

Rolf H. Weber

## **The Crucial Triangle: Analysis of the Links between Transparency, Accountability and Participation in the Information Society**

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Transparency is an important principle enabling civil society to participate in decision-making processes and hold the «rulers» accountable for their activities. By applying geometric notions (straight line, angle, triangle) the relevant links between transparency, accountability and participation can be assessed in respect of the Internet address system and data protection matters and consequences in view of an improved realization of the three principles can be drawn.

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## Inhaltsübersicht

1. Introduction
2. Transparency
  - 2.1. Notion and Features of Transparency
  - 2.2. Transparency in the Internet Address System
  - 2.3. Transparency in Data Protection Matters
3. Accountability
  - 3.1. Notion and Features of Accountability
  - 3.2. Accountability in the Internet Address System
  - 3.3. Accountability in Data Protection Matters
4. Participation
  - 4.1. Notion and Features of Participation
  - 4.2. Participation in the Internet Address System
  - 4.3. Participation in Data Protection Matters
5. Concluding Assessment of the Links between Transparency, Accountability and Participation

### 1. Introduction

[Rz 1] During the last two decades, terms such as «information society» and «information age» have been widely discussed. The information society's myriad questions and specific problems can be analyzed from different perspectives of many disciplines; but some common characteristics are given as being indicators of the information society:<sup>1</sup>

- Information and knowledge are undoubtedly of paramount importance; theoretical knowledge is more than ever at the center of economic and social life.
- The information infrastructure that has been put in place to handle the information flow is in constant progress: information and communication technologies (ICT) proliferate and advance, online services expand.
- The access to and the use of ICT are fundamental indicators (as well as salient issues) of the information society.

[Rz 2] New technologies have not only improved the storage, processing and transfer of information, but have also created a new «habitat», new virtual spaces, where action, interaction, and exchange of information can take place; the celebrated and visionary expectation of McLuhan's «Global Village» seems to be close.

[Rz 3] However, the term «Global Village» has been slightly distorted in the political discussions, shifting away from the original social communications theory approach to a more economic and structural concept.<sup>2</sup> Particularly, key issues of information sciences are at risk to disappear from the scene. This assessment is mainly true for transparency; however, it also applies to accountability and participation. This contribution addresses the links between transparency, accountability and participation as the pillars of the «legitimacy building» in a global society.

[Rz 4] The theoretical approach is based on geometric notions governing the interrelations between different objects (or issues):

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<sup>1</sup> WEBER, R. H., *Shaping Internet Governance: Regulatory Challenges*, Zurich (2009), p. 9.

<sup>2</sup> WEBER, n 1, pp. 9/10.

- The straight line or straight axle relates to objects (or issues) through a linear (horizontal or vertical) slope.
- The angle constitutes a link between objects (or issues) by using an intermediation point.
- The triangle establishes a link between each of the three objects (or issues); normally, the three links do not encompass the identical legal qualities.

[Rz 5] The information society provides numerous examples which can be used for a discussion of the links between transparency, accountability and participation. Hereinafter, the Internet address system and data protection, mainly the problems of big data, cloud computing and surveillance, will be addressed in the context of the mentioned theoretical concept.

## 2. Transparency

### 2.1. Notion and Features of Transparency

[Rz 6] Exactly hundred years ago, Supreme Court Justice Louis Brandeis phrased the famous sentence: «Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman». <sup>3</sup> However, it should not be overlooked that for Brandeis the duty to make information available to the public was a necessary companion to the right to privacy, a concept which he had pioneered. <sup>4</sup> Already at that time, transparency implied elements such as shedding light on governments' actions with regard to data collection, anti-corruption strategies, transactions in financial markets and generally governance issues in legal entities.

[Rz 7] At the bottom, transparency is a measure to warrant «market confidence». However, in the real world, the fundamentals of market confidence are neither clear or rational, nor necessarily based on stable evidence and they are not carved in stone. <sup>5</sup> Even if the principles for transparency developed in constitutional law are also applicable to ICT features, states should take windows of opportunity to be creative and improve legal certainty by including the inputs of all relevant stakeholders.

