

Lawmaking during the digital era

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Abstract:

“E-democracy”, a new concept based on digital technology, should not take the place of legislative institutions, nor undermine parliament’s legitimacy. This new technology provides powerful means for public decision-makers to improve the drafting of laws and include citizens in the hearings process.

During his New Year greetings to the press on 11 January 2018, François de Rugy, president of the National Assembly, expressed support for an eventual “*fundamental right for free, equal and universal access to digital networks*”.¹ This principle might soon be engraved in the bedrock of the Constitution. Are we moving toward an electronic and potentially participatory democracy?² “Electronic democracy” refers to the set of arrangements and procedures that use information and communications technology (ICT) to promote citizen participation in the control, discussion or drafting of public decisions.³

Digital technology is not just a technical or economic revolution. It also bears a philosophy, a revolutionary switch from a vertical to a horizontal society, where anyone who wants is able to access information and interact with decision-makers. It has altered the bond with citizens not in relation to lawmaking but, more broadly, via their direct exchanges with elected officials. Prior to digital technology, the means for this communication were articles and interviews that, mostly run in regional dailies, had a limited number of words and that journalists sometimes chose and commented; or else pamphlets distributed through the mail (by paying the post office) or in mailboxes by activists. All of this was inevitably restricted and restrictive.

The Internet has set off a revolution in exchanges, by enabling elected officials to communicate through blogs, Facebook or Twitter without journalists as a filter and without the drawbacks related to the means used. Indeed, a revolution: every elected official can defend his/her positions and exist in the media. The Internet has involved more citizens in parliament’s work. Applications, such as PolitikApp, Ciwik or Citeos, are gradually boosting exchanges, improving information and involving citizens. The Internet, which offers citizens unlimited access to information, has not come along with an education in the analysis of information. The Web is a literal forum where citizens vent their opinions and exchange with each other. The online media have considerably altered social relations.

¹ F. de Rugy quoted in: LAUSSAN J. (2018) “La neutralité du net dans la Constitution. Le président de l’Assemblée est pour”, *Numerama*, 12 January, consultable at <https://www.numerama.com/politique/320960-la-neutralite-du-net-inscrite-dans-la-constitution-le-president-de-lassemblee-est-pour.html>.

² Recommandation CM/Rec (2009) of the Council of Europe.

³ This article, including quotations from French sources, has been translated from French by Noal Mellott (Omaha Beach, France). The translation into English has, with the editor’s approval, completed a few bibliographical references.

For parliament, the conclusion is obvious. The lawmaking machine is in full swing: at the start of the current session, Article 24 of the French Constitution has never had as much significance: “*Parliament votes laws*”. Evidence of this are the many bills of law introduced by the government and passed during the past year: reform of the Labor Code, an act extending the state of emergency, and an act on the accountability of officeholders and politicians. During the 2016-2017 session, parliament voted 61 bills of law introduced by the government and 37 by MPs. Compare this with 2011-2012, when 59 bills introduced by the government were approved, but only one bill introduced by private members. These figures are telling: a spate of low-quality lawmaking.

It is said that France has 67 million selectors for the national soccer team. But do we have 67 million lawmakers? Can digital technology contribute to this?

Digital technology has made the relations between citizens, lawmakers and the law more complex

The citizen, an actor in lawmaking

Nowadays, citizens have the same access to information as elected officials. They express opinions through the mail or e-mail, and on the social media, websites, blogs and the Internet. Digital technology offers everyone access to an infinite, unfiltered space. Organizations have launched many a petition: signatories need but enter their name and town, and the petition will be sent to MPs, whose e-mailboxes are overflowing.

Some movements, strong and powerful, feed on fear and spread partial, even fake, information in pursuit of their goals — a new form of “citizen lobbying”. Take the example of the antivaccination campaigns. Since the bird flu crisis, fears have amplified about vaccines, especially on several Internet forums that the parents of young children consult. As a consequence, opposition to vaccination has grown, even to the legally required vaccinations, with dire effects for public health.

