The Internet : New principles of political right, new social contract[1]

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Abstract: The Internet is now at the crossroads of the information and media spheres, at the juncture between private and public areas. Since the '90s, with the widespread use of the *web* and the domain name system the power to name, to identify, to search and to retrieve data on the Internet includes a deep societal and ethical dimension. Therefore one could identify multiple regimes of *"governmentality"* of the Internet following the track of the studies initiated by Michel Foucault. In fact, not so much the governance of the Internet but how the Internet governs the world. As a background of further analysis and researches the recent two Summits on the Information Society organised by the United Nations and held in Geneva in 2003 and in Tunis end of 2005 have agreed on a series of texts in form of Declaration of Principles, Plan of Action, Commitment and Agenda for the next five years*. In this context an impetus will be given to the bottom up *"multistakeholders"* approach. This will only be achieved if ethics, value and principles are put forward at the same level as any process of reflexivity. It is clear that the ambition and prospect of these texts and of the Agenda would need in order to be effective and implemented the formalization of common agreed principles and to set up adequate international instruments. In short this would imply a new *social contract* for the digital world.

Keywords: governance, governmentality, democracy, common good, sovereignty

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[1] The opinions expressed in this text are those of the author and do not necessarily reflect the position of the European Commission.
Documents are available at: http://www.itu.int/wsis/index.html

"The media transforms the great silence of things into its opposite. Formerly constituting a secret, the real now talks constantly. News reports, information, statistics, and surveys are everywhere" **Michel de Certeau** [2]

The Internet is now at the crossroads of the information and media spheres, at the juncture between private and public areas. From the outset, the *network of networks* has been engaged in ontological ambiguity: the need of government for secrecy and security but also the social demand for inclusiveness, freedom of expression and autonomy. Since the '90s, with the widespread use of the *web* and the domain name system as a universal identifier, a commercial, merchant mind-set has been adopted, without weighing up the principles of law and regulatory adjustments required for this transformation. However, denomination, the power to name and to identify on the Internet includes a deep societal and ethical dimension.

Furthermore, considering the animation, management and coordinating functions of the network, it would be possible to identify specific regimes of "*governmentality*" of the Internet following the track of the studies initiated by Michel Foucault. This has not been sufficiently explored. In fact, not so much the governance of the Internet but how the Internet governs the world.

Thus, the current *"governance"* of the Internet could be seen as an imperfect form of social regulation, a multiple "staircase world", would have said Gilles Deleuze, in which each landing would be suspended from its own legitimacy and unique method of organisation, irrespective of any overall coherence or hierarchy. Accordingly, there would be a constellation of many "Internet" models, operating isolated, in tandem or in multiplicity, while mapping our forms of life: the new economy, electronic commerce, on-line democracy, the digital divide, the network infrastructure, free exchanges, freedom of expression, protection of personal data and trade marks, encryption, security, etc. Up to now there is no agreed framework of values and principles for the Internet.

I Governance, governmentality and consensus

It should be remembered that at international level, recognition of the Internet has been achieved by the regulation of a technology. It consisted of specifying and stabilising, through an organisation, the IETF (Internet Engineering Task force), assisted by the IAB (Internet Architecture Board), the series of Internet technical protocols established in the '60s by the ARPANET network, at the instigation of the American Agencies concerned, mostly DARPA (Defence Advanced Research Projects Agency) and NSF (National Science Foundation).

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2 de Certeau, Michel."The Practice of Everyday Life", Ed. John Storey.NY, 1994

This process took place outside the traditional information technology standardisation process and progressively achieved the consensus of the world community of researchers and developers with the financial support of the industries concerned. The system is still operational and functions effectively.

In reality, the process has not given rise to any specific legislation: the IP protocols, which became *de facto* standards and PAS (*Public Available Specifications*), have been swallowed up in a general movement towards open standardisation.

At the same time, the physical infrastructure of the networks, initially borne by the American agencies, universities and research centres such as CERN in Europe, has been taken up by the computer, telecommunications and now media industries world wide.

