

## **EuroDIG – Strasbourg, CoE – October 20-21 2008**

### **Session « Managing critical Internet Ressources »**

Contribution from Françoise Massit-Folléa

#### **Governing Internet as a Common Good?**

##### **Etymological and conceptual background**

During the 2004 FING Summer School, devoted to the concept of “Common Good” related to the Internet, Alain Giffard reminded that it is necessary to distinguish between “Common Good” in the singular and “common goods” in the plural. For that purpose, let us briefly return to the linguistic, philosophical and legal bases of the Western societies. The bond between “common » and communication is obvious, starting from the Latin root. On the other hand, the “good” as a substantive always concerned two meanings, one of economic order (for an object, a product or a service, likely or not to be suitable), the other of a moral nature, the “good” opposed to the “evil”. Various modes of Law apply in one and the other case, but they are often confused when one speaks about freedoms or the threats on the Internet.

Giffard is founded to recall that the Roman Law did not confuse the people and the things: concerning these last, it distinguished the sacred things, property of the gods; the public things, which belong to the state or city (*res publica*); common things, like the sea or space (*res communis*); and private things, property of the people, who are organized by the private law (*jus gentium*). The modern societies devoted the refusal of appropriation of certain “common things” by a Law of the sea, a Law of space, and protecting against proprietarization some territories like the poles, etc. The economists who study the characteristics of the to-day Internet gave ahead the concepts of “rival” or “not rival” good. The developments-to come of the Internet of Things give way to a “naturalization” of the human person in an ecosystem of automated, permanent and invisible connection, permitted by the convergence of RFID, the mobile phone and IP addresses.

All that brings back to the foreground the philosophical interest of the concept of “common good”.

In the XIIIth century the philosophical concept of *bonum communis*, has been created, as an essential condition of the foundation of the “city”. The philosophers of the Lights, and Rousseau in the highest degree, as for them stressed the political concepts of general interest, and of general will at the base of the social contract. One century later, the distinction between “public domain” and “public interest» settled. From where, for example, the implementation in France of the «droit d’auteur» rules (different from the American copyright).

### **Internet and Common Good**

More recently, many research works, conferences, public refer to the concepts of public good, common good, global public or private common good. They tackle the questions of development or regulation of “globalization” starting from the economy, but they try to exceed the barriers and to soften the pregnancy of economic theory and practices.

The universal access to information is a first recurrent claim, insofar as consumption by one does not prevent consumption by the other, and as the leverage of growering knowledge is a guarantee for the future. The same presupposed thoughts are used for the defence of the environment and the building of a sustainable development. But they run up against same blockings: egocentric sovereignties and constitution of private monopolies. It should be recalled that the right to have access to information is specifically mentioned in several international instruments, such as the UDHR, Convention of the Council of Europe, European Charter of Fundamental Rights, etc.

The respect of fundamental freedoms is quite as strong a requirement, be it a question of guaranteeing freedom of expression or of protecting the privacy, to ensure the conditions of articulation of public freedoms and individual freedoms. But for various reasons, economic and geopolitical, the couple freedom-security is seen today like antagonistic.

However, the notion of “common good” is particularly adapted to the problems of the Internet:

- on the one hand, the logic of the market as that of the sovereignty of the States obviously show their limits to control a global infrastructure of communication;
- in addition, the Internet uses rest on “goods” from which the appropriation escapes the traditional frames of property, for instance the protocol TCP/IP, the hypertext language and peer-to-peer dissemination of the contents;

- finally, the importance of the new collective forms on the Net, but also of the new individual behaviors, gives matter to a revitalization of the freedom of communication (free software and contents, wiki, blog, remix etc.) and leads to asking for a « right to access ».

### **Common good, governance and multistakeholderism**

As a concept, highly promoted by WSIS and IGF, “multistakeholderism” is right: so that a good decision is made, it is necessary that the interests, expectations and the needs for all the players are taken into account and that the communication between them is favoured. But there is a risk: that the multistakeholderism become a theoretical justification of a governance model intended for the perpetuation of practices opposed to the development of the common good. Searching for a new type of « global interdependence » (as Nitin Desai said), it seems to us that, in the model of the IGF, the incentive to coordination is rhetoric if the participation is finally rather restricted, if the delimitation of the categories of actors is porous and if the objective is limited to maintain the conditions of a dialogue supposedly disinterested between... interest groups.

