

INTERNATIONAL JOURNAL OF OPEN GOVERNMENTS

REVUE INTERNATIONALE DES
GOUVERNEMENTS OUVERTS

Vol. 8 - 2019



ISSN 2553-6869

International Journal of Open Governments
Revue internationale des gouvernements ouverts

Direction :
Irène Bouhadana & William Gilles

ISSN : 2553-6869

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 des Gouvernements ouverts (RIGO)/ the International Journal of Open Governments** 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. Enfin, elle est avocate au barreau de Paris, associée de BeRecht Avocats.

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. Fondateur et associé de BeRecht Avocats, il aussi avocat au barreau de Paris et médiateur professionnel agréé par le CNMA.

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 Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** 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. She is an attorney at law at the Paris Bar and a partner of BeRecht Avocats.

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. Founder and partner at BeRecht Avocats, he is an attorney at law at the Paris Bar and a professional mediator accredited by the CNMA.

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

THE FOURTH TRANSFORMATION OF DEMOCRACY IN EUROPE - DELIBERATION AND THE RESPONSIBILITY OF EUROPE

by **Jürgen NEYER**, Professor at the European University
Viadrina.

When Robert Dahl coined the term of the “third transformation of democracy” (Dahl, 1994), he could not foresee the emergence of a transnational network society.¹ Only twenty-five years after the publication of his article, we are in the midst of a fourth transformation of democracy in Europe. City-states have been replaced by nation-states in the 17th and 18th century, and nation-states were embedded in multi-level governance arrangements in the 20th century. In the 21st century, we are witnessing the emergence of a transnational network society organized around the opportunities of the digital revolution, cutting through nation-states and emptying the very idea of a national community of much of its empirical and normative content. Facebook, Twitter and Co. are not only profit-oriented enterprises, but also agents of global social integration. They provide important communication infrastructures and complement the world of states with a transnational level of interaction (Bohman, 2004, Grofman et al., 2014). The transnational network society is opening up a political horizon in which the traditional national loyalties represent only one form of political orientation among others (Keck & Sikkink, 1998). This new social structure is not only emerging in parallel to the national structures but is having a deeply disruptive effect on the old world’s social structures, communicative integration and its mode of political interest mediation. The much-described digital divide redesigns the map of worldwide society, generating or widening generational, geo-graphic, socio-economic and cultural divides. Already more than twenty years ago, Manuel Castells described this gap as giving expression to a world organized “in networks pertaining to a space of flows that links them up around the world, while fragmenting subordinate functions, and people, in the multiple space of places, made of locales increasingly segregated and disconnected from each other” (Castells, 1996, p. 476). In this new world, cultural codes, value, and power are produced and decided in a “meta-network” that is often experienced as a “random sequence of events” following an

¹ An earlier version of this paper has been presented to the Academic Days on Open Government and Digital Issues, which took place on 11/13-14, 2018 and were organized by the IMODEV with the IRJS and the *Université de Paris 1 Panthéon-Sorbonne*.

“uncontrollable logic” and changing human experience fundamentally (ibid., p. 477).

The twin impact of transnational integration and national fragmentation is challenging all political systems. Strongly opposing suggestions for how to cope with the advent of network society are clashing in the domestic arenas, and are putting the communicative capacities of modern societies under severe stress. What does all this imply for democracy in Europe? How should the relationship between the emerging network society and the world of democratic states be organized in order to safeguard democratic legitimacy? And what is the specific role of the EU in this process? The article argues that the transnational network society is unlikely to develop the necessary communicative infrastructure for updating the social contract of modern democracies autonomously. It is organized as an associative cluster rather than as a network association and thus lacks the necessary institutional infrastructure for meaningful political communication. The first best alternative is the European Union. It combines liberal ideas with an emphasis on cross-border communication and social responsibility, and is thus well equipped to address the challenges of the ongoing revolution.