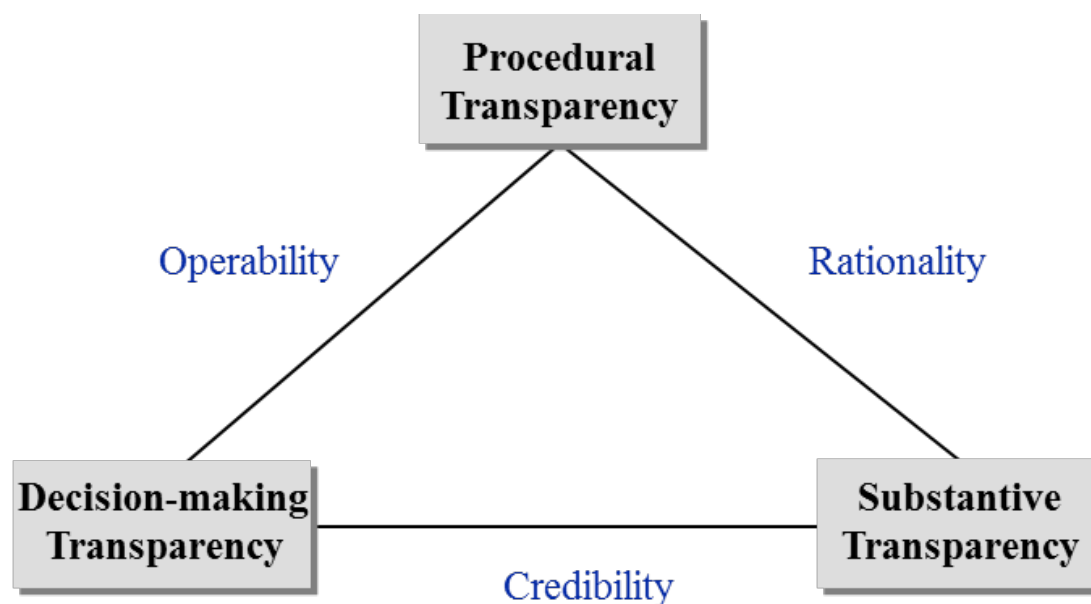
[Rz 8] From a general theoretical perspective, transparency is composed of three main pillars, namely procedural transparency, decision-making transparency and substantive transparency, building a geometric triangle:

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<sup>3</sup> BRANDEIS, L., *Other People's Money: And How the Bankers Use it*, New York (1914), p. 92.

<sup>4</sup> WARREN, S. D./BRANDEIS, L., *The Right to Privacy*, Harvard Law Review, Vol. 4 (1890), p. 193.

<sup>5</sup> KAUFMANN, CH./WEBER, R. H., *The Role of Transparency in Financial Regulation*, Journal of International Economic Law, Vol. 13(3) (2010), p. 779.



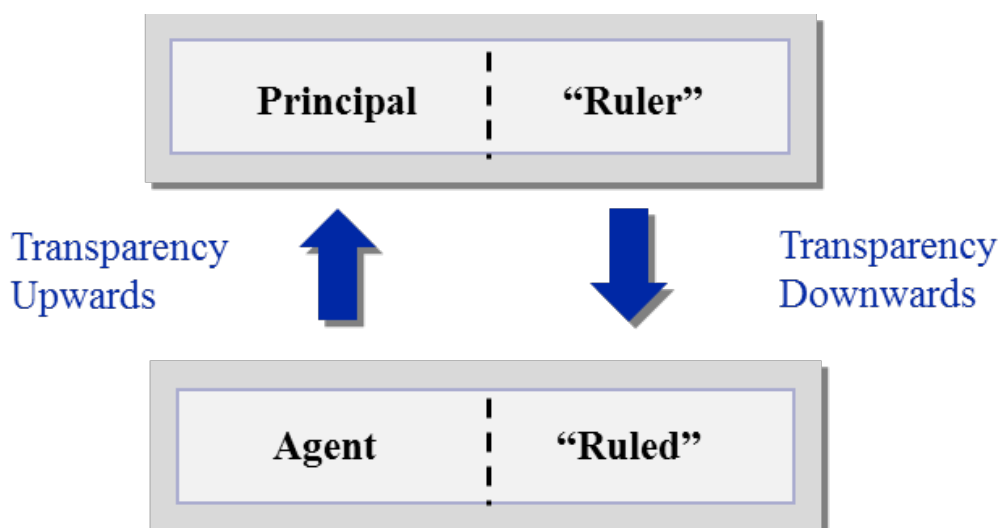
[Rz 9] The three pillars can be described in short as follows:<sup>6</sup> (i) *Procedural transparency* encompasses rules and procedures in the operation of organizations, being unambiguously designed and publicly disclosed, and should make the process of governance and lawmaking accessible and comprehensible for the public, including elements such as the due process principle. (ii) Being based on the acknowledgment of access to political mechanisms, *decision-making transparency* strengthens the institutional credibility and legitimacy of governmental decisions being based on reasoned explanations. (iii) *Substantive transparency* is directed at the establishment of rules containing the desired substance of regulations, standards and provisions which avoid arbitrary or discriminatory decisions and realize the requirements of rationality and fairness.