The emergence of regulation challenges

In 1997, the Clinton administration wanted to transfer the management of the DNS system to the private sector. The main reason for this was the need to put an end to a *de facto* monopoly, particularly as regards the management of generic domain names (.com), which appeared to contradict the aims of transparency and openness to competition. But also, with the widespread use and commercial success of the *web*, the American authorities thought it would be opportune to obtain consensus on the detailed rules of the phenomenon from all interested parties.

The approach was based on two principles: 1) recognition of the function of switching the Internet to a global scale and ii) the need to ensure enduring stability of the system. These two requirements, still provided by the supervision of the American administration, rely on a three-pronged mechanism: 1) the domain names system (DNS), 2) the allocation of IP addresses by regional registers, 3) the consortium of the 13 route servers which are still administrated and financed on a voluntary basis.

The discussions which opened in 1998 at the time of the American government's Green Paper, followed by the White Paper, enabled the European Union to have an influence on the process of creating ICANN at the time it was launched.

Thanks to the action taken by the Commission and Member States, general principles, this time of a legal and not technical nature, were put forward: the applicability of international law – internationalisation of the system – opening up the DNS system to competition. Moreover, a consultative committee of governments (GAC) was appointed to ICANN to highlight the objectives of public policy and those of the international community of states.

In actual fact, the entire system is still a project led by the American authorities, in particular by the Department of Commerce, which exercises direct supervision over ICANN and the route servers' system.

Within this legal framework, as from the end of 1998, ICANN entered into a series of agreements with the American authorities and NSI/Verisign which had a monopoly over generic domain names. It should be noted that the initial Memorandum of Understanding of 1998 between the US Department of Commerce

and ICANN, which has been several times extended, has recently been renewed for another 3 years as from 29 September 2006. This agreement has confirmed that the path to full privatization of the management of DNS and IP resources seems open: *"The Internet Corporation for Assigned Names and Numbers (ICANN) today signed a new agreement with the United States Department of Commerce (DOC) that is a dramatic step forward for full management of the Internet's system of centrally coordinated identifiers through the multi-stakeholder model of consultation that ICANN represents"*[3].More specifically the responsibility for the technical management and the transfer of technical functions that were previously operated by the IANA has been gradually being devolved to ICANN and has recently been confirmed for another period of five years.

As quoted by analysts of the "Internet Governance Project"[4], the new agreement replacing the former MoU, "renamed a Joint Project Agreement (JPA), is a response to the comments received by NTIA during its Notice of Inquiry in July 2006. The object seems to be to strengthen the public's perception that ICANN is relatively independent". The analyst added that "one of the most important issues ICANN is considering at the moment is the relationship between domain name registration data (the Whois service) and individual privacy rights. The new agreement orders ICANN to "enforce existing Whois policy" which requires that ICANN maintain "timely, unrestricted and public access to accurate and complete Whois information".

ICANN's legal set-up must be put into perspective. It is really a matter of granting delegated powers rather than truly decentralised powers. The applicable law and appropriate jurisdictions are essentially under a North American system. The agreements and contracts are concluded by an organisation under Californian jurisdiction, responsible for managing a public resource and for services of general interest to the international community. In particular, the legal system of contracts to be concluded with national domain name registers (ccTLDs) raises problems that the international arbitration procedures will not always be able to resolve.

More generally, the transfer and use of data between all "actors" in the DNS (ICANN, Regional Internet Registries (RiRs), names registries, registrars, ISPs, etc.) raise a number of issues that are not easy to clarify and to solve legally speaking. However, if there already exist a great variety of legal provisions at national level and adequate procedure for litigation of domain names set up by the World International Protection Organisation in relation with ICANN (Universal Dispute Resolution System), it is clear that an international legal framework will have to be agreed soon or later for the Internet.