§1–THE DEBATE

The intellectual discourse on the proper constitutional principles governing the interface between the new world of networks and the old world of sovereignty is divided in two camps with strongly opposing and equally misleading suggestions. Libertarians challenge all forms of state interventions, submit a “declaration of independence” of the Internet (Barlow, 1996) and argue for a form of political organization based on the model of multi-stakeholder governance. Mueller (2017: 134) even claims that “the people of the internet” (meaning all those who are “sufficiently mobilized around the issue of Internet governance to weigh in”) should form a transnational popular sovereignty independent from state authority. It should displace the nation-states in all matters related to the regulation of the Internet and develop an own political identity. The Libertarian approach to constitutionalizing the transnational network society has strong backing in Silicon Valley but hardly any followers in the European debate. It is properly criticized for its lack of concern with those individuals who are not formally represented and who lack the skills to make their voice heard. Libertarianism is a severely elitist conception of political organization that pays hardly any respect to the fact that some are more capable of living up to the opportunities and challenges of the digital revolution than others. Libertarianism, in short, is insensitive to pressing challenges of the digital revolution and thus hardly adequate of leading the discussion.

On the other side of the debate, a number of authors harshly criticize unlimited internet freedom for its destructive effects on political communities. They point out that the anonymity of the internet allows hatemongers to propagate their rhetoric and strategies, recruit, organize and unify through websites, private message boards, listservers and email (Banks, 2010; Perry & Olsson, 2009). Their demand for a realignment of national borders and political control over the internet is joined by critics of the technological supremacy of the US. It is feared that the cyberspace is de facto becoming a space of US surveillance and control which can only be countered by a new emphasis on “technological sovereignty” (Reading, 2015), i.e. the realignment of the network society with national borders (Keller, 2013). Realigners and nationalists emphasize the right of political communities to self-determine the substance and quality of their domestic discourses. At the same time, however, the emphasis on national borders as the defining structures for delineating communities is out-dated. Politics, the economy and society are following increasingly a transnational logic and it is hard to see how any of these the could be renationalized without fragmenting the Internet and destroying much of the promise of a more open and liberal world. China, Iran and other illiberal regimes around the world are already experimenting with national digital walls and provide good insights into the nightmare that a fragmented and governmentally controlled Internet could look like.

This article pursues a third way siding with contributions that apply a deliberative approach to reflecting about the political order of a transnational social structure (Dryzek, 2006; Habermas, 2001). Deliberative approaches share the important strength of being analytically open to thinking legitimate political order outside of national boundaries. They emphasize communicative interaction as the backbone of democracy (Habermas, 1992; Bächtiger et al., 2018) and trust in the will and the capacity of citizens to come to mutual agreements on matters of public interest. Political institutions are not merely instruments for government but are conceptualized as serving the purpose of facilitating open, transparent and constructive discourses and thus of taming power asymmetries. They allow all participants to engage in free discourses and to cooperate in the setting of rules and the shaping of the future of society (Habermas, 1992). This highly ambitious concept of political institutions is connected to an idea of an inclusive public in which good arguments are used by free and non-dominated citizens for the collective production of the argumentative foundations of decision-making.

In a deliberative perspective, the new information technologies are first of all an appreciated promise. They set the stage for a communicative world with lower transaction costs and more discourse and exchange among citizens. Citizens no longer need to buy international newspapers for having access to different point

of views and opinions but can process the opinions of the world by simply visiting webpages. They develop autonomously new public spaces for meeting and interacting, for learning from each other across cultures and nations, and for making the idea of a global civil society connected via discourse an emerging empirical reality. The new borderless world of communication can even give rise to the “historisch versunkene Gestalt eines egalitären Publikums von schreibenden und lesenden Konversationsteilnehmern” (Habermas 2008: 161).

The critical reader will be quick to point out that the promise of a free transnational discourse among equals under conditions of non-domination is more of an idea than a reality. Illiberal states like China, Turkey, Iran and Russia have developed efficient and effective surveillance technologies and expanded governmental control into many areas formerly free of intervention. The Snowden revelations have given clear evidence that even liberal governments can easily fall prey to the temptations of accumulating additional governmental powers. The challenge for democracy is more fundamental, however, than coping with governmental transgressions of legal and other normative constraints. The emerging digital society is putting at least three fundamental cornerstones of democracy under pressure.

