

INTERNATIONAL JOURNAL OF DIGITAL AND DATA LAW

REVUE INTERNATIONALE DE DROIT
DES DONNÉES ET DU NUMÉRIQUE

Vol. 2 - 2016



ISSN 2553-6893

International Journal of Digital and Data Law
Revue internationale de droit des données et du numérique

Direction :
Irène Bouhadana & William Gilles

ISSN : 2553-6893

IMODEV
49 rue Brancion 75015 Paris – France
www.imodev.org
ojs.imodev.org

*Les propos publiés dans cet article
n'engagent que leur auteur.*

*The statements published in this article
are the sole responsibility of the author.*

Droits d'utilisation et de réutilisation

Licence Creative Commons – Creative Commons License -



Attribution

Pas d'utilisation commerciale – Non Commercial

Pas de modification – No Derivatives

À PROPOS DE NOUS

La **Revue Internationale de droit des données et du numérique (RIDDN)/ the International Journal of Digital and Data Law** est une revue universitaire créée et dirigée par Irène Bouhadana et William Gilles au sein de l'IMODEV, l'Institut du Monde et du Développement pour la Bonne Gouvernance publique.

Irène Bouhadana, docteur en droit, est maître de conférences en droit du numérique et droit des gouvernements ouverts à l'Université Paris 1 Panthéon-Sorbonne où elle dirige le master Droit des données, des administrations numériques et des gouvernements ouverts au sein de l'École de droit de la Sorbonne. Elle est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Elle est aussi fondatrice et Secrétaire générale de l'IMODEV.

William Gilles, docteur en droit, est maître de conférences (HDR) en droit du numérique et en droit des gouvernements ouverts, habilité à diriger les recherches, à l'Université Paris 1 Panthéon-Sorbonne où il dirige le master Droit des données, des administrations numériques et des gouvernements ouverts. Il est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Il est aussi fondateur et Président de l'IMODEV.

IMODEV est une organisation scientifique internationale, indépendante et à but non lucratif créée en 2009 qui agit pour la promotion de la bonne gouvernance publique dans le cadre de la société de l'information et du numérique. Ce réseau rassemble des experts et des chercheurs du monde entier qui par leurs travaux et leurs actions contribuent à une meilleure connaissance et appréhension de la société numérique au niveau local, national ou international en analysant d'une part, les actions des pouvoirs publics dans le cadre de la régulation de la société des données et de l'économie numérique et d'autre part, les modalités de mise en œuvre des politiques publiques numériques au sein des administrations publiques et des gouvernements ouverts.

IMODEV organise régulièrement des colloques sur ces thématiques, et notamment chaque année en novembre les *Journées universitaires sur les enjeux des gouvernements ouverts et du numérique / Academic days on open government and digital issues*, dont les sessions sont publiées en ligne [ISSN : 2553-6931].

IMODEV publie deux revues disponibles en open source (ojs.imodev.org) afin de promouvoir une science ouverte sous licence Creative commons **CC-BY-NC-ND** :

- 1) la *Revue Internationale des Gouvernements ouverts (RIGO)/ International Journal of Open Governments* [ISSN 2553-6869] ;
- 2) la *Revue internationale de droit des données et du numérique (RIDDN)/ International Journal of Digital and Data Law* [ISSN 2553-6893].

ABOUT US

The **International Journal of Digital and Data Law / Revue Internationale de droit des données et du numérique (RIDDN)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

Irène Bouhadana, PhD in Law, is an Associate professor in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where she is the director of the master's degree in data law, digital administrations, and open governments at the Sorbonne Law School. She is a member of the Institut de recherche juridique de la Sorbonne (IRJS). She is also the founder and Secretary General of IMODEV.

William Gilles, PhD in Law, is an Associate professor (HDR) in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where he is the director of the master's degree in data law, digital administration and open government. He is a member of the Institut de recherche juridique de la Sorbonne (IRJS). He is also founder and President of IMODEV.

IMODEV is an international, independent, non-profit scientific organization created in 2009 that promotes good public governance in the context of the information and digital society. This network brings together experts and researchers from around the world who, through their work and actions, contribute to a better knowledge and understanding of the digital society at the local, national or international level by analyzing, on the one hand, the actions of public authorities in the context of the regulation of the data society and the digital economy and, on the other hand, the ways in which digital public policies are implemented within public administrations and open governments.

IMODEV regularly organizes conferences and symposiums on these topics, and in particular every year in November the Academic days on open government and digital issues, whose sessions are published online [ISSN: 2553-6931].

IMODEV publishes two academic journals available in open source at ojs.imodev.org to promote open science under the Creative commons license CC-**BY-NC-ND**:

- 1) the *International Journal of Open Governments/ la Revue Internationale des Gouvernements ouverts (RIGO)* [ISSN 2553-6869] ;
- 2) the *International Journal of Digital and Data Law / la Revue internationale de droit des données et du numérique (RIDDN)* [ISSN 2553-6893].

LEGALLY NON-BINDING CITIZEN CONSULTATION VIA INTERNET AN END IN ITSELF OR ONE STEP CLOSER TO THE DEMOCRATIC IDEAL

by **Theresa WITT**, Mag. Iur. Research Assistant at Heinrich-Heine-University Düsseldorf Chair of Public Law, Legal Theory & Legal Sociology, Prof. Dr. Martin Morlok – Graduate School “NRW Fortschrittskolleg Online-Partizipation”

§ 1 – E-PARTICIPATION – WHAT DO WE TALK ABOUT?

Researchers need to find and agree on terms and definitions to describe and discuss scientific observations. If new research is done on established topics, however, it may be enough to alter the understanding of already existing concepts, to broaden definitions and modify scientific terms respectively to link them with new levels of meaning.

