

Book Proposal Digital Democracy in a Globalised World

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PART I: INTRODUCING GLOBALISATION, LAW AND DIGITAL DEMOCRACY

Setting the stage for analysing digital democracy through the lens of globalisation and global law

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Introduction

The contributions in this volume deal with the profound effect that digitalization and online tools are having on the relationship between citizens and states, and particular national and global democratic affairs. More specific, the respective chapters analyze the way in which internet-based opportunities and movements interact with processes of democratization in a globalised world. In doing so, this volume takes up the challenge to explore the impact of the growing digitization of democratic processes on our legal thinking and more in particular thinking of what is called 'global law'.

As known, digital technology has brought us a world that challenges governments, organizations, and individuals. Sometimes it confronts these actors on a very day-to-day basis with its unpredictable consequences, as has been demonstrated by the events related to the US National Security Agency. In today's world, individuals, (organised) groups of citizens and organisations use mobile devices and social network fora to create certain kinds of democratic awareness, or mobilise and assert themselves vis-à-vis the state. In turn, governments have reacted and responded, both in democratic ways and in autocratic manners, e.g. by denying access or controlling content.

These developments raise challenging questions. Clearly, democracy oriented digital initiatives succeed to have an impact on processes of democracy: effects are visible, both at the level of the national state as well as across borders. The digital social movements in some of the Arab spring nations testify that online tools indeed have an impact on these processes. But we do not know yet to what extent the new forms of digital political engagement really change or adapt to the traditional architectures of participation and democratic processes. To what extent can they really enrich democratic societies? Or act as a threat? And what can and/or should democratic countries do in regard to these global developments? Questions also relate to the receptiveness of governments to the social digital movements. Where do governments react well, where do they overreact and where is their reaction simply wrong? Turkey, where early March 2014 prime minister Erdogan threatened to block Facebook and YouTube, is an illustrative example of a state reacting to the use of online media for democratic processes. But what are determining criteria in judging these and other reactions, in particular given the cross-border effects of movements as well as the reactions thereupon?

In considering these questions, a distributed approach has been suggested.¹ It is argued that division and mixture are needed in order to create as much checks and balances on

¹ Ronald J. Deibert, *Black code: Inside the Battle for Cyberspace*, Random House 2013; William H. Dutton, "The Fifth Estate Emerging Through the Network of Networks", *Prometheus*, Vol. 27, No. 1, pp. 1-15, 2009 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1167502

every actor's (public, private, civil) behaviour. Democratic states should avoid trying to create top-down approaches. Instead, they should try to organize their interaction with the developments through, what is called, a networked approach. But given the ambition of a networked approach: who then is going to shake the hands of whom? Put differently, with what actors and institutions do we undertake the journey towards enriching democratic societies by means of online tools? Some actors might be effective (Anonymous, hacktivists), but lack legitimacy in what they do. Others have legitimacy (sovereign states), but sometimes lack the necessary digital consciousness, actual power and influence in the online world. Does this imply that - given the ambition of a networked approach - we need to get representation of certain actors in ways that better reflect the powers in the digital world?

A networked (distributed) approach in reacting to the social digital movements, is illustrative for the evolution of a 'law' beyond that of the legal orders of national states and the international law frameworks that are derived from the will of sovereign states. Put different, it is an illustrative example of often expressed need for a new, global legal perspective. In this vision, eDemocracy testifies of the required shift towards what is called global law.

On an intellectual level we agree that online tools can actually enrich democratic societies, but when thinking how to develop and realize this ambition through law, it becomes quite a different thing. For, we have little choice as regards the characteristics of digitization. Whether we like it or not: we are faced with cross-border fluidity, fragmentation and polycentricity. As a result, we have to acknowledge that the effects of digitization are difficult to address by means of the law of a single jurisdiction or system. However, we can explore how to respond to them. But this requires a better understanding of the characteristics of eDemocracy developments in different cultures and legal traditions.

This volume therefore attempts to identify the characteristics of different legal traditions and their responses to digitization. In engaging with these responses and reflect on their cross-border effects, we hope to contribute to a better understanding and learning of the challenges we face and give concrete substance to a response through law. Thus, the chapters in this volume aim to offer insights in what is happening in different countries and regarding certain democratic processes when it comes to the interaction between digitisation and democracy. From these contributions it becomes clear that these developments have certain characteristics in common, among them fracture, fluidity, and polycentricity. They are all characteristic for the broader phenomenon of globalisation and as such also underlie the radical challenges to our understanding of law.² Hence, before broadly introducing major tendencies in digitization of democratic processes, the underneath paragraph briefly introduces the phenomenon of 'global law'.

Global law

The effects being brought about by online technologies transcend traditional borders in many different ways, among them the borders of countries and thus their jurisdiction and legal system. Digitization also affects the monolithic state-based claim to authority

² Backer, Larry Catá, "The Structure of Global Law: Fracture, Fluidity, Permeability, and Polycentricity", (July 1, 2012). CPE Working Paper No. 2012-7; Penn State Law Research Paper No. 15-2012. Available at SSRN: <http://ssrn.com/abstract=2091456>

in performing regulatory functions for achieving particular social ends. More and more, other global players (Facebook, Google) built social and legal norms into technology and thus challenge the exclusive nexus between regulatory power and the state.

In light of the challenges that have come with the complexity of interactions captured by the shorthand of 'globalisation' and the challenges it brings to law and legal thinking, scholars have begun to explore new ways of orientation: not bound by the state-orientated, universalist, 'top-down' approaches to law. This re-orientation is often referred to as global law.³ There is no single definition and common consensus of the notion of global law. For the purpose of this volume, we use the concept to the development of normative regulation maturing into a multilevel, non-hierarchical and semi-autonomic ordering across the world. This is effectuated by means of international, national as well as regional and local legal sources whereby these sources are applied by a growing variety of regulatory institutions, instruments, procedures and principles. Put simple in using Backer's words: "Global law can be understood as the systematization of anarchy".⁴

In the absence of a clear definition, it might nevertheless be helpful to describe in what way global law differs from international law. In brief, global law does not deal with relations between sovereign states. As known, a core characteristic of international law is that only states have the power to organize political and legal affairs. Of course, other actors do play a role in international law, with international organizations as the most prominent example. But ultimately their role is derived from the will of sovereign states and serves as an expression of state based collective governance.

Clearly, today's world has become much more complex than a legal order sculptured merely by sovereign states. We see different actors as well as multiple levels of regulation. Self-regulation established by branch organizations. Global players like Google and Facebook, use technology to steer the behavior of not only the users of their services but the online world as well. And bottom-up regulation is gaining relevance with dissatisfied consumers teaming up in using digital tools to force companies as well as their fellow citizens to change their practices.⁵ Of course, the majority of the day-to-day dealings of private and public actors is still governed by laws issued by states. But we cannot ignore that various pluralistic and hybrid regulatory manifestations, have a significant impact on the normative standards in today's world. This is why some scholars argue that international law is in a crisis.⁶

Some scholars also distinguish global law from transnational law. The concept of transnational law has been used to describe the practices and changes in our world order that occur through the involvement of other actors than states. In his famous work on transnational law, Phillip Jessup introduced the concept in 1956 to address the increasing importance of private and non-state actors in networks of legally relevant interactions.⁷ Prominent examples of transnational law can be found in the context of international commercial arbitration. Here, standards established by the International

³ W. Twining, *Globalisation and Legal Scholarship*, 2009, p. 21.

⁴ Backer, *Ibid.*

⁵ See e.g.: <http://mashable.com/2012/05/23/parking-douche-app/>

⁶ R. Domingo, *The New Global Law*, Cambridge University Press 2010.

⁷ Phillip Jessup, *Transnational Law*, Yale University Press 1956; See also: Peer Zumbansen, "Transnational Law", in: J. Smits, *Encyclopedia of Comparative Law*, Edward Elgar Publishing 2006, pp. 738-754.

Chamber of Commerce (ICC), are seen as a source of law for cross border trade which is in some cases more important than national or international law.⁸ Hence, these privately created rules exist as a third form of law besides national and international law.

While some seem to characterize global law as an approach that very much resembles transnational law⁹, others see a difference between the two concepts: “Rather there is something soulless about transnational law, denoted by its primary focus on economic interactions. ‘Global law’ must be something more than this.”¹⁰ To Morag Goodwin, global law - much more than transnational law - is formed by normative and moral pluralism. In approaching the inter-connectedness of actors, of relationships between actors, legal tools and concepts, “it must concern itself explicitly with power relations, with domination, with questions of justice”.¹¹ In other words, global law has a normative heart.¹²

In particular when following this approach to what is meant by global law, an observation made by Neil Walker becomes of particular importance. In discussing the concept, Walker referred to what he calls the double element in global law: one must realize that at the same time that we use the idea of global law as an analytical tool to understand or map the shifting legal landscape around us, it is also sculpting that very landscape.¹³ This observation underscores the importance of knowledge of other democratic cultures and legal traditions when engaging with globalization and more in particular digitization as a phenomenon thereof. It is in light of this, that we subsequently need to reflect on perspectives on the notion of democracy and the values reflected in it.

Digitisation and democracy

Digitisation is a fascinating phenomenon whose impact on society can scarcely be overestimated. With digital tools having become part of everyday life in a large part of the world, the fundamental changes they are bringing about and the consequences they have for society and democratic processes are becoming clearer. By now, the Internet and the countless applications using it have become the first and most obvious place for many users to search for, disseminate, and create information. Clearly, this affects the way people as well as authorities use this information for democratic processes. By now, multiple examples show that digitisation has a significant impact on the roles and positions of the public and the regulatory actors, the division of their responsibilities and political authority. Online tools allow citizens to participate in democratic processes, increasingly in collaboration with others. It was precisely for that reason that *Time* magazine selected not a great politician, scientist or artist as its “Person of the Year” in 2006, but “YOU” – the group of interactive individuals who were changing the shape of our world through the Internet. The digital social movements in some of the Arab spring nations, are a prominent example that online tools may facilitate societies in their democratic processes. At the same time, developments in other countries show that the

⁸ A. Maurer, “The Creation of Transnational Law – Participatory Legitimacy of Privately Created Norms”, (November 22, 2012). ZenTra Working Paper in Transnational Studies No. 03/2012. Available at SSRN: <http://ssrn.com/abstract=2179584> or <http://dx.doi.org/10.2139/ssrn.2179584>

⁹ See e.g. S. Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’, (2005) 37 *Journal of International Law & Policy* 663, 668.