[Rz 10] The relations between the three pillars can be expressed by way of a triangle since each pillar is tied to the two others by a specific connection-link. Procedural transparency helps to improve the operability of the decision-making processes and to make the decisions on substantive issues more rational. In addition, the decision-making transparency increases the credibility of substantive decisions.

[Rz 11] Furthermore, various «directions» of transparency can be discussed. In the relation between principal/«ruler» and agent/«ruled», a vertical straight line/axle designs the transparency upwards and the transparency downwards as follows:

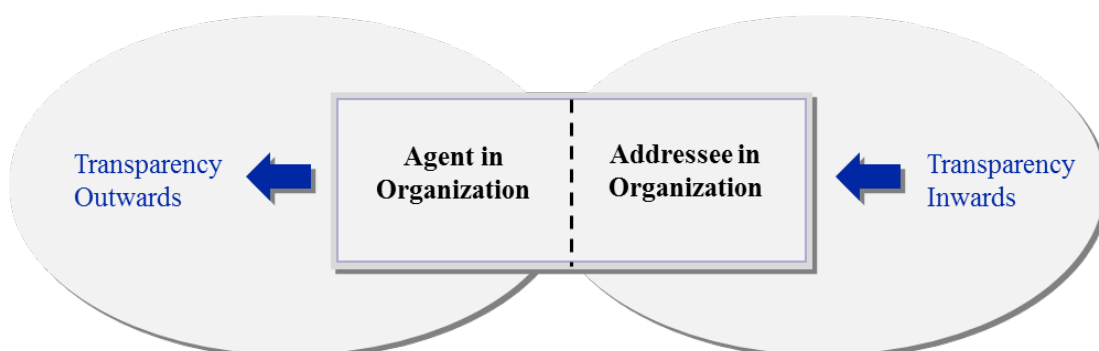
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<sup>6</sup> WEBER, n 1, p. 122.



[Rz 12] The *transparency upwards* allows the principal (hierarchical superior) to observe the conduct, behavior, and/or «results» of the agent (hierarchical subordinate). The *transparency downwards* gives the «ruled» persons the possibility to observe the conduct, behavior, and/or results of their «rulers»; this relationship is well known in democratic theory and can also be seen under the umbrella of the later discussed accountability.<sup>7</sup>

[Rz 13] In the relation between the agent and a collectivity, a horizontal straight line/axle exists by way of transparency outwards and transparency inwards as follows:



[Rz 14] The *transparency outwards* looks at situations in which the agent is a position to observe what is happening «outside» the organization. The *transparency inwards* addresses the freedom of information of «outsiders» in having access to elements «inside» the organization.<sup>8</sup> This right of access is well known in many fields of law (against governments and their agencies, corporations, data controllers etc.).

## 2.2. Transparency in the Internet Address System

[Rz 15] As mentioned, the principle of transparency must be seen as an important aspect of good regulatory governance, since it allows the exercise of authority to be publicly accessible. The

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<sup>7</sup> See para 3 hereinafter.

<sup>8</sup> WEBER, n 1, p. 122.

medium of the Internet itself offers valuable opportunities for transparent communications. In order to achieve transparency in the regulatory process, the Internet should be designed in a way that enables the participants to have open access to negotiations, to collect proposals and statements from the various stakeholders concerned, to present the decisions and results, and thereby to enhance and facilitate communication and dialogue between the different Internet governance regulating institutions and the interested parties.<sup>9</sup>

[Rz 16] A thorough review of the existing transparency regulations in the context of ICANN shows that improvements would be possible in various areas, for example in the decision-making processes of the Board and in the restructuring of the three existing review mechanisms for Board recommendations.<sup>10</sup> According to the appreciation in the Annual Report 2012 of ICANN the previously submitted recommendations have been fulfilled.<sup>11</sup> This assessment does not fully correspond to the reality. Even if the second Accountability and Transparency Review Team (ATR2) has expressed the opinion that progress was achieved, the experts reached the finding that ICANN «should develop new transparent and accountable mechanisms that combine more effective resource allocation and use with the involvement of all parties within the multi-stakeholder model».<sup>12</sup>