Online participation is an excellent example for such an approach, since many (offline) principles have been equipped with the prefix “e” for “electronic”: e-participation, e-government and e-democracy are the most discussed *concepts 2.0*. This field of research involves scholars from many different disciplines, such as political science, law, sociology as well as communication studies, information science and economics. Therefore, it is all the more important to distinguish carefully between different terms, concepts and research perspectives, especially, if the terms are closely related to one another.

A) Definition of E-Participation

There are many definitions of e-participation, which deal with a variety of aspects. In this paper, *e-participation* (synonymously used with online participation) is understood as the legally non-binding, deliberative and voluntary contribution of citizens to administrative/ political decisions *via* top down initiated online processes (partly or completely organized *via* the Internet). The participation platforms/websites should at least partly be accessible to the public (although the actual discussion may be for registered participants only). These processes can either be formal or informal. Participants shall be able to contribute actively to the discussion, for example by posting comments/statements/opinions, providing information, making proposals, submitting ideas and expressing agreement or disagreement to the posts of others.

B) Categorizing Different Types of E-Participation

When categorizing types of (e-)participation, there are many different approaches, some of which are very detailed and

complex. Before dealing with details, though, it may help to ask these four basic questions:

- 1) Is the participation process formal or informal?
- 2) Which political or administrative aims shall be accomplished?
- 3) At what level of intensity does the process take place?
- 4) Who is allowed to participate?

1) *Formal and Informal Participation Processes*

Participation can either be formal or informal.¹ A participation process is formal if the competent authorities are legally obligated to initiate it. Those formal participation processes are often found in urban planning schemes, in Germany *see inter alia* § 3 BauGB (Building Code),² § 10 ROG (Regional Planning Act),³ § 10 (3, 4) BImSchG (Immission Control Act),⁴ § 9 UVPG (Environmental Impact Assessment Act),⁵ § 73 VwVfG (Administrative Procedure Act).⁶ For informal participation on the other hand there are no preexisting legal regulations, consequently, informal participation is initialized voluntarily. Formal participation leaves less flexibility to the initiators than informal participation, since the aims, level of intensity and groups of participants are already set by law. Internationally prominent examples for such informal participation are public budgeting and local action plans, for example for noise reduction.

2) *Participation Aims*

According to Fritsche, there are two main objectives for participation: making rational political decisions and reducing the distance between rulers and those who are ruled.⁷ These two aspects can be defined as the rational dimension and the legitimizing dimension.

In more detail, participation may *inter alia* aim at: strengthening civil engagement, gathering information, encouraging political discussions and enhancing transparency, legitimacy and acceptance.⁸ Identifying and distinguishing the individual aims and intentions for each participation process is indispensable. Only then can the initiators decide which type of process fits their needs

¹ N. Enke & I. Reinhardt, *Akzeptanz durch Beteiligung* in G. Bentele et al., *Akzeptanz in der Medien- und Protestgesellschaft* 57, 65, 2015.

² Baugesetzbuch [BauGB] [Federal Building Code], Sept. 23, 2004, BGBl. I at 2414, as amended.

³ Raumordnungsgesetz [ROG] [Federal Regional Planning Act], Dec. 22, 2008, BGBl. I at 2986, as amended.

⁴ Bundesimmissionsschutzgesetz [BImSchG] [Immission Control Act], Sep. 26, 2002, BGBl. I at 3830, as amended.

⁵ Gesetz über die Umweltverträglichkeitsprüfung [UVPG] [Environmental Impact Assessment Act], Feb. 24, 2010, BGBl. I at 94, as amended.

⁶ Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], Jan. 23, 2003, BGBl. I at 102, as amended.

⁷ MIRIAM FRITSCH, *MIKROPOLITIK IM QUARTIER* 68 (2011).

⁸ P. NANZ & M. FRITSCH, *HANDBUCH BÜRGERBETEILIGUNG* (2012); Jan Zickow, *Neue Formen der Bürgerbeteiligung?* GUTACHTEN D ZUM 69. DEUTSCHEN JURISTENTAG [DJT] D14-D19 (2012).

and what kind of information they must provide in order to enable citizens to participate. Also, evaluating a process as successful or failed is only possible in relation to the identified aims. Finally, different aims require different considerations regarding the structure, design, content and outcome of the participation initiative (in regard to the consequences of different aims on representativeness *see* § 1-B-5).

3) *Level of Intensity*

Sherry R. Arnstein was one of the first who spoke about different steps of participation. In 1969, he introduced his concept of the so called “*Ladder of Citizen Participation*”.⁹ Since then, multiple models have been developed, involving different “*levels of intensity*”.¹⁰ In all models the lowest level of intensity is information. Participation types at this level are for example fact sheets, open houses, web sites or newsletters. The second commonly accepted level of intensity is consultation. At the consultation-level, citizens can express their opinions, for example via surveys, public comments, focus groups and public meetings. The highest level of intensity is a legally binding decision made by citizens in the form of direct democratic instruments. Direct democracy (as legally binding participation) is left out of most participation-models, though. Categories higher than consultation but lower than legally binding participation differ from model to model. The OECD¹¹-model¹² for example includes three basic levels: information provision, citizen-consultation and citizen active participation. At the level of citizen active participation, citizens engage in decision making even though the final responsibility rests with the government. Macintosh¹³ draws on this three-level-model. She views the information-level as e-enabling, the consultation-level as e-engaging and the last level as e-empowering. While e-enabling and e-engaging is understood as top-down participation, bottom-up ideas are facilitated at the e-empowering-level. Medicmorec et al.¹⁴ suggest a four-level-model, consisting of information, consultation, cooperation and codetermination. At the cooperation-level,

⁹ S. R. Arnstein, *A Ladder of Citizen Participation*, 35 AIP Journal at 216 (1969).

