
Googling Democracy? New Technologies and the Law of Global Governance: Afterword to Eyal Benvenisti's Foreword

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Abstract

This Afterword to Eyal Benvenisti's EJIL Foreword, 'Upholding Democracy amid the Challenges of New Technology: What Role for the Law of Global Governance?' focuses on two sets of issues that Benvenisti analysed. These issues are the multi-fold dimensions of global administrative law and the role of the law of global governance before new technologies, with particular reference to fake news and disinformation, which is probably one of the most harmful contemporary threats against democracy in our time.

It's not enough to just connect people. We have to make sure that those connections are positive. It's not enough to just give people a voice. We need to make sure that people aren't using it to harm other people or to spread misinformation. And it's not enough to just give people control over their information. We need to make sure that the developers they share it with protect their information, too. ...

[T]he most important thing that I care about right now is making sure that no one interferes in the various 2018 elections around the world.

We have an extremely important U.S. midterm. We have major elections in India, Brazil, Mexico, Pakistan, Hungary coming up. And we're going to take a – a number of measures, from building and deploying new A.I. tools that take down fake news, to growing our security team to more than 20,000 people, to making it so that we verify every advertiser who's doing political and issue ads, to make sure that that kind of interference that the Russians were able to do in 2016 is going to be much harder for anyone to pull off in the future.

– Mark Zuckerberg¹

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¹ Hearing of Mark Zuckerberg before the United States Senate Committee on the Judiciary and the United States Senate Committee on Commerce, Science and Transportation, 10 April 2018, available at www.judiciary.senate.gov/meetings/facebook-social-media-privacy-and-the-use-and-abuse-of-data. See also the hearing of Jack Dorsey, Twitter Co-Founder and Chief Executive Officer, and Sheryl Sandberg, Facebook Chief Operating Officer, before the US Senate Select Committee on Intelligence, 5 September 2018, available at www.intelligence.senate.gov/hearings/open-hearing-foreign-influence-operations-use-social-media-platforms-company-witnesses.

1 Law and Democracy before the Internet Society

On 10 April 2018, Facebook chief executive Mark Zuckerberg was heard before the US Senate's Commerce and Judiciary committees reporting on Facebook, social media privacy and the use and abuse of data in connection with the Cambridge Analytica scandal and the Russian actions of disinformation perpetrated during the 2016 US presidential elections. The over 400 pages of questions and answers between the senators and one of the richest and most powerful men in the world cover several topics: Internet regulations, data privacy, foreign interference, fake news, freedom of speech and censorship, artificial intelligence, machine learning and algorithms, to name but a few. These are the same kind of problems examined, amongst others, by Eyal Benvenisti in his rich and sophisticated EJIL Foreword entitled 'Upholding Democracy amid the Challenges of New Technology: What Role for the Law of Global Governance?', which was published before the Cambridge Analytica episode came to the fore.

Benvenisti offers a very effective reconstruction of the evolution of international organizations and their law; he brings the readers into a fascinating journey from the post-World War II dream of cooperation during the 1960s to the accountability concerns and their possible solutions during the 1990s and the 2000s, until the most recent challenges coming from new technologies, such as big data, fake news and data privacy. Benvenisti's thesis can be easily endorsed, not least because it is supported by strong empirical arguments and solid literature. In this reaction, I would focus on two sets of issues that the Foreword analysed, and I will try to further illustrate their complexity. These issues are the multi-fold dimensions of global administrative law (GAL) and the role of the law of global governance before new technologies, with particular reference to fake news and disinformation, which is probably one of the most harmful contemporary threats against democracy in our time.²

2 GAL and Its Multi-Facets

GAL, Benvenisti observes, developed in order to improve the degree of accountability of international organizations – namely, through the adoption of administrative law type mechanisms, such as, for instance, participation, duty to give reasons and review.³ This conception of GAL and its instruments is eminently normative and requires some clarifications. First, the diffusion of public and administrative law mechanisms at international level is a phenomenon already known before the 1990s. In 1949,

² See C.R. Sunstein, *#republic: Divided Democracy in the Age of Social Media* (2017); M. Kakutani, *The Death of Truth. Notes on Falsehood in the Age of Trump* (2018); Alemanno, 'Editorial: How to Counter Fake News? A Taxonomy of Anti-Fake News Approaches', 9 *European Journal of Risk Regulation (EJRR)* (2018) 1; T. Baldwin, *Ctrl Alt Delete: How Politics and the Media Crashed Our Democracy* (2018); see also S. Cassese, *La democrazia e i suoi limiti* (2018), who cites the Isaac Asimov's story 'The Franchise' (1955) – in which the US president is elected by a computer through the examination of one single citizen – in order to highlight the risks of electronic democracy; J. Bartlett, *The People Vs Tech. How the Internet Is Killing Democracy (and How We Save It)* (2018); and the French works collected in *La datacratie* (2018).

