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Constitutional Clothes for ICANN?

ICANN has a hybrid identity as a private corporation with global quasi-regulatory powers. This structure can hardly be made compliant with general international legal principles such as sovereignty or democratic participation. Since WSIS 2005, the literature on Internet governance shedding light on issues such as transparency and accountability of ICANN has exponentially increased and seems to already fill libraries. However, the approach of trying to mirror ICANN's legal status against the constitutionalism theories is less frequently chosen.

It is worthwhile to extend the frontiers of constitutional law into the setting of Internet governance by looking into the traditional questions of constitutional government. In this context, the following issues should be addressed:

- Are constitutional principles relevant for the legal status of ICANN?
- How must sovereignty be rephrased in the age of Internet?
- Should ICANN be bound by a charter encompassing human rights in the form of a Magna Charta?
- What does the principle of separation of power mean for the decision-making processes with ICANN?
- How should a legal remedies system be implemented being able to protect fundamental rights of individuals (such as by introducing a special court or a board of review)?

The contribution shows that the principles of constitutional law offer promising means for achieving fair and equitable governance standards in the Internet age.

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Inhaltsübersicht

1. Introduction
2. Legitimacy, Governance and Stakeholders
 - 2.1. Constitutionalism in a Multi-stakeholder Environment
 - 2.2. Legitimacy Perceptions
3. Elements of a Constitutionalism Approach
 - 3.1. Tradition of Constitutionalism
 - 3.2. Main Constitutional Principles
 - 3.2.1. Charter or Constitution
 - 3.2.2. Fundamental Rights
 - 3.2.3. Organizational Elements (Separation of Powers, Enumeration of Powers)
 - 3.2.4. Legal Remedies and Independent Courts
 - 3.3. Implementation of Constitutional Principles in the ICANN Framework
 - 3.3.1. Charter or Constitution
 - 3.3.2. Fundamental Rights
 - 3.3.3. Organizational Elements (Separation of Powers, Enumeration of Powers)
 - 3.3.4. Legal Remedies and Independent Courts
4. Conclusion

1. Introduction

[Rz 1] ICANN has a hybrid identity as a private corporation with global quasi-regulatory powers. International organizations can neither influence the appointment of directors nor do they have any means of surveillance. This legal structure cannot be easily made compliant with general international laws' principles such as sovereignty or democratic participation.

[Rz 2] The term Internet governance has become a major feature since the second World Summit on the Information Society (WSIS) held in Tunis in November 2005. Then, the delegates have approved the definition of Internet governance developed by the Working Group appointed at the first WSIS held in Geneva in December 2003. The definition reads as follows:¹ Internet governance is the development and application by Governments, the private sector and civil society, in their perspective roles, of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet. During the last few years the literature on Internet governance has mainly shed light on issues such as transparency and accountability of ICANN.² Due to the intensive discussions, ICANN has extended its transparency and accountability efforts; notwithstanding the fact that further improvements are still possible, the approach of trying to mirror ICANN's legal status against the constitutionalism theories, however, seems to be equally important.

2. Legitimacy, Governance and Stakeholders

[Rz 3] Internet governance tackles central questions such as: Who rules the Internet in who's interest, by which mechanisms and for which purposes? Particularly with the growing influence

¹ Report of the Working Group on Internet Governance, August 2005, no. 10, <http://www.itu.int/wsis/docs2/pc3/off5.pdf>.

² See *Weber, R. H.*, *Shaping Internet Governance: Regulatory Challenges*, Zurich (2009), pp. 121 et seq. with further references.

which for example ICANN has achieved, questions on its legitimacy have arisen. The envisaged realization of a concept of multi-stakeholder governance,³ perceived as the new way ahead in favor of the inclusion of the whole society, goes beyond the scope of traditional governance theories, which generally pursue an approach strictly distinguishing the state (public law) from the society (civil law).