[Rz 17] For accomplishing this goal, ICANN is invited to get control of its financial governance structure and to yearly publish a report indicating the implementation status quo in relation to the transparency requirements. Furthermore, ICANN received the request (i) to establish clear assessment criteria to measure improvements in its accountability and transparency, (ii) to communicate clearly and regularly about all these processes and (iii) to improve the current review processes. Looking at this assessment from the described theoretical concept, decision-making and substantive transparency must be improved in order to grant the «ruled» better transparency downwards and to strengthen the inwards right of access.

### 2.3. Transparency in Data Protection Matters

[Rz 18] Transparency contradicts the right of self-determination of data owners to disclose or not to disclose certain data. The concrete rights of data owners are regulated by national data protection laws and international data protection instruments being legally binding or not binding. The extended scope of data collections and of surveillance by different kinds of intelligence bodies puts data protection at risk. Taking the example of big data, analytical models depend of small data inputs, including information around people, places, and things collected by sensors, cellphones, click-patterns, and the like; such small data inputs can aggregate large data sets. Available technics allow acquiring far-reaching insides.<sup>13</sup>

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<sup>9</sup> For the transparency commitments of ICANN see Art. III Sec. 1 of its Bylaws and No. 7 of its Core Values.

<sup>10</sup> Accountability and Transparency Review Team 1, Final Recommendations of the Accountability and Transparency Review Team, December 31, 2010, <http://www.icann.org/en/about/aoc-review/atrt/final-recommendations-31dec10-en.pdf>.

<sup>11</sup> ICANN, Annual Report 2012, <http://www.icann.org/en/about/annual-report/annual-report-2012-en.pdf>.

<sup>12</sup> Accountability and Transparency Review Team 2, Report of Draft Recommendations for Public Comment, 15 October 2013, <http://www.icann.org/en/about/aoc-review/atrt/draft-recommendations-15oct13-en.pdf>.

<sup>13</sup> WEBER, R. H., Big Data: Sprengkörper des Datenschutzrechts, in: Jusletter 11 December 2013, margin number 13, <http://jusletter-eu.weblaw.ch/magnoliaPublic/issues/2013/11-Dezember-2013/2274.html>.

[Rz 19] This assessment gives rise to a so-called transparency paradox. The promise of big data consists in making the world more transparent, however, the collection of data is invisible, its tools and technics are opaque and the different physical, legal and technical layers hardly allow the application of privacy by design rules. Therefore, question can be asked why the big data (r)evolution is mostly occurring in secret.<sup>14</sup>

[Rz 20] Obviously, business secrecy provisions allow opposing to transparency requests made by the concerned data owners. The data collection can also be connected to highly sensitive intellectual property rights and national security assets. But, as correctly observed, if «big data analytics are increasingly being used to make decisions about individual people, those people have a right to know on what basis those decisions are made».<sup>15</sup>

[Rz 21] A certain remedy could be seen in the call for a «technological due process» that should apply to both governmental and corporate decisions.<sup>16</sup> In view of the data protection threats caused by cloud computing, big data and surveillance measures, technical, commercial, ethical and legal safeguards are to be developed in order to safeguard accepted non-disclosure requests of individuals. In a democratic society, a system, or even the appearance of a system, allowing secret surveillance or opaque and unreviewable (i.e. Kafkaesque) decision-making is not acceptable.<sup>17</sup> In particular, procedural transparency merits a better implementation, thereby contributing to transparency downwards.

### **3. Accountability**

#### **3.1. Notion and Features of Accountability**

[Rz 22] Accountability, stemming from the Latin word *acomptare*, is the acknowledgement and assumption of responsibility for actions, products, decisions, and policies within the scope of the designated role. Various types of accountability can be distinguished, namely moral, administrative, political, immaterial, market, legal/traditional, constituency related and professional accountability.<sup>18</sup> Transparency through the making available of reliable information being accessible both logistically and intellectually is a condition for accountability.