Thus we would be in front of an institutional innovation with low added-value. A contributor of the mailing-list of IGC dared to say that “the multistakeholderism is a very poor substitute, and unfruitful, to the political requirement which made the individual a citizen and all citizens equal to the law. Its only advantage is to break the monopoly of the States in the international dialogue”.

According to Padovani (2004), when considering the role of the civil society, the paradox consists in this : “the formula (the multistakeholder one) is not valid if one does not devote to a preliminary exercise of categorization, but one can categorize the civil society only in an intuitive way” (in the name of a certain speech, carrying certain values). In addition she notes down the weak expression of the geographical, cultural, linguistic characteristics which should have irrigate the civil society. Thus the interests of the other stakeholders (States and companies) would be clearly represented, while those of the civil society are carried by the only skills and knowledge of the individuals who claim they are part of. The civil society rests on a negative, or residual identity: it has to represent the diversity of the non selfish interests, but it can in no kind assert the monopoly of the general interest.

Frydman (2001) recalls that two opposite designs coexist in the political life: “on one side, the liberal model resulting from the Lights bets on the critical resources of the opinion to ensure the control of the public action... and to preserve a public space where the civil society can

discuss without constraints and formulate its claims; on the other side, the corporative model drawn by Hegel praises the institution of intermediate places of consultation and decision which structure the lobbys and support the conclusion of sectoral compromises, articulating the general interest with the diversity of the needs and the aspirations”. The first can generate conflicts without exit, the second can dissolve in the soft consensus.

However, we must take into account the fact that, according to some internet users and developers, tripartite division (between States, enterprises, civil society) is a relic of an old industrial age - because the Net consumers make business on line, companies and the international organizations largely determine the political decisions, the governments are clashing for considerations of national or regional economic growth – so that we would like to reconsider the way in which Internet Governance is approached today.

### **Internet Governance and European common design**

Internet is both a socio-technical system and a human experiment, which concerns the individual as well as the « collectif ». Internet Governance, such as we observe it, is at the same time an opaque managerial system, a place of techno-economic confrontations and a field of socio-political experiment.

The European political and cultural context would be quite appropriate to build an agreement on a common corpus of Rules for Internet because

- It gives the place to permanent public debates on regulations,
- It has the experience of new political concepts and instruments,
- It is a multicultural entity and it can be a bridge between all the continents,
- It can initiate, develop and exploit research results, both in Technical or Social Sciences, in a mix of « rough consensus and running code » and « multiconsensus and living mode ».

If Governance horizon consists in establishing an effective and equitable technical coordination in an internationally accepted legal framework (Braman, 2004), that undoubtedly requires to assume the radical complexity of the norms and to avoid an answer that would be too instrumental, monolithic and closed in terms of power. It is important to clarify the expression of a radical tension between the principle of creation and the principle of conservation, which overflows the traditional designs of the normativity of the Law and the ethics of the behaviors.

The notion of Internet governance therefore calls for supporting the principles of diversity together with universality, fair treatment and respect of international law, opening and reinforcing legal competition. In addition, it implies major advancements for the emergence of new instruments of political deliberation (not only dialogue !). It calls for a renewed conception of the old pairing of the technological and the social in the public realm. This paradigm, which could aim towards proposing a new "social contract" for the digital world, is still vague. Consequently, the task that falls to researchers is three-fold: to clarify, to experiment and model, to debate.

The next step of the Vox Internet II research Programme (2006-2009) focusses on « The democratic Building of Internet Normativity » . We are exploring 4 normative paths :

Internet as a daily-life experience, between Market Power, Human Rights horizon and new Subjectivities ;

Internet as a socio-technical system, with its (hidden) fences and (threatened) levers ;

Internet Governance as an experimental shelter for Multistakeholder international political Dialogue (where Civil Society is wether sacrificed, whether sanctified ...) ;

Internet as a Common Good to be built through Public and Private regulations, Local and Global requirements, Experts and Common Users experiences, Ethical and Political issues.

