.’⁷

The plain words Ó Dálaigh CJ in *McMahon* seem particularly apposite: ‘(The Constitution) speaks of voting by secret ballot. The fundamental question is: *secret to*

⁴ [1972] IR 69.

⁵ In England, for example, packages of ballot papers and the lists described may only be opened pursuant to the Order of a Court and may be scrutinised only upon the Order of a judge obtained after an inter partes hearing. For criticism of these safeguards as inadequate, see *Ballot Secrecy* (London, Electoral Reform Society/Liberty 1993).

⁶ Lit. ‘Whether he likes it or not’.

⁷ [1972] IR 69 at p.105.

whom? In my opinion there can only be one plain and logical answer to that question. The answer is: *secret to the voter*. It is the voter's secret. It is an unshared secret. It ceases to be a secret if it is disclosed.'⁸

In summary, the *McMahon* judgment provides that under the Irish Constitution any interference with the secrecy of the ballot has to be necessary in order to allow the voter to cast the ballot and must not be construed as a waiver by the citizen of the constitutional right.

The second case which is of assistance is that of an application for a trial of internet voting for the French Presidential election in Vandoeuvre-lès-Nancy which was rejected by the *Commission nationale de l'informatique et des libertés*, in its Deliberation No 02-022 of 2 April 2002 on four grounds: that they were insufficient safeguards against personation, that home voting was susceptible to influence and pressure being placed upon voters, that the server being used was not subject to supervision by the national authorities, and that it was possible to trace individual voters.

Grounding The Law

It has been demonstrated above that the current law seems to exclude RVEM, but for this law to have authority and thus for it not to be challenged or changed as merely inconvenient or wrong, we need to provide independent reasons which lead to the same conclusion⁹ – that RVEM is inimical to democracy. It is proposed to undertake this task of providing independent reasons by examining and criticising the work of Pierre Lévy of the University of Ottawa given in a paper at the Robert Schuman Centre for Advanced Studies, European University Institute, Florence in May 2002¹⁰ and based upon arguments in his book *Cyberdémocratie*.¹¹

Cyberdemocracy?

Lévy takes the view that 'on-line voting is becoming increasingly common'¹² and 'in the cyberdemocracy of the future, elections, votes and referenda will take place in cyberspace, like so many provisional conclusions of a conversation involving more and more increasingly well informed people.'¹³ Lévy opines that 'The fundamental act of democracy is not voting but *deliberation*,¹⁴ in other words the exercise of collective intelligence in formulating laws and taking major political decisions'. Leaving aside the seemingly sterile debates as to whether deliberation is the correct word, for debate seems more accurate, and whether deliberation (or better, debate) is an act, it seems that Lévy is drawing an unnecessarily sharp distinction between debate and voting and is erroneously prioritising debate. Whilst it may be that Lévy is correct in prioritising debate in the context of a direct democracy although, as we

⁸ [1972] IR 69 at p. 106. The italicisation is in the judgment.

⁹ This reasoning derives from Joseph Raz's work on the authority of law; see *The Morality of Freedom* (Oxford; Clarendon, 1986) ch 3.

¹⁰ Towards Cyberdemocracy.

¹¹ Paris: Odile Jacob, 2002

¹² Lévy, n10. at page 9

¹³ Lévy, n10. At page 9

¹⁴ Italicisation in original.

shall see, there are weaknesses in this view; however he is quite wrong to make this claim in the context of a representative Burkean democracy, where citizens choose between the platforms of political parties to form a government. Once a party enters government, it is generally 'safe', at least in Britain, for the following four to five years. In 1983 Kavanagh¹⁵ wrote that some 75% of voters voted in General Elections with about one quarter of the population expressing a real interest in politics, since the former had fallen to 60% in 2001 we can now realistically expect that no more than some 15% of the population has an active interest in politics.¹⁶ Given these preliminary observations, it seems more accurate to propose that fundamental to the practice of democracy is the triad: debate, deliberation, voting. Each of these words is used with a special meaning that will be set out below. It seems, furthermore, that in a representative democracy voting is the most important part of the triad for it is only by means of the casting and accumulation of votes that a party may gain power.

Lévy argues that the widespread introduction of electronic means of communication into democratic practice will, in due course, lead to the formation of a *cyberdemocracy* where the entire polity, which may well be worldwide, will form a *virtual agora* where matters of political concern will form the subject of on-line debate and be determined by electronic voting. Thus, RVEM is integral to Lévy's vision of an on-line new world, for citizens cannot be expected to leave their terminals for a dash to the polling station. It is suggested that Lévy is not brave, but merely foolhardy, for there are a number of ways in which cyberdemocracy can fail at each stage in the triad of debate, deliberation and voting. In order to demonstrate these failures we need to compare what may happen in the virtual *agora* with its Athenian model.