¹⁰ P. Parycek et al., *Identification in E-Participation*, in ELECTRONIC PARTICIPATION 108, 109 (Efthimios Tambouris et al. eds. 2015).

¹¹ Organization for Economic Cooperation and Development.

¹² R. Al-Dalou & E. Abu-Shanab, *E-Participation Levels and Technologies*, research paper at the 6th ICIT (2013), available at:

<http://sce.zuj.edu.jo/icit13/images/Camera%20Ready/E-Technology/656.pdf> (last visited March 7, 2016); OECD, *Citizens as Partners* (2001) (prepared by Joanne Caddy & Christian Vergez), available at http://www.oecd-ilibrary.org/governance/citizens-as-partners_9789264195561-en (last visited March 7, 2016).

¹³ A. Macintosh, *Characterizing E-Participation in Policy-Making*, research paper at the 37th HICSS (2004) available at:

<http://www.computer.org/csdl/proceedings/hicss/2004/2056/05/205650117a.pdf> (last visited March 7, 2016).

¹⁴ DANIEL MEDIMOREC ET AL., *VITALIZING DEMOCRACY THROUGH E-PARTICIPATION AND OPEN GOVERNMENT* (2010), available at

<http://documents.mx/download/link/vitalizing-democracy-through-e-participation> (last visited March 7, 2016).

citizens are able to influence a decision by collaboratively preparing results. The term codetermination is defined as a decision, commonly made by citizens and politicians. This model is almost identical with the model presented by the working group e-democracy of the Austrian Federal Chancellery.¹⁵ The only difference is that the Austrian model does not use the term codetermination, but rather *co-decision*. Furthermore, co-decision is not understood as a separate level, but as a sub category of the cooperation-level. Finally, the IAP2¹⁶-model¹⁷ – adapted by UNDESA^{18,19} distinguishes between five different levels of intensity, involving: information provision, consultation, involving the public (workshops, deliberative polling), collaboration (advisory committees, consensus-building, participatory decision making) and empowerment (delegated decisions, citizens' juries).

4) Group of Participants

The group of participants depends on the different *roles of citizens* “as customers, participators and creators, and even as sovereigns”.²⁰

5) Interdependency

The interdependency of these four basic questions is revealed by the following example: A City Council decides to initiate an informal participation process on a noise-reduction action plan. Freedom of expression shall be accommodated and encouraged, and citizens' opinion(s) on different proposals shall be gathered. Also, the Council wants to accumulate helpful ideas and/or creative counter-proposals (*crowd sourcing*). These goals can only be achieved at the intensity-level of consultation respectively at the cooperation-level.

This reflects on procedural details, like the timeframe for participation. Educated proposals can only be accumulated, if the participation process takes place over an appropriate period of

¹⁵ KERSTIN ARBTER, STANDARDS DER ÖFFENTLICHKEITSBETEILIGUNG (adopted by the Austrian Council of Ministers on July 2, 2008), available at http://www.partizipation.at/fileadmin/media_data/Downloads/Standards_OeB/standards_der_oeffentlichkeitsbeteiligung_2008_druck.pdf (last visited March 7, 2016); Austrian Working Group on Electronic Democracy [EDEM], *Whitepaper AG EDEM-1.0.0: Positionspapier zu E-Democracy und E-Participation in Österreich* (2008), available at http://www.partizipation.at/fileadmin/media_data/Downloads/Standards_OeB/standards_der_oeffentlichkeitsbeteiligung_2008_druck.pdf (last visited March 7, 2016).

¹⁶ International Association for Public Participation.

¹⁷ IAP2, *Spectrum of Public Participation* (2007), available at <http://www.iap2.org/associations/4748/files/spectrum.pdf> (last visited March 7, 2016).

¹⁸ United Nations Department of Economic and Social Affairs.

¹⁹ U.N. Division for Public Administration and Development Management [DPADM] & UNDESA, *An Overview of E-Participation Models* (2006) (prepared by Nahleen Ahmed), available at:

<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan023622.pdf> (last visited March 7, 2016).

²⁰ MEDIMOREC ET AL., *supra* note 14, at 7.

time.²¹ It is necessary to provide a solid basis of information in advance in order to ensure a high discussion quality and good results.²² Another crucial time-related factor is when to start the participation process. If the process takes place at the co-decision-level, the initiators must make sure that the decision still *can* be made.²³ Complex political decisions are time-intensive and must be coherent with one another.²⁴ That is why the preparation of those proposals often consumes a lot of resources and require binding arrangements with external partners which both may lead to prejudices for active participation.²⁵

Finally, the group of participants depends on the aims of the participation process, the level of intensity and the participants' role. If a conjoined decision with citizens in the role of the sovereign is made to enhance legitimacy, the group of participants has to be as representative as possible. In this example, though, the Council's main interest is to gather new ideas by consulting/cooperating with citizens.

At this stage, representativeness is not necessary, since the intended aim is equally accomplished, if only one citizen comes up with a helpful new idea.²⁶ The final decision, though, still must be democratically legitimized. In conclusion, democratic legitimation is obtained so long as the City Councilors as elected representatives are responsible for further discussions about the idea as well as for making the final decision. How the idea was brought to their attention, however, is not a relevant concern.

§ 2 – E-PARTICIPATION – DEMOCRATIC IMPLICATIONS

Democracy – *δημος* (dêmos) “people” and *κράτος* (krátos) “power” – provide the central principles of state structure, as guaranteed by the German constitution in art. 20 (2) GG (Basic Law).²⁷ Directly translated, democracy means power by the people. Consequently, the sovereignty of the people is at the very heart of democracy.²⁸ As art. 1 GG implies, the state should not only rule over the people, but also acknowledge it as a heterogenic group of individuals.²⁹ The

²¹ See Ziekow, *supra* note 8, at D80-D83.