A) The Contested Public Sphere

A first challenge to deliberative democracy refers to the very idea of how we understand political communication and how we institutionalize it. Deliberative democracy conceptualizes public deliberation as being embedded in a multi-stage communicative process (Habermas, 1992: 431, Peters 1993). According to this model, it is the initially unfiltered opinions and views of individual citizens which meet in lifeworld substructures and rub against each other until some dominant and well-reflected position emerges. Association, unions and civil society organizations take the best of them on board and provide them with additional institutional leverage. The media do also take part in the process of selecting among the large variety of opinions those which are most convincing or which appeal to the largest audience. Parties are next. Looking for new political products to sell to their constituency, they scrutinize the different arguments voiced and select again those which refer to broadly held values and larger constituencies. Only those positions which make it through the whole process reach the final stage of legislation and will be subjected to majoritarian decision-making. This cumbersome process safeguards that almost everybody will finally have good reasons to accept majoritarian decisions even if they have opposed them in the first place.

The institutionally embedded model of a democratic political public sphere is obviously difficult to reconcile with the culture and

the communicative practices of the transnational network society.² The transnational network society is established on a culture emphasizing more direct forms of interest articulation. Political parties, trade unions and other traditional forms of interest mediation are rapidly losing their central place in politics (Persily, 2017) and are challenged by more direct modes of interest mediation such as the *eDemocracia* program in Brazil, or *Parlement et Citoyens* in France. New technologies allow people to make proposals to their representatives and work with them to improve bills and policies. The *Better Reykjavík* program allows people to suggest and rank ideas for improving the city. New parties are experimenting with grassroots decision-making in both digital and offline forums. Taiwan is currently experimenting with an innovative online-platform (*vTaiwan*) for organizing public discourses and intensifying communication between citizens and politics. In all of these cases, digital technologies are intended to improve representative democracy by supplementing it with direct democratic components (Hilpert, 2009).

The ongoing structural change of the public is not limited to the emergence of new forms of interest mediation but also colonizes the world of traditional media. Almost all established media houses have acquired elaborate online presences, which are far more directly influenced by the readership than in the past. Today, the most important institution for determining the relevance of news is no longer exclusively the (supposedly elitist) editorial conference, at which general political considerations are weighed against the presumed demand on the part of the readership. The frequency with which readers click on certain contents and the time span they use for consuming them has become often more important for the selection of news and their prominence than anything else. All the major news providers now have technologies which record the frequency of viewing specific news content, the length of time a user stays on certain content and the intensity with which they read it.

B) Discursive Pluralism

Deliberative communication is also closely linked to the precondition that discourse participants are interested in dissenting opinions and willing to deal with them seriously. Deliberative democracy involves trying to understand new arguments and insights, and questioning established traditions. Tolerance and openness are the basis for the recognition of the other as equal (Habermas 1998). In this sense, democracy is not only a procedure, but also an attitude of mind. It is in crisis when political positions

² For the time being “fehlen im virtuellen Raum die funktionalen Äquivalente für die Öffentlichkeitsstrukturen, die die dezentralisierten Botschaften wieder auffangen, selektieren und in redigierter Form synthetisieren” (Jürgen Habermas, Ach, Europa. Kleine politische Schriften XI, Frankfurt/M. 2008, S. 162).

become increasingly polarized and the different social layers and cultures of society stop trying to understand each other (Levitsky and Ziblatt 2018).

This willingness to think and discuss across different sectors and cultures of society seems to be a critical factor in the networked world of peer-based relationships. According to Bennett and Iyenagar (2008), media use on the Internet is not only much more actively shaped by users, but also promotes one-sided information. The permanent selection of content by users tends to further strengthen existing opinions and attitudes and lead to users becoming “less informed and more polarized” (2008: 724). Eli Pariser (2011) coined the meanwhile famous metaphor of the “filter bubble”. Pariser referred to a “universe of information” that only showed us what we wanted to hear and read. The algorithms of the most common search engines are set up in such a way that they filter out from the mass of theoretically available information those that confirm our existing prejudices and make them available to us. YouTube suggests videos similar to those we’ve seen before, Amazon offers us products that match our previous demand profile, and Google customizes its search results so that suggestions are highly likely to reflect what users wanted to read in the past. As a result, it is feared that the consumption of content from the Internet acts like a mirror of ourselves, holding us in a bubble of self-affirmation and merely pretending to process new information. Moreover, users would neither notice the filter bubble nor escape from it. According to Pariser, they are living in increasingly disconnected worlds between which there is hardly any exchange and understanding. The consequences for the communicative cohesion of modern society are harmful. Societies lose the ability to communicate without even being aware of it and being able to take appropriate countermeasures. “The filter bubble,” Pariser judged, “is a centrifugal force that tears us apart”. Similarly, Blumler and Coleman (2015) argue that the increasing availability of various news sources and navigation technologies implies the risk of losing a shared life world. In return, companies would find it easier and easier to monitor and manipulate the audience.