2.1. Constitutionalism in a Multi-stakeholder Environment

[Rz 4] Such a development challenges the traditional international legal and political understanding of legitimacy as a concept primarily relevant to sovereign states being subjects of international law according to traditional doctrine. Consequently, two questions are to be addressed:

- Do traditional sovereignty concepts still correspond to the needs of allocating regulatory powers in the age of the Internet?
- Can the same criteria for assessing states' legitimacy be applied to private organizations having regulatory functions in the field of the Internet?

[Rz 5] Indeed, the Westphalian concept of sovereignty encompassing a right to monopolize certain exercises of power and a right against interference or intervention by any foreign power does not anymore fully fit into the globalized world of the Internet. Governance is changing under conditions of interconnectedness now happening, the inclusion of a larger number of involved persons and entities in the decision-making processes based on a multi-stakeholderism approach is needed.⁴ If sovereignty is developing to people, the emergence of a participatory process becomes vital. The concept of cooperative sovereignty also leads to the notion of shared state responsibility for the realization of fundamental rights protection not only on the national level but also on the international level.

[Rz 6] As far as private actors are concerned, the question arises who could be a legitimate stakeholder in a multilayer governance structure. In particular, participation becomes an issue; the involvement of the members of civil society in decision-making processes evolves as a new target in the Internet organization. Furthermore, the question can be raised whether specific values such as fundamental rights are to be met and what such concrete values could be.

[Rz 7] Policy-making decisions within a constitutionalist framework must rely on adequate procedural aspects, i.e. legitimization is effected by adequate procedures.⁵ Legitimacy can be described as the aspect of governance that validates institutional decisions as emanating from a right process. What constitutes right process is described in a society's adjectival constitution or rules of order, or is pedigreed by tradition and historic custom.⁶ Sociology has tried to link the procedural aspects with specific notions of contents; those norms can claim validity which receive the approval of all potentially affected people, insofar as they participate in a free rational discourse.⁷

³ See *Kleinwächter, W.*, A new Generation of Regulatory Frameworks: The Multistakeholder Internet Governance Model, in: Sethe et al. (eds), *Festschrift für Rolf H. Weber*, Bern (2011), pp. 559 et seq.

⁴ For further details see *Weber, R. H.*, New Sovereignty Concepts in the Age of Internet, published in *Journal of Internet Law*, Vol. 14 (2010), pp. 12-20.

⁵ *Luhmann, N.*, *Legitimation durch Verfahren*, 2nd ed. Darmstadt/Neuwied (1975), pp. 9-53.

⁶ *Franck, T. M.*, *Fairness in International Law and Institutions*, Oxford (1995), p. 1.

⁷ *Habermas, J.*, *Faktizität und Geltung*, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats, Frankfurt (1992), p. 161.

2.2. Legitimacy Perceptions

[Rz 8] The legitimacy concept is to be framed as giving the governed the feeling that their own values are represented in a decision-making context, i.e. as establishing an authority's right to rule. The Latin word *legitimus* means lawful, according to law.⁸ As a sociological phenomenon, legitimacy is establishing why state authority is factually accepted; insofar, Max Weber distinguished three ideal types of governance: the rational or legal, the traditional and the charismatic authority.⁹ Another differentiation has been adopted by scholars distinguishing between normative theories on legitimacy, which set out general criteria for evaluating the right to rule, and empirical theories, which focus on believe systems of those subject to government.¹⁰ In other words, legitimacy can either be justified by formal ideas as the rule of law rational (legality) or by substantial value rationality based on morality and justice.

