

C.1 The Algorithms of Law: Essays

Data Driven Democracy (in the West): A Look from the Field and the Quantitative Turn

Coalition for Peace & Ethics

Prepared by

Larry Catá Backer¹

Like Marxist-Leninist systems in the 21st century, private organizations that believe themselves a necessary component of markets driven vanguards are working toward the implementation of comprehensive data driven systems of punishments and rewards grounded in assessments measured against a preferred ideal. Chinese Social Credit systems, the term generally used by Western people to reference the constellation of Marxist Leninist projects, tend to be demonized and condemned by the very actors in Western liberal democratic systems who then seek the benefits and structures of those very forms of popular management but now tilted toward their own ends.²

This reminder that hypocrisy across "competing" systems, however, is not meant to condemn (or laud) either expression of control through data driven metrics based systems or the ideologies from out of

¹ Member, Coalition for Peace & Ethics, also holds an appointment as the W. Richard and Mary Eshelman Faculty Scholar, Professor of Law and International Affairs at Pennsylvania State University (B.A. Brandeis University; M.P.P. Harvard University Kennedy School of Government; J.D. Columbia University) where he teaches classes in constitutional, corporate, and transnational law and policy. Professor Backer is a member of the American Law Institute and the European Corporate Governance Institute. For further information see his website, Backerinlaw, available [<https://backerinlaw.com>].

² See, e.g., Larry Catá Backer, 'Next Generation Law: Data Driven Governance and Accountability Based Regulatory Systems in the West, and Social Credit Regimes in China,' (2019) 28 Southern California Interdisciplinary Law Journal 123-172.

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which it is made to seem natural that the politics of such control are expressed through markets, vanguard parties, or elites formed on the basis of technocratic or wealth based private collectives (foundations, non-governmental organization, and the like). Nor is it meant to assess the "value" of the ideal around which these metrics based systems are constructed, which themselves are meant to reduce the normative core premises of a political society to its quantitative "essence." Neither is it necessary to condemn or praise the forms that rewards and punishments take. The reminder of hypocrisy across the political control spectrum, and the pious catechisms that its leadership cores naturalize within its populations through "statistics"³ is merely to note a certain convergence between data driven governance in the liberal democratic camp (through markets and private actors deeply embedded in public organs) and those in the Marxist Leninist camp (through state direction or coordination and in partnership with state managed or directed enterprises and other organs).

One such effort, the *Economist Intelligence Unit's Democracy Index 2020: In Sickness and in Health?* (released 2021),⁴ merits a deeper analysis. The Economist Intelligence Unit, established in 1946 under conditions of conflict with Soviet Imperial and ideological threat serves as the research and analysis division of The Economist Group. The 2020 Index suggests the working style of markets driven and privatized discipline of the core ideologies of the liberal democratic camp through a cultivation of disciplined approaches by its research and academic arms. The ideology of democracy is not driven by normative principles, but increasingly by indicators that reduce those norms to quite specific markers of conduct, of polling results, and of conditions that together are meant to incarnate the ideal operation of a democratic state.

Unlike normative markers, the reduction of democratic ideology to a set of indicators also makes it possible to fine tune the process of identifying and correcting defects, of monitoring, and of disciplining deviance among states. It also suggests the growing authority of data driven ratings systems on the disciplining of ideology and its application in public organs. This year, the report noted a quantitative decline, it "finds that just 8.4% of the world's population live in a full democracy while more than a third live under authoritarian rule. The global score of 5.37 out of ten is the lowest recorded since the index began in 2006."⁵

³ For the classic discussion, see Michel Foucault, 1975–76 [2003]. *Society Must be Defended: Lectures at the Collège de France 1975–76* (Penguin, 2003 [1975–76]).