²² See M. Morlok, *Demokratie und Wahlen*, in 2 FS 50 JAHRE BVERFG 559, 583 (Peter Badura & Horst Dreier eds., 2001).

²³ See Ziekow, *supra* note 8, at D80-D81.

²⁴ E.-W. Böckenförde, *Demokratie als Verfassungsprinzip*, in 2 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 24, at 72 (Josef Isensee & Paul Kirchhof, eds., 3d ed. 2004); Morlok, *supra* note 22, at 587-588.

²⁵ BVerwGE 45, 309 (p. 316 f., marginal no. 43 f.).

²⁶ MARIO MARTINI & SASKIA FRITZSCHE, *KOMPENDIUM ONLINE-BÜRGERBETEILIGUNG*. (Innovationsstiftung Bayerische Kommune ed., 2015), available at http://www.bay-innovationsstiftung.de/fileadmin/docs/OBB/Online_Buergerbeteiligung.pdf (last visited March 7, 2016).

²⁷ Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law], May 23, 1949, BGBl. I at 1, as amended; see also BVerfGE 2, 1 (12 f., marginal no. 38).

²⁸ See e.g. Böckenförde, *supra* note 24, at 2, 8, 10; 1 JÖRN IPSEN, *STAATSRECHT* 62 (27d ed. 2015); Martin Morlok, *Das Demokratieprinzip des Grundgesetzes*, in *STAATSORGANISATIONSRRECHT* § 5, at 9 ff. (Martin Morlok & Lothar Michael eds., 2d ed. 2015).

²⁹ JULE MARTIN, *DAS STEUERUNGSKONZEPT DER INFORMIERTEN ÖFFENTLICHKEIT* 40, 45 (2012); MARTIN MORLOK, *SELBSTVERSTÄNDNIS ALS RECHTSKRITERIUM* 9 (1993).

people as a political entity, however, depends on organization and institutionalization.³⁰ Without constitutionalized procedural rules, sovereignty and the common will of the people, namely Rousseau “*Volonté générale*”³¹ are nothing but nominal ideals.³² Establishing the common will is the number one task of democracy.

According to Luhmann and Morlok,³³ democracy can be understood as a process of selection and complexity. Selection means a process of evaluating, discussing, amending and finally choosing one of many diverse options. Complexity in this context means that the decision-making process shall stay open to new arguments and different choices for as long as possible. Therefore, adequate input channels must be established.³⁴ The more relevant interests are incorporated in the final decision, then the more a decision is considered to be oriented towards the common good. Hence, participation and (operationalized) influence on political decisions are the basis of democracy.³⁵

Second, democracy secures individual freedom and equality and to protect minorities by limiting political power.³⁶ Most important for putting that into effect are fundamental human rights, protection of political opposition, as well as effective control mechanisms.³⁷ Human rights must be constitutionally and equally guaranteed. Minorities must have the chance to become majorities; there can be no “tyranny of the majority”.³⁸ Control can be guaranteed by the principles of transparency and public debate (public control), independent courts (judicial control) and the division of powers. Finally, the third key aspect of democracy, which is significant for the following analysis, is the role of trust and responsibility.³⁹

A) The Local/Municipal Level

The local/municipal level plays a special role in terms of including citizens in political decision making. The German Federal Constitutional Court considers municipalities to be the democratic nucleus,⁴⁰ and the one most likely to be resistant against dictatorship.⁴¹ Therefore, it is a central objective, to actively include citizens in local political life and administrative decisions. At the same time, administration must be efficient. As a result, municipalities must find suitable solutions to ease the tension

³⁰ Morlok, *supra* note 22, at 570, 576, 579-586; Morlok, *supra* note 28, at 36 ff.

³¹ J.-J. ROUSSEAU, *DU CONTRAT SOCIAL/VOM GESELLSCHAFTSVERTRAG* (Hans Brockard trans., Reclam 2010) *passim* (1762).

³² Morlok, *supra* note 22, at 579.

³³ *Id.*; N. Luhmann, *Komplexität und Demokratie*, 10 PVS 314, 319 f. (1969).

³⁴ Morlok, *supra* note 28, at 38 ff., 69.

³⁵ *Id.* at 158; Morlok, *supra* note 22, at 571, 574.

³⁶ *See e.g.* Morlok, *supra* note 28, at 23 ff.

³⁷ *Id.* at 167 ff.; *see also* Böckenförde, *supra* note 24, at 15, 40, 54, 88.

³⁸ JOHN STUART MILL, *ON LIBERTY* at 4 f. (4th ed., Longman, Roberts and Green Co. 1869), available at <http://bartleby.com/130/> (last visited March 7, 2016) (1859).

³⁹ *See e.g. Recommendation of the Committee of Ministers to Member States on E-Democracy*, CM/Rec (2009) 1 *passim* (adopted on Feb. 18, 2009), available at: <https://wcd.coe.int/ViewDoc.jsp?id=1410627> (last visited March 7, 2016).

⁴⁰ BVerfGE 79, 127 (149, marginal No. 59).