Debate.

'Debate' may seem at first sight to be a misleading term for the process whereby citizens acquire information about the range of political parties on offer to them as voters. Citizens' activity is often limited to asking questions of politicians with little opportunity to put points of their own or to make political speeches on their own account. Actual debate is limited to that between the political parties desirous, however fancifully, of gaining power; most voters content themselves with observing the debate. Lévy clearly wishes to reinvigorate the spirit of the *agora* (which, as we shall see, is rather different from its substance) which will 'lead to the emergence of new modes of political information and debate'¹⁷ involving its 'citizens in deliberations on the law in virtual *agoras* (sic)¹⁸ The representatives, chosen by electronic vote, will debate and decide on laws in networks of virtual parliaments that would be fully accessible to all citizens'¹⁹ Lévy argues that the virtual *agora* would 'give everyone the chance to voice their opinion'²⁰ There is currently little evidence to suggest that any such development is taking place for the Web seems to be dominated

¹⁵ Kavanagh, D. *Political science and political behaviour* (London; Allen & Unwin 1983) Ch 5.

¹⁶ See, furthermore, the Preface to *Elections in the 21st Century: from paper ballot to e-voting. The report of the Independent Commission on Voting Methods* (London ERS, 2002) which sets out the general decline in political participation

¹⁷ Lévy, *Towards Cyberdemocracy*, at pp 1-2

¹⁸ *Agorae*.

¹⁹ Lévy, *Towards Cyberdemocracy*, at p 16

²⁰ Lévy, *Towards Cyberdemocracy*, at p6

by sites offering pornography, music, opportunities for gambling and shopping rather than politics; people do not seem to be voicing political opinion.

Furthermore if we examine what happened in the Athenian *agora* we observe that it was highly structured with strict qualifying conditions,²¹ and with stewards who 'attend to the orderly conduct of the meeting, bring forward items that have to be dealt with, act as tellers, and generally direct the meeting.'²² It seems that little could be further from the cacophony of the Internet.

The most damaging evidence concerning attendance at the Assembly in the *agora* is, however given by Aristotle where he reveals that citizens were paid for their attendance,²³ Rodewald making it clear that attendance at the *agora* was seen as a chore and that the only way to ensure a good attendance was to make some form of payment.

In conclusion, it would seem that Lévy would need to present strong empirical evidence that people read political websites and engage in political debate online. Such websites would need to be sufficiently widely read so as to broaden political debate. Clearly a website might have, for example, 100 'hits' each day, but this is no measure of its popularity or penetrance for such a result might well be achieved by a group of regular readers logging onto the site repeatedly. Given the marked unpopularity of television exposure of party election broadcasts, party political broadcasts and political programmes generally, it is doubted that Lévy would succeed.

Deliberation

In his discussion of deliberation, which I suggest is more properly called debate, Lévy argues that political 'deliberation' is the 'exercise of collective intelligence in formulating laws and taking major political decisions'. I do not disagree in principle, if the word 'debate' is substituted for 'deliberation' and the points made in the preceding section are addressed. It will be argued below that 'collective intelligence' has no part in true deliberation. By deliberation I mean the process whereby an individual voter, armed with whatever information s/he thinks is relevant, selects a party or candidate for whom to vote.²⁴ Political scientists have expended much effort in determining voters' reasons for voting and empirical studies have revealed a large number of differing motivations. Suffice it to say that reasons for voting for, or as a reaction against, particular parties or candidates include considerations of policy, personality or other characteristics of candidates or party leaders, real or perceived competence in government, the political culture of the country, the political socialisation of voters and a number of other factors. No doubt that small fortunes are spent by political parties in trying to influence voters' selections. However these matters are beyond the scope of this paper, the simple claim is that deliberation is simply the process whereby voters choose for whom to vote. This process is, by its nature, individual and secret. The individual voter makes his or her provisional choice for whom to vote in a position - as it were alone - in the privacy of their own

²¹ Rodewald, C., *Democracy: Ideas and realities* (London; Dent, 1974) at p 6 Aristotle *Constitution of Athens* 42; p12 Aischines *Against Timarchos* 27-32

²² Rodewald, p.8, *Aristotle Constitution of Athens* 47

²³ Rodewald, p.10, *Aristotle Constitution of Athens* 62

²⁴ Or, for that matter, positively to abstain from voting.

mind. The product of deliberation, that is to say the reason for voting in a particular way, be it good, bad, or indifferent, is the voter's *prima facie* reason for voting. It is not denied that such a *prima facie* reason could have become ingrained in a person over a period of time and be against their previous or 'natural' inclinations. One could well imagine a person brought up in a household where socialist values were inculcated marrying a person of a liberal persuasion and being 'converted' to liberal values and voting intentions, however such a gradual change of views does not seem objectionable simply because their views have, in fact, changed. The point is that a *prima facie* reason for voting is, in fact, the voter's own internal²⁵ reason for voting. The problem arises where a person having deliberated and arrived at a *prima facie* or internal reason for voting is persuaded by some sort of external pressure to vote in some other way.