⁴ Economist Intelligence, 'Democracy Index 2020: In sickness and in health?' (February 2021) accessed <https://www.eiu.com/n/campaigns/democracy-index-2020/?utm_source=economist-daily-chart&utm_medium=anchor&utm_campaign=democracy-index-2020&utm_content=anchor-1>

⁵ Sere, 'Global democracy has a very bad year: The pandemic caused an unprecedented rollback of democratic freedoms in 2020,' *The Economist* (2

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The big loser, of course, was the United States, now rated a flawed democracy because of the quantitative effects of Mr. Trump's supporters to accept the results of the election. Ibid. In the end, it now appears, democracy is a matter of data driven metrics overseen by members of the

Systems of data driven governance--again built on the construction of an "ideal" type against which the conduct of a group can be measured, and once measured, judged and corrected through systems of punishment and reward--tend to focus on sub-national systems, or on international private actors. Yet there is nothing in the form or methods of such approaches that suggest any limitation on its use. Indeed, one is now beginning to see that way that private actors are attempting to use the methods of data driven governance to hold state and state systems accountable. This is particularly interesting when these private actors seek to undertake the role reserved to the political vanguard (Communist) party in Marxist Leninist systems through the development of such data based accountability systems through private markets that are meant to target (and manage) the responses of the democratic masses in liberal democratic states.

That, of course, is precisely what is at play when private organs seek, for example, to construct an ideal of a liberal democratic state, and then to subject a group of target governments to measurement against that ideal.⁶ The process involves the determination, by that group, of the constituent parts of the ideal liberal democratic state, the transformation of those ideals into measurable objects, and the valuation of those objects (in themselves) and within an aggregated set of relationships (the quantitative analytics) that then permit two forms of ranking. The first is as against the ideal type against which all are measures. The second is against each other through the development of hierarchies of rank that can then be grouped for judgment (for example as "full" and "flawed" democracies and beneath them (as measured against the liberal democratic ideal) as "hybrid" or "authoritarian" regimes.

In effect, one engages here is the fundamental work of democratic politics--one works on the construction and maintenance of the fundamental ideological line of a political-economic system. In Marxist-Leninist states that is a responsibility of the vanguard party and essential to the exercise of its political power--autonomously or through the administrative organs of state.⁷ In liberal democratic states that

February 2021); accessed <<https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year>>

⁶ On this structuring framework see, Larry Catá Backer, and Matthew McQuilla, 'The Algorithmic Law of Business and Human Rights: Constructing a Private Transnational Law of Ratings, Social Credit, and Accountability Measures,' (1 September 2020); accessed <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3684196>

⁷ See, Jiang Shigong, 'Chinese-Style Constitutionalism: On Backer's Chinese Party-State Constitutionalism,' (2014) 40 40(2) *Modern China* 133-167; Larry Catá

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function is disaggregated and devolved among the people who, it might be assumed, have some control over the construction and application of the ruling ideologies against which their own behaviors must be judged and to which they must conform to remain loyal participants in the polity. Over the last several centuries, however, the effective management of founding ideology has been exercised much more decisively by those groups near the top of the organizational hierarchies of liberal democratic states. In the 18th century it might have been vested in large landowners and business elements (United States) or in leading elements of the aristocracy (UK and Europe).

By the 20th century, in line with the consequences of industrialization, effective management became more widely shared among leading groups (as measured by their control over the levers of politics, economic, religion, and societal organization). These included in addition to the remnants of old aristocracies and the early generation owners of the great institutions of industrialization, commerce, and finance a rising group of professionals now essential to the operation of the political and social order. These included bureaucrats (the managers of people and processes); academics (both in and out of the academy), and technicians (those who could rationalize operations as a function of norm-objectives). The professionalization of the management of ideology became more pronounced after 1945 when it appears to have been thought to be too dangerous to leave this to the masses--rather the structures of democratic "engagement" were developed to provide the masses a means of participation, but under well controlled conditions. There are lots of examples of this sort of management by professional bureaucrats throughout the organization of liberal democratic society.⁸

This exercise of the liberal democratic "mass line"(群众路线)⁹ approach (from the people to the people) has become an important element in the disciplining and advancement of the liberal democratic model. Traditionally the working style of this management was inherently qualitative--through the development of norms and its application to (or against) the leading elements of elected government and the

Backer, 'Party, People, Government and State: On Constitutional Values and The Legitimacy of the Chinese State-Party Rule Of Law System,' (2012) 30 *Bastion University International Law Journal* 331-408.