⁴¹ BVerfGE 7, 155 (167, marginal no. 43); E 11, 266 (275, marginal No. 33, 34).

between the two central demands of local administration: *efficiency* on the one hand, and *being close to the citizens* on the other hand.⁴²

1) *The Right to Self-Administration*

Germany is a democratic state, governed by the rule of law, and organized as a federal republic,⁴³ which is divided into the federal level (*Bund*), the state level (*Länder*) and the local/municipal level (*Kommunen*). This decentralized structure establishes a vertical (bottom-up) division of power, maximizing the self-determination of the people.⁴⁴ Legislative jurisdiction for local law is attributed to the federal states.⁴⁵ Nevertheless, within the limits prescribed by the laws, municipalities have the right to regulate all local affairs on their own responsibility (Right to Self-Administration). This fundamental Right to Self-Administration is guaranteed in art. 28 (2) GG, respectively in the state constitutions. It is concretized in municipal codes.

Furthermore, it is strengthened by art. 93 (1) no. 4 b GG, which guarantees municipalities the right to file constitutional complaints in the Federal Constitutional Court on the ground that their Right to Self-Administration has been infringed. Also, local self-administration is required under EU law, which specifies in Protocol CETS No. 207 that citizens shall have the right to participate in the affairs of a local authority.⁴⁶

2) *The Local Legal System in NRW – City Council and Offline Participation*

At the local level, the main political body is the *City Council* which consists of the Councilors and its chairman, the mayor.⁴⁷ In NRW, both the Councilors and the mayor are directly elected by the citizens.

Since the City Council controls the administration, it can easily be mistaken for a local parliament. Legally speaking, however, the Council is an administrative body⁴⁸ and therefore is part of the

⁴² BVerfGE 79, 127 (147 f., marginal no. 56).

⁴³ Arts. 20, 28, 79 (3) GG guarantee these *principles of state structure* (Staatsstrukturprinzipien) both in the federal constitution and in the constitutional order of the federal states.

⁴⁴ Martin Morlok, *Der Bundesstaat*, in STAATSORGANISATIONSRECHT § 8, at 9 (Martin Morlok & Lothar Michael eds., 2d ed. 2015).

⁴⁵ Arts. 30, 70 (1) GG, official translation available at https://www.gesetze-im-internet.de/englisch_gg/. According to art. 30 GG “the exercise of state powers and the discharge of state functions” is a matter of the federal states, “except as otherwise provided or permitted by this Basic Law”. According to art. 70 (1) GG legislative jurisdiction is attributed to the federal states, “insofar as this Basic Law does not confer legislative power on the Federation”.

⁴⁶ European Charter of Local Self-Government, Oct. 15, 1985, CETS No. 122, BGBl. 1987 II at 65, 66, in conj. with the Additional Protocol on the right to participate in the affairs of a local authority, Oct. 16, 2009, CETS No. 207 (entered into force on 1 June 2012, not yet ratified by Germany).

⁴⁷ Gemeindeordnung NRW [GO NRW] [Municipal Code NRW], July 14, 1994, GV NRW at 666, as amended, § 40 (2).

⁴⁸ § 41 (1) GO NRW.

executive power.⁴⁹ Unlike the federal/state Parliament, it cannot enact formal law. Provided that the Council is authorized by formal federal or state law,⁵⁰ it may adopt *local statutes* (valid for the city area). Also, in contrast to professional politicians in the federal/state Parliament, the Councilors at the local level are volunteers. Furthermore, only citizens of German nationality who are age 18 or above can vote in federal Parliament elections. At the local level, though, every citizen of the European Union of 16 years of age has the right to vote in City Council elections.

These structural differences from the state/federal level facilitate (online) participation at the local level. Thus, the municipal code is equipped with a broad variety of input channels:

– *Direct Democratic Instruments*: According to § 26 (1) GO NRW, legally binding referenda can be initiated both by citizens and by the City Council (provided that the formal requirements are met (especially the necessary amount of signatures – *quorum*)).

– *Duty of/Right to Information*: The City Council is obligated to inform citizens about important administrative matters, § 23 GO NRW. Citizens can submit questions to the Council, § 48 GO NRW or file complaints and suggestions, § 24 GO NRW. Further rights to information are *inter alia* guaranteed in art. 5 (1) GG, § 29 VwVfG and in the provisions of the IFG (Freedom of Information Act).⁵¹ Further rights to be heard are *inter alia* guaranteed in art. 17 GG (right to petition), § 25

– *VwVfG and § 28 (1) VwVfG. 3) Residents' Request*: According to § 25 GO NRW, residents can force the City Council to deal with and decide on a local matter within its jurisdiction (certain signature quorum required).

– *Experts in Local Committees*: Local committees are not exclusively composed of Councilors of the City Council. As long as the majority of members consists of Councilors, citizens with expertise can become members of local committees, too, § 58 (3) GO NRW. Moreover, the committees are allowed to consult with external experts and citizens who are primarily affected by the pending decision.

Additionally, some municipalities regulate further methods and details of such input channels in local statutes or policy guidelines on citizen participation.

3) § 18 eGovG NRW – Legal Anchor of Legally Non-Binding E-Participation

In general, *Bund* (federal level), *Länder* (state level) and *Kommunen* (municipal/local level) have separate jurisdictions, art. 30, 28 (2)

⁴⁹ MARTIN BURGI, KOMMUNALRECHT § 12 at 5 (5th ed. 2015); MAX-EMANUEL GEIS, KOMMUNALRECHT § 11 at 11 (3d ed. 2014); *conciliating* THORSTEN INGO SCHMIDT, KOMMUNALRECHT § 10 at 381, 382 (2d ed. 2014).

⁵⁰ For example, art. 28 (2) cl. 1 GG, art. 78 (1, 2) LVerf NRW (State Constitution) in conj. with § 7 GO NRW.

⁵¹ Informationsfreiheitsgesetz [IFG] [Freedom of Information Act], Sep. 5, 2005, BGBl. I at 2722, as amended.