[Rz 23] Accountability has become an important topic in the discussions about the legitimacy of international institutions. Due to the lack of a «global democracy» to which organizations must abide, global administrative bodies are confronted with requests to overcome accountability gaps. Non-governmental agencies are also beginning to prepare and sign «accountability charters». As a pervasive concept, encompassing political, legal, philosophical and other aspects, accountability can be visualized by way of the subsequent triangle, in principle identical to the transparency assessment:

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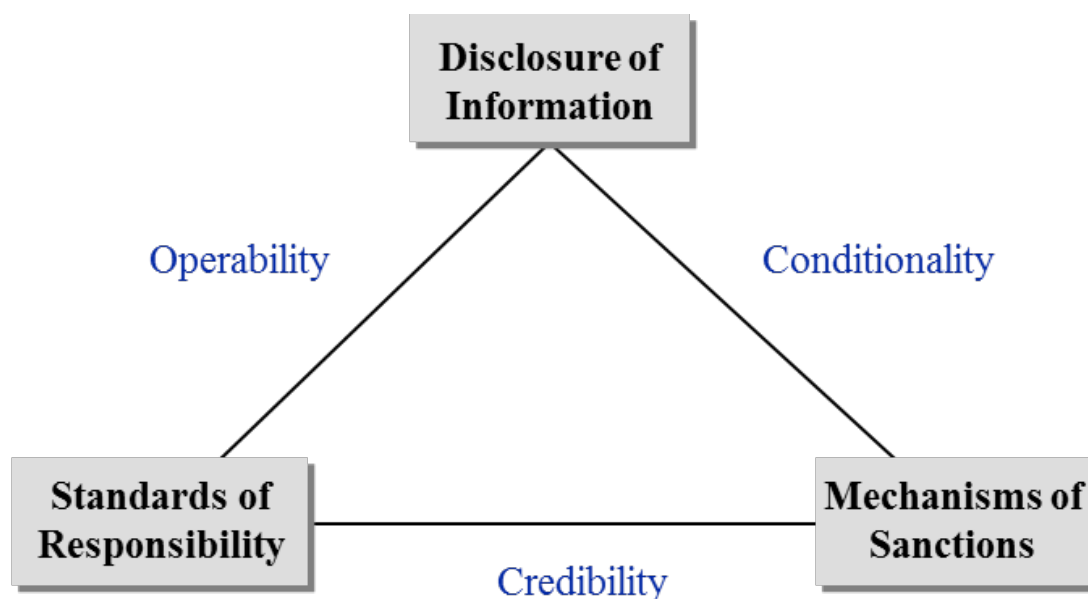
<sup>14</sup> RICHARDS, N. M./KING, J. H., Three Paradoxes of Big Data, *Stanford Law Review Online*, Vol. 66, 3 September 2013, p. 42.

<sup>15</sup> RICHARDS/KING, n 14, p. 43.

<sup>16</sup> CITRON, D. K., *Technological Due Process*, *Washington University Law Review*, Vol. 85 (2008), p. 1249 ff.

<sup>17</sup> RICHARDS/ KING, n 14, p. 43.

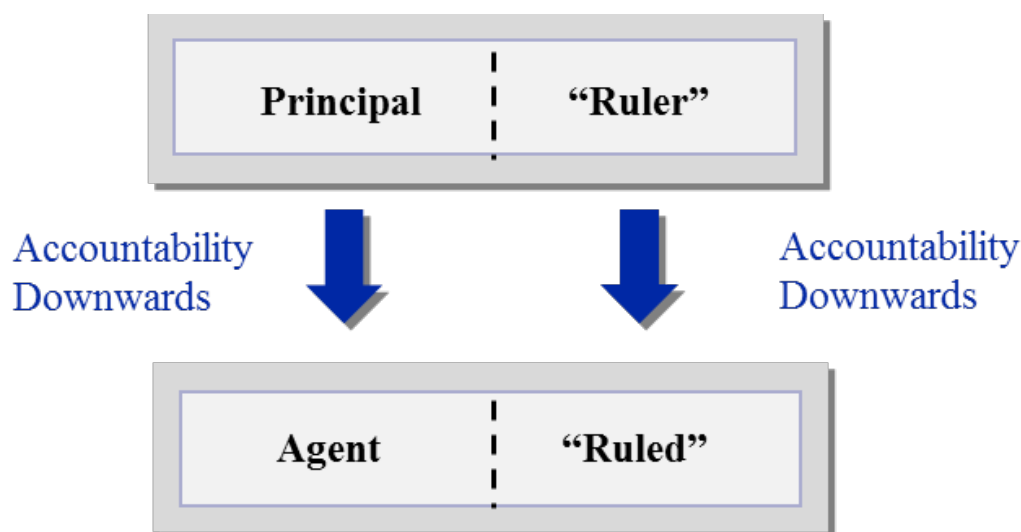
<sup>18</sup> WEBER, n 1, p. 133.