³ Benvenisti, 'Upholding Democracy amid the Challenges of New Technology: What Role for the Law of Global Governance?', 29(1) *European Journal of International Law (EJIL)* 2018, at 31ff.

one of leading public law scholars of the 19th and 20th centuries, Vittorio Emanuele Orlando, wrote on the crisis of international law and on its need to productively look to notions and tools developed by public law, as the former appeared to be *minus quam perfectum* than the latter, exactly as public law appeared to be less perfect than the more ancient private law.⁴ Indeed, although the 'name' GAL, as such, appeared only in the 21st century,⁵ phenomena of administrative law occurring at the international level dates back to the late 19th century.⁶ The concept of GAL 'begins from the twin ideas that much global governance can be understood as administration, and that such administration is often organized and shaped by principles of an administrative law character'.⁷ This implies that GAL has not only a normative dimension but also a realistic one stemming from the actual practice of international organizations.

Second, Benvenuti lists the different functions of procedure according to the (mainly US) administrative law tradition and applies it to the global governance context.⁸ Once national borders have been transcended, procedures can enhance legitimacy and democratic accountability,⁹ or they can serve as an instrument to control power.¹⁰ This may occur through participatory mechanisms because procedures are also instruments for representing and negotiating interests.¹¹ However, procedures are, first of all, a device for governing complex organizations and their decision-making processes,¹² and this is why global regulatory regimes and global institutions have been increasingly engaged in developing their procedural dimension. Examples of this growing number of procedures may be found in several sectors, such as finance, cultural heritage, sports, health and the environment, including the production of global

⁴ Orlando, 'La crisi del diritto internazionale', 1 *Rassegna di diritto pubblico europeo* (1949) 32.

⁵ The concept of global administrative law was adopted and first explained in 2004 by the New York University research project led by Richard B. Stewart and Benedict Kingsbury. See Casini, 'Global Administrative Law Scholarship', in S. Cassese (ed.), *Research Handbook on Global Administrative Law* (2016) 548; S. Cassese, *A World Government?* (2018), especially 109 ff.

⁶ E.F. Martens, *Le droit international actuel des peuples civilisés*, 3 vols (1883); Kazansky, 'Théorie de l'administration internationale', 9 *Revue Générale de Droit International Public* (1902) 353; Reinsch, 'International Administrative Law and National Sovereignty', 3 *American Journal of International Law (AJIL)* (1909) 1; Borsi, 'Carattere ed oggetto del diritto amministrativo internazionale', *Rivista di diritto internazionale* (1912) 384. See Kingsbury and Donaldson, 'Global Administrative Law', in *Max Planck Encyclopedia of International Law* (2011); Cassese, 'Relations between International Organizations and National Administrations', in International Institute of Administrative Sciences, *Proceedings, XIXth International Congress of Administrative Sciences* (1983).

⁷ N. Krisch and B. Kingsbury (eds), 'Symposium on Global Governance and Global Administrative Law in the International Legal Order', 17 *EJIL* (2006) 1, at 2.

⁸ Benvenuti, *supra* note 3, at 33 ff.

⁹ N. Luhmann, *Legitimation durch Verfahren* (1969).

¹⁰ McCubbins, Noll and Weingast, 'Administrative Procedures as Instruments of Political Control', 3 *Journal of Law, Economics, and Organization (JLEO)* (1987) 243; Mashaw, 'Explaining Administrative Process. Normative, Positive and Critical Stories of Legal Development', 6 *JLEO* (1990) 267. See G. Napolitano, *Comparative Administrative Law: Foundations, Cases and Problems* (2019).

¹¹ Stewart, 'Administrative Law in the Twenty-first Century', 78 *New York University Law Review (NYULR)* (2003) 437; Stewart, 'The Reformation of American Administrative Law', 88 *Harvard Law Review* (1975) 1670.