Digital technology has the power to cast doubt on what public authorities say. This new, more horizontal society raises new questions: why are those who govern or who represent us more credible than anyone else? We even observe a reversal of credibility: since what public authorities say is official, it is suspected of being manipulative, of serving the interests of the state or of financiers instead of citizens. The words of public authorities are constantly challenged, commented and interpreted.

Digital technology has broken with journalism’s traditional codes of ethics. The Web offers to anyone who claims to be an expert the possibility of publishing an opinion and publicizing it as the truth. Sensationalism is constantly being used to attract cybernauts and channel currents of opinion. The race is on to win over public opinion. Forces have lined up, and some stakeholders have adopted an extremist attitude in order to make themselves heard by any and all means.

In this novel cultural and technological context, the forthcoming French “*act of law on the reliability of, and confidence in, information*” will introduce sanctions against “fake news”. A court order will be able to stave off the diffusion of false information with an eventual impact on national elections. Qualifying an information as fake news is a touchy question, since the borderline is sometimes thin between what the constitutional right of the freedom of speech must at all costs protect and what should be sanctioned because of the use of highly questionable methods (as in the case of the British Analytica scandal).

Growing frustrations are rattling democracy

Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen — “*The law is the expression of the general will. All the citizens have the right of contributing personally or through their representatives to its formation*” — is taking on a new meaning in the digital age. The Digital Republic Act of 7 October 2016 was drafted through a novel process of online consultation.⁴ Once the appropriate platforms were set up, the same process was used to draft an “*action plan for growth and the transformation of firms*” (PACTE) under the auspices of the Ministry of the Economy and Finance.⁵ Participation via a referendum was broadened through a reform on 4 August 1995, and then further broadened during the modification of the constitution in July 2008.

Despite these advances, citizens do not see the concrete results of their proposals, whence more frustration than satisfaction. In effect, they think that they are the real experts on the issues under discussion. This situation creates problems, and is potentially explosive for our democracy founded on a social contract.

Organize the new relations to lawmaking stemming from digital technology

Reassert parliament’s role in drafting laws

In *The Social Contract*, Jean-Jacques Rousseau wrote about the essential relation between the law and rights. Rights are not fixed by decree or by arbitrary decision: they are the positive content of acts of law. In this sense, citizens are endowed with not just an electoral but also a legislative power. The individual is both a subject and a lawmaker but in a distinct way. Democracy’s distinctive characteristic is that it is a political body in which the word “citizen” refers to the ideas of obedience as well as lawmaking.⁶ Members of parliament differ from citizens in that they are attributed a legitimacy based on the general will. Therefore, MPs must be visionaries who anticipate changes in the law and follow the country’s ceaseless transformation while acting in the general interest. Since they bear a special or private interest, citizens must not replace MPs. However they can bring knowledge and information to MPs.

To correctly do the work of lawmaking, MPs must have the means to conduct analyses. This is not so nowadays. In this respect, citizens have a special place in the lawmaking process. Lawmakers have to determine the meaning of the general interest, which must guide their legislative actions. In a report to the National Assembly, we have proposed involving citizens in assessing the impact of bills of law.⁷ Without overlooking the important advances made by public administrations in conducting impact assessments, there are several gaps in the *ex ante* assessments of this impact. Many of these assessments are made after a bill has been drafted in order to explain the reasons and objectives of the articles contained in the bill. Digital technology must be used to improve the impact assessment of bills of law. The intent is to reconsider the citizen’s place in the processes of making and applying laws. For each bill in the future, an impact

⁴ Texts of French laws and decrees, as well as many court decisions, are available at <https://www.legifrance.gouv.fr/Droit-francais>.

⁵ “Tout citoyen peut-il concourir à l’élaboration de la loi?” (2018) *Vie publique*, 30 June, available via <http://www.vie-publique.fr/decouverte-institutions/citoyen/citoyennete/definition/droits/tout-citoyen-peut-il-concourir-elaboration-loi.html>.

⁶ LENOIR N. (2001) “La loi et les deux visages du citoyen chez J.-J. Rousseau”, *Philosophiques*, 28(2), pp.327-350.