Most recent studies on the actual relevance of filter bubbles, however, arrive at more cautious and balanced results. Empirical data suggests that users are consciously choosing certain formats and content, and that FakeNews distributors are well aware that their perception differs from what is reported in the established media.³ The emergence of bubbles of dissent seems to be less due to people being unaware of biased information than to the explicit interest of users in dissenting opinions. This picture of deliberately formed - and thus controlled - bubbles is further reinforced by the

³ <http://www.spiegel.de/netzwelt/web/twitter-datenanalyse-wir-hatten-eine-falsche-vorstellung-von-der-filterblase-a-1185406.html>

fact that it seems to be a numerically rather small group that disseminates hate speech and obviously false reports. The fear that digital algorithms would tear apart the overall social communication context is therefore at least of today probably strongly exaggerated.⁴

C) Privatization

A third challenge to the communicative capacity of society stems from the growing power of private providers of communicative infrastructure and the distortive effect that market principles might have on democratic deliberation. Ever since people have agreed on democratic procedures, it was clear that all interested citizens should have unhindered access to the most important places of consultation and decision-making. The central political places of discourse and democratic deliberation therefore have at all times been in public ownership. It would have been unacceptable to the ancient Romans just like the citizen of Athens to have private interests in control of the Forum Romanum or the Agora. The 19th and 20th century practice of modern democracies to allow private parties to run the media houses and thus to be in control of the infrastructures of democratic discourse was only acceptable as long as the market provided for a pluralistic structure of the media landscape. The domination of domestic politics by private parties has only too often proven to be highly risky.

With a global market share of Google in the range of 80 per cent of all search requests, and a social media market share of 70 per cent for Facebook and Youtube,⁵ we are in the midst of an unprecedented concentration process of the communicative infrastructures of democracy. They are provided by private companies and access to them is controlled accordingly. Only those who enter into a private contractual relationship and pay their contribution either in monetary terms or in the form of economically usable data have a say. Unconditional participation, which is only linked to citizen status, is not provided for in the transnational network society. The private providers of these new spaces are self-assuredly claiming their right to design the new market places of ideas. Mark Zuckerberg, for example, states that the most important corporate goal for Facebook is to establish a social infrastructure for a global community. The claim is nothing less than to develop the communicative infrastructures of future transnational community-building: “Our goal is to strengthen existing communities by helping us come together online as well as offline, as well as enabling us to form completely new

⁴ Cf. 27/5/2017, <https://www.wired.com/2017/05/eli-pariser-predicted-the-future-now-he-cant-escape-it/>.

⁵ <https://www.faqdirect.com/search-engines-market-share/>,
<https://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/>; both visited 10/2/2018.

communities, transcending physical location. When we do this, beyond connecting online, we reinforce our physical communities by bringing us together in person to support each other.”⁶

This claim is currently accepted by approx. 1 billion users worldwide. There is probably no communicative infrastructure with a similar broad impact. Nor has there ever been. With the increasing relevance of digital public spheres, communication in society is increasingly shifting towards a market-driven sphere in which every speech act has a price. Today, the state provides neither the software of the Internet nor its most important content. In order to gain access to the digital agora, every citizen must purchase network access from a private provider. Political communication and participation are made conditional on payment. Providers of network infrastructure reserve the right to transport content at the speed (and thus also availability) that corresponds to their economic value, i.e. the price that providers of content are prepared to pay for transmission. This would be roughly comparable to a situation where not only the parliament building is owned by a private provider, and access to it is regulated according to economic criteria, but in which also the volume of the loudspeakers and the transmission of speeches to the outside world are subjected to market prices.