¹² Conticelli, 'Global Administrative Proceedings: Distinguishing Features', in J.-B. Auby (ed.), *Droit comparé de la procédure administrative* (2016) 979.

indicators.¹³ Furthermore, as Benvenisti recognizes, participation in decision-making processes is not always the right answer; public actors, for instance, may involve private interests and stakeholders to strengthen their powers or because they have been ‘captured’ by stronger private powers and sometimes ‘maximizing transparency and participation for the interested minimizes transparency and participation for the disinterested’.¹⁴

Third, GAL procedural mechanisms – such as notice and comment, request of advice and involvement of consultative bodies or committees – are not the only instruments capable of ensuring accountability and legitimacy.¹⁵ This latter mechanism also relies on other factors, like the key role played by states within international organizations and their organs – for example, the involvement of governments (as usually happens), domestic administrations (as in the case of transnational networks) or even different levels of public authorities. Moreover, there are plenty of different mechanisms for accountability: supervisory, hierarchical, fiscal and legal,¹⁶ plus the so-called ‘horizontal’ accountability, based on ‘peer review’ mechanisms (although there may be alternative forms based on the market or reputation, albeit less frequently).¹⁷ Therefore, responses to the ‘accountability dilemma’ are diverse,¹⁸ to the extent that there may even be a risk to incur the phenomena of ‘over-accountability’.¹⁹

In conclusion, GAL cannot be reduced to its normative procedural dimension. It can also shed light on institutional features, such as in the case of the hybrid public and private forms of governance or of private bodies exercising public functions at the global level. This latter perspective, which has been productively adopted in cases such as sports (for example, the World Anti-Doping Agency), the Internet (the Internet Corporation for Assigned Names and Numbers) or public health (e.g., the Global Fund), may be fruitful in the case of technology companies as well, especially when we consider information or the cyberspace as a whole as a global public good.²⁰ Zuckerberg’s famous statement – ‘in a lot a ways Facebook is more like a government

¹³ An overview is in S. Cassese *et al.* (eds), *Global Administrative Law: The Casebook* (3rd edn, 2012).

¹⁴ Shapiro, ‘Administrative Law Unbounded: Reflections on Government and Governance’, 8 *Indiana Journal of Global Legal Studies* (2000) 369, at 373; Shapiro, “‘Deliberative’, “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the EU?’, 68 *Law and Contemporary Problems* (2005) 341; see also Morison, ‘Citizen Participation: A Critical Look at the Democratic Adequacy of Government Consultations’, 37 *Oxford Journal of Legal Studies* (2017) 636, cited by Benvenisti, *supra* note 3, who examines the phenomenon of ‘participatory disempowerment’.

¹⁵ Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’, 20 *Academy of Management Review* (1995) 571; Buchanan and Keohane, ‘The Legitimacy of Global Governance Institutions’, 20 *Ethics and International Affairs* (2006) 405; R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (2008).

¹⁶ Grant and Keohane, ‘Accountability and Abuses of Power in World Politics’, 99 *American Political Science Review* (2005) 29; J. Ferejohn, *Accountability in a Global Context*, IILJ Working Paper no. 2007/5 (2007); Reinisch, ‘Securing the Accountability of International Organization’, 7 *Global Governance* (2001) 131.

¹⁷ Grant and Keohane, *supra* note 16, at 37ff.

¹⁸ Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’, 108 *AJIL* (2014) 211.

¹⁹ Gersen and Stephenson, ‘Over-Accountability’, 6 *Journal of Legal Analysis* (2014) 185.

²⁰ Benvenisti, *supra* note 3, at 79. See Sunstein, *supra* note 2, at 147ff, also cited by Benvenisti.

than a traditional company' – might thus lead to some unexpected forms of global regulation; as a matter of fact, Facebook is already by itself introducing several measures aimed at increasing transparency and introducing internal appeal and review procedure against decisions.²¹