Voting

The act of voting is where the 'word is made flesh'²⁶ and mere speculative reason becomes the practical reason for voting. In English election law, at least where voting takes place in a supervised polling station, it is where

*2) The voter, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station and there secretly mark his paper and fold it up so as to conceal his vote, and shall then show to the presiding officer the back of the paper, so as to disclose the official mark, and put the ballot paper so folded up into the ballot box in the presiding officer's presence.*²⁷

Here we can, at least, presume that a voter is acting in accordance with his own motivation. John Plamenatz²⁸ here provides some useful distinctions:

Motives from which men desire to act we will call desired motives; whereas motives from which they desire not to act we will call undesired motives. Freedom, in its primary meaning, can therefore be defined as action from a desired or neutral motives; whereas motives from which they desire not to act we will call undesired motives. Freedom in its wider secondary meaning we will call freedom from restraint, and it will be defined as action from a motive other than an undesired motive which is the effect in the agent's mind of another man's, or other men's, actions done with a view to this effect. Freedom, in its narrower secondary meaning, we will call freedom from coercion, and it will be defined as action from a motive other than an undesired motive which is the effect in the agent's mind of another man's, or other men's, actions done with a view to this effect, and consists in a desire to avoid threatened consequences which are either painful themselves or else the thought of which is painful.²⁹

²⁵ I am grateful to Sheldon Leader for reminding me of this useful term and its opposite - external. The argument suggested by Sheldon Leader will be examined below and rejected.

²⁶ John 1:14.

²⁷ Rule 37 of Schedule 1 of the 1983 Representation of the People Act,

²⁸ Plamenatz, J.P., (Oxford, OUP, 1938) *Consent, freedom & political obligation*.

²⁹ Plamenatz, above n.28 at p. 125.

In Plamenatz's secondary meanings of freedom we can see generalized descriptions of the matters that are declared to be election offences by sections 113-115 of the Representation of the People Act 1983 – bribery, treating, and undue influence – clearly similar offences appear in the election law of many countries. Surely it is common ground that as citizens of democracies we all agree that restraining or coercive practices ought to be excluded from elections, since a voter who is subject to restraint or coercion so that she or he votes for other than his / her choice is not free. However, Plamenatz's primary meaning is of more interest, for here we are dealing with matters which neither amount to restraint or coercion. Here we see that for an actor to be 'unfree' she or he has to act according to an undesired motive. What counts as an undesired motive? An example may help.³⁰

Some years ago, I stood as the candidate in a County Council election for a major political party. I knocked on a door canvassing for votes. When an elderly man answered the door, I identified myself and asked whether I could count on the voter's support. He said very loudly that I certainly could not. He was going to vote for his son- the candidate for another party. Then, pulling the door almost closed behind him he descended onto the step and said in an undertone 'Yes, of course I'll vote for you mate, I can't understand my son going over to (that other party). But I can't tell my wife that can I?' Pushing the door open, he repeated loudly his intention to support his son. Suppose that he had voted in the home as proponents of remote electronic voting may suggest – by Internet, digital interactive television, mobile or static telephone or other electronic technology from their home – what would be the result? The simple answer is that we do not know – he may have voted for me – in accordance with his normal political beliefs -, or for his son, in accordance with his wife's wishes or, perhaps, his desire for domestic harmony.

It has been suggested that a motive, which comes from a person other than the voter, is an external motive and we ought, as a matter of public policy, to diminish the effect of external motivations wherever possible.³¹ This attractive proposition is however wrong. The motive is neither external nor, contrary to Plamenatz's suggestion is it undesired. Our voter (call him John) is subject to some influence from his wife (call her Mary). It seems certain that Mary does not want to force (coerce or restrain) John to vote for their son, for we may presume that she see that this is unfair. Neither would she want John to vote in accordance with her wishes; an adoption of an undesired motive by John would offend against her sense of fair play. Mary wants John to want to vote for their son, but John does not want so to do. Mary wants her desire to become John's desire – this will achieve the position of greatest domestic harmony – both John and Mary will be happy. However, suppose that this is not about to happen. How can we deal with this?

a) John can vote in the home in his wife's view in accordance with his political conscience – this will cause disharmony.