With the increased power of providers of communicative infrastructures, the question of the openness of the network and discrimination against economically weaker players has become important. Violations of net neutrality are not a theoretical question, but a practically important problem. A number of cases from the recent past show the significance of the problem when economic interests become the guardians of discourse. In December 2017, for example, the US Federal Communications Commission abolished the requirement of net neutrality and allowed companies to design future data flow according to economic criteria. In the future, providers will be able to allocate additional costs to unpopular content or reduce their flow rate. In Europe, there is widespread practice of so-called zero rating. This means that telecom companies do not credit selected services to the data volume of users. Conversely, this means that all other services are charged with additional costs.

Even well-intentioned government regulations cannot solve the problem easily: The *Netzwerkdurchsetzungsgesetz* (Network Enforcement Act) in Germany, for example, stipulates that Internet platforms must delete illegal content within a short period of time or face high penalties. It is not the courts but the employees of the social networks who decide whether the law is to be applied in over 20 complex criminal offences, ranging from incitement of the people to hatred, or the formation of terrorist groups. In

⁶ <https://www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634/>, visited 9/17/2018.

addition, the law does not provide for a claim for recovery in the case of unjustified removal of content. Whoever expresses a legitimate opinion on the Internet and is wrongly deleted is not protected by the law. Companies thus have a strong incentive to filter out anything that might be offensive in any way. This is clearly expressed in the practice of Facebook: according to the civil rights organisation “Reporters without Borders”, Facebook received just under 1,000 complaints in the last reporting year, mostly for incitement to hatred (247), insult (460), defamation (407) and slander (342). At the same time, however, Facebook has removed tens of thousands of contents for violations of its own house rules.⁷ The competence to identify hatred, discrimination, criminal offences, etc., is in fact delegated to actors who apply economic criteria and undisclosed algorithms. In this way, economic interests become the de facto guardian of public discourse.

These examples clearly illustrate that any economically motivated regulation of public discourse is in open contradiction to democratic standards. Here, of course, it can be argued that these examples are not yet really dramatic. There can be not yet talk of a fundamental distortion of democratic discourse and a serious weakening of democracy. And it is also true that the market was in the past a major driver of innovation. All this is right and wrong at the same time. It is true insofar as the vast majority of messages still moves freely through the Internet - regardless of whether they are rated as true or false by a provider. However, it is also true that the question of net neutrality is a question of principle. Net neutrality goes to the substance of democratic infrastructures and hands over a central precondition of democracy to actors who ultimately pursue other goals. This is simply unacceptable from a democratic point of view. Today, democracy must re-appropriate its own infrastructures if it is not to accept the dominance of market principles over civil liberty and the pursuit of justice.

§ 2 – POLITICAL RESPONSIBILITY

It is highly doubtful whether the emerging transnational network society will be capable of autonomously meeting any of the challenges for deliberative democracy. It is organized as an “associative cluster” rather than as a proper network (Mueller, 2013: 42). Network organizations have a well-defined point of access and clearly defined criteria for inclusion and exclusion. They are bounded and consciously arranged, and their participants pursue a common objective. Associative clusters are a weaker form of organization. They are not created by purpose and denote a relational pattern among an unbound set of actors (Scharpf, 1997: 146) without any single point of administration nor of decision-

⁷ <https://rsf.org/en/news/german-facebook-law-creates-risk-over-blocking>, visited 9/17/2018.

making. Simply put, the network society does neither have agency nor only the institutions necessary for collective will-formation.

A) The States and Due Diligence

In the absence of autonomous democratic self-regulation, it is the democratic states that are in charge of accepting responsibility for the common good of free and unhindered democratic discourses. States have both the resources and the constitutional obligation for safeguarding democratic procedures. States do also have obligations according to the principle of due diligence. This principle is firmly anchored in international law and can be found today in areas as diverse as environmental and cyber policy (Bonnitcha & McCorquodale, 2017). The central idea of the principle is that states have a duty to do everything necessary to ensure that other states do not suffer damage from avoidable activities emanating from their territory. For example, German pollutants should not discharge harmful substances into rivers crossing the border into France. In cyber policy, states are obliged to take all necessary measures to prevent domestic non-state actors from launching attacks on foreign governmental or non-governmental entities (Bendiek, 2013). What is decisive here is that all states have a general duty to behave responsibly in the sense that everything expected and reasonable is done to prevent damage to others.