[Rz 9] The described perceptions of legitimacy emphasize the concept's origin in the political sciences, i.e. the concept's primary applicability to nation states. The debate on the governance of the Internet has not focused on states for historical reasons. Nevertheless, with the Internet gaining importance, legitimacy questions become weightier not only for the international society in general, but also for the stability of the international order and thereby for international law as well as for private organizations playing an important role within this framework. These developments again broaden the basis for the envisaged constitutionalism approach.¹¹

[Rz 10] Therefore, Internet governance debates need to encompass the implementation of standards of accountability which are to be observed by ICANN; how should binding and independent accountability standards be designed and how could ICANN meet these standards? For the time being ICANN relates on a complex network of Supporting Organizations and Advisory Committees organized by the presumed subject matter expertise or interest of the concerned members. Nevertheless, the ICANN keeps the sole decision-making authority and the influence of the various (technical and political) organizations remains unclear. Furthermore, decisions of the Board of Directors of ICANN may be reviewed through reconsideration or by an Independent Review Panel (IRP); so far, only two cases have been handled by the IRP. A request for reconsideration may be brought to correct the acts or omissions of staff members or a decision of the Board not complying with the corporate rules of ICANN. However, the IRP is only entitled to make a recommendation to the Board on the merits of the request; any such recommendation is not binding to the Board. The IRP may also not challenge or reverse a decision meaning that the review process does not constitute a sharp weapon.

[Rz 11] Therefore, a certain lack of accountability with the ICANN structures is not uncontested:¹² In the context of the Affirmation of Commitments, concluded in fall 2009, replacing the previous Memorandum of Understanding with the US Department of Commerce, ICANN has assumed the task to establish the Accountability and Transparency Review Team (ATRT) that has subsequently reviewed ICANN's transparency and accountability in four Working Groups.

⁸ See *Weber*, n FN 2, pp. 109/10.

⁹ *Weber, M.*, *Wirtschaft und Gesellschaft, Grundriss der verstehenden Soziologie*, 5th ed. Tübingen (1976), pp. 122 et seq.

¹⁰ *Clark, I.*, *Legitimacy in International Society*, New York (2005), pp 18/19.

¹¹ See *Weber*, n FN 2, p. 111.

¹² See *Mueller, M.*, *ICANN Inc. Accountability and Participation in the Governance of Critical Internet Resources*, Internet Governance Project, November 16, 2009, p. 4, <http://www.internetgovernance.org/pdf/icanninc.pdf>.

Several recommendations have been presented by the ATRT, mainly related to internal organizational measures, but a strict appeal's process (appellate review) has not been proposed by the ATRT.¹³ Thereafter, the Berkman Center being mandated by ICANN to conduct a thorough scientific analysis of the given legal framework came to the conclusion that ICANN's present approach to accountability would be subject of considerable criticism.¹⁴ Nevertheless, the Report of the Berkman Center does not clearly recommend the implementation of a judicial review process.

3. Elements of a Constitutionalism Approach

3.1. Tradition of Constitutionalism

[Rz 12] Constitutional principles embody a tradition of political understanding and activity with roots in ancient Greece, reflecting the ideal that in some important respects law transcends politics.¹⁵ Constitutionalism aims at establishing the rule of law. By limiting governmental authority, the principle applies that a governmental act beyond the border of the assigned authority is not law.¹⁶

[Rz 13] Furthermore, constitutionalism means that individual liberties are preserved; philosophers such as John Locke¹⁷ and Thomas Hobbes¹⁸ emphasized the importance of civil liberty opposing arbitrary or absolute power of states. Insofar, it can be said that a constitutional approach encompasses three cognate concepts, namely legality, morality, and constitutionality marking out the terrain within which the practice of legitimacy tends to take place.¹⁹

[Rz 14] This understanding has culminated in constitutional documents such as mainly the Magna Charta of several nation states establishing the civil rights of individuals against the governmental authority and maintaining the principle that any authority is subject to law.²⁰ However, protecting fundamental rights and market access rights guaranteed by treaty principles of non-discrimination are no longer secured exclusively by national constitutions; moreover, a wholly state-centered concept risks failing to appropriately tackling the new challenges of international law.²¹

¹³ ATRT, Final Recommendations of the Accountability and Transparency Review Team, December 31, 2010, pp. 52 et seq., <http://www.icann.org/en/reviews/affirmation/atrt-final-recommendations-31dec10-en.pdf>.