[Rz 24] Accountability states the obligation of a person to another person according to which the former must give account of, explain and justify his/her actions or decisions in an appropriate way. As a fundamental principle, accountability concerns itself with power and power implies responsibility. In so doing, accountability can be framed along the elements of (i) providing information in a timely manner (being a condition for the introduction of review processes), (ii) introducing standards that hold governing bodies accountable (by causing operability for standards) and (iii) establishing mechanisms of sanction (thereby making responsibility standards credible). In the theoretical concept of the triangle, obvious similarities with transparency exist since the information disclosure is the basis for the acknowledgement of responsibility standards and mechanisms of sanctions, the latter being the (credible) consequence of the responsibility principle.

[Rz 25] Accountability addresses a vertical straight line/axle relation: the principal or the «ruler» has to observe certain obligations towards the agent or the «ruled» and these obligations must be subject to adequate compliance by the concerned persons; therefore, the accountability has a downwards character as shown in the following chart:





[Rz 26] Not completely in line with transparency, the accountability's main focus is vertical in the downwards mode; the accountee offers to assume certain tasks which are linked to review and responsibility. Nevertheless, generally looking accountability is depending upon «transparency» since the enforcement of the accountability is necessarily based on disclosed information.

### 3.2. Accountability in the Internet Address System

[Rz 27] The first thorough review of the accountability mechanisms within ICANN came to the conclusion that «despite the importance accorded to configurations of accountability for ICANN, there is neither a standard working definition of accountability nor agreements on metrics to monitor and measure progress».<sup>19</sup> The ATRT1 issued 27 recommendations looking at manifold angles of accountability. The ICANN Annual Report 2012 negates the existence of an accountability gap by claiming that all 27 recommendations were already implemented.<sup>20</sup>

[Rz 28] The assessment of ATRT2 regarding the implementation of the recommendations is relatively vague so far. Nevertheless, the ATRT2 is of the opinion that ICANN should reconsider the Ombudsman's charter as a symbol of good governance to be further incorporated into accountability processes.<sup>21</sup> In fact, the implementation of stricter requirements seems to be adequate. In democratic nation states, accountability is typically bolstered through institutional checks and balances which do not yet exist within ICANN. The implementation of consultation processes could help streamline the realization of envisaged policies. Civil society should not only be consulted in the preparatory phase of any project, but also be informed after its implementation. Feedback mechanisms concerning review processes need to be consistently utilized being an aspect which should allow the participants in the process to understand how their insights and expertise have influenced the policy outcomes.<sup>22</sup> Furthermore, accountability must be able to en-

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<sup>19</sup> Accountability and Transparency Review Team 1, n 10.

<sup>20</sup> ICANN, Annual Report 2012, n 11, p. 16.

<sup>21</sup> Accountability and Transparency Review Team 2, n 12, p. 48.

<sup>22</sup> WEBER, R. H., The legitimacy and accountability of the internet's governing institutions, in: Brown (ed), Research Handbook on Governance of the Internet, Northampton (2013), pp. 99-119, p. 114.

close some sort of disciplinary and enforcement powers, thus attaching costs to the failure to meet the standards.<sup>23</sup>

[Rz 29] In addition, the presently weak review procedures giving the Board of ICANN almost unchecked autonomy must be changed; the ICANN Board should not continue acting as the ultimate arbiter of its own disputes.<sup>24</sup> Reconsideration might be worthwhile under certain circumstances, but it is not sufficient to cover all complaints' issues. The improvement of the Ombudsman system can support the search for amicable settlements. Nevertheless, a Board of Review should be established, composed of legally educated members being independent from ICANN and its officers. Decisions should be issued in the form of written opinions explaining in what respect the disputed action did or did not comply with the corporate documentation of ICANN.<sup>25</sup> Consequently, from a theoretical perspective, major attention must be paid to the accountability downwards (compliance review, sanctions' application) that would have a positive influence on the credibility of the given framework.

### **3.3. Accountability in Data Protection Matters**

[Rz 30] As outlined, in case of big data the collection of the information is invisible and the applied techniques are not known to the concerned individuals, leading to the situation that data collection is mostly occurring in secret. Big data analyses cause benefits and risks; if e-health data are available in case of an accident at whatever place, the individual can be treated in an appropriate way. However, if personality profiles are built with sensitive data, the collection of information becomes critical, particularly if data are sold to third parties.