GG. To promote the digitalization of state authorities, though, art. 91 c GG has been added to the Federal Basic Law (federal constitution). According to art. 91 c GG, *Bund* and *Länder* may cooperate to facilitate the establishment of new information technology systems. That points out, how seriously digital progress in the public sector is taken. The next step was the enactment of a federal Law on electronic Government (eGovG)⁵² and corresponding state laws.⁵³ In these laws especially electronic information and communication channels have been established. The use of electronic devices to communicate with citizens has also been included in the Administrative Procedure Act, § 3a VwVfG. § 4 a (4) BauGB introduces the possibility to supplementary use electronic systems for formal participation in urban planning. NRW is the first state⁵⁴ to anchor legally non-binding informal e-participation into formal state law. According to the new e-participation clause, § 18 eGovG NRW,⁵⁵ state and local authorities are encouraged to initiate electronic, especially online, participation. This clause does not affect or limit any other existing participation methods [*see* § 2]. Furthermore, § 18 eGovG NRW is the first formal law in Germany, creating certain (minimum) responsibilities for state/local authorities in regard to informal e-participation. First, the initiators must guarantee an appropriate timeframe. Second, they are responsible for creating a transparent process. Finally, from the day that the law goes into effect, authorities are legally obliged to evaluate, revise and officially announce/publish the results of informal e-participation § 18 (2) eGovG NRW.

Statistics on the actual use of the Internet in informal participation (online participation as defined in § 1-A) at the municipal level in NRW are currently being compiled by a group of doctoral candidates with the NRW Fortschrittskolleg Online-Partizipation.⁵⁶

B) “Win-Win-Win”-Situation

The range of – potential and actual – benefits of e-participation is broad. One buzzword, which is often used in German literature to describe the *trialogue* between citizens, politics and administration, is that it is a “Win-Win-Win-Situation”.⁵⁷ Since a margin of discretion is left to

⁵² Gesetz zur Förderung der elektronischen Verwaltung [eGovG] [E-Government Act], July 25, 2013, BGBl. I at 2749.

⁵³ An eGovG is in force in Baden-Wuerttemberg, Bavaria, Saxony and Schleswig-Holstein. Legislative process is initiated in Berlin and NRW. In Rhineland-Palatinate, a transparency law is in progress.

⁵⁴ Baden-Wuerttemberg adopted the “*Verwaltungsvorschrift Öffentlichkeitsbeteiligung*” (Administrative Regulation on Public Participation) in 2013 (GABl. No. 2, 2014 at 22) (for informal participation in urban planning, which is only binding on state authorities – not municipalities – though).

⁵⁵ *Gesetzesentwurf eGovG NRW* [Draft E-Government Act NRW], Landtag NRW, Drucksache 16/10379, (Dec. 2, 2015) (not yet in force.).

⁵⁶ <http://www.fortschrittskolleg.de/projekte/datenbank/>. First results approximately in June 2016. (last visited March 7, 2016).

⁵⁷ *See e.g.* Franziska Fischer, Newspaper Interview “*Die Bürgerbeteiligter*“, WUPPERTALER RUNDSCHAU, Jan. 27, 2016, *available at*:

<http://www.wuppertaler-rundschau.de/lokales/die-buergerbeteiligter-aid-1.5719682>.

political representatives, delegating political power from the people (as sovereign) to politicians requires *trust*.⁵⁸ Those who are ruled must trust the rulers to decide in their best interest. Establishing a broad range of input – and control – channels [see § 2], such as e-participation, can help strengthen this trust, provided that the process is transparent and the results of e-participation are taken seriously. Also, consensus-building is a key task of participation. This task is especially important, since politicians must make decisions despite uncertainties⁵⁹ that they may be confronted with (like future court decisions, new knowledge that is not available at the time of the decision making etc.). In open discussions with interested citizens, new relevant information and ideas can be brought to the political discourse, which might have been considered without public consultation. The display of pro and contra arguments may also bring broader *acceptance* of political decisions. Finally, a pre-selection of relevant arguments can increase the efficiency of political decision making.⁶⁰

Online participation, if used properly, can make participating in political decisions flexible and easy. All relevant information is centralized in one source (for example a website), which can be accessed at any time and from any place. Citizens are not dependent on public meetings anymore, but can individually plan, how, from where and when to participate. Moreover, the Internet facilitates the documentation and evaluation of participation processes.⁶¹

The variety of profits, in the end, leads back to the two fundamental dimensions of public participation: its rational dimension on the one hand and its legitimizing dimension on the other hand [see § 1-B-2].

C) Risks of E-Participation

On the other hand, the use of the Internet to include citizens in political decisions contains risks that need to be addressed. Due to the anonymity of online discussions (registration with pseudonym), e-participation is vulnerable to non-topic-related posts. In face-to-face discussions, participants are more likely to self-regulate personal disputes and dismiss off-topic statements. This can be done online by the creation of binding code of conducts (*netiquette*) and suitable sanctions in case of infringement such as being blocked from the website and legal charges for insulting language. This problem may also be solved by qualified moderation, provided that authorities are clear regarding the basis on which posts may be deleted, users may be blocked, etc. According to Kubicek and Lippa consensus-building and reciprocal

(last visited March 7, 2016); HELMUT KLAGES & ANGELIKA VETTER, BÜRGERBETEILIGUNG AUF KOMMUNALER EBENE 42 (2013).

⁵⁸ Morlok, *supra* note 22, at 572.

⁵⁹ Martin Morlok, *Informalisierung und Entparlamentarisierung Politischer Entscheidungen als Gefährdung der Verfassung?*, in 62 VVDStRL 37, 49 (2003); Martin Morlok, *Der Text hinter dem Text*, in FS HÄBERLE 93, 134 f. (Alexander Blankenagel et al. eds., 2004).