⁸ Larry Catá Backer, 'On the Practice of Town Hall Meetings in Shared Governance--Populist Technocracy and Engagement at Penn State,' *Monitoring University Governance* (17 Jun3 2015); accessed <<https://lcbpsusenate.blogspot.com/2015/06/on-practice-of-town-hall-meetings-in.html>>

⁹ For the mass line in its formative period, see, e.g., H. Arthur Steiner, 'Current "Mass Line" Tactics in Communist China,' (1951) 45(2) *The American Political Science Review* 422-436; for a contemporary application from inside the system, see, e.g., Jiayue Quan & Liqiong An, 'The Mass Line Is the Core Ideas and Values of the Communist Party of China,' (2018) 11(1) *Journal of Politics and Law* 37-41.

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administrative apparatus over which they managed political affairs. Voting served in part to ensure rewarding those who remained at least officially aligned with the core ideology (e.g. it is difficult for a socialist to win an election in the United States at least for the moment given the nature of US underlying ideologies of democracy and its ties to forms of economic organization).

Increasingly though, and in line with developments elsewhere quantitative measures have appeared to become more useful and perhaps eventually more important in the development (and disciplining) both of the character of the ruling ideologies in liberal democratic states and their assessment as practiced by those states whose political economic models are built on (and legitimated through) this ideology. But the effective control over that disciplining remains held by the core influencers that emerged after the Second World War: bureaucrats, technocrats, and academics who together constituted a techno-ideological complex responsible for the care and maintenance (and refinement) of the ruling ideology.

That positioning is what makes the *Economist Intelligence Unit's Democracy Index 2020*¹⁰ both fascinating and important. It is fascinating for the way in which it reveals (at least in part) the quantification of ideology as well as the ideal against which it is measured. It is important because of the way in which its output reinforces the power of the techno-ideological complex and its influence on the operations of the state. That power reinforcement is inherent in its methods--a quantification of normative expectations is a function of the application of a new language, one that is much more difficult for elements of the masses to engage with at a fundamental level. It permits assessment that can be challenged only by other elements of the techno-ideological complex or those trained well enough in its methods.

Given that perspective I am much less concerned about the results of the ratings--though that will be its greatest impact--to provide a basis for political reform in the United States having been reduced from full to flawed democracy as a punishment for the politics of 2016-2020. In this sense it well serves its disciplinary function. As well it provides a nice quantifiable basis for distinguishing between the characteristics shared in common among the liberal democratic camp and those that identify a political ideology as hybrid or authoritarian--including the vastly incompatible ideological systems of Marxist Leninism.

Yet for students of ideology and its governance, it is the materials on pages 54-68 of the report that serves as its most important element. Here one finds expressed in quantitative terms both the core memorialization of the ideology of democracy, and its transposition first into a quantitatively expressed ideal form, and then into the data

¹⁰ Economist Intelligence, 'Democracy Index 2020,' *supra*.

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components that when amalgamated through proprietary analytics produces a score that can be used to measure individual assessments against the ideal and against another states that are being rated.

The remarkable thing, of course, is that this is all undertaken from a quite curious starting point: "There is no consensus on how to measure democracy. Definitions of democracy are contested, and there is a lively debate on the subject".¹¹ And they cannot resist a sneer at the political authorities to which they are bound: "there is no consensus within the US government as to what constitutes a democracy. As one observer put it: "The world's only superpower is rhetorically and militarily promoting a political system that remains undefined—and it is staking its credibility and treasure on that pursuit."¹² The sneer is of course strategically necessary--it helps position this group as a site of authority for the definition on which they will base their ratings because they must. To that end they rely on their own circle of a techno-ideological complex.

Our Democracy Index is based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. The five categories are interrelated and form a coherent conceptual whole. The condition of holding free and fair competitive elections, and satisfying related aspects of political freedom, is clearly the *sine qua non* of all definitions.¹³

This is a definition that is authoritative by its pedigree; it is touched by the work of the academic wing of the techno-ideological complex--at least as read by this group¹⁴ and related to efforts by competitor members of this group though these (naturally) are found wanting.¹⁵ And it is a definition that is made to appear structurally firm by its quantification. The fundamental idea here—the semiotic presumption—is that while the qualitative embeds within it a potentially distorting element of discretionary judgment, numbers in the4mselves do not judge. That is, that the process of quantification, and the judgments and assessments grounded in robust data harvested appropriately and applied rigorously can substantially reduce the discretionary and distorting element in the calculus of assessment—and judgment. And yet, as commentators have noted—quantification and analytics changes the siting of discretionary distortion rather than eliminating it. Where qualitative assessments back end the application of ideologically distorting judgments, quantitative assessment front load

¹¹ Ibid., p. 54.

