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**Social Contract for the Internet Community?
Historical and Philosophical Theories as Basis for the Inclusion of Civil
Society in Internet Governance?**

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Abstract

Netizens are affected by decisions taken with regard to Internet governance and should therefore be able to influence such. However, the heterogeneity of Internet users requires special efforts in order to find a method of consensus building which includes all interested parties and creates the opportunity to make decisions acceptable for as large a part of the civil community as possible. Notwithstanding the fact that the Internet society is a newly emerging civil society, considerations taken into account in earlier contexts can lead to valuable lessons. In this respect, a theory which seems to offer a feasible approach encompasses the concept of a so-called "social contract" that is historically and philosophically addressing issues of civil society's participation.

Through the establishment of a civil society, each individual is protected by the whole of the community. The inclusion of civil society requires the implementation of a bottom-up process allowing responsiveness of the concerned actors in a rational discourse which improves democratic quality of the structures. Furthermore, each individual should be granted with the same rights and obligations in the sense of the same chance to development for everyone, in particular with respect to the use of freedom by having the social contract which secures the self-determination of all individuals. Furthermore, a new forum should be created which could realise appropriate fairness in all decision-making matters.

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1. Introduction

Civil society, i.e. individuals using the Internet, is concerned by decisions taken in the context of the Internet. Indeed, both civil society and the private sector have been recognized as non-state stakeholders by the United Nations in Internet governance; the Internet Governance Forum (IGF) even allows individual actors to participate within the forum. The notion of “civil society” is usually perceived as organized civil society, as opposed to civil society at large, and furthermore refers to a global or transnational society.¹ Netizens should therefore also be able to express their opinions and participate in decision-making processes. Since the right to freedom of expression is relevant in all policy matters, opportunities are to be created for civil society to actually express its view.

The heterogeneity of Internet users originating from different geographical zones, linguistic areas, and cultural backgrounds leads to very different conceptions related to the organization of the Internet. However, decisions need to be supported by a large part of the Internet community in order to ensure its effective functioning. By introducing participation possibilities for civil society enhancing accountability, stability, and sustainability of the Internet community, integration and harmonization of netizens will be increased. Furthermore, the enhancement of information flows between the members of civil society, based on adequate information provided for by the governing body,² which allows the public to form an opinion and participate in negotiations. Additionally, the effective bridging of information asymmetries can help to avoid arbitrary or discriminatory decisions because an informed civil society is able to brand such behaviour. By realizing transparency about decision-making processes and by letting the public participate in these processes, active involvement of civil society can be encouraged.³

Therefore, efforts should be undertaken to look for a method of consensus building which includes all interested parties and creates the opportunity to make decisions acceptable for as large a part of the civil community as possible. Notwithstanding the fact that the Internet society is a newly emerging civil society, considerations taken into account in earlier contexts can lead to valuable lessons. In this respect, a theory that seems to offer a feasible approach encompasses the concept of a so-called “social contract” that is historically and philosophically addressing issues of civil society’s participation.

¹ See J Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum* (Perth: Terminus Press, 2008), at 122-123 with further references.

² J Steffek and P Nanz, “Emergent Patterns of Civil Society Participation in Global and European Governance” in: J Steffek, C Kissling and P Nanz (eds.), *Civil Society Participation in European and Global Governance* (Basingstoke: Palgrave Macmillan, 2008), 1-29, at 7.

³ For transparency in Internet governance see R H Weber, “Transparency and the Governance of the Internet” (2008) 24 *Computer Law & Security Report*, 342-348; J Malcolm, note 1, at 260-266, 493-504.

2. Concept of the Social Contract

2.1 Form of Integration

Jean-Jacques Rousseau departed from the idea that individuals are transforming from their natural state into members of the society. It is only with the emergence of personal property that social structures develop and a need for regulation can be recognized. Rousseau herewith followed the ideas of John Locke, who argued that inequalities start to exist with the emergence of personal properties which can then lead from disagreements to actual war. If this situation occurs, individuals join together in order to interrupt this process and protect their properties.⁴

According to Rousseau, a contract, called social contract,⁵ amongst all members of society must be concluded due to the fact that individuals by themselves are unable to originate new forces; therefore, they have no other choice than to unify.⁶ The purpose of this social contract is the accumulation of forces into a community that can protect each individual.⁷ Although each member of the society stays as free as before and only obeys to himself, the individual merges completely and utterly with the collective.⁸ Similarly, Immanuel Kant argues that individuals do not naturally live in communities and create law, they do it for rational reasons.⁹ In other words, individuals weigh the advantages of living as a society against its disadvantages and draw the conclusion that they profit more from the establishment of a community.