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3 See at: http://www.icann.org/announcements/announcement-29sep06.htm
4 See at: http://www.internetgovernance.org/

II   Tension between unity and plurality

Placing the technical standard in a social context

It should be pointed out that the procedure for creating and running ICANN shows a loss of the traditional reference points of political science and economic regulation. Since the 1998 White Paper, an artificial "consensus" culture has been promoted, which is presented as giving incontrovertible legitimacy to a particular mode of governance. In accordance with a consistent process in the Internet communities, the search for an impossible consensus leads to favouring the dynamics of judgment and persuasion of the actors. Here, for the DNS and ICANN, the system has been introduced to the advantage of some industries and not with the aim of encouraging the management of a common good for the benefit of the greatest number. Gradually, ICANN has allowed the establishment of a speculative and uncontrolled market for domain names and IP addresses, reflecting the economic value of what needs to be treated as a resource, a common good, that is necessarily scarce and of public interest.

Towards an Internet law, as new political principles and a new social contract

The Vice-President of the Conseil d'Etat in France, Renaud Denoix de Saint Marc[5], identifying an inexorable progression of common law compared to civil law, invited to transcend the confrontation of these two families of law. It could be useful, so far as concerns the Internet, to examine the possibilities of forming an hybrid corpus of principles with a view to a mixed law which would guarantee the concept of a common good forming part of the international community, which has always underpinned the establishment of the major infrastructure networks, whilst leaving the public and private actors independence of innovation and initiative.
        The notion of common good, *bonum communis*, is not new in philosophy and international law. Since Thomas Aquinas the notion has been widely documented and developed as, for example, by Gaston Fessard[6], Jesuit and philosopher, who described three dimension of the common good: i) the good of the community, ii) the community of the good, iii) the good of the common good, i.e. the relationship between the person and the community. More recently David Bollier, the policy strategist and journalist, has developed a new paradigm for the commons. This was also the track followed by Lawrence Lessig, professor at Stanford, who has applied

5 DENOIX de SAINT MARC Renaud, in Le débat no 1115, Gallimard, May-August 2001
6 FESSARD Gaston, "Autorité et bien commun", Aubier, Paris, 1944.

the notion of commons to the Internet in several books, in particular in *"The future of Ideas"*[7].

At last, the dimension of names and languages used on the Internet is central to the access information and to communicate. The seminar "Vox Internet" led in France by Ms Françoise Massit-Follea organised in a joint effort by ENS-Lyon and FMSH in Paris has pointed out the importance of "naming the world" on the Internet[8]. The dominance of the English language as well as the growing islands of content in various idioms are the reality of the media of today.

It should be reminded, as a back ground of further researches that the various social and legal issues of the Information Society have been addressed in December 2003 and November 2005 at the Summits on the Information Society in Geneva and Tunis organised by the United Nations and related Agencies. Both Summits have agreed on a series of texts in form of Declaration of Principles, Plan of Action, Commitment and Agenda for the next five years[9]. It is clear that the ambition and prospect of these texts and of the Agenda would need in order to be effective and implemented the formalization of common agreed principles and to set up adequate international instruments. In short this would imply a new *social contract* for the digital world.

In this context an impetus will be given to the bottom up *"multistakeholders"* approach which was initiated at the occasion of the last two WSIS and will be extensively followed for the Internet Governance Forum (IGF). But this will only be achieved if ethics, value and principles are put forward at the same level as any process of reflexivity.

If the Internet is to be transforming the forms of life, in a scheme of representation of our lifestyle or an ontology of our future, such an approach would need, as Marc Maesschalck suggested when analysing the links between Bourdieu and Habermas, to initially deepening *"the relations between the theory of social action and a comprehensive sociology of the world... as this explanation reduces the context of action to a function of a semantic background"*[10].

Therefore we are facing a strong social appeal, targeted at the international community, governments and society: how to first name the Internet and then to deploy universally the digital networks and contents for the benefit of all, understandable to all, accessible to all.

7BOLLIER David "The rediscovery of the commons", http://www.bollier.org/reclaim.htm.
8 DELMAS Richard, "Langues et culture de l'internet", June 2005, first chapter of the Report Vox Internet http://www.voxinternet.org
9 Documents are available at: http://www.itu.int/wsis/index.html
10 MAESSCHALCK Marc, "La réduction du contexte chez Bourdieu et Habermas", Revue Philosophique de Louvain, Juillet 2003.