The due diligence principle is also relevant for the democratic quality of states. Immanuel Kant described already more than 200 years ago that individual democratic states can only feel secure if their neighbors are also democracies (Kant 1795/2008). Furthermore, under conditions of complex interdependence, states are subject to multiple external effects of decisions adopted by their neighbors. Democracies therefore have a right to demand that other states undertake all necessary measures in order to guarantee that their democratic procedures remain uncorrupted and their external effects tamed by the discipline of democratic self-restraint. In this sense, democracy is not a national matter only, but also an international responsibility towards other societies. Regarding democratic governance in the transnational network society, a number of concrete implications for national policy can be derived from this.

First of all, states have a responsibility for ensuring domestic pluralistic media discourses. All excessive concentration processes must be counteracted accordingly. Even if no systematic attempts at political influence can be observed at present, there is always the risk that power has a corrupting effect in the future and will be used for a selective provision of information. Precaution demands to force Google, Facebook and other important suppliers of communicative infrastructure to disclose their search algorithms or, alternatively, to develop independent, competitive and publicly

controlled substitutes. Ultimately, it is not easy to see why there are demanding criteria for the admission of passenger cars to road traffic, but not for the communicative infrastructures of democracy. It is also disturbing to notice that the large tech companies have started to acquire major newspapers such as the Washington Post (Amazon) or the Time Magazin (Salesforce). In order to safeguard media pluralism, states will have to keep a close eye on these processes and get ready to intervene before the public influence of organized interests becomes too strong for governments to be checked successfully.

Democratic states also retain the responsibility to take all necessary measures in the area of data protection and privacy to ensure the sovereignty of their citizens. If private corporations accumulate enough knowledge about citizens to be able to influence them selectively, there is a very real danger that formerly autonomous decisions are affected by deliberate strategies of cleverly designed nudging. This fundamentally involves a responsibility on the part of the state vis-à-vis its citizens to counter all illegitimate practices of collecting and using of private data by third parties. Again, it may be necessary to force companies of a certain size to disclose their algorithms.

B) Regulating in Europe

The principle of due diligence and its policy implications are easier to formulate than implement. States may in themselves have an interest in a democratic network society and also in democratically constituted neighbors. States do also, however, pursue a multitude of other interests that are often more pressing in the short-term. The European Union has an important role to play here. A future European democratic communication policy would center around common norms and rules for the market of opinions. It would provide for open and transparent discourses and safeguard that the infrastructures of democratic discourses are unimpeded by non-democratic concerns. The principle of democracy would replace the still prevailing market principle.

Accepting the role of being in charge of democratic ordnungspolitik in Europe would mean to accept that democracy in Europe can today only mean European democracy. The common market has provided for a regulatory frame in which no member state can autonomously regulate its communicative space without infringing on the freedoms of goods and services, and thus to act beyond European law. The member states have tied themselves de jure and de facto to a common regulatory discipline according to which they all enjoy the benefits of high consumer standards, data protection and a pluralistic media landscape, or suffer from its deficiencies. National regulations of market-related services are no longer either feasible or legal.

The EU should also not shy away from accepting the external effects of its internal policies. The new General Data Protection Regulation (GDPR) is an interesting case in point. It sets out the ambitious principles of purpose limitation, data minimization, accuracy, the limitation of storage, and integrity and confidentiality. The GDPR has effects that go beyond Europe and even affect the US market. “Ironically, many Americans are going to find themselves protected from a foreign law”, said Rohit Chopra, the Democratic commissioner at the Federal Trade Commission (FTC) (Romm et al. 2018). The EU has emerged as the most powerful regulator of Silicon Valley, “stepping in where Washington has failed or simply has been unwilling to limit some of the United States’ most lucrative and politically influential companies” (ibid.). For global companies like Google, Facebook or Amazon, it is neither an option to leave the European market nor to organize their business along two different sets of legal regulations. Data’s inherent mobility necessitate *de facto* transnational regulation, even if that is politically not welcome in some of the markets. It is by far more efficient to implement the rigid European regulations on a global scale than to try aligning digital markets with national borders, and thus to offer to the American consumer the level of protection intended for Europeans only. The outcome is straight forward: although legally only aiming to safeguard EU customers who rely on foreign based services, the EU *de facto* extends the territorial reach of its data protection law, forcing foreign market participants to obey EU law irrespective of whether they serve EU, US or any other customers (Bendiek, 2013).