3 Combating Disinformation and Fake News

In the final part of the Foreword, Benvenisti examines one of the most challenging global contemporary problems that (legal) scholarship will have to address in the next decades – that is, how to regulate new technologies and to avoid the issue that their use and abuse might affect fundamental rights and the very functioning of democracy.²² In the above-mentioned hearing before the US Senate, Zuckerberg stated that 'the real question, as the Internet becomes more important in people's lives, is what is the right regulation, not whether there should be or not', and he ensured total cooperation with the Congress in the law-making process, which would not have been feasible without his help, as senators confirmed with their reiterated request for his collaboration. On the other side, Twitter co-founder Jack Dorsey, in his opening statement at the hearing before the US Senate Select Committee on Intelligence on Foreign Influence Operations' Use of Social Media Platforms, affirmed that 'as a private company, there are threats that we cannot understand and address alone. We must continue to work together with our elected officials, government partners, industry peers, outside experts, and other stakeholders so that the American people and the global community can understand the full context in which these threats arise'.²³

Benvenisti tames and frames several problems, such as cyberspace as a global common, the danger of decision-making processes driven by algorithms²⁴ and the harm that fake news and disinformation can create for individuals and society as a whole.²⁵ This latter issue probably represents the most serious challenge for contemporary democracies; in France, there are studies on the '*datacratie*';²⁶ in the United Kingdom,

²¹ Zuckerberg's statement can be found in several articles and interviews. See, e.g., 'Mark Zuckerberg on Facebook's Hardest Year, and What Comes Next', *Vox*, 2 April 2018, available at www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge.

²² Benvenisti, *supra* note 3, at 55ff.

²³ US Senate, *Reports*, available at www.intelligence.senate.gov/sites/default/files/documents/os-jdorsey-090518.pdf.

²⁴ Chagal-Feferkorn, 'The Reasonable Algorithm', 2018 *University of Illinois Journal of Law, Technology and Policy* (2018) 111; Kroll *et al.*, 'Accountable Algorithms', 165 *University of Pennsylvania Law Review* (2017) 633; Tutt, 'An FDA for Algorithms', 69 *Administrative Law Review* (2017) 83; Thornton, 'Cost, Accuracy, and Subjective Fairness in Legal Information Technology: A Response to Technological Due Process Critics', 91 *NYULR* (2016) 1821; F. Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (2015); Cardon, 'Le pouvoirs des algorithmes', in *La datacratie*, *supra* note 2, 63.

²⁵ Tandoc, Jr., Wei Lim and Ling, 'Defining "Fake News"', 6 *Digital Journalism* (2018) 137; Bakir and McStay, 'Fake News and the Economy of Emotions', 6 *Digital Journalism* (2018) 154; see also Harsin, *Un guide critique des fake news: de la comédie à la tragédie*, in *La datacratie*, *supra* note 2, 99; G. Riva, *Fake News* (2018).

²⁶ *La datacratie*, *supra* note 2.

Jeremy Corbyn has presented a manifesto for digital democracy.²⁷ Michel Foucault underlined that the forms and ways in which truth is represented and communicated play a crucial role for any kind of government.²⁸ The incredible development of social networks gave everyone the opportunity to say everything, and this gift has been inexorably used also for bad purposes, such as hate speech, disinformation and (foreign) interference with elections. And the capacity that these instruments have to influence public opinion ultimately affects the very essence of legislation, as Albert Dicey already pointed out at the beginning of the 20th century.²⁹

Facebook, Google and other tech companies are already trying to solve these problems and the issue of 'disinformation',³⁰ especially during elections.³¹ Is that enough? On 28 August 2018, US President Donald Trump complained that 'Google search results for "Trump News" shows only the viewing/reporting of Fake News Media' and that 'Google & others are suppressing voices of Conservatives and hiding information and news that is good. They are controlling what we can & cannot see. This is a very serious situation – will be addressed!'.³² In addition to Trump's protest against Google news algorithms,³³ the European Union (EU) has attempted other solutions against fake news,³⁴ such as the EU versus Disinfo initiative, which was essentially based on debunking through a disinformation review.³⁵ The introduction of criminal sanctions appears less feasible for several reasons, not least the difficulty of identifying the actual guilt of the hypothetical crime and the very fake nature of the news; so the risk may be to find ourselves in the position of 'fighting against shadows' ('σκιμαχῆν').³⁶

²⁷ J. Corbyn, 'The Digital Democracy Manifesto', available at https://d3n8a8pro7vhmx.cloudfront.net/corbynstays/pages/329/attachments/original/1472552058/Digital_Democracy.pdf?1472552058.