¹² Irving Horowitz, 'The Idea of War and Peace: The Experience of Western Civilization, Taylor & Francis 2006), p. 114).

¹³ Economist Intelligence, 'Democracy Index 2020,' supra., 55; generally pp. 55-56.

¹⁴ Ibid., p. 55.

¹⁵ Ibid., pp. 54-56.

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that distortion¹⁶ in (1) the structuring and identification of data; (2) the mechanics of the collection of data; and (3) in the analytical categories within which data is used as the raw materials for assessments. It is in the data set production rather than in the normative discussion or in the evaluation, that the guts of the normative discussion of the granular practice of ideal democracy occurs.¹⁷

That, precisely is what occurs in this case. The object is not so much to describe that state of things, but rather the object is to assess actual practice among states against a quite specific idea of the perfect liberal democratic state. That has consequences. It substantially policies against 'heresy' within liberal democracy (reducing the possibility and scope of variation in the practice of liberal democracy judged authentic or legitimate). But it also excludes conceptualization of democratic practice that is incompatible with the core premises of liberal democracy as manifested through the objectification of its ideal. That effectively excludes any efforts by other ideological bases for the organization of power to practice democracy—including for example efforts within Marxist Leninist ideologies to develop what is now called whole process democracy.¹⁸

Having described the normative premises of the ideal democracy it is then time to transpose it into quantitative form. To that end, democracy is reduced to a scale of 0 to 10. Assessment of the place of a state on the scale is the product of an analytics "based on the ratings for 60 indicators, grouped into five categories: *electoral process* and *pluralism*; *civil liberties*; the *functioning of government*; *political participation*; and *political culture*."¹⁹ The category indexes are themselves the aggregation of a number of indicator scores that are adjusted based on assessment of (1) free and fair elections; (2) voter security; and (3) civil service capacity.

¹⁶ See, e.g., Deborah Raji, 'How Our Data Encodes Systemic Racism: Technologies Must Take Responsibility for the Toxic Ideologies that Our Data Sets and Algorithms Reflect,' (2020) MIT Technology Review <<https://www.technologyreview.com/2020/12/10/1013617/racism-data-science-artificial-intelligence-ai-opinion/>> ("Those of us building these systems will choose which subreddits and online sources to crawl, which languages to use or ignore, which data sets to remove or accept. Most important, we choose who we apply these algorithms to, and which objectives we optimize for.").

¹⁷ In the context of citizenship and national security in the United States, see, John Cheney-Lippold, '*Jus Algoritmi*: How the National Security Agency Remade Citizenship,' (2016) 10 International Journal of Communication 1721-1742.

¹⁸ Discussed in Larry Catá Backer, 'Linking People to Governing Institutions Through Leninist Political Parties: 全过程民主 (Whole Process Democracy), Socialist Consultative Democracy, and 《中国新型政党制度》 (China's New Political Party System),' (23 June 2022) available SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4134483>.

¹⁹ Economist Intelligence, 'Democracy Index 2020,' supra. ("Each category has a rating on a 0 to 10 scale, and the overall Index is the simple average of the five category indexes.").

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The object of all of this is to fit rated states into one of four categories; (1) The index values are used to place countries within one of four types of regime: (2) Full democracies: scores greater than 8; (3) Flawed democracies: scores greater than 6, and less than or equal to 8; (4) Hybrid regimes: scores greater than 4, and less than or equal to 6; and (5) Authoritarian regimes: scores less than or equal to 4.²⁰

And here is where the real ideological work begins--not in the normative framing--a study in righteous ambiguity, but rather in the quantification of those ambiguities into something solid, into the quantified conception of the ideal liberal democratic state. From there it follows that a system of judgment can be developed to rate those liberal democracies that do not measure up.²¹ It is the scoring system, then, that serves as the disciplinary mechanism, and as justification for the judgment in the form of labels ("full", "flawed" etc.) which themselves describe the ideal types of non-ideal democratic.