¹⁰ M. Goodwin, “What I Talk about when I Talk about Global Law”, *Tilburg Law Review. Journal of International and European Law. Global Law Special Issue*, vol. 17 no. 2 2012, p. 271.

¹¹ Goodwin, *Ibid.* 273.

¹² Goodwin, *Ibid.* 272.

¹³ Neil Walker, Intimations of Global Law, Montesquieu Lecture delivered in Tilburg on 21 June 2012.

use of online tools result in undemocratic responses by their governments and sometimes spark violent protests.

Hence, digitization has the potential to bring about a - sometimes far-reaching - transformation of the relationship between the public on the one hand and the states and their authorities on the other hand. What is more difficult, however, is to decide what direction this transformation should take. For the effects are extremely varied. The late 2010 WikiLeaks affair is an illustrative example of the unexpected disruptive global shockwave and power (whether one regards that power in a positive or negative light). WikiLeaks and more recently the NSA-affair, have made patently clear that digital technologies increasingly force states to face fundamental questions that they have not even begun to answer. The speed at which information is disseminated and copied – even (or especially) when it is unwelcome to national states – means that the authorities will also have to consider their own information position, more in particular their position with respect to what states conceal or reveal to their citizens. Transparency is generally regarded as something that government concedes to citizens. It is certainly not something that citizens can claim or force from government. In today's digital world, however, the authorities will increasingly have to consider precisely how they intend to deal with transparency. As John Naughton commented in *The Guardian*, the authorities must “[l]ive with the WikiLeaks world or shut down the net. It's [their] choice.”¹⁴ They are not likely to choose the latter option. Nevertheless, they will need to find a new balance between revealing and concealing information about their dealings. Part of the answer may lie in regulating parties outside government (servers, clouds etc.), but part of it may also require government to engage in self-examination. Some information should perhaps not be stored at all; other information sources should be more transparent rather than confidential and secret; and still other data should be stored more securely than it currently is. But government can never entirely rule out the unpredictability and uncertainty of society and, consequently, the online society. The rise of interactive online platforms such as Facebook, YouTube and Twitter and the associated influence of the ‘crowd’ are also affecting what government does. Various government departments and agencies want to harness the potential of citizen engagement, sometimes referred to as e-participation. Because the Internet makes communication and co-creation possible, government can potentially do much more than merely inform its citizens. Social network platforms e.g. allow for reciprocities between mobilisation, encouragement, creativity and engagement. The search for new ways to communicate with the public is one response to the ‘gap thinking’ that has increasingly come to dominate the discourse about government's legitimacy. Online tools are regarded as an ideal means of turning the tide, with e-participation strengthening the legitimacy of politicians and policymakers. An easy way lies in the way government shares information (for example by publishing policy documents), consults citizens (for example concerning legislation), and allows them to participate in decision-making. One step further is for government to forge a new kind of relationship with its citizens, one in which politicians and policymakers do not simply take decisions based on a popular mandate, but allow discerning individuals to participate directly in policymaking and decision-making processes.

The opportunities and power that digitization holds out, also changes roles and positions of actors in that the Internet makes it possible for citizens to supervise

¹⁴ J. Naughton, “Live with the WikiLeaks world or shut down the net. It's your choice”, *The Guardian*, 6 December 2010.

government and act as a “countervailing power” in the public arena. A couple years ago it was mostly Web-savvy citizens, who for example set up websites which revealed how elected representatives voted on issues. Nowadays, almost everyone can join in, using their mobile devices with multiple facilities to share information and images and interact with others.

What is relevant here is the idea that the Internet is an open forum where everyone can join in. However, there is now a movement away from the open environment toward various semi-restricted platforms such as Facebook and LinkedIn. Instead of searching the entire online world, users simply go straight to a trusted, familiar website. The use of icons on smartphones and tablets has encouraged this search strategy: their use makes it very easy to consult a specified source straightaway. The feature that makes these platforms so appealing to users – the ease with which they can share information and interact with others – is also why other actors, including state authorities start using them in their interaction with citizens.

Digitisation as a determining factor

When considering the exact role and influence of digitalisation, we touch upon the academic debate about the conceptual interpretation of technology and the factors that can be emphasised when studying technology, society, and the interaction between them. Is digital technology – whether we mean social network platforms, biometrics, or surveillance applications – nothing more than a neutral tool wielded by citizens, politicians and government institutions? Or is it in fact an irresistible force that follows its own logic and, in doing so, also has its own separate impact? Opinions expressed in the literature are by no means unanimous in this regard. Within the scope of this contribution, it is not possible to analyse the wide-ranging academic debate about the nature and role of technology in society. For the purpose of our analyses, we can distinguish between three viewpoints applied in the debate.

At one end of the spectrum is instrumentalism. According to this viewpoint, technology is regarded as value-free and neutral tool in the hands of those who can use it either for good or evil. Technological applications are the neutral bearers of the ideas and aims of their designers' and users'. Online tools, e.g., offer an excellent solution in strengthening the legitimacy of politicians and policymakers. If the outcome is disappointing, it is the users who are to blame, and not the technology. Although the notion of technology as a neutral instrument has lost popularity in academic circles in recent decades, it is often still very much alive in national and international policy making and public debate. At the other end of the spectrum is technological determinism. It is based on the assumption that technology plays a crucial role in shaping society. Technology is depicted as an irresistible force that follows its own logic and has a major impact on the way work, the economy, and society as a whole are organised.¹⁵ Technological determinism can take both an optimistic and a pessimistic view of technology. The optimists believe that everything technologically possible will come to pass and will benefit society. The pessimists agree that everything technologically possible will come to pass, but they believe that society will be “overwhelmed” and “suffer a loss of autonomy and solidarity”. They fear a world driven by technological rationalism, with

¹⁵ R. Williams, D. Edge, “The social shaping of technology”, pp. 53-67 in W.H. Dutton (ed.) *Information and communication technologies. Visions and realities*, Oxford: Oxford University Press 1996, p. 55.

little regard for the human dimension.¹⁶ The middle ground between these two extremes consists of a dense multidisciplinary field that is more constructivist in its approach. Proponents of this idea regard technology as both a cause and an effect of societal change.¹⁷ The main idea is that the form that a technological application ultimately takes is the result of various choices. A technological artefact does not simply appear out of nowhere; it is the outcome of existing social, economic and technological relationships.¹⁸

Given the contributions in this volume aim to analyse eDemocracy through the lens of globalisation and global law, it takes the idea that social relationships relevant for democratic processes mould technology and that technology simultaneously influences social relationships and thus democratic processes. Digital tools are viewed as part of a dynamic convergence of multiple processes, interests and actors in the global democratic arena. Of key importance then is the role of actors and institutions. The way in which digital tools are used in democratic processes depends on the interests, ability to influence, views, knowledge and skills, expectations, values, and perceptions of the relevant actors (citizens, national and international governments, NGO's and other users), as well as on the technical possibilities and impossibilities.¹⁹ This also includes the balance of power. Which actors are capable of controlling the use of online tools relevant for democratic processes, and which are not? The occasional battle over the way an application should be designed and used is not fought on a level playing field. Indeed, there are different levels of influence and power at play in the interactions between institutions, cultures and systems.²⁰

It is this interaction between institutions, cultures and systems in influencing eDemocracy in a global setting, that is taken as a basis for the analyses in this contribution. That means that it will focus on the interplay between the various actors in their specific democratic and political culture under the influence of digital tools.²¹ It is this interplay that ultimately shapes the responses we might be moving towards. The most prominent actors considered here are citizens, institutions, states and applications.²²

An agenda for reflections on globalization, law and digital democracy

At the end of the day, a crucial question in light of the afore-mentioned developments is whether and how democracy or democratic values can be furthered through digitization. The answer to this question will to a large extent be determined by the specifics of the context. Here, various factors are of influence: the stage of democratic processes, the level of online activity, a country's legal culture, or its tradition as regards

¹⁶ Ellul, J. *La système technicien*, Paris: Calmann-Levy 1977; G. Anders, *Die Antiquiertheit des Menschen. Über die Seele im Zeitalter der zweiten industriellen Revolution*, München: C.H. Beck 1980.

¹⁷ Williams & Edge, *Ibid*, 55.

¹⁸ W. Bijker, J. Law (eds.), *Shaping technology/Building society. Studies in sociotechnical change*, Cambridge, MA: MIT Press 1992.

¹⁹ A. Stirling, "'Opening up' and 'closing down'", *Science, technology and human values* 33 (2) 2008: 262-294.

²⁰ R. Mansell, R. Silverstone (eds.), *Communication by design: The politics of information and communication technologies*, Oxford: Oxford University Press 1996, p. 213.

²¹ An actor is something or someone who makes a difference in a relationship: B. Latour, *Reassembling the social. An introduction to actor-network-theory*, Oxford: Oxford University Press 2005.

²² Although of course, one cannot ascribe free will to an application, it can, however, influence human behaviour through the design and function of an application. Also, it is clear from the way people deal with their mobile devices and social network platforms that applications also possess agency – the capacity to act – in everyday life. Also, while the labels of citizen, state, etc. are useful abstractions that allow us to consider how actual citizens, institutions or national states and international organisations relate to one another and to digital technologies, we do recognize that in reality they consist of many different citizens, states, institutions, etc.

the role of the state and other actors in law making, etc. Part II of this volume therefore explores how democracy-related initiatives are taken up in different countries (Netherlands, Belgium, Brazil, India and Iceland).

In considering what role there is to play for law and regulation in facilitating the use of digital technologies for democratic processes, a challenging issue relates to the type of regulatory instruments that could be instrumental both in that they facilitate the development and deployment or hinder and even block. Do promising initiatives show that other than law-based instruments be considered and used? Closely related is the type of actors that play a role here, what role this then is as well as how prominent this role can or should be in light of the specifics of the digital developments as well as the context in which they are initiated. For example, what actors can or should play a (dominant) role other than the state? In discussing several manifestations of the use of digital tools for democratic processes, Part III of this volume discusses the role of the state as well as other actors when digital tools are used in representative and monitory democracy as well as constitution making. The authors address issues such as to what extent social media can be seen as a public sphere and what democratic multistakeholder governance patterns are currently seen in internet policy-making.