To clarify and classify the normative plurality which is spread in Internet Governance then imply to recognize the limits of the devices currently proposed: regulation (Vivant, 1999), self-regulation (Berleur, 2002), co-regulation (Poulet, 2006). At the present stage, the move from the governance to the governability supposes to accept a kind of indetermination, to go deeper in the "reasoned pluralism" concept suggested by Mireille Delmas-Marty (2004, 2006,2007), looking for subsidiarity, proportionality and the complementarity of the rules - what Marianne Frison-Roche indicates by the word of « interregulation ».

What is missing in the governance issue could be a normative design of the action, in Christian Arspenger's sense: "The political arena is the place, always started again, of the common good if, and only if, it becomes the place where meet people equipped with normative theoretical convictions on the society ".

### **Some tracks to go further:**

If the step forward is to establishing a European Dialogue on Internet Governance, the limits of the WSIS-IGF mechanism have to be carefully considered, as well for time reasons (its mission is limited) as for conceptual or methodological reasons.

Then, we have to carefully consider in the same time the emerging challenges of the Future Internet (as explored in the recent European conference in Nice) – it is not too late for avoiding the Politics of the « fait accompli » ...

To avoid locking up in the critics of liberalism, on the one hand, of the bureaucracy on the other hand, it is important to confront the epistemological stakes as a preliminary. Trying to go beyond a rhetoric exercise and to advance the dialogue towards results, we have to analyze the methodological framework of the WSIS and the IGF. And for example to focus less on the procedures (negotiation, partnership, coproduction), and more on the levels (individuals, unformal collectives, formal organizations) and the forms of decision (co-operation, coordination, control).

For this purpose, it is interesting to think about the question of *legitimacy* in the participation in the ‘chose publique’ to fill the ditch which separates it from the decision. Rosanvallon (2008) invites us to seek it through three concepts: impartiality, reflexivity and proximity. Let us try to bring them back onto our subject.

#### *Impartiality:*

The first level of application of the principle of legitimacy precisely leads to explore the distinction between private interests and general interest: on which agreed corpus of principles Internet Governance can be founded, taking into account at the same time the economic competitions, the persisting inequalities and the multiple cultural traditions? A second level more precisely relates to the statute of the “experts” emerging from the civil society, quickly inclined with becoming semi-professionals of official debates. A third element is at work in the search for a Internet regime in the international law.

#### *Reflexivity:*

There are existing legal instruments (treaties, conventions, charters, agreements), produced by various international institutions, on which to rest. An exhaustive recension could be concluded, through the various families of instituted rights, as well as a comparative study of the decisions of the Courts, making it possible to clarify the points of friction or convergence.

In parallel, research on the intercultural ethics of information would be to develop. They relate to the change of the norms and the rights, even new emergent rights. There is here an abundant matter to clear with the help of European research laboratories in social sciences. The whole could lead to a shared conception, adaptive but guaranteed by various levels of responsibility, of a kind of Internet Law, designed less like one dogma than like a horizon of thought and action.

*Proximity:*

Commissaire Reding recently pointed out the interest of the concept of “hubs” of governance, for which Europe could initiate and develop an adequate model. In the European Union, the current redefinition of the economic and social parameters for the revision of the regulation framework could constitute a basis of relevant work which could be followed by other areas of the world.

This vision encompasses both the economical dimension of innovation and competition and the defence of users' rights. It would even be more justified and a matter of urgency when considering that the Internet of Things will present a new form of conjunction between private and public networks while articulating local and global issues for many industries, administration and services.

Lastly, it should not be forgotten that the success of the Internet was very largely due to the fact that innovations are located “at the end” of the network altogether with decoupling factor between the regulation of the infrastructure and that of content. The many threats of the appropriation of the Internet which weigh more and more on the general operation of the networks will have to be clearly identified and fought.

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