If the scoring system provides the basis for judgment, and its nudging effects, then the 60 indicators serve as the laundry list of behaviors that contribute toward the construction of the ideal democracy. It is in the choosing of those indicators--the data that is to be harvested to feed the analytics producing the ratings judgments, that the real work of instructing states in the behaviors that together constitute the operation of an ideal democracy, are revealed. Those behaviors and expectations, then, are the key to the entire exercise--and the lesson that the good people at the Economist Intelligence Unit seek to embed in those to whom the mechanisms of the state are entrusted.²²

And it is here that there is something that troubles. The behaviors tend to align but are sometimes quite disconnected from the realities of state practice in the age of globalization (foreign powers and organizational influence on government functions or policies are of course, for example, the essence of multilateralism inherent in globalized governance). One could go through the list but the point is a simple one--taking the aggregate of these sixty indicators as the basis for the ideal state would produce a form of democratic organization that some might view as far from an ideal democratic state (especially under conditions of globalization) that one might (eventually) hope to achieve.

In this context, it is then worth considering what are the constitutive elements of the ideal liberal democratic state. That ideal state is a composite of the 60 indicators appropriately weighed in a self-

²⁰ Ibid., pp. 56-57.

²¹ Ibid., p. 57.

²² For a nice discussion, see, John Cheney-Lippold, 'A New Algorithmic Identity: Soft Biopolitics and the Modulation of Control,' (2011) 28(6) *Theory, Culture & Society* 164-181.

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referencing exercise in which unstated core conceptions inform the judging (and the application of discretion) in assigning quantitative judgments. What is unstated is likely obvious—one builds an ideal from the idealization of existing states. And in this case those states must occupy the core of leadership of the liberal democratic order—in effect the ideal state is likely a composite of the great liberal democratic states of Europe under the leadership of the United States. It is with that in mind that one can most usefully approach the elements of the composite ideal state.

The ideal state is first measured against its core premises.²³ Those are constituted as the five principal categories of liberal democratic organization around which the ratings analytics are built. The first category, “Electoral Process and Pluralism” is built on the concept of *freedom*. The term is likely used in the sense of freedom from external control (the negative sense) and the exercise of power and privilege of choice (positive sense). And yet it is assumed to described only the network of formal control. Freedom is a *de jure* concept in the sense that it is unlikely to touch on the nudging of social relations—from religion, to class, to occupation, to the manipulations of the market and more recently of algorithms. This is manifested in the recognition of the types of freedom privileged: freedom in the context of the rituals of elections for national legislators and the head of government; the same sort of freedom for local elections. In these contexts the operative baseline concept is not merely of freedom but also of fairness, perhaps in the sense developed by Robert Dahl as a sufficient absence of coercion or manipulation (impartial choice).²⁴

But here one runs into trouble. It is possible to understand the political party system as a form of coercion and manipulation, especially when the great political parties are embedded in systems of elections. And yet that is not what is meant. Where one draws the line is the stuff of discretion, and again likely folds back to extracting the ideal from the baseline practices of the great liberal democratic states. It is to reduce ambiguity that the rest of the factors in this category are devoted. They produce an ideal state in which the factors constituting freedom and fairness include universal suffrage, the absence of threats in the context of elections, election campaign and financing equity, systems for orderly transitions of administration, the autonomy of political parties that may be formed without much impediment, the effectiveness of opposition parties, the capacity of individuals to form mass organizations other than political parties, and the wide access to elective office.

These, in turn, are built around the operative principles of liberal democracy: (1) that state organs are representative bodies; (2) that

²³ Economist Intelligence, ‘Democracy Index 2020,’ *supra*.

²⁴ Jorgen Elklit and Palle Svensson, ‘What Makes Elections Free and Fair?’ (1997) 8(3) *Journal of Democracy* 32-46, 35 (with key data measures *ibid.*, at 37).

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representation is legitimated through election; (3) that election vests the winner with all of the authority of the office for which they were elected; (4) that access of individuals to the mechanisms of government cease formally with the casting of a ballot; (5) that political parties and other mass organizations may agitate outside of the organs of state, and that opposition parties may do the same within the legislative organs of state but without any state authority or obligation by elected representatives to respond; and (6) political discipline is limited to periodic elections and internal discipline but only for gross misconduct. Within this model, then, the role of individuals is concentrated on elections and their mechanics. And thus the focus of democracy is reduced or centered on the protection of the integrity of the election process. The rest is politics—or where political power is delegated to administrative organs, an issue of the management of bureaucracy not directly accountable to the people.