As mentioned, online initiatives and manifestations are not hindered by geographical borders. Hence, cross-border effects are visible. Different contributions illustrate the cross-border effect when it comes to issues such as open data, transparency, censorship and the openness of governments to changes facilitated by digital initiatives and tools. These and other implications require us to reflect on how eDemocracy relates to the broader development of globalization and what international actors are or should become involved. In considering these and other questions, the developments relate to the role of global law: what makes e.g. that the reaction to the cross-border effects and development do not fit the traditional concept of international law but is illustrative for global law? And, specifically related to eDemocracy, what makes digitalization specific in all of this and in what way is it merely an example of the broader development of globalization (in other words, is technology merely a neutral tool, is it instrumental or something in between (and if so, what characterizes this)? The final chapter of this volume aims to present some building blocks for answering these questions.

Democracy and the Democracy Debate: From City State to a Globalising Society?

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In a seminal paper published nearly 60 years ago, British philosopher W.B. Gallie examines the term “democracy” as one of four “essentially contested concepts”. These are concepts “the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.”²³ The crux of such concepts is that their meaning is a veritable theatre of operations. In other words, the users of such a concept adhere to competing views of its proper use or interpretation. Gallie asserts that an essentially contested concept possesses a number of characteristics. To begin with, “it must be *appraisive* in the sense that it signifies or accredits some kind of valued achievement.”²⁴ Furthermore, “[t]he accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances.”²⁵ What is more, “each party must have at least some appreciation of the different criteria in the light of which the other parties claim to be applying the concept in question.”²⁶ As a further condition Gallie adds “the derivation of any such concept from an original exemplar whose authority is acknowledged by all the contestant users of the concept”.²⁷ This implies a degree of continuity – a historical dimension.

These characteristics would appear to fit the concept of democracy like a glove, for it is obvious that certain values are at issue. For many it is an intrinsically value-laden concept that hardly requires explanation. Who could be against democracy? Paradoxically, proponents of conflicting interpretations may be locked in an unrelenting and fierce clash of opinions. Indeed, a review of the relevant literature makes it abundantly clear that protracted discussions about the proper use of the democracy concept proliferate. These discussions are brought on in large measure by the appraisive character of the concept. Each of the different descriptions and conceptions of democracy reflects the value the concept is meant to express. In the democracy debate, adopting a position is not some accessory issue like ordering a side dish to go with one’s main course; it is a matter of the greatest import. The debaters rally behind a value with which they passionately identify. In this battle of ideas the historical dimension – mostly the Athenian city state as the cradle of democracy – also often features.

Clearly, democracy is not a one-size-fits-all notion: it has many meanings, frequently associative ones. That it is endlessly disputed is hardly surprising. To the contrary, that is precisely what its nature would lead one to expect. The effect is that the debaters evaluate generally accepted criteria for its use differently; elements that some regard as imperative may to others be negligible or inconsequential.

²³ W.B. Gallie, “Essentially Contested Concepts”, *Proceedings of the Aristotelian Society* 1956, pp. 167-198. Reprinted in W.B. Gallie, *Philosophy and the Historical Understanding*, London: Chatto and Windus, 1964. The other three are art, social justice and religion. Gallie presents these four concepts as “live examples”.

²⁴ *Ibid.*, p. 171. Italics in original.

²⁵ *Ibid.*, p. 172.

²⁶ *Ibid.*, p. 172.

²⁷ *Ibid.*, p. 180.

This position paper is not the proper forum for a full exegesis of Gallie's views. Such an endeavor would precipitate the almost inevitable observation that the notion of "essentially contested concepts" is itself essentially contested. A much more promising avenue would be to use Gallie's thesis as the starting point for a closer inspection of the ideas that abound about democracy. For while Gallie may be right in positing the sheer impossibility of a generally accepted principle that will conclusively resolve the interpretation of an essentially contested concept, this in itself is no bar to a reasonable discourse involving opposing perceptions. Therein lies the attraction. The point is not to resolve the debates or even to justify them. Rather, the point is to show that acknowledging the contested nature of a particular concept opens the door to understanding and appreciating all of the interpretations it subsumes. This may benefit the nature of the debates and the arguments used. As enduring disagreement encourages more acute reasoning, the democratic values at stake will become more clearly visible.²⁸

In this position paper, then, the contested nature of democracy takes center stage. The following is a brief discussion of three perspectives ('conceptions', as Rawls would have it) on the concept of democracy, perspectives that refer to the apparent meaning of the concept itself, or at other times relate to the societal context of democracy. They in any case can be problematized in the context of *digitization* and relate to views (and related questions) that might be particularly relevant in this context, though it falls to each of you to elaborate or diverge on this. In doing so, the focus of this paper is geared towards the concept of democracy (with side-steps to digitization). In the paper by professor Prins, the focus is more on what might be the meaning of Global law and digitization (with side-steps to democracy). The two papers are closely related and have to be read in the light of each other. The explicit invitation to each of you is thus to think through how the paper you are writing will relate to the concept of democracy *as you understand it*, especially in relation to what is written in professor Prins' paper and the general theme of the workshop.

Perspectives and questions

History.

As was observed above, every view of an essentially contested concept must ultimately derive from an original exemplar. In other words, an evolution, a historical development, must be in evidence. While it is true that the contours of modern-day democracy are a product of the eighteenth century, these contours themselves are the offshoot of the portrayal of democracy as it was first shaped by the Greeks in the fifth century BC and which reached its peak in Pericles' Athens.

Possibly the most traditional notion underlying the democracy concept is that of "self-legislation" (*Selbstgesetzgebung*). In this sense, so the general consensus appears to be, democracy is primarily an Athenian invention. In a Greek city (*polis*/πόλις) a

²⁸ To which could be added the relevance of sensibly marking off the area within which the democratic ideal ought to acquire meaning: differences of opinion about its meaning indeed do not make its meaninglessness a foregone conclusion (nor does Gallie's view support such a conclusion). A practical example is the probable reluctance of the large majority of people to label Saddam Hussein's Iraq a democracy. Apparently, the age-old debate about the meaning of the concept of democracy has yielded some criterion that must be met before democracy itself can be discussed. There is something to democracy that enables it to be compared to non-democratic systems.

dēmokratia/δημοκρατία (*demos* = people, *kratos* = power/government) was mainly *direct* democracy. The city was governed not by a body of people's representatives but by all male "citizens" (thus excluding slaves, foreigners and women), who constituted the People's Assembly (*ekklesia/έκκλησία*). Every citizen, regardless of social rank or status (and excepting the three groups just mentioned), had the right to be heard in public matters (*isēgoria/ισηγορία*). The People's Assembly, which convened at least forty times a year, voted by a show of hands on all matters of public concern, such as foreign policy, war and peace, the election of senior city officials and legislation. In this way, these citizens laid down the law by which they themselves would be governed (and which they themselves also had to implement).²⁹ It bridged the gap between polity and society. In Athens authority was not an external force imposed on the governed; it was the governed who governed themselves. This line of thought ties in with the idea of popular sovereignty, a system of government that brooks no or very few intermediary bodies between the people and the norms that they define on behalf of and for the people.

The strength of direct democracy of this type lies in its potential to empower citizens to become experts through participation in public life. Possibly this is also to some extent true for some contemporary 'netizen' or for some current political contexts (Egypt?)! In any case, to the ancient Athenians a citizen was, to use Aristotle's phrase, a *zooion politikon* (ζῷον πολιτικόν)³⁰: social life was a vital ingredient of existence and belonging to and living for one's *polis* the acme of being human. The state was not the outcome of a social contract freely concluded by individuals but the perfection of man's social nature; a natural necessity, orientated towards the public good, indispensable to mankind and predating all other forms of community. As such, the state was the most complete realization of human nature, in which the community, not the individual (as appears to be the case today), was at the heart of the state's organization. Civic awareness amounted to the recognition that belonging to a city state was a quintessentially human trait. On this view, man is a microcosm, the world a macrocosm, with the community order poised between these two extremes. It is readily discernible that in this perception the political and the ethical, unlike in this day and age, converge to the point of becoming indistinguishable. One of the results of this, is that to the Athenians separation of powers, today considered to be so important for a healthy democracy, was an outlandish concept for the very simple reason that there was no distinction, no disparity, between the state and its citizens. In ancient Athens the political was social, and the social political.

Citizen democracy.

Intriguingly, it is this Athenian notion of democracy that today is often relied on, either explicitly or by implication, to remedy a number of 'fatigue symptoms' of modern democracy. Notable among these symptoms is the averred excess of freedom and individualism in society, with citizens using politics only to serve their private interests and retreating into "gated communities" (real or in outlook) without caring much about the public interest.

This dearth of attention to the *bonum commune* can indeed stem from a particular interpretation of the current strongly "liberal" ideal of citizenship, especially when individualism is elevated to a position of near-exclusive prominence. This interpretation

²⁹ All the same, some decisions were left to a policy preparation council of five hundred citizens (the *Boulè*/Βουλή).

³⁰ This connotes "social creature" rather than "political animal".

is alien to the Greek ideal of citizenship (leaving aside how close Greek reality came to achieving this ideal), because under this particular brand of democratic freedom citizens are at liberty to opt out of active participation in public life.

But for a democratic political culture to flourish it is vitally dependent on what is known as civic culture or civil society. The hyper individualistic vision of liberal civic ethics can sanction civic apathy to the extent that citizens only take an interest in the *res publica* insofar as it serves their own interests to do so. Here liberal democracy can indeed fail quite spectacularly, because in practice it has little to say about what unites people but rather more about what divides them. An active vision of democracy, on the other hand, “envisions politics not as a way of life but as a way of living – as, namely, the way that human beings with variable but malleable natures and with competing but overlapping interests can contrive to live together communally not only to their mutual advantage but also to the advantage of their mutuality.”³¹ The catch is of course that the failure of the freedom-centered view of democracy poses a most serious threat to democracy and therefore to freedom itself. This is by no means the latest flash of wisdom: Machiavelli observed that freedom misread (he was referring to political laziness) is indeed its own enemy. Society stands to lose if the positive conditions for making democracy work are ignored. As a social phenomenon, then, democracy presumes active citizenship. Again, since active citizenship is rather prominent in the e-stratosphere, this raises the question what actually these positive conditions are in a context of digitalization or e-democracy? Under what conditions can democracy or democratic values be furthered through e-participation? Can and should they be regulated? With what kinds of criteria as a guide? Are there best practices?