¹⁴ Berkman Center for Internet & Society at Harvard University, in ATRT, Final Recommendations, n FN 13, p. 70.

¹⁵ *Berman, H. J.*, Law and Revolution: The Formation of Western Legal Tradition, Harvard (1983), p. 9.

¹⁶ *Weber R. H./Gunnarsson R. S.*, A Constitutional Solution for Internet Governance, forthcoming (2012), chapter IV.8.

¹⁷ *Locke, J.*, Two Treatises of Government (edition Peter Laslett), Cambridge (1988), pp. 359, 398.

¹⁸ *Hobbes, T.*, Leviathan (edition Richard Tuck), Cambridge (1991), pp. 148, 184.

¹⁹ *Clark*, n FN 10, p. 19.

²⁰ See *Weber/Gunnarsson*, n FN 16, chapter IV.B.

²¹ *Cottier, T./Hertig, M.*, The prospects of 21st Century Constitutionalism, published in Max-Planck Y.B.U.N.L. 7 (2003), pp. 261, 269, 297.

3.2. Main Constitutional Principles

[Rz 15] Looking at the experience of the last centuries, the main constitutional principles encompass the following four pillars:²²

3.2.1. Charter or Constitution

[Rz 16] In order to achieve a stable legal framework, the constitutional principles should be comprised in a written charter expressing the essential political commitments of the society and a set of architectonic plans which make clear the locus of political authority. The definition of the process of decision-making can limit the arbitrary exercise of political power. As James Madison said, constitutional charters are superior in obligation to all other laws because they give effect to all others.²³ The constitutional charter is the place to state a coherent set of long-term fundamental principles and rules of a higher legal rank constituting the basic order of a political community.

[Rz 17] The original form of a constitutional order was seen in a contrat social, serving as a legitimizing source for state power, thereby protecting freedom and equality among all people.²⁴ Consequently, substantive principles should call for self-constraint to bind the governing authorities: By existing independently of the actual policy and the decision-making entities, such principles foster the establishment of a sort of checks and balances regime providing for a basis for the assessment of the governing outcome.²⁵

3.2.2. Fundamental Rights

[Rz 18] Constitutions usually encompass bills or declarations of fundamental rights granting a number of civil liberties to the members of the society. Fundamental rights encompass for example the freedom of expression, the protection of personality and the right to participation in public affairs. Traditionally, fundamental rights have been directed against the government, establishing a barrier against too far reaching interventions of state power; in the meantime, however, reality has shown that private organizations could also have a negative impact on the exercise of fundamental rights by individuals leading to the acknowledgement of indirect effects of fundamental rights.²⁶

[Rz 19] Obviously, a simple declaration of rights is not sufficient; the exercise of rights has to be complemented by positive safeguards. Therefore, bodies must exist which can intervene to the benefit of an oppressed individual by means of defiance sanctioned by written law. Usually, the most effective means are legal remedies administered by impartial judges.

²² A more extensive discussion can be found in *Weber/Gunnarsson*, n FN 16, chapter IV.D.

²³ *Madison, J.*, Charters, National Gazette of January 19, 1972, reprinted in *Madison Writings* (edition Jack N. Rakove), New York (1999), p. 503.

²⁴ *Rousseau, J.-J.*, *Du Contrat Social*, Livre II, Chapitre I, and Livre III, Chapitre XV.

²⁵ See *Weber*, n FN 2, p. 119.

²⁶ *Kälin, W./Künzli, J.*, *The Law of International Human Rights Protection*, Oxford (2009), pp. 81-85.