One understands this wall of separation between the exercise of democracy through election, and the autonomy of the apparatus of government (populated by elected representatives and their instrumentalities) from the people in the construction of the second category—on the functioning of government. Here the focus is on the exercise of power by elected representatives. But it also makes a strange choice within liberal democratic theory—embracing the principle of legislative supremacy (an English variation) that may not be reflected in the liberal democratic choices of other apex liberal democratic states (for example those which adhere to the co-equal branches principle of separation of powers). The choice is moderated by a focus on checks and balances analysis. In addition, the idealized liberal democratic governmental apparatus must be superior to its military apparatus, and must be able to effectively resist projections of political will from other states. That later point is also fraught—in a globalized world with substantial interconnection (bilateral and multilateral treaties, public contracts with international financial institutions and the like) it is difficult to measure this accurately. It also is built on the premise that political authority sits at the apex of authority and must be held by the apparatus of government, which somehow must develop measures of accountability other than through the device of election. These, in turn, are grounded in effective control of territory, in “good governance premises”,²⁵ in effective measures against corruption, and in a capable bureaucracy embedded with positive values. It is measured by markers of public confidence. In the state apparatus and in the intermediary structures of representative political parties.

²⁵ For example World Bank, International Bank for Reconstruction and Development, Public Sector Group, Poverty Reduction and Economic Management Network, *Reforming Public Institutions and Strengthening Governance: A World Bank Strategy – Implementation Update*, (2000).

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These two categories then provide the basis for fleshing out the last three categories: political participation, democratic political culture, and civil liberties. The first of these focus on the issue of universal suffrage and effective political participation leading to and through the structures of representative elections. But it also focuses on educating democratic theory and practice along ideologically idealized bases. It suggests a liberal democratic mass line as well—centered on the responsibility of state organs to “make a serious effort to promote political participation.”²⁶ T

he second focuses on the development and maintenance of appropriate political cultures that reinforce the drive toward the liberal democratic ideal state. These focus on democratic consensus (without crossing over to the Leninist notion of democratic centralism). It also includes a list of liberal democratic cultural taboos—cults of personality, cultivation of military savior perceptions, avoidance of rule by technocratic elites, separation of church and state, cultivation of positive values for democratic dynamism, and the avoidance of conflating democratic dynamism with national political instability. These are tall orders, even for mature liberal democratic states. And thus the idealized element here as both regulatory and aspirational, and as disciplinary in the sense of nudging states toward the ideal through rating assessment.

The last, civil liberties, speaks to the control of public space for debate. This touches on both physical space and the openness of press and social media organs irrespective of technology. It also touches on rights of petition (though not necessarily of the obligation to satisfy petitioners except in accordance with law and practice. In this section one finds the idealized expression of the liberal democratic reliance on judicial mechanisms as formal mediators, on the protection of rights to property (and therefore subtly embedded the fundamental protection and privileging of markets driven by private choice) And it includes the great taboo against physical abuse for the exercise of political rights, including agitation, by the state, at the end of a spectrum that includes recognition of internationally recognized human rights.

This, then, is an emerging way in which liberal democratic theory is (re)constituted. It migrates from the qualitative to the quantitative. It focuses on the management of the separation of the process of democracy from the operation of state organs. In the process it reconstitutes the democratic ideal as an object—something that is measurable. But this is a semiotic object. Its measurement also signifies the object, and that signification is the basis for its meaning. This is a collective meaning which is reflected in its measure but is also measured by its reflection in signified practice. Together they suggest not merely the judgment of quantified assessment, but also the contours of a model—of the simulacra of liberal democracy best represented by its idealized measure.

²⁶ Economist Intelligence, ‘Democracy Index 2020,’ supra.

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And yet that ideal must, if it is to be effective, never be attainable. “It is the fantasy of seizing reality live that continues—ever since Narcissus bent over his spring. Surprising the real in order to immobilize it, suspending the real in the expiration of its double.”²⁷

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²⁷ Jean Baudrillard, *Simulacra and Simulation* (Sheila Faria Glaser (trans) University of Michigan Press, 1994 (1981), p. 105.