Nation state and democracy.

Democracy saw the light of day in the context of the nation or city state. Democracy, community and a specific territory share a long-standing and close connection. The nature of the *demos*, the political community, defining citizenship, notions of self-rule, representation, accountability and transparency are almost solely associated with the institutions of the nation state. And there is a good measure of interaction, because over time the increasing authority of the nation state has reinforced the bond between democracy and territory.

Even so, the “national” perspective is waning. Increasingly, power rests not with the national government, its institutions and its citizens, but with multinational corporations, which bring their influence to bear on industries and the international economy. And the international economy does not deal with citizens, only with consumers and their markets. Barber astutely observes that while democracies are interested in markets the reverse is not necessarily true.³² Consequently, the effectiveness of national administration declines – the national State is less powerful – and the national government faces a legitimacy issue. In a global system of intensifying interdependence and of discussions and decision-making on far-reaching social developments that progressively take place outside the traditional political arena’s – e.g., at the head offices of international corporations – social problems rarely respect territorial sovereignty. The question, more pressing than ever before, is how democracy

³¹ B. Barber, *Strong Democracy. Participatory Politics for a New Age*, Berkeley: University of California Press, 1984, p. 118.

³² B. Barber, *Jihad vs. McWorld*, New York: Times Books, 1995, p. 243.

can be translated to a world without borders. What meaning does democracy retain if it is severed from the community in which it is to function?

All this might also have implications for our notion of what it means to deal with 'law', and for what it means to create 'law' (or regulation) in a democratic manner, e.g. in line with 'rule of law' guarantees and safeguards. In any case, the Western idea of law as 'state law' (or state legality) is a concept that does just partly catches the normative reality within which norms function. Regulation has indeed always been much broader than law proper.³³ However, by turning state law into the standard, the researcher relegates non-Western or non-standard forms of normativity to a place in the shadows. However well intended the intentions may be, the researcher thus becomes guilty of conceptual colonization. As also becomes abundantly clear from the paper by professor Prins, there is no single legal norm that can be encapsulated in a coherent and neatly hierarchical system; the reality is too complex for that, and fragmentation and polycentricity are key for analysis. Even stronger, digitization is strongly characterized by cross-border fluidity. Therefore, we might well need the language of hybridity to catch normativity and regulation. But how does all that relate to democracy, which is for many still so strongly connected to the nation state? Is the nation-state as a normative actor indeed becoming meaningless, and should or can 'law' and normativity indeed only be understood in a global sense, or is it still to some extent or some digital contexts parochial?

Representation and the will of the people.

The Athenian concept of democracy discussed earlier mainly involved direct democracy. Its corollary is representative democracy. In such a system of government, majority-based political decisions are taken by those members of the public who have been elected by their fellow citizens to act on their behalf. It stands to reason that representative democracy is several removes from the Athenian perception.

Today, representation is mostly perceived as a check on passing fads, as a buffer against populist tyrannical majorities or as a form of necessary division of labor. The people are excused from continuous involvement in politics (a futile task for non-specialists) and politicians are given the time and means to specialize in it. Representation appears typical of and crucial to a modern democracy. But what in a high-technology and globalizing society can the continued meaningful relevance be of acknowledging the will of the people? Are citizens at all capable of imagining the public interests that are at stake in a technocratic society? Do citizens have the knowledge and insight to exercise their political rights in a worthwhile manner? Are they even pursuing public interests (and are they not acting solely on their own behalf)?

As political historian Pierre Rosanvallon asserts (as does political theorist John Keane, see below), the combined pressures of social discord and complexity combine to transform democracy. In his book *La contre-démocratie – counter-democracy –* Rosanvallon shows that the democratic order is turning into a form of what he calls organized distrust: a cocktail of movements, factions, tendencies and constructs that forces the official structures to perform better. This is a system of balance of power and

³³ On this, see also the work of Seán Patrick Donlan, eg, "Things Being Various: Normativity, Legality, State Legality", in M. Adams and D. Heirbaut (eds.), *The Method and Culture of Comparative Law*, Oxford, Hart Publishing, 2014 (forthcoming).

of checks and balances that covers a much wider area than the three traditional powers. *Trias politica* becomes *multiple politica*, and both active citizens and civil society play a prominent part in it. Seen in this light, there is no cause for gloom over the fate of democracy: the wish for consultation is fulfilled and citizens do have representation, albeit it of a non-elected variety.

In this new equilibrium bodies representing the people are but one of several powers; apparently they can no longer claim political primacy. In the work of authors like Rosanvallon and Keane elected parliaments are characteristically inconspicuous, a given, an element whose existence is implied or taken for granted. Two authors express this feature as follows:

Democratic system, accountable or responsible administration and rule of law are intimately linked [...]. In a democracy balanced and proper administration is synonymous with a public administration that is organized in such a way that all of its constituent elements together form an equilibrium and monitor each other, thus reducing misuse of power to a minimum: ethical administration. Furthermore, for the organization to be democratic it must be structured in such a way that as many citizens as possible are involved in the administration and that the stated citizen goals are achieved to the fullest extent possible through the efficient use of scarce resources: good governance.³⁴

The new key concepts appear to be openness, accountability, integrity, proper administration and balance of powers. These notions are in part manifest in representative democracy, but in part also in other forms of democracy, such as participatory democracy. Maybe a projection can be made: are these criteria also relevant for (developing) digital or e-democracy, as you understand it?³⁵

In his recent book on the history of democracy, John Keane notes the inception of a new type of democracy, which amends and adjusts representative democracy by means of a growing number of institutions – watchdogs or monitors – that critically follow the performance of the official state institutions. Van Gerven and Lierman (the authors quoted above) show that a multiplicity of institutions are involved in a new, multi-layered and compound (European) legal order. In a similar vein, Keane shows a prodigious variety of forms of “monitory democracy”. In fact, he lists so many that it is sometimes hard to see what connects them. Keane’s list includes (to name but a few) citizen juries, citizens’ participation in municipal budgets, think tanks, consensus conferences, teach-ins, focus groups, advisory bodies, human rights organizations, consumers’ associations, activist judges, democracy cafés, deliberative opinion polls, social forums, expert councils and commemorations. These and many other forms qualify as manifestations of monitory democracy if their objective is to inform the public, and better if needs be, about the many positions that can be adopted in public matters. “What is distinctive about this new historical type of democracy is the way all fields of social and political life come to be scrutinized, not just by the standard machinery of representative democracy but by a whole host of non-party, extra-parliamentary and often unelected bodies operating within, underneath and beyond the

³⁴ W. Van Gerven and S. Lierman, *Algemeen Deel van het Belgisch Privaatrecht* (General Part of Belgian Private Law), Mechelen: Kluwer, pp. 56-57.

³⁵ In, for instance, the evolving new European order either mentioned form of democracy (representative and participatory) is as yet fairly weak.

boundaries of the territorial states.”³⁶ It might be fair to say that Keane’s overview implies recognition of the importance of observing boundaries, on the part of administrative bodies (both in government and adjudication) as well as on the part of democratic monitors that aim to safeguard citizens’ interests. The idea of checks and balances is prominent here.

Keane concludes that the old maxim of representative democracy – one person, one vote, one representative – must make way for the new norm of monitory democracy: “One person, many interests, many voices, multiple votes, multiple representatives.”³⁷ This might well be a very relevant notion for e-democracy and digitalization.

But this raises the question what meaning is left to a number of major official institutions of the democratic-political system, such as an elected parliament (which is mostly developed in nation states). Have they in fact become meaningless? Keane barely comments. Yet here tension is making itself felt: while a healthy democracy requires that civil society can question political actions at all times, a civil society that is too strong – one where the personal is paramount – can deteriorate into ‘interest group’ democracy. Moreover, to whom are all these action groups in fact accountable? Who do they represent? Can they be held accountable? What is their legitimacy, as professor Prins puts it? What about the organization of an equitable system of checks and balances in a networked society? And we will take care of the common good in the context of a multiplicity of monitors? One of the qualities of official politics is that the lines of representation and accountability can to some degree be detected, and that through plurality in e.g. a parliament the common good is also institutionalized as a topic of concern. Is that also true in the context of a digital and globalizing world?

³⁶ J. Keane, *The Life and Death of Democracy*, London: Simon and Schuster, 2009, p. 695.

³⁷ *Ibid.*, p. 691.

PART II: COUNTRY SPECIFIC INITIATIVES

Digital democracy in The Netherlands. **Dutch digital manifestations of representative and monitory democracy** *Karsten Meijer*

“All institutions in the business of scrutinizing power rely heavily on these media innovations; if the new galaxy of communicative abundance suddenly imploded, monitory democracy would not last long”.³⁸

In the contemporary debate on the relationship of democracy and the digitization of society, there appear to be at least two (opposite) perspectives on the matter: the first understands digitization as merely a new vehicle for democracy, as a set of neutral instruments, leaving the core of democracy untouched. The second considers the digital revolution as profoundly affecting all aspects of human, including democracy.

To avoid prejudgment towards one of these perspectives, this proposal takes an empirical approach. This country report will list, analyze and categorize a wide variety of manifestations of digital initiatives in the sphere of democratic government and governance, state and non-state, representative and monitory, launched within one well demarcated geographical area: the Netherlands.

Monitory democracy

The historian Keane claims that from around 1945 a new historical era began for democracy. In this era many changes in the language and ideals and institutions of democracy took place. People living within most areas of the world, independent of their language, nationality, religion or civilization, for the first time on this global scale, got acquainted with democracy. This process is one of Keane explanations of the recent outburst of many different understandings and forms of democracy. Gradually multiple forms of post-parliamentary politics came into existence, the so-called “power-scrutinizing mechanisms”.³⁹

The internet seems to be a huge accelerator of monitory democracy. Keane also recognizes that power-scrutinizing mechanisms seem highly dependent on online instruments: “Monitory democracy and computerized media networks behave as if they are conjoined twins.”⁴⁰ Monitory democracy consists, inter alia, of surveys, focus groups, deliberative polling, online petitions and customer voting. Obviously, but not necessarily, a lot of these monitory forms are online.