It is, finally, also true that political interventions into the public discourse and its infrastructure should not only be ambitious, but also modest. Political institutions must shy away from any unwarranted interference into free speech. Legal interventions do always have the negative side-effect of not only threatening democratic liberties but also the openness of the Internet. Already today can we observe how national legal regulations have an increasingly fragmenting effect (Mueller, 2017). Regulatory interventions must therefore not lead to state leapfrogging and the misguided idea of renationalizing the Internet. The transnational network society is an outstanding achievement that has achieved an enormous number of positive things. Here we find another good reason for allocating respective powers to the EU. As a supranational entity presiding over twenty-eight member states with own regulatory traditions, the EU must respect a large variety of regulatory traditions and philosophies. It does hardly ever impose rigid laws on its member state addressees but most often applies directives which only detail the aim of an intervention without specifying the applicable tools. The EU’s governance mechanism is neither built on bureaucratic hierarchy nor on the application of majoritarian decision-making but on deliberative

interaction among the member states and the principle of subsidiarity (Neyer, 2012). The EU is thus forced to realize a sound mixture of regulatory restraint with a firm commitment to democratic norms.

C) Empowering Citizens

No reform agenda is complete without situating the individual. At the end of the day, it is neither the EU nor the state which fosters change but citizens who undertake the necessary steps. As it is today, however, many citizens feel overwhelmed by the speed of change and are only too often content to observe the new economic giants revolutionizing the political and social world. An important element of changing this is to reform academic education. What is needed today is a new type of academic education which combines transdisciplinary science with an entrepreneurial spirit.

Such a combined form of university education would be founded on understanding the digital society in its many different aspects. Lawyers can teach about tectonic shifts in legal regimes, the overlapping of national, European and international regulations, and the many new legal challenges to the digital European society. Economists and sociologists can help understanding the logic of the platform economy and the effects of ever more flexible forms of labor on welfare regimes. Political scientists can analyze new forms of interest mediation and their comparative advantages and disadvantages to representative democracy. And the humanities, finally, can set all this in the bigger context and help us understand how the changes resonate with and change our culture and the very way we live together.

Understanding is important, but not enough. In an age where global corporations invest billions of Euro every year in revolutionizing the economy, society and culture, we must re-empower the next generation of graduates to become agents of democratic digital change. We need a new class of university institutions which equip students with the entrepreneurial and the technical skills for developing and implementing new not-for-profit ideas. Study programs are needed that transgress the divide between theory-oriented traditional universities and practice-oriented universities of applied sciences and thus contribute to empowering graduates to transform ethical aspirations into practical impact.

CONCLUSION

This short text cannot offer any definitive answer to the question of whether the fourth transformation of democracy will invite a new era of more deliberation, participation and better governance or whether the structural changes in social stratification processes

and the public sphere will erode necessary preconditions for democracy. It might well be that new transnational opportunities for participation are developing in parallel with a devaluation of the substance of national representative democracy. Whatever the future might bring, it will be important to understand that democracy must no longer be thought of as a domestic structure only. Its integrity is closely tied to the way how we constitutionalize its interface with the emerging transnational network society. Europe has an important role to play here. It must not succumb to the temptation of dramatic interventions such as the breaking up of large tech companies or the state-run establishment of competitors to Google, Amazon and other tech companies. A more modest but nevertheless crucial step towards harmonizing the network world with democratic standards is already taken if the major players in the network world become more transparent and disclose their algorithms, and if Europe self-consciously accepts its responsibility to champion the cause of its citizens. This is where the European Union is called upon today. Such a move will reduce mistrust and create the basis for a more constructive integration of the transnational network society into the democratic world of states.

LITERATURE

BÄCHTIGER A., DRYZEK J. S., MANSBRIDGE J. and WARREN M.E., *The Oxford handbook of deliberative democracy*, 2018, Oxford: Oxford University Press.