³⁰ For empirical evidence in support of the proposition that people using mobile telephones to 'text' others using an SMS message service, see Weilenmann and Larsson 'Local use and sharing of mobile phones' in Brown, Green and Harper (eds) *Wireless World* (London, Springer-Verlag, 2002) at p. 95 in which it is concluded that teenagers engage in both mobile telephone and 'conversation' sharing: 'The remote communication, i.e. the phone calls they receive or make, as well as the SMS messages they receive or send, are accounted for in the ongoing local interaction. Teenagers thus share the communication they take part in with their co-present friends. Not only the communication but also the phone itself is often shared.'

³¹ I am grateful to Sheldon Leader for this suggestion.

- b) John can vote in the home in his wife's view against his political conscience – this will cause him to feel resentful.
- c) John can vote in the home but out of his wife's view – no matter how he votes this will cause suspicion. She will say, 'Why are you hiding your vote?'.
- d) John can go to the polling station and vote there. This suffers from the same problem faced in c) above.
- e) John can refrain from voting, perhaps he can persuade Mary so to do. The two parties 'trade' votes and both may feel resentful.

The point is that in all of the cases John and Mary are made less happy by the vote being made available at home. If Mary and John were, on the other hand compelled to go to the polling station to cast their vote in secret, whilst it may be that they would not attend because of inclement weather, the worst case of deception or disagreement which could occur is that John would repeat his earlier deception of Mary, where he surreptitiously told me on the doorstep that he wanted to vote for me rather than his son. The issue of Mary and John staying away from the polling station might be resolved by the opportunity to vote being made available in a far wider selection of locations, for longer times but in a number of privacy booths. These need not be elaborate³² if there are signs outside the booths emphasising the necessity to secure privacy for voters and the booths were small; a single polling official could supervise many booths if the polling machines therein had access to a real-time online register.

Lévy, in his enthusiasm for voting from wherever one might be and for cyberdemocracy in general, misses an important point about voting in the Athenian *agora*. The ancient Greeks seemed to have realised that being identified with one's vote may well lead to difficulties where the matter being subjected to ballot is controversial. Andokides³³ writes that 'No law applying to an individual may be passed, if it does not apply equally to all Athenians, unless six thousand votes have been cast in favour by secret ballot.'

Conclusion

I will conclude this article with a bold claim -not only is RVEM unlawful but that its unlawfulness was welcome. Unlawfulness is welcome because whilst RVEM may allow people to vote more easily it threatens one of the core values of democratic societies – the principle of the secrecy of the ballot. Why is ballot secrecy so important, indeed so important that it, along with the right not to be tortured or subject to inhuman and degrading treatment under Article 3 ECHR, is recognised as an absolute right in the European Convention of Human Rights? In the secrecy of the ballot booth a voter may vote any way she or he chooses and may do so for any reason, be it good or bad. She or he is answerable to no one save his or her own conscience. If the secrecy of the ballot is degraded the possibility arises that the voter will become answerable to someone else. If voting takes place in a family group or amongst a group of friends the conscience of individual voters may be passed to another or others for reasons of group loyalty or family bond. In any of these cases the voter is, whether they like it or not, degraded just as surely as if they had been tortured.

³² See *Nicolson & Others v The Provost, Magistrates, Councillors of Wick and Others* in which it was said that a polling booth should be constructed to provide reasonable privacy.

³³ Andokides, *On the Mysteries* 82-87, reproduced in Rodewald at p 20.

One of the central policy commitments of the three main political parties contesting elections in Britain might well be summed up in the words of Joseph Raz – *the state has a duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy* (which consist) *of the availability of an adequate range of options and the mental abilities necessary for an autonomous life*.³⁴ That is not to say that the three largest parties agree on the means whereby such freedom could be provided. However a commitment to freedom seems to start with a commitment to the provision of freedom at the ballot box. Being free at the ballot box means that one must be free to exercise one's own choice and, perhaps, to be able to lie about how one has voted. One's parent, child or partner may wish one to vote in a particular way and one may well have reasons for letting them think that one has, in fact, voted in that way. The act of secret voting, not voting *simpliciter*, is the defining act of the political citizen in a democracy and we ought to respect laws which protect that act.

³⁴ Quotations from Joseph Raz; *The morality of freedom* (Oxford; Clarendon 1986) p.425