One the features of monitory democracy is its multiformity. In fact, the range of forms of the power-scrutinizing mechanisms is so large that the adage of monitory democracy has become “one person, many interests, many voices, multiple votes, multiple

³⁸ J. Keane (2009). The Life and death of democracy, p. 739

³⁹ Idem, p. 688

⁴⁰ Idem, p. 739

representatives". To secure the focus and structure of this research however, we will not just sum up all digital forms of "power scrutinizing mechanisms" in the Netherlands. Instead this research will divide these mechanisms into ones contributing to "impartiality", "reflexivity" or "proximity", the distinction of contemporary democratic forms made by the likeminded philosopher Pierre Rosanvallon, in his work *Democratic Legitimacy*.⁴¹

Representative democracy

For a complete investigation into the current manifestations of digital democracy in the Netherlands, it is necessary to also focus on the representative side of democracy, despite the importance of the development of monitory democracy. It is needless to say that this side is still one of the most important parts of Dutch democracy. There are also a lot of examples of digital that support the representative democracy that comes into mind. Think of voting advise websites or digital projects that monitor voting behavior of electives.

Methodology

In this contribution, the focus is on The Netherlands. By listing current manifestations and analyzing their nature, we aim to achieve a better understanding of the relationship between democracy and the digital world. We will distinguish in listing manifestations that belong to the strands of representative and monitory democracy. Subsequently, the latter will be divided in Rosanvallon's impartiality, reflexivity or proximity.

The result of this inquiry will be a list of developments, an overview of the Dutch digital democracy. Each development will be categorized as and be supplemented by a description. First, this will give us an empirical overview of the current developments in digital democracy. Second, this approach will teach us more about the scientific value of the division of representative and monitory democracy, and the two perspectives on democracy and digitization mentioned above.

It's possible to divide this list of manifestations into more than period since the rise of the Internet, but for reasons of time and space this research will focus on current (2009-2014) developments only.

Digital manifestations of representative and monitory democracy in Belgium.

Koen van Aeken

Two strands compete in the current analysis of the interplay of democracy and the digital overhaul. The first conceives digitalisation as merely a new vehicle for democracy, leaving its bare essentials untouched. The second considers the digital revolution as profoundly affecting human life and all of the ingenuities created by man, including democracy.⁴²

⁴¹ P. Rosanvallon, *Democratic Legitimacy*, p. 16

⁴² The authors of the Belgium and the Dutch country report closely work together at Tilburg University and will tune their contributions to avoid unnecessary overlap.

To steer away from potential bias towards one of these strands, we suggest an empirical analysis of a wide variety of manifestations of digital initiatives in the realm of democratic government and governance, state and non-state, representative and monitory, launched within one well demarcated geographical area. In this contribution, focus is on Belgium. By listing current manifestations and analysing their nature, we aim to achieve a better understanding of the relationship between democracy and the digital world.

Digital Democracy in Brazil: how open is the government to change?

Mônica Steffen Guise Rosina and Alexandre Pacheco da Silva

When it comes to the digital environment, Brazil has been in the spotlight over the past year. The recent approval of the Civil Rights Framework for the Internet (*Marco Civil da Internet*); the Internet Governance discussions that took place early this year, as the city of São Paulo hosted Net Mundial; Dilma Rousseff's explicit and bold opposition to the United States' collection of personal information of Brazilian citizens and espionage targeted on the country's diplomatic missions and strategic industries; are a few examples of how issues related to the internet have become central to the public policy and regulatory debate, both in the national and international levels. There is this overall feeling that Brazil is headed in the right direction, leading global initiatives that aim at fostering internet users' rights and privacy and succeeding in passing a law – one of the first of its kind – that establishes a set of principles and rights that must guide the use of the internet.

But what about using the internet and Information and Communication Technologies (ICTs) to enhance political participation? Have we succeeded in opening up spaces for public engagement, for governments' accountability and for social mobilization? Can we actually talk in terms of "Digital Democracy" when the Digital Divide in Brazil is still quite remarkable?

The hope that new sources of online information would make citizens more aware of politics, that the cyberspace would become a robust forum for political debate and that traditionally inactive citizens would finally be engaged because of and through virtual initiatives is still very much alive. The manifestations that took place in Brazil in June 2013 have certainly highlighted the role of social networks as a key element for the flow of information and political debate and the internet has indeed proven to be a remarkable place for people to interact and collaborate as peers. There are countless examples of civil society reaching out for the government, demanding more access to information, more transparency and more accountability.

But how far has the government come in terms of opening up for the possibilities laid out by the web and by Information and Communication Technologies? Is decision-making still taking place behind closed doors or has the internet encouraged governments to welcome the people into the process? While *Marco Civil da Internet* is portrayed to the world as a highly collaborative and open exercise of putting a bill together, a lot of the last-minute changes that actually enabled the bill to pass were not only done behind closed, but rather heavily locked doors.

It is our proposed goal to answer some of these questions through the lenses of the Brazilian case so that we can contribute to a broader debate on Digital Democracy. In order to do so, this chapter is structured in three main parts. Part one portrays Brazil's stand on internet access and digital literacy, by reviewing and

combining the most recent literature and research efforts in this area. Part two looks at successful examples that demonstrate how the internet has been useful in allowing for the creation of communication, information and mobilization channels, but mostly flowing from one end (people or civil society) to the other (government). Part three will map government efforts in opening up and analyze its effects for the advancement of democracy in the country.

In the end, we hope to gather enough evidence to build arguments that allow us to challenge some of the common-sense perceptions about democracy in the digital environment

Internet Censorship in India

Arpan Banerjee

In legal academia, there is a narrow and a broad view of what constitutes censorship. Kathleen Sullivan defines censorship as “the restriction of speech by the government.”⁴³ Eric Barendt’s use of the term is even narrower, and confined to prior legal restraints on speech by the government.⁴⁴ Adherents of the broad view, such as Paul O’Higgins⁴⁵ and Louis Blom-Cooper,⁴⁶ believe that censorship can emanate from non-state actors and is not necessarily limited to legal prohibitions. O’Higgins lists six possible methods of censorship, including autonomous methods.⁴⁷ Only two of O’Higgins’s methods— “legal censorship” and “extra- legal censorship”— directly involve reference to questions of law.⁴⁸ Legal censorship is imposed through means strictly authorised by law. It comprises both pre-censorship (pre-dissemination restraints) and subsequent censorship (post-dissemination sanctions). Extra-legal censorship refers to the suppression of information through means not strictly authorised by law, such as “bluff and bluster.”⁴⁹ Therefore, in O’Higgins’s scheme of things, Barendt’s idea of censorship is simply pre-censorship, which is one of many kinds of censorship. Arguably, the broad view of censorship is more suitable while discussing freedom of expression in many developing countries, particularly in the context of a complex medium like the internet. In my paper, I propose to use this approach to discuss internet content regulation in India, a diverse democracy which is currently home to the world’s third-largest internet population.

In general, India has a chequered record on the subject of free speech. On the one hand, the Indian higher judiciary has laid down a large body of case law granting citizens the right to criticise the state and powerful non-state institutions, frequently peppering their decisions with references to Western liberal theorists like John Stuart Mill and Alexander Meiklejohn.⁵⁰ However, on the ground, both state and non-state actors have ignored such dicta and harassed their critics, both overtly and covertly. Thus, despite

⁴³ Kathleen M. Sullivan, *The First Amendment Wars*, 207 *NEW REPUBLIC* 35, 38 (Sept. 28, 1992).

⁴⁴ ERIC BARENDT, *FREEDOM OF SPEECH* 151–53 (2005).

⁴⁵ PAUL O’HIGGINS, *CENSORSHIP IN BRITAIN* 11–13 (1972);

⁴⁶ Stuart Hampshire & Louis Blom-Cooper, *Censorship?*, 6 *INDEX ON CENSORSHIP* 55 (1977).

⁴⁷ O’HIGGINS, *supra* note 3, at 12–13.

⁴⁸ *Id.* at 12.

⁴⁹ *Id.* at 12–13.

⁵⁰ *See, e.g.*, *In re Mulgaokar*, (1978) 3 S.C.R. 162, 1; *Rangarajan v. Jagjevan*, (1989) 2 S.C.R. 204, 39–42; *Singh v. Gandhi*, (2002) A.I.R. (Del.) 58, 59; *Bhadra v. State of W. Bengal*, (2005) 4 C.H.N. 601, 12.8; *Rajagopal v. Jayalalitha*, (2006) A.I.R. (Mad.) 312, 27; *Khan v. State of Rajasthan*, (2008) 1 R.L.W. (Raj.) 809, 62.

acknowledging that India has “a legal framework that is largely favourable to press freedom,”⁵¹ Reporters Without Borders currently ranks India a lowly 140 in its global Press Freedom Index.⁵² Justifying the poor rank, the organisation observes that “[c]riminal organisations, security forces, demonstrators and armed groups all pose a threat to India’s journalists”, resulting in “self-censorship”.⁵³ In the context of the internet, the same dichotomy holds true. The think tank Freedom House rates India only as “partly free” with respect to internet freedom, citing several examples of how, “[i]nstead of combatting inflammatory content,” the government “disabled numerous objective sources of information.”⁵⁴

In my paper, I will study internet censorship in India — in the broad sense of the term — in two segments. First, I will analyse substantive laws which allow the state to censor online content through prior restraints or post-dissemination sanctions, particularly the Information Technology Act, 2000. I will discuss how Indian courts have repeatedly instructed the state not to misuse these laws to stifle dissent, and dismissed criminal cases filed against the state’s critics. Second, I will discuss how, in practice, the state, as well as certain non-state actors, have repeatedly disregarded such dicta and harassed their critics. Here, I will refer to examples of websites being blocked by the Indian government, as well as frivolous police complaints being filed against activists. I will argue that this dichotomy exists due to two broader reasons unrelated to the internet: a) loopholes in Indian criminal procedure which give the police disproportionate powers, and b) an inefficient, expensive judicial system which makes it inconvenient for citizens to challenge examples of unlawful censorship. Unless these larger defects are addressed, the internet in India will be plagued by self-censorship due to fear of harassment. To further my enquiry, I will interview citizens who were victims of such methods of censorship.