⁶⁰ Herbert Kubicek & Barbara Lippa, *Der Doppelte Medienmix in der Bürgerbeteiligung*, 15 VM 305, 310 (2009).

⁶¹ See MARTINI & FRITZSCHE, *supra* note 26, at 7.

understanding of opposing arguments is easier in face-to-face discussions and smaller discussion groups, than *via* the Internet.⁶² Anonymity may obstruct transparency, especially if an individual registers multiple times with different pseudonyms, and makes it difficult or impossible to identify the participants as citizens, politicians, experts or agents for certain interest groups. The higher the level of intensity, though, the more important is transparency. If citizens and politicians collaborate on the Internet to make a conjoined decision, it must be clear which arguments were posted by state authorities. Only then, can they later be held responsible and accountable for the final decision. Parycek et al. recommend that, the higher the level of intensity, the higher the level of identification.⁶³

Furthermore, the more complex the topic, the more *expert input* is needed to ensure a good and dynamic discourse. In face-to-face meetings, the discussion leader can make sure that everybody has received and understood the required information. However, online, participants may need to take care to properly inform themselves. Also, online input-channels may nurture the influence of organized interest groups rather than individuals. In conclusion, the higher the level of intensity, the more democratic standards are needed for e-participation,⁶⁴ such as the principle of equal possibilities to influence political decisions. In this context, Kißler recalls the problem of a silent majority in participation processes and warns about a tyranny of the minority in cooperative democracy.⁶⁵ This minority often consists of only those citizens who don't agree with the decision.⁶⁶ Finally, the digital divide⁶⁷ causes further problems in regard to the group of participants.

§ 3 – E-PARTICIPATION AND LEGAL/POLITICAL COMMITMENT

Participation processes, online and offline, formal and informal, do not create legally binding results. Yet, they may factually have a binding character.

A) Factual Effects of Legally Non-Binding Citizen Participation

Legitimate private interests should be included in political decisions because of the obligation to balance private and public interests (Abwägungsgebot) in urban planning, § 1 (7) BauGB. This obligation originally derives from the rule of law and the principle

⁶² Kubicek & Lippa, *supra* note 60.

⁶³ Parycek et al., *supra* note 10, at 115 (the lowest level is no identification, on the highest level there are unique identification methods – implemented by the state – such as the Austrian Citizen Card).

⁶⁴ BVerfGE 83, 60 (74 f., margin no. 44 ff.).

⁶⁵ L. Kißler, *Kooperative Demokratie*, in FS SCHILLER 103, 115 (Thomas von Winter & Volker Mittendorf eds., 2008).

⁶⁶ See Ziekow, *supra* note 8, at D84.

⁶⁷ D. Roleff, *Digitale Politik und Partizipation*, 62 APuZ 14, 15 (2012).

of proportionality, art. 20 (3) GG. To a limited extent,⁶⁸ infringements can be reviewed by federal courts.⁶⁹ One purpose of formal participation in urban planning is to bring relevant interests to the governments' attention.⁷⁰ Informal deliberative participation, though, primarily evaluates public opinion. The rule of law guarantees individual liberty, especially for human rights, such as freedom of opinion. On the other hand, members of Parliament and the City Council are free from external preferences, art. 38 (1) GG, art. 30 (2) LVerf NRW, § 43 (1) GO NRW. Paradoxically, it is also the free mandate which opens up political decision making for influence by citizens.⁷¹ Elected representatives shall be free to decide, which arguments and concerns they want to include in their final decision.

If participation processes are initiated top-down, the public expects the results of those processes (though legally non-binding) to have an actual impact (*political efficacy*) on the pending decision.⁷² If the results are not seriously considered, poor reputation, public protests, rejection of the decision, disadvantages in political competition, mistrust and eventually the loss of office in the next elections, are possible consequences.⁷³ Also, citizens can put deviating decisions up for a public referendum, provided that the formal requirements are met. The higher the level of intensity, the higher the expectations towards the actual impact,⁷⁴ thus, the greater the effort to justify a deviating decision.⁷⁵

Another motivation behind factual political commitment to allowing participation relates to the principle of efficiency. If consensus is built once, defending it by following public preferences can immensely reduce further transaction costs. These factual effects are intensified by the Internet and the use of online participation, since everybody with access and a little knowledge can spread and share information and critique proposals. In Germany, the term Shitstorm has been created to describe the phenomenon of a storm of mass indignation, often accompanied by insulting remarks.⁷⁶ Shitstorms can target political decisions as well as the persons of decision makers.⁷⁷ Social media and blogs are a significant second channel to traditional media and journalism. Posts by citizens bear the risk of being subjective, incorrect or

⁶⁸ Three groups of infringements can be reviewed by the court: 1) There has been no weighing of the public and private interests at all (*Abwägungsausfall*), 2) some relevant interests have been left out (*Abwägungsdefizit*), 3) the relevance of an interest has been misjudged (*Abwägungsfehleinschätzung*), 4) the interests are not balanced correctly (*Abwägungsdisproport*).

⁶⁹ BVerwGE 45, 309 (316 f., marginal no. 43 f.); E 47, 144 (146, marginal no. 21).

⁷⁰ L. WINTER, BAULEITPLANUNG UND INTERNET 108-110 (2013).

⁷¹ See Morlok, *supra* note 22, at 586.

⁷² Committee of Ministers, *supra* note 39, at G.79.

⁷³ See Ziekow, *supra* note 8, at D.

⁷⁴ See U. Schliesky, *Bürgerschaftliches Engagement in der Repräsentativen Demokratie*, 57 DIE GEMEINDE SH 16, 19 ff. (2005).

⁷⁵ See H. Aden, *Online-Demokratie*, 35 KJ 398, 19 ff. (2002).