[Rz 31] Looking from a public interest angle, big data analyses must be executed under an accountability umbrella. Standards need to be implemented that induce the collector of data to handle the data in a responsible way.<sup>26</sup> The substantive foundation for concretizing this responsibility can be found in the data protection principles, namely the proportionality, the objective orientation, and the good faith principle. Such kind of accountability regime is the corresponding obligation to the vast opportunities given by big data analyses.<sup>27</sup> As in the case of the Internet address system, the main issue concerns the accountability downwards; if accountability is realized, the credibility of big data activities might increase.

## **4. Participation**

### **4.1. Notion and Features of Participation**

[Rz 32] Experience shows that governance needs to involve more actors, traditionally not grounded with power, such as business entities, non-governmental organizations, and members of civil

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<sup>23</sup> WEBER, n 22, p. 117.

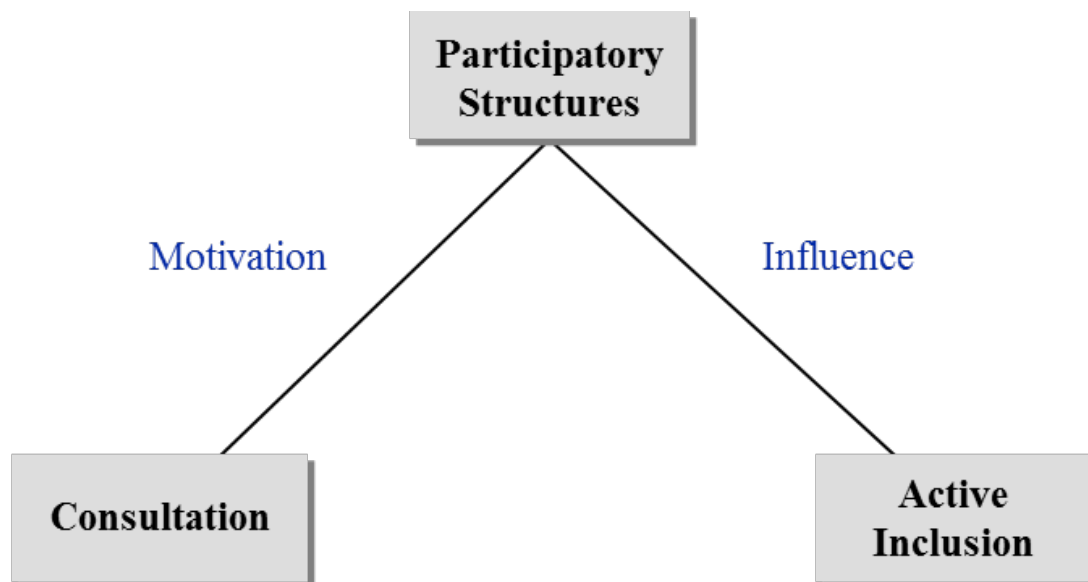
<sup>24</sup> WEBER, R. H./GUNNARSON, R. S., A Constitutional Solution for Internet Governance, *Columbia Science and Technology Law Review*, Vol. 14 (2012), p. 69.

<sup>25</sup> WEBER/GUNNARSON, n 24, p. 71.

<sup>26</sup> WEBER, n 13, margin number 57.

<sup>27</sup> See also MAYER-SCHÖNBERGER, V./CUKIER, K., *Big Data, A Revolution*, New York (2013), p. 175.

society. If participation is not offered to civil society, decision-making will not be democratic. Participation can be visualized by way of the subsequent angle:



[Rz 33] Contrary to transparency and accountability, participation is rather to be seen as an angle than as a triangle since consultation and active determination in decision-making processes are two different kinds of participation. Consultation does not necessarily build a link to the active inclusion and vice versa. During the last few years, the term «multistakeholderism» has been coined for describing the consultation and inclusion elements with regard to all stakeholders in the governance processes and the joint involvement of all stakeholders who have the necessary know-how being desirable to strengthen the public's confidence in decision-making processes.<sup>28</sup>

#### 4.2. Participation in the Internet Address System

[Rz 34] No. 4 of the Affirmation of Commitments<sup>29</sup> refers to the existence of a multistakeholder development model acting for the benefit of global Internet users by highlighting the importance of ICANN to maintain and improve robust mechanisms and to make its decisions not just in the interest of a particular set of stakeholders but in the public interest. ICANN is aware of the respective needs and the Annual Report 2012 emphasizes the necessity to have a «bottom-up, consensus-driven, multistakeholder model».<sup>30</sup> The Annual Report 2012 also refers to the continuously increasing number of attendees at the meetings adding their voices to the discussion

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<sup>28</sup> WEBER, R. H., Visions of Political Power: Treaty Making and Multistakeholder Understanding, in: Radu/Chenou/Weber (eds), The Evolution of Global Internet Governance, Zurich (2013), p. 96.