Popular Constitution-Making The Case of Iceland

Anne Meuwese

“Never again can the world be told by the custodians of the old that the people cannot be relied upon to write the contract between citizens and government, and write it well. From Richard Bater, “Hope from below: composing the commons in Iceland.”⁵⁵

This chapter will build upon previous work regarding the recent Icelandic experiment with popular constitution-making through a process heavily adorned with social media utensils in the wake of the banking crisis. At the basis of the Icelandic constitution-drafting enterprise was the idea that parliaments are not best placed to revise constitutions, given that their incumbent members have vested interests in the organizational structure of the state (Gylfason 2012: 11). This chapter will reflect on the

⁵¹ REPORTERS WITHOUT BORDERS, PRESS FREEDOM INDEX 33 (2008), <http://en.rsf.org/pressfreedom-index-2008.html>.

⁵² REPORTERS WITHOUT BORDERS, WORLD PRESS FREEDOM INDEX 31 (2014), http://rsf.org/index2014/data/index2014_en.pdf.

⁵³ *Id.* at 17.

⁵⁴ FREEDOM HOUSE, FREEDOM ON THE NET 17, 354 (2014), http://freedomhouse.org/sites/default/files/resources/FOTN%202013_Full%20Report_0.pdf

⁵⁵ December 1, 2011, www.opendemocracy.net, as shared by the Icelandic Constitutional Council (Stjórnlagaráð) on Facebook.

Icelandic case of popular constitution making to see how it relates to assumptions on democracy or democratic values being furthered through digitization.

PART III: ACTORS, SPHERES AND REGULATORY INSTRUMENTS

A Critical Theory of Social Media As Public Sphere

Dr. Emre Bayamlıoğlu

If global law is understood as a normative system of multilevel, non-hierarchical and semi-autonomic ordering across the world then, the effects of digital communication technologies on Habermasian public sphere may be the right starting point for a critical theory of the notion of “digital democracy” and its relation to the global legal order. This article aims to provide a critical theory of the “digital public sphere” and its impact on the notions of political action and participation as foundational pillars of modern democracy.

Communication and information in the Habermasian public sphere

In the Habermasian public sphere, the centrality of information and communication lies with their role in the process of legitimation. Social media has revived the aspirations associated with the Habermasian public sphere that, it is universal, anti-hierarchical and facilitates communication. The emergence and widespread use of digital technologies for mediating information and communication has been much celebrated for their transformative potential. However such understanding of the public sphere may be criticized of being too much restrained in a philosophically idealistic interpretation.

Imbalanced nature of power relations and the digital public sphere

The materiality of the public sphere as defined by Habermas mandates certain moral and intellectual qualities possessed by individuals of certain autonomy who are independent of subordinated power relations. In the networked communication environment of the social media, the public sphere is not only a space of discursive speech, but also a purposive realm of commodification of communication and information. Defining digital public sphere as a network of connectedness of free and autonomous individuals will neglect the fact that democratic values are built upon cultural elements produced by political institutions and economic relations as an expression and reinstitution of their dominance. Giving a critical account of the public sphere requires an analysis in light of the evolution of western societies from industrial to post-industrial “*information societies*”.

Depoliticisation through information abundance

Habermas has drawn attention to the commercialization of the press and the mass media that it has become a profit centric, ineffective and privatised communication realm where citizens evidently have little or no influence.⁵⁶ Since the middle of the 20th century, public sphere is inseparable from culture and entertainment consumption and, most of the times, subsumed by the systemic logic of profit and efficiency. In the post industrial capitalism of the 21st century, the constituents of public sphere as processes of information, communication and participation have become ends that are sufficient unto themselves rather than being means to achieve certain political goals.

⁵⁶ *ibid.*, at 68

Furthermore, today's public sphere as dominated by social media, has atomising and fragmenting effects that it constantly produces new utterances and novel perspectives that never reach to a point where different views are structured and organised as politicised discourses. Social media personalizes free speech so that public sphere dissolves into an endless number individual view. Social media creates an atomized hyper-plurality where constant communication and interactivity obstruct any criticism of systemic nature and mostly become restricted to the symptomatic effects of social and economic antagonisms, rather than stressing those antagonisms.

A sense of false participation

Democracy also a material condition of which its attainment requires the political engagement and struggle of organised individuals who are motivated and who have the capacity of coherent political action. Communication perceived as an end to itself creates a sense of false participation that individuals do nothing but "simply exchange information, register a previously established opinion, coordinate activity or agree to disagree". However one should not overlook the fact that all these, one way or the other, are kind of activities that involve no political action but are mere forms of communication.

Contributing to content circulation may turn out to be profoundly passive since the content is linked but may be, not really connected. This is where communication and empowering technologies loose their primary function and transform into a *fetish*, and thus give rise to a sense of false participation. Indeed, authoritarian regimes develop a new strategy that they try to control and manipulate online communication environment since it is understood that blocking access to the Internet does not result as expected and rather stir up the disturbance in the streets.

Politics as Anti-politics

Illusions engendered by information abundance and false participation contribute to the legitimisation of practices that systematically distort the channels for politicization of questions of material equality, as it conceals the imbalanced nature of power relations in the contemporary free market societies. If the term "politics" taken in the broader sense as related to the question of distribution of power and economic resources, then a democratic system should, in the first place, provide mechanisms to produce dissensus and controversy over the questions of material importance. In the current information and communication environment, the system is more focused on containing and channelling controversies in certain direction and thus become depoliticizing.

Digital Democracy: Do We Want Electronic Elections and Are They Constitutional?

Rivka Weill

This chapter suggests that while we tend to think of digital democracy as a positive development, embracing digital democracy to the fullest by using it for elections may at times be too risky an experience for democracies. Even assuming technology may reliably replace traditional paper voting, transforming to e-voting nonetheless may mean paying heavy prices in terms of transparency, popular participation in the conduct of elections, state's duty to independently provide for reliable elections and even mere public trust in the democratic system. But, this assumption of reliability may not

withstand reality as the incentives of both inside and outside saboteurs to cheat and determine falsely electoral results are so great.

All this is true even when elections are conducted at controlled environments. Were we to enable remote voting through the internet, it would also be impossible to guarantee the free and secret nature of elections, suggestions to the contrary notwithstanding. Moreover, internet voting will completely transform the meaning of elections as a communal endeavor in collective self-definition.

It is thus suggested that countries should be especially careful when drawing conclusions from other countries' experiences with e-voting. There are various factors that weigh heavily in the decision whether e-voting should be treated as constitutional in a given country. Especially in the context of e-voting what's constitutional for one country may not necessarily be so for another.

The Structure of the Chapter:

- . Introduction—introducing the topic and its relevancy
- . Constitutional Framework—offering proportionality as the framework through which to evaluate whether transitioning to e-voting is constitutional
- . E-voting at controlled environments—discussing the constitutional challenges e-voting poses even when conducted at controlled environments (e.g. voting at official polling stations supervised by the state)
- . Remote Voting—discussing the additional constitutional challenges e-voting poses when conducted through the internet
- . Proportionality and Comparative Factors—elaborating factors that vary comparatively and should be weighed in the decision whether adopting e-voting is constitutional
- . Conclusion

European citizens' initiative

Marie-José Garot

This chapter will analyze the “European citizens' initiative” that might illustrate the emergence of a European democracy, thanks to digitalization. As known, the Lisbon Treaty introduced the citizens' initiative as a new right granted to the citizens of the European Union. Within the new title on “Provisions on Democratic principles”, Article 11.4 of the TEU states: “Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.” On its part, Article 24 adds that “The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member

States from which such citizens must come.” Based on this article the European Parliament adopted, jointly with the Council, Regulation 211/2011 in February 2011 on “Citizens’ initiative”. Months later, the European Commission adopted Regulation 1179/2011 of 17 November 2011 “laying down technical specifications for online collection systems pursuant to Regulation (EU) No 211/2011 of the European Parliament and of the Council on the citizens’ initiative”.

Based on the papers written by Corien Prins and Maurice Adams, it is interesting to analyze to what extent the European citizens’ initiative might foster (direct) democracy in the European (if not global) sphere, thanks particularly to the Internet. This will require first to understand the substantial and procedure rules that govern the presentation of a citizens’ initiative (Who are the actors involved? How are they involved? “What makes digitalization specific in all of this?”). Then, I would like to explore how the European Commission is taking into account the initiatives presented (the “cross-border effect”). For the time being, only one initiative has been successful (meaning that the European Commission will formally present a legislative proposal to the European Parliament and the Council based on it). Analyzing the reasons why the other initiatives have not been taken positively into account can also give indication of the limits of such a new tool of direct democracy. Finally I would assess whether this kind of expression of citizens’ opinion can facilitate the emergence of a European public sphere, considered as a necessary step for the birth of a European demos, and hence a European Democracy.

In search of the holy grail: democratic multistakeholder governance in internet policy-making

Nicolo Zingales & Roxana Radu

The evolution of internet encapsulates the tensions of globalization in the most concrete manner. Two decades after the boom of the World Wide Web and the rise of e-commerce, the global governance of the internet remains at odds with the traditional conceptualization of international law. What is specific to the internet is the absence of a treaty signed by sovereign states to regulate key aspects of the network or activities conducted online. While an agreement was reached to assign to an international organization (the ITU) specific technical matters such as the international radio frequencies spectrum, satellite orbits and global telecommunication standards, a wide range of issues have been left either unaddressed at the international level, or only “informally” regulated through mechanisms of “soft law” that leave ample room for experimentation (and continuous reform) at the national or regional level.