⁷⁶ Duden online Wörterbuch [Duden online lexicon], search for "Shitstorm", available at <http://www.duden.de/rechtschreibung/Shitstorm> (last visited March 7, 2016).

⁷⁷ S. MAUCH, BÜRGERBETEILIGUNG (2014).

incomplete. In this context, responsive communication as a function of the state is more important than ever.⁷⁸

An example of factually binding results resulting from legally non-binding participation is provided by the local budget 2015/2016 in Bonn.⁷⁹ The administration asked citizens for comments and ratings on twenty-five budgeting proposals, and allowed citizens to submit and discuss their own proposals online. All in all, 3700 citizens actively participated in the process which was open for four weeks. With Bonn having 322.960 inhabitants, the number of participants was only a little higher than 1% of the population. After the process had closed, administration picked the 25 best rated of 390 citizen proposals. The list of these best performers and corresponding official statements by the administration were submitted to the City Council which decided the local budget. Eight of these proposals were fully adopted by the Council, and another eight were partially adopted.

B) Consequences for the Necessity of Legal Regulation – A Sociological Approach

According to § 10 VwVfG, administrative procedures need not be conducted in a particular format except as provided by law. It might be argued that, if even formal administrative procedures might be conducted without a particular format, similar rules should apply *a fortiori* to informal participation processes. Nevertheless, the (potentially) binding political effects of e-participation can make legal regulation necessary. To organize large group discussions, it is essential to establish ground rules.⁸⁰ Qualified moderation facilitates consensus-finding by ensuring a structured course of discussion and observance of discussion rules. Normatively, the necessity to regulate e-participation can be derived from the social function of law. From a sociological point of view, law is an instrument of power which preserves and promotes social cohesion by balancing opposing interests.⁸¹ Based on the law-jobs theory developed by Llewellyn,⁸² Reh binder⁸³ presents a model of five social functions of law:

- 1) Elimination of conflict (function to react);
- 2) Control of behavior (regulatory function);
- 3) Legitimization and regulation of social power/authority (political function);
- 4) Organization of living conditions (planning function);
- 5) Juristic method (control function).

⁷⁸ H. Hill, *Verwaltungskommunikation und Verwaltungsverfahren unter europäischem Einfluss*, 117 DVBl. 1316, 1316 (2002).

⁷⁹ Ergebnisse des *Bürgerdialogs* zum Haushalt “Bonn packt’s an” 2015/2016 [Official Results of the Local Budget Bonn 2015/2016], available at: https://www.bonn.de/rat_verwaltung_buergerdienste/buergermitwirkung/buergerbeteiligung_haushalt/ (last visited March 7, 2016).

⁸⁰ See Morlok, *supra* note 22, at 580.

⁸¹ M. Reh binder, *Die Gesellschaftlichen Funktionen des Rechts*, in FS KÖNIG 354, 354 (Günter Albrecht, Hansjürgen Daheim & Fritz Sack eds., 1973).

⁸² K. Llewellyn, *The Normative, the Legal, and the Law-Jobs*, 49 Yale L. J., at 1355 (1940).

⁸³ Reh binder, *supra* note 81, at 366.

In regard to online participation, the two most important functions of law are the regulatory function, creating legal certainty, and the political function, clarifying authority and procedural rules. Both functions serve to restrict arbitrariness on the part of the powerful, making their behavior more predictable and accountable.⁸⁴ As a result, in well-established – traditionally offline organized – participation, such as citizen advisory groups, vision workshops, round tables and planning cells, procedural rules are commonly used and largely standardized. If online participation has as much actual influence and impact for the participants as offline participation, appropriate rules must be adopted, taking the specific characteristics of online deliberation into account.

CONCLUSION

Online participation can be a powerful tool for making rational political decisions and reducing the distance between rulers and those who are ruled. If effectively used, it can enhance the legitimacy of political decisions. At the same time, input-legitimation of the final decision must not be decreased. By erasing potential conflict during the preparation of a political decision, online participation can reduce transaction costs and increase administrative efficiency. The Internet offers societies the possibility for broadening the group of participants, simplifying the access and management of information, and thus creating greater public control. Especially at the local level, online participation provides an innovative way to link political decisions to affected citizens in-between elections. In this way, politics can adapt to current social trends and become more representative of our individualized society. In conclusion, e-participation can bring us one step closer to the democratic ideal. Yet, democratic aspirations require careful consideration. Generally speaking, the higher the level of intensity, the higher the actual impact of participation on final political decisions. As a consequence, online participation must respect constitutional principles, especially the municipal Right to Self-Administration, human rights, the rule of law and the principle of equality. Citizens' may serve in the role of experts, supervisors and providers of impulses, still, the state as guardian of the common good⁸⁵ must make decisions based on common interests instead of singular interests. The key to successful e-participation requires mutual trust between citizens and politicians. Regulation can help create legal certainty by clarifying the authority and responsibilities of the state. Hence, legal rules can help improve the relationship between citizens and government.

As (non-exhaustively) described in § The Local Legal System in NRW – City Council and Offline Participation, *de lege lata* there are many participation possibilities at the local level. Nevertheless, § 18 eGovG NRW is the only state law *expressis verbis* regulating minimal standards

⁸⁴ See MAUCH, *supra* note 77, at 112; Reh binder, *supra* note 81, at 359.

⁸⁵ BVerfGE 33, 125 (159, marginal No. 121).

for informal online-participation. This groundbreaking first step provides the basis for more detailed regulation by municipalities. Because of the Right to Self-Administration and regional differences in Germany, it seems adequate to leave detailed (legal) specifications up to the individual cities. Further research will help suggest concrete rules that need to be adopted and how they should be integrated in the German legal system.