<sup>29</sup> Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, <http://www.icann.org/en/about/agreements/aoc/affirmation-of-commitments-30sep09-en.htm>.

<sup>30</sup> ICANN Annual Report 2012, n 11, p. 2.

(including remote participation).<sup>31</sup> Nevertheless, more stakeholder groups could still be motivated to participate in widened consultation opportunities.

[Rz 35] A specific approach adopted from national democratic frameworks could consist in the implementation of direct elections. The original attempt of ICANN to integrate direct elections of (a part of) its Board into its organizational structure was deemed a failure in the year 2000 and consequently stopped in view of the very small percentage of voting Internet users who actually participated in the elections. However, the question whether the termination of that experiment was in fact the right decision remains doubtful, especially because the other option of encouraging the public to vote was not even given a chance; the untried option would admittedly have contributed to an improvement of participation.<sup>32</sup> Insofar, active inclusion of stakeholders still remains an important objective in order to improve their influence.

### 4.3. Participation in Data Protection Matters

[Rz 36] As mentioned, big data analyses bring benefits and risks. In order to adequately balance potential gains and losses big data analysts and concerned individuals could agree on a «sharing the wealth» strategy. Data controllers should provide individuals with access to their data in a usable format, allowing them to take advantage of the applications and draw useful (personal) conclusions; consequently, organizations must be induced to share with the individuals the wealth their data helps create.<sup>33</sup>

[Rz 37] Access creates value to individuals since they have the ability to use and benefit from their own personal data in a tangible way.<sup>34</sup> The «sharing the wealth» strategy could lead to an ecosystem that allows to appropriately allocate rights and obligations. Therefore, individuals should have a right of exit from the market and opt-in default rules could reduce information asymmetry and support disclosure.<sup>35</sup> In addition, enterprises should not only be liable for damages in case of abuses, but also be incentivized to comply with bargained-for terms and legal safeguards (oversight function).<sup>36</sup> In this big data field, consultation and active inclusion are underdeveloped and need to be tackled by the concerned entities.

## 5. Concluding Assessment of the Links between Transparency, Accountability and Participation

[Rz 38] Transparency, accountability and participation have close links in many fields of the information society, for example in the Internet address system and in respect of big data/ cloud computing. These links can be visualized by geometric notions (straight line in horizontal and vertical mode, angle and triangle). Assessing the links from a substantive perspective it beco-

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<sup>31</sup> ICANN Annual Report 2012, n 11, p. 13.

<sup>32</sup> WEBER, n 22, p. 115.-\*

<sup>33</sup> RUBINSTEIN, I. S., Big Data: The End of Privacy or a New Beginning?, International Data Privacy Law, Vol. 3(2) (2013), p. 8.

<sup>34</sup> RUBINSTEIN, n 33, p. 8.

<sup>35</sup> See also SCHWARTZ, P. M., Property, Privacy, and Personal Data, Harvard Law Review, Vol. 117 (2004), p. 2100.

<sup>36</sup> RUBINSTEIN, n 33, p. 8.

It is clear that procedural transparency and disclosure of information are necessary to establish operability and rationality of activities, thereby leading to credibility of the respective behavior. [Rz 39] Furthermore, transparency enables civil society to participate in decision-making processes and hold the «rulers» accountable for the rendering of their tasks. Consultation and active inclusion help to establish participatory structures. Transparency as key notion and, derived therefrom, accountability and participation need to be improved in both discussed segments, the Internet address system and the big data/cloud computing field (in view of a more efficient data protection regime).

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ROLF H. WEBER Chair Professor University of Zurich, Faculty of Law Ramistrasse 74/38, 8001 Zurich, CH [rolf.weber@rwi.uzh.ch](mailto:rolf.weber@rwi.uzh.ch); <http://www.rwi.uzh.ch/weberr>.