⁷ DE LA RAUDIÈRE L. & JUANICO R. (2014), *Mieux légiférer, mieux évaluer: 15 propositions pour améliorer la fabrique de la loi*, Information report to the French National Assembly n° 2268, 9 October. Available at [http://www2.assemblee-nationale.fr/documents/notice/14/rap-info/i2268/\(index\)/rapports-information](http://www2.assemblee-nationale.fr/documents/notice/14/rap-info/i2268/(index)/rapports-information).

assessment should be systematically made available via open public data.⁷ Citizens may then, if they want, use this information, criticize the assessment and complete it by presenting consequences that have been overlooked, whether deliberately or not. Obviously, MPs will do a better legislative job when the quality of the impact assessment has, thanks to citizen-users, been improved, and when each article of the bill is evaluated in relation to its objectives. The deviant effects of articles in bills of law will also be better detected.

Modify legislative procedures to make more room for citizen input

At the start of the new session, François de Rugy, president of the National Assembly, launched work on “*a parliament for tomorrow*”. With input from work groups, he presented the first suggestions for reforms in favor of citizen participation: a reform of the right to petition (under condition of ten thousand signatures), then a response by the competent committee or by the rapporteur of a bill of law (under condition of one hundred thousand signatures); the hearing of the petition’s authors by the competent committee; and under condition of one million signatures and with backing by a tenth of MPs, a debate automatically scheduled on the Assembly’s agenda.

In this same sense, a report has drawn attention to the importance of assessing public policies as a way of changing the actions conducted by public authorities.⁸ Under the French Constitution, one of the three fundamental duties of MPs is to evaluate public policies. In fact however, MPs have little time and few means for efficiently evaluating laws; and citizens are still very little involved in assessments, *ex ante* or *a posteriori*, of the impact and efficiency of laws.

The assessment of public policies in France must undergo a revolution with the help of digital technology. To improve assessments, public discussions must be enlightened by making more accessible, transparent and useable the assessments of laws and policies for citizens, scientists and the media. Everyone will thus have the information to ponder and to use to form an opinion or make their voices heard during public hearings. For that matter, better assessments will help do a better job of lawmaking. Given the inflation of legislative texts, assessing the impact of laws will help us understand what works and what can be improved, and see whether laws meet their objectives. Consequently, better assessments will lead to better actions since the current context of reducing expenditures calls for “doing more with less” while taking account of the requirements of democracy, the expectations for public services and the acceleration of economic and social trends.

In brief, citizen actions, in particular via digital technology, must reinforce the quality of parliament’s work but not take its place. The current system, as laid down in the Constitution, is not intended to be a participatory democracy. MPs have the legitimacy for drafting and voting laws (Article 40 being an example thereof).⁹

Will the situation always be so? Or will we soon move, under pressure from the new technology and citizens’ demands, from the Fifth to a Sixth Republic that will institute a full, direct participatory democracy? Digital technology will surely make this possible. But will we make this decision? I am not sure about this on a countrywide scale. MPs shoulder the responsibility of voting the law, and they represent political positions that are useful for comparing visions and debating ideas. This function will still be necessary!

Two things are necessary for an optimal involvement, via digital technology, of citizens in lawmaking: a better handling of the information that circulates between citizens and MPs, and a genuine political willingness to draft and construct public policies with citizens. Concomitant with

⁸ MOREL-À-L’HUISSIER P. & PETIT V. (2018) “Mieux évaluer pour mieux agir: pour une évaluation des politiques publiques au service de la transformation de l’action publique” information report to the French National Assembly n° 771, 15 March. Available at: <http://www.assemblee-nationale.fr/15/rap-info/i0771.asp>.

⁹ Under Article 40 of the French Constitution, the proposals and amendments formulated by MPs are not admissible when their adoption would have, as consequence, a decrease in public resources or the creation or aggravation of public expenditures.

this implication of citizens in legislative deliberations, education in the handling of information is indispensable. In general, this is a question of political responsibility: our duty to citizens is to make the best (less restrictive and interventionist) laws and public policies. The law must become, once again, general and impersonal; this will leave more room for individual citizen initiatives.