BANKS J., “Regulating hate speech online”, *International Review of Law, Computers and Technology*, 2010, 24(3), pp. 233-239.

BARLOW J., *A Declaration of the independence of cyberspace*, 1996: <https://www.eff.org/cyberspace-independence>, retrieved 9/23/2018.

BENDIEK A. and PORTER, A., “European Cyber Security Policy within a Global Multistakeholder Structure”, *European Foreign Affairs Review*, 18 (May 2013) 2, pp. 155-180.

BENNETT W. L. and IYENGAR S., “A new era of minimal effects? The changing foundations of political communication”, *Journal of Communication*, 2008, 58(4).

BLUMLER Jay G. and COLEMAN S., “Democracy and the Media – Revisited”, *Javnost - The Public*, 2015, 22:2, pp. 111-128.

BOHMAN J., “Expanding dialogue: The Internet, the public sphere and prospects for transnational democracy”, *The Sociological Review*, 2004, 52:1, pp. 131-155.

BONNITCHA J. and MCCORQUODALE R., “The concept of ‘due diligence’ in the UN Guiding Principles on Business and Human Rights”, *European Journal of International Law*, 2017, 28(3), pp. 899-919.

- CASTELLS M., *The Network Society. The Information Age: Economy, Society and Culture*, 1996, Vol. 1, Maiden/Oxford: Blackwell.
- DAHL R. A., “A democratic dilemma: System effectiveness versus citizen participation”, *Political Science Quarterly*, 1994, 109, pp. 23-34.
- DRYZEK J. S., *Deliberative global politics: discourse and democracy in a divided world*, 2006, Cambridge: Polity Press.
- GROFMAN B., TRECHSEL A. H., FRANKLIN M. (eds.), *The Internet and democracy in global perspective. Voters, candidates, parties, and social movements*, 2014, Springer.
- HABERMAS J., *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 1992, Frankfurt am Main: Suhrkamp.
- HABERMAS J., *The postnational constellation. Political essays*, 2001, Polity.
- HABERMAS J., *Ach, Europa - Kleine Politische Schriften XI*, 2008, Frankfurt am Main.
- HILBERT M., “The maturing concept of e-democracy: From e-voting and online consultations to democratic value out of jumbled online chatter”, *Journal of Information Technology & Politics*, 2009, 6(2), pp. 87-110.
- KANT I., *Zum ewigen Frieden und andere Schriften*, 1795/2008, Fischer, Frankfurt.
- KECK M. and SIKKINK M., *Activists beyond borders. Advocacy networks in international politics*, 1998, Cornell University Press.
- KELLER, P., “Sovereignty and liberty in the Internet era”, in R. RAWLINGS, P. LEYLAND and A. YOUNG (eds), *Sovereignty and the law: Domestic, european and international perspectives*, pp. 305-324, Oxford University Press, pp. 305-324.
- LEVITSKY S. and ZIBLATT D., *How Democracies Die: What History Reveals About Our Future*, 2018, New York.
- MUELLER M., *Networks and states. The global politics of Internet governance*, 2013, MIT Press.
- MUELLER M., *Will the Internet fragment? Sovereignty, globalization, and cyberspace*, 2017, Cambridge, UK: Polity.
- NEYER J., *The justification of Europe. A political theory of supranational integration*, 2012, Oxford: Oxford University Press.
- PARISER E., *The Filter Bubble: What the Internet Is Hiding from You*, 2011, Penguin Books.
- PERRY B. and OLSSON P., “Cyberhate: the globalization of hate”, *Information and Communications Technology and Law*, 2009, 18(2), pp. 185-199.

PERSILY N., “The 2016 U.S. election: Can democracy survive the Internet?”, *Journal of Democracy*, 2017, 28.

PETERS B., *Die Integration moderner Gesellschaften*, 1993, Suhrkamp, Frankfurt am Main.

READING V., *Digital sovereignty: Europe at a crossroads*, 2015, EIB Institute.

ROMM T., TIMBERG C. AND BIRNBAUM M., “Europe, not the U.S., is now the most powerful regulator of Silicon Valley”, *The Washington Post*, May 25, 2018.

SCHARPF F. W., *Games real actors play. Actor-centred institutionalism in policy research*. 1997, Boulder, Col.