3.2.3. Organizational Elements (Separation of Powers, Enumeration of Powers)

[Rz 20] The constitutional charter should also fix the structure of the government itself; according to Montesquieu, a self-conscious structuring of the government can serve to avoid the abuse of power.²⁷ The principle that power must check power by the arrangement of things leads to the concept of separation of powers; if powers are divided and allocated to several offices, the assumption can be taken that each may be a check on the other. This principle of separation of powers has been influential in the constitutional development of many countries.²⁸

[Rz 21] Another important principle is the enumeration of powers.²⁹ Thereby, the competence of a specific state entity is limited to those powers which are expressly stated in the constitutional charter. This principle is particularly important in states knowing the federalist system since it requires the implementation of the concept of subsidiarity meaning that governmental control should be exercised by the most local authority competent to act.³⁰

3.2.4. Legal Remedies and Independent Courts

[Rz 22] The rule of law establishing the legitimacy requires having judges supervising governmental actions if a respective complaint has been made; a judge is indispensable in establishing and preserving the rule of law. Thereby, judges must be independent from governmental activities; traditional independence is a key feature of a constitutional government.³¹ The implementation of an appropriate legal system includes the possibility to have a right to appeal as an expression of the Rechtsstaat principle which entitles the individual citizen to have a judgment reviewed by an impartial court.³²

[Rz 23] Furthermore, an effective legal system should provide for sanctions in case of non-compliance with constitutional principles by governmental officers.³³ Accountability-holders must be able to impose some sort of sanction, thus, attaching costs to the failure to meet the required standards, being based on adequate participation schemes; having a sanctioning mechanism does lead to a higher degree of accountability.³⁴

3.3. Implementation of Constitutional Principles in the ICANN Framework

[Rz 24] As mentioned, ICANN has global and cohesive powers over the Internet Domain Name System; these powers must be put into a constitutionalism framework preserving freedoms and limiting power exercising discretion. The bodies of ICANN need to comply with the well-established accountability principles, such as controllability, responsiveness, responsibility, and

²⁷ *Baron de Montesquieu*, *The Spirits of the Laws* (edition Anne M. Cohler/Basia Caroline Miller/Harold Samuel Stone), Cambridge (1989), p. xv.

²⁸ See *Weber/Gunmarsson*, n FN 16, chapter IV.D.2.

²⁹ *Auer, A.*, *The Constitutional Scheme of Federalism*, 12 *Journal of European Public Policy* (2005), pp. 419, 422.

³⁰ *Weber, R. H./Schneider, T.*, *Internet governance and Switzerland's particular role in its process*, Zurich (2009), p. 60.

³¹ *Hamburger, P.*, *Law and Judicial Duty*, Harvard (2008), p. 316.

³² See *Weber/Schneider*, n FN 30, p. 62.

³³ *Hart, H. L. A.*, *The Concept of Law*, 2nd ed., Oxford (1997), p. 6.

³⁴ See *Weber*, n FN 2, p. 147.

liability.³⁵ Constitutional principles can overcome the problem of the issue of power going beyond right. In particular, an application of the discussed general constitutional principles on the present Internet governance regime as realized by ICANN gives the following picture:

3.3.1. Charter or Constitution

[Rz 25] As mentioned, the constitutional principles have been developed in the context of nation states. Nevertheless, due to the fact that private organizations are exercising quasi-regulatory functions in the world of the Internet, these principles should also play a role vis-à-vis the private rulemaking bodies. ICANN is based on a large number of organizational documents including an Affirmation of Commitments with the Department of Commerce of the United States. However, this documentary framework hardly constitutes a constitutional charter embodying the most fundamental commitments in respect of the exercise of its functions. The proper implementation of constitutional principles binding officers and stakeholders could strengthen legal stability and predictability.³⁶

3.3.2. Fundamental Rights

[Rz 26] Notwithstanding the fact that transparency measures have improved in ICANN, the clear declaration and enforcement of fundamental rights, such as the right to information and the right to participate in decision-making processes, could ameliorate the legitimacy of ICANN.³⁷ By introducing fora of discussion and procedures of decision-making in which all actors can participate, integration of members of civil society will be increased; by providing information about decision-making processes and letting the public participate in the respective procedures, arbitrary or discriminatory decisions can more likely be avoided.³⁸