The near-absence of transnational treaties for regulating internet communication is part of a broader paradigm shift towards the governance of public resources, which implies a reconsideration of sovereignty and of the extent to which states act as governors, be it directly or indirectly. In this context, multistakeholder participation has emerged as the mode of governance most typically associated with the governance of the cyberspace, premised on the transnational engagement of different actors in decision-making processes, including governments, civil society and the private sector.⁵⁷ From a global

⁵⁷ De Nardis, Laura (2014). *The Global War for Internet Governance*. New Haven: Yale University Press; Mueller, Milton (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, MA: MIT Press; Radu, Roxana, Jean-Marie Chenou and Rolf H. Weber, *The Evolution of Global Internet Governance: Principles and Policies in the Making*. Berlin and New York: Springer.

governance perspective, the Internet is currently run through a combination of frameworks of coordination, rhetoric and modeling, constraints and inducements, as well as routine interactions.⁵⁸

Although no single formula of multistakeholder participation has prevailed so far, its various embodiments are closely linked to the ideals of deliberative democracy, aiming to strike a balance between process fairness (in particular equal footing), political equity (power and influence) and deliberation. A key element here is the use of procedures and guiding norms for interaction in order to ensure that the viewpoints articulated are taken into account and debated in a constructive manner, while allowing for input and feedback from other actors. Apart from achieving specific aims, engagement with policy processes is premised upon a set of general expectations, including making a particular voice heard, shaping interactions and activating supportive attitudes, and exerting influence over decision-making. However, the loose conceptualization of this form of participation, first as a model for policy-making and then as a sort of messianic approach to every sort of Internet governance issue under discussion, has recently led to a mushrooming of critical voices lamenting a discrepancy between the ideology that is now advanced with “multistakeholderism” and widely accepted democratic principles.⁵⁹

First, multistakeholderism as a form of governance for policy making has not been fully institutionalized into the structures within which internet governance decisions are made. Second, current definitions of multistakeholderism do not provide any procedures by which decisions are to be taken, other than them being based on consensus and being open, transparent and accountable. Also, agreement has not been reached yet on whether multistakeholderism should rather be seen as a policy-making process or as a form of representation. Finally, it is observed that developing countries participation to Internet governance fora or in online public consultations has been hindered for a few reasons. Low level of access to and use of ICT, an absent or nascent Internet industry, lack of financial resources to travel to the venues of the meetings, and lack of capacity to meaningfully engage in global governance debates are only a few of the main obstacles preventing multistakeholderism to emerge as a truly inclusive form of Internet governance.⁶⁰

In other words, the challenge seems to be not only one of ensuring equality among intra-group stakeholders, but also of defining the extent whether inter-group equality should be promoted by the multistakeholder approach. The extent to which different stakeholders should be on the same footing has been debated since the laying down of the definition of Internet governance in the so-called “Tunis Agenda” of the World Summit on Information Society in 2005, which contained a recognition of the “respective roles and responsibilities” of the stakeholders. More recently, the Netmundial Multistakeholder Statement adopted by the Global Multistakeholder Meeting on the Future of Internet Governance embraced a flexible view of such

⁵⁸ Sylvan, David (2014). “Global Internet Governance: Governance without Governors”, in: Radu, Roxana, Jean-Marie Chenou and Rolf H. Weber, *The Evolution of Global Internet Governance: Principles and Policies in the Making*. Berlin and New York: Springer, pp. 23-36.

⁵⁹ Chenou, Jean-Marie (2010). Multistakeholderism or elitism? The creation of a transnational field of Internet governance. Presented at the Fifth Annual Conference of the Global Internet Governance Academic Network (GigaNet) in Vilnius, Lithuania (September 2010); Gurstein, Michael (2014), “The Multistakeholder Model: Neoliberalism and Global Internet Governance”

<http://gurstein.wordpress.com/2014/03/26/the-multistakeholder-model-neo-liberalism-and-global-internet-governance/>

⁶⁰ Calandro, Enrico, Gilwald, Allison and Zingales, Nicolo (2013), *Mapping Multistakeholderism in Internet Governance: Implications for Africa*, Research ICT Africa Discussion Paper (August 2013).

respective roles and responsibilities, which reflects the diversity of issues under discussion and the documented multistakeholder practice of different organizations involved in Internet governance.⁶¹ This suggests an evolution of the understanding of the concept of multistakeholder governance, which was simply equated with “bottom-up participation” of stakeholders in the early days of the Internet⁶², but came under scrutiny more thoroughly in the different attempts to institutionalize it in policy development processes. Undoubtedly, the digitization of information and the increasing use of the Internet for consultation and policy discussion has played an important role in making this evolution possible; however, at the same time there seems to be significant participatory potential that remains unexploited or not adequately encouraged, largely due to the lack of overarching norms on the incorporation of participatory inputs into Internet policy-making.

In this chapter, we define ‘multistakeholder governance’ and discuss some of these conceptual and definitional challenges, starting from what we believe to be the values furthered through multistakeholder participation and proposing on this basis a sensible way of implementing its core principles into administrable procedures. Ultimately, we advance concrete proposals for a shift of paradigm towards “democratic multistakeholderism”.

Civic driven open data initiatives: transparantizing the workings and performance of the State?

Stefan Soeparman

In earlier times, governments have often relied on secrecy as a legitimate part of governing. Similarly, in a long tradition of political thought, ranging from classical authors such as Tacitus to more recent ones such as Carl Schmitt, secrecy was thought of as an indispensable part of state affairs. In this tradition, centering on the so called *arcana imperii*, secrecy was seen as a way of securing discretionary powers for the state that contributed to its stability and effectiveness. The tradition points to ‘an awareness that the stability and preservation of power requires a withholding of knowledge and a refusal to communicate’.⁶³ This appreciation of secrecy fits a Machiavellian approach to politics in which concealment benefits the State’s ability to manoeuvre freely in order to beguile Fortuna or fortune as the ultimate enemy of political order and a constant threat to state security.

Nowadays however, the antonyms of secrecy – openness and transparency – are widely seen as far more desirable traits of good governance. They are regarded as key components of modern democratic rule⁶⁴ and are even viewed as essential values in

⁶¹ DeNardis, Laura and Raymond, Mark, “Thinking Clearly about Multistakeholder Internet Governance,” Paper presented at the Eight Annual Conference of the Global Internet Governance Academic Network (GigaNet) in Bali, Indonesia (October 2013).

⁶² Doria, Avri (2014). “Use (and Abuse) of Multistakeholderism in the Internet”, in: Radu, Roxana, Jean-Marie Chenou and Rolf H. Weber, *The Evolution of Global Internet Governance: Principles and Policies in the Making*. Berlin and New York: Springer, pp. 115-138.

⁶³ Horn E (2011) *Logics of political secrecy Theory, Culture and Society* Vol 28 (7-8): 103-122.

⁶⁴ Hendriks F, Brandsen T, Munckhof ED, Brink GJM, Soeparman SB, Oude Vrielink MJ and Kruijven PM (2006) *Scanning good governance: een handreiking*. *Goed bestuur : tijdschrift over governance*, 2 (4): 23-29 and Piotrowsky S (2007) *Governmental transparency in the path of administrative reform*. Albany, New York: State University of New York Press.

what some see as a paradigmatic shift transforming rule bound representative democracy in a far more fluid form characterized by a vast multitude of highly dispersed power – contesting and power – monitoring mechanisms.⁶⁵ In this monitory democracy: ‘the rules of democratic representation and public accountability and citizen participation are applied to a much wider range of settings than ever before’.⁶⁶ In it, the democratic principle is no longer primarily confined to formal modes of representation and an institutionalized realm in which political parties contend for voter approval and legislative power. Somewhat akin to Bauman’s notions of liquid modernity⁶⁷ the monitory democracy is characterized by a waning institutional coherence, a permanent state of flux and the rise of transgressive forms of power. To borrow a phrase from Donald Schön, monitory democracy truly implies a shift beyond the stable state.⁶⁸ The advent of monitory democracy coincides with new forms of civic engagement that are clearly visible in many modern societies today. These new civic initiatives can often be found on a local level in a wide range of societal sectors as diverse as (health)care, energy, social-security or fabrication. They include local care cooperatives, energy collectives, mutual insurance funds for the self employed or so called fablabs, to name but a few examples. Such and similar initiatives are said to form a ‘third wave in collective civic engagement’.⁶⁹ This third wave fits the narrative of the Big Society⁷⁰ in which increased civic action and self-governance go hand in hand with dwindling public programmes and receding state institutions from many aspects of modern life. Do it yourself democracy or ‘do-ocracy’, a phrase originally coined in the open source communities of the internet, is all around us. In Elinor and Vincent Ostrom’s terminology, democracy thus becomes far more polycentric containing many self-regulating and often formally independent centres of decision making and multiple governing authorities at differing scales.⁷¹

Rhizomatic forms of transparency and openness are endemic to the intertwined emergence of monitory democracy and the third wave in collective civic engagement. Amongst having other effects – such as promoting collaborative capacity⁷² – they enable non-institutional actors to oversee each other, and the workings or performance of the state. A call for openness and transparency – especially of government affairs – has gained tremendous momentum with the on-going mediatization of society⁷³, the emergence of the internet⁷⁴, the recent economic crisis⁷⁵ and strides in ubiquitous computing power that enable state of the art analytics to scrutinize government action. Not surprisingly, open government or open data initiatives – often relying on digital data processing – have sprung up in many countries in recent years. National, regional or

⁶⁵ Keane J (2008) Monitory Democracy? Paper prepared for the ESRC Seminar Series, ‘Emergent Publics’, The Open University, Milton Keynes, 13th 14th March 2008.

⁶⁶ Idem, 4.

⁶⁷ Bauman Z (2000) Liquid modernity Polity Press, Cambridge.

⁶⁸ Schön, DA (1973) Beyond the stable state: public and private learning in a changing society. Harmondsworth: Penguin Books.

⁶⁹ De Moor T (2013) Homo Cooperans: instituties voor collectieve actie en de solidaire samenleving. Universiteit van Utrecht.

⁷⁰ Blond, Ph. (2010) Red Tory. How left and right have broken Britain and how we can fix it. London: Faber & Faber.

⁷¹ Ostrom V et al., (1961) The organization of government in metropolitan areas: a theoretical inquiry. American Political Science Review 55: 831–842. Ostrom E (2010) Polycentric systems for coping with collective action and global environmental change Global Environmental Change 20: 550–557.