²⁸ M. Foucault, *On the Government of the Living: Lectures at the Collège de France* (2014), where he defines the concept of 'alethurgy' as 'the manifestation of truth as the set of possible verbal or non-verbal procedures by which one brings to light what is laid down as true as opposed to false, hidden, inexpressible, unforeseeable, or forgotten'; therefore, 'there is no exercise of power without something like an alethurgy' (at 7); see also J. Nida-Rümelin, *Demokratie und Wahrheit* (2006).

²⁹ A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (1914); see also von Bogdandy, Goldmann and Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority', 28 *EJIL* (2017) 115.

³⁰ See *Information Operations on Facebook* (2017), available at <https://fbnewsroomus.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf>.

³¹ Persily, 'The 2016 U.S. Election: Can Democracy Survive the Internet?', 28 *Journal of Democracy* (2017) 63; Eyriès, 'La twit-politique: l'élection présidentielle française de 2017 sur les réseaux sociaux numériques', in *La datacratie*, *supra* note 2, 87.

³² D. Trump, *Twitter*, 28 August 2018, available at <https://twitter.com/realDonaldTrump/status/1034456273306243076>.

³³ On the topic, see Haim, Graefe and Brosius, 'Burst of the Filter Bubble?', 6 *Digital Journalism* (2018) 330; Carlson, 'Facebook in the News', 6 *Digital Journalism* (2018) 4; Julian Wallace, 'Modelling Contemporary Gatekeeping', 6 *Digital Journalism* (2018) 274; see also F. Pasquale, *The Black Box Society* 59 (2015); Kowalik-Bañczyk and Pollicino, 'Migration of European Judicial Ideas Concerning Jurisdiction over Google on Withdrawal of Information', 17 *German Law Journal* (2016) 315.

³⁴ Alemanno, *supra* note 2.

³⁵ 'New and Analysis', *EU vs Disinfo*, available at <https://euvsdisinfo.eu>.

³⁶ Plato, *Apology of Socrates*, 18d.

What options do we have? In the long term, the solution should be investing resources in education, allowing children – and adults – to better understand the different levels and degrees of text reading and to overcome the immediate and often superficial input of a tweet. In the short term, we will need a mixed approach that puts together all possible kinds of actions, including debunking and establishing reliable sites for given public events, such as elections. States and tech companies should work together in order to create official platforms where fact checking and review of fake news can be realized. The sensitivity of the issue is rather evident, and the risks for freedom of speech or even censorship it evokes are around the corner. But should states leave Facebook or other private entities alone in combating fake news or in ensuring the integrity of electoral procedures?

Information, as Benvenisti underlines, plays an essential role in democracy. There are of course different kinds of information: one to one, one to many and many to many. It is mostly the first and the third ones that raise issues in terms of control, privacy and security, not to mention the problem of censorship. Moreover, if states do not have the (big) data, there will be difficulties in building proper forms of participation.³⁷ The law of global governance can therefore offer fruitful tools, which, of course, should be endorsed by states. However, this is always difficult and, in this field, even more so; China, for instance, strictly controls the use of the Internet within its territory. Such tools can act not only at the regulatory or procedural levels but also at the institutional one – for example, this could consist in establishing a dedicated international body³⁸ or in the recognition that global private companies that operate in a condition of de facto monopoly might be likened to global public administration and may require specific forms of control.³⁹ The world priority, therefore, should be to prevent scenarios like those described by George Orwell, in 1984, with the Ingsoc party (English Socialist) claiming that ‘ignorance is strength’.⁴⁰

³⁷ Devins *et al.*, ‘The Law and Big Data’, 27 *Cornell Journal of Law and Public Policy* (2017) 357; Krause Hansen and Porter, ‘What Do Big Data Do in Global Governance?’, 23 *Global Governance* (2017) 31; Alemanno, ‘Big Data for Good: Unlocking Privately-Held Data to the Benefit of the Many’, 9 *EJRR* (2018) 183.

³⁸ Similarly to what could be done for combating cyber-security, see Finnemore and Hollis, ‘Constructing Norms for Global Cybersecurity’, 110 *AJIL* (2016) 425; Mačák, ‘From Cyber Norms to Cyber Rules: Re-engaging States as Law-makers’, 30 *Leiden Journal of International Law* (2017) 877.

³⁹ The dangers connected with such monopoly are highlighted by F. Foer, *World without Mind* (2017), who refers to Facebook, Google, Amazon and big tech companies as ‘the Monopolists of mind’ (at 8ff).

⁴⁰ G. Orwell, 1984 (1949), at 70.