3.3.3. Organizational Elements (Separation of Powers, Enumeration of Powers)

[Rz 27] A more coherent enumeration of the powers of ICANN could help to clarify the scope of activity of this private rulemaking organization; at the forefront, ICANN must perform a specific set of functions related to the coordination of the Domain Name System. Whether policy activities in general should fall into the scope of competence of ICANN and become a part of ICANN's mission is a debatable issue; the corresponding assessment needs specific considerations.³⁹

[Rz 28] Traditionally, constitutional principles try to avoid that unconstrained power is exercised; in the words of Montesquieu power must check power⁴⁰. Apart from enumerating the powers, it is also important to divide powers by placing express limits which are subject to supervision. Furthermore, the internal organization of ICANN could be restricted in a way that powers of the

³⁵ See with a similar description *Koppell, J. G. S., Pathologies of Accountability: ICANN and the Challenge of Multiple Accountability Disorder*, 65 *Pub. Admin. Rev.* (2005), pp. 94, 96-98.

³⁶ See *Weber/Gunnarsson*, n FN 16, chapter V.A.

³⁷ See *Weber/Gunnarsson*, n FN 16, chapter V.D.

³⁸ See *Weber*, n FN 2, p. 148.

³⁹ See *Weber/Gunnarsson*, n FN 16, chapter V.B.

⁴⁰ *Montesquieu*, n FN 27, p. 155.

Board and of the management would be allocated in a more specific way.⁴¹ Notwithstanding some improvements during the last few years, the chosen path should be further followed.

3.3.4. Legal Remedies and Independent Courts

[Rz 29] Finally, and most importantly, the existing review of decisions of the Board must be improved. As mentioned, the present possibilities of challenging decisions with the IRP body are unsatisfactory. The judicial review that can be executed by the Californian courts is hardly acknowledged on a global level (with different legal systems). A new mechanism should enable aggrieved parties to appeal to an independent Board of Review having the competence to reverse decisions of the Board, not only review them.⁴²

[Rz 30] A new Board of Review could be composed of for example five members possessing the narrow but critical jurisdiction to decide whether any action by the Board of Directors of ICANN is inconsistent with the given legal framework in place. Thereby, eligibility criteria for the Board of Review should be strict, encompassing outstanding legal qualifications and full independence from governing bodies of Internet organizations.⁴³

[Rz 31] The rules to be followed by the Board of Review could be drafted in a similar way as the rules of the International Court of Justice. The decisions should be issued in the form of written opinions explaining in what respect the disputed action did or did not comply with the relevant legal provisions.⁴⁴

4. Conclusion

[Rz 32] In a nutshell, ICANN needs independent and binding accountability. This objective can be achieved by the implementation of constitutional principles. As historical experience has shown, constitutional standards are promising means to establish an adequate rule of law; adopting a better constitutional solution could strengthen ICANN's role as global manager of the Domain Name System while bolstering the long-term prospects of the multi-stakeholder model of Internet governance. Such an approach is not a revolutionary model, but can be realized as evolutionary development.

[Rz 33] The most important pillar of the constitutional principles consists in the establishment of an independent judicial review system being available to those members of civil society being interested to challenge a Board decision. Such kind of review by judges is a guarantor for the preservation of the rule of law.

⁴¹ See *Weber*, n FN 2, p. 147.

⁴² Council of European Union, International Management of the Internet Domain Name System, Doc. 11960/09, Annex, p. 4, July 14, 2009.

⁴³ See *Weber/Gunnarsson*, n FN 16, chapter V.E.

⁴⁴ See *Weber/Gunnarsson*, n FN 16, chapter V.E. at the end.