⁷² E.g. Foster-Fishman PG, Berkowitz SL, Lounsbury DW, Jacobson S, Allen NA (2001) Building collaborative capacity in community coalitions: a review and integrative framework American Journal of community psychology 29(2): 241–61.

⁷³ Strömbäck J (2008) Four Phases of Mediatization: An Analysis of the Mediatization of Politics The International Journal of Press/Politics 13 (3): 228–246.

⁷⁴ Bannister F & Connolly R (2011) The Trouble with Transparency: A Critical Review of Openness in e-Government Policy & Internet, Vol. 3 (1), Art. 8: 1–30.

⁷⁵ del Sol DA (2013) The institutional, economic and social determinants of local government transparency Journal of Economic Policy Reform, 16 (1): 90–107.

local governments are making public ever larger parts of the data(sets) they collect. Shadbolt identifies four main strategic drivers for this trend: transparency and accountability, economic and social value, public service improvement and finally the creation of new industries and employment.⁷⁶ Many open data initiatives are thus at least partly being initiated from above in a top down process. Civic engagement however, is often a crucial bottom up driver in the sensemaking process, the analytics, the redistribution and novel use of government data. It seems that government affairs are at least potentially transparentized by open data initiatives, often as a by-product of other and more immediate civic aims such as attempts to encourage and advance forms of local self governance under the receding shadow of publicly funded programmes. According to Kassen: 'Theoretically, the main value of open data as a concept is that in providing a free public access to various official files the government not only becomes presumably more transparent but also more efficient as it potentially could promote civic engagement by enabling citizens to participate in various discussions on how to better address their needs'.⁷⁷ Focussing on transparency and testing theory, the crucial question in reality seems to be to what extent and in what way government transparency is being promoted by open data initiatives? Using a typology of transparency devised by Meijer⁷⁸, thus differentiating between process oriented, institutional, informational and performance related forms of transparency, this study aims to highlight the extent and ways in which citizen driven open data initiatives transparentize the workings of (local) government. Two Dutch open data initiatives are (to be) included in the study: the Rotterdam open Data Lab and the Centre for budget monitoring and citizen participation, located in Amsterdam. The study will use a qualitative case study design consisting of a thematic analysis of public records and approximately 12 fully transcribed semi-structured interviews with local civil servants and civic interviewees involved in the open data initiatives included in the study.

Edemocracy; reconciling the interests of open government and data protection

Colette Cuijpers

Openness and transparency are key ingredients to build accountability and trust, which are necessary for the functioning of democracies and market economies.⁷⁹ An "open" government is transparent, accessible to anyone, anytime, anywhere; and responsive to new ideas and demands. E-Government, Internet-based technologies and applications will be crucial components for open, transparent and accessible governments.⁸⁰ Legal instruments can be helpful in creating open government by providing rights of access and (re)use of public sector information (PSI)⁸¹, a field in which the European Union has enacted numerous policy and legislative initiatives.⁸² However, besides openness and

⁷⁶ Shadbolt, N. (2010). The linked data revolution In: Innovating through information lecture series. London School of Economics.

⁷⁷ Kassen M (2013) A promising phenomenon of open data: A case study of the Chicago open data project *Government Information Quarterly* 30: 508.

⁷⁸ Meijer A (2013) Understanding the Complex Dynamics of Transparency *Public Administration Review* Vol 73, (3): 429–439.

⁷⁹ Angel Gurría, Openness and Transparency - Pillars for Democracy, Trust and Progress. Available at: <http://www.oecd.org/fr/etatsunis/opennessandtransparency-pillarsfordemocracytrustandprogress.htm>

⁸⁰ Idem.

⁸¹ More on PSI see Janssen, K. (2011). The influence of the PSI directive on open government data: An overview of recent developments. *Government Information Quarterly* 28(4), 446-456.

⁸² E.g. Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information. (PSI Directive) and Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001

transparency, privacy is also fundamental to democracy. In the wording of Cohen: “Privacy is an indispensable structural feature of liberal democratic political systems. Freedom from surveillance, whether public or private, is foundational to the capacity for critical self-reflection and informed citizenship. A society that permits the unchecked ascendancy of surveillance infrastructures cannot hope to remain a liberal democracy”.⁸³ The European Union is known for its strict privacy and data protection regulations, reaffirmed by the current pending proposal for a Privacy Regulation.⁸⁴ Increased computer power, advancing data mining techniques and the increasing amount of publicly available big data extend the reach of the EU Data Protection regime to much more data than currently assumed.⁸⁵ Privacy and data protection regulations could obstruct the implementation of open data policies in the EU.⁸⁶ As both legal frameworks are key to liberal democracy, a proper balance is needed between open data and information privacy regulations. On the one hand, unfair privacy arguments may hinder the use of data or innovative technologies that foster democracy, while, on the other hand, the uncontrolled availability of public datasets will lead to more profiling, with chilling effects on individual freedom and a reduction in democratic accountability. Moreover, privacy also shelters the processes of play and experimentation from which innovation emerges.⁸⁷

This chapter will analyze the possible misbalance between the current EU legal framework on access to and (re)use of public sector information and the proposed Regulation on Data Protection. It will be assessed if changes to the Regulation can be proposed to improve this balance in view of fostering liberal democratic values.

Why can't we be friends? Copyright and Freedom of Expression at the Crossroads of Digital Democracy
Pedro Letai

Free speech theory and policy intertwine with copyright at multiple points. Copyright profoundly shapes the mix of speech and speakers that populate our public discourse. Both the speech and speakers that copyright impacts stand at the heart of free speech policy.

Information is not a commodity anymore, but a critically important resource and input to learning, culture, competition, innovation and democratic discourse. Copyright is often written about as if it is, or could be, a kind of constitutional law for the Internet. Were copyright to appropriately balance the private rights of owners to control access

regarding public access to European Parliament, Council and Commission documents, OJ L 145; and the European Commission, Open data An engine for innovation, growth and transparent governance, Brussels, 12.12.2011

COM(2011) 882 final available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0882:FIN:EN:PDF>; European Commission (2011). Communication from the European Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions “Open data: An engine for innovation, growth and transparent governance”, Brussels (“2011 Commission Communication”).

⁸³ Cohen, Julie E., What Privacy Is For (November 5, 2012). Harvard Law Review, Vol. 126, 2013. Available at SSRN: <http://ssrn.com/abstract=2175406>

⁸⁴ Proposal for a Regulation on the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) Brussels, 25.1.2012 COM(2012) 11 final 2012/0011 (COD), available at: http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf

⁸⁵ Ohm, P. (2010). ‘Broken promises of privacy: Responding to the surprising failure of anonymization’ UCLA Law Review 2010, p. 1701.

⁸⁶ The Art. 29 Working Party acknowledged possible frictions. Article 29 Working Party (2013) Opinion 06/2013 on open data and public sector information (‘PSI’) reuse, WP 207.

⁸⁷ Cohen, p. 2.

to information against the public interest of creators, consumers and the public at large to gain access, then the foundations for a democratic Internet and society would be more secure.

Historically, there have been differences in the rights recognized by states, reflecting different cultural and legal responses to technological innovation. Whilst ostensibly similar in character, exclusive rights were conferred to some depending upon the classification of copyright subject-matter, which is another way of saying that the rights were, to varying degrees, technologically and culturally specific. Even amongst western nations with similar economies, different national emphases were accommodated. The French regulation of photography, cinematography, and its comparatively generous film rights are an example. However, in the 1990s piracy was identified as a generic problem affecting all digital technology. Piracy mandated essentially the same legal response to digitalization, regardless of the nature of the technology, the uses made of it, the domestic history and local circumstances.

Accordingly, significant differences in the history and development of rights and treatment - between northern and southern countries, western and Asian legal systems, Commonwealth and continental regimes in particular - were set aside, so that trade opportunities of the "digital economy" could be expanded for all. The "one size" we were all moving towards was primarily an American standard, reflecting that country's strength in the information economy and its comparative influence in world trade relations. This trend was further accentuated in bilateral and multilateral free trade agreements, notwithstanding the regional and national anomalies that also crept in with these negotiations. Consequently, owner protections have advanced everywhere and digital freedoms have been formally and symbolically curtailed.

The strategy of defending the democratic Internet by relying on a global copyright, free speech, and innovation tradition is nowadays politically far from reality. Whether copyright helps or hinders a democratic Internet cannot be decided by idealized assertions of the inherent public good of open access. For copyright to serve a public law function, it needs to be responsive to real communities and their political problems. Here, the public is not all of one kind or in the same situation. Being responsive to historical impediments to communities coming together - problems of being respected, heard, and able to realize common desires - is a higher priority for a democratic Internet than a commitment to open copyright or enabling individual autonomy per se. This requires looking beyond questions about the politics of copyright law and the Internet and looking at copyright in relation to the broader state of society and the problems facing disadvantaged groups.

In this chapter I would draw a few of the many possible alternatives for paring back speech chilling copyright holder control while continuing to provide ample remuneration for market based authors and media firms dedicated to producing original expression. The proposal tends toward narrowing copyright holders' proprietary entitlements, converting in some cases those proprietary copyrights to liability rules that deny copyright holders a veto but entitle them to compensation for use of their works. The proposal would then not result in net loss for copyright holders. In some areas, actually, mechanisms for payment where today copyright holders receive nothing would be proposed.

The proposal can be roughly grouped as follows:

Copyright's scope as 'extension of the creative appropriation';
Copyright's scope as 'length of its terms of protection';
Copyright vs. personal and other fair uses of protected materials; and
Revisiting the unlimited character of moral rights.

Today's increasing set of proprietary rights regarding copyright too often serves as a tool for private censorship. Copyright law would truly serve as an engine of free expression when it limits the reach of copyright holders control no less than when it spurs the creation of original works of authorship.

PART IV: An agenda for reflections on globalization, law and digital democracy

Based on the insights gained from the chapters presented in Part II and III, Part IV aims to present some building blocks for answering more general questions pertaining the relationship between eDemocracy and the broader development of globalization, such as: *What international actors are or should become involved? What makes e.g. that the reaction to the cross-border effects and development do not fit the traditional concept of international law but is illustrative for global law? What makes digitalization specific in all of this and in what way is it merely an example of the broader development of globalization (in other words, is technology merely a neutral tool, is it instrumental or something in between (and if so, what characterizes this)?*