Even though the social contract may never have been pronounced aloud, its validity is impliedly accepted and approved on the whole territory of a community as it constitutes everyone's personal will.¹⁰ Each individual is transformed from a solitary human being into a part of a greater communitarian whole.¹¹ The decision to form a community is made based on reason; because every person knows of the advantage a community gives to individuals, the merging into a society is not questioned.

The social contract itself does not give an authority that some individuals are governing others. The individuals responsible for the leadership of the community are appointed by the entire community only after the establishment of the social contract.

⁴ J Locke, *Two Treatises of Government*, published anonymously in 1689.

⁵ J Rousseau wrote his *Social Contract* in 1754/62.

⁶ An established definition of social contract, going further than the understanding according to which the members of the society agree to a certain forum of collectivity, does not yet exist (see the description in Wikipedia, available at http://en.wikipedia.org/wiki/social_contract [accessed on 23 March 2009]).

⁷ J Rousseau, *Social Contract*, book 1, chapter 6, para. 2.

⁸ *Ibid*, para. 5.

⁹ I Kant, *Metaphysics of Morals*, 1797, XIX 99/100.

¹⁰ J Rousseau, note 7, book 1, ch 6, para. 5.

¹¹ *Ibid*, para. 6.

However, it is the population that is the sovereign of the State; the government is established only to carry out the will of the sovereign and act as an arbitrator.¹²

In *A Theory of Justice*,¹³ John Rawls advanced these theoretical approaches of the social contract on a higher level of abstraction. By departing from the hypothetical situation that people live in an original position of equality (which corresponds to the state of nature in the traditional theory of the social contract) and by assuming that individuals do not know their place in the society, their class position or social status, fortune and abilities, intelligence, strength and the like, choices are made by the individuals based on the principles of justice and are the result of a fair agreement or bargain. According to Rawls, individuals live behind a veil of ignorance, where they do not know their status or future. Therefore, if decisions need to be taken, individuals have to consider the positions of all persons affected by the respective decision and to opt for the solution they deem most favourable for everyone. As the individual position of all concerned persons is unclear, individual interests do not exist and all possible personal and selfish interests are blinded out; only the common interests of civil society are implemented. Individuals choose decisions with which they could live well no matter what exact future they will have.¹⁴

2.2 Necessity of Overall Approval

The social contract includes every single member of the community. If someone does not agree to the terms stated in the social contract, such a person is considered a foreigner.¹⁵ Rousseau sees the reason for the necessity of a consensus of all for the social contract in the fact that the civic membership is the most voluntary action of all. Only the free wills of all members justify the institution of a common society.¹⁶ Insofar the social contract¹⁷ is perceived as a moral arrangement between participants, who agree to follow the agreed provisions notwithstanding their lack of legal force.¹⁷

Concerning other decisions than the social contract itself, two basic principles apply:

(1) The more important a decision is, the higher ratio of approval needs to be available. Consequently, Rousseau does not propose a simple majority rule, but a proportional majority rule depending on the importance of the particular matter.¹⁸

¹² *Ibid*, book 3, ch 1, para. 18; Rousseau herewith disagrees with Thomas Hobbes, who argued that individuals confer their right to self-determination and self-protection to the sovereign. In response, the sovereign protects all parties to the contract (*Leviathan*, 1651).

¹³ Published in 1971.

¹⁴ John Rawls, *A Theory of Justice*, part I, chapter I, para. 3; see also Wolfgang Kersting, "John Rawls – Verteilungsgerechtigkeit und politischer Liberalismus" in: Jochem Henningfeld and Heinz Jansohn (eds.), *Philosophen der Gegenwart* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2005), 142-159, at 142 s.

¹⁵ J Rousseau, note 7, book 4, ch 2, par. 6.

¹⁶ *Ibid*, para. 5.

¹⁷ See S Biegel, *Beyond Our Control?, Confronting the Limits of Our Legal System in the Age of Cyberspace* (Cambridge Mass.: MIT Press, 2001), at 101-102; L Gibbons, "No Regulation, Government Regulation or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace" (1997) 6 *Cornell Journal of Law and Public Policy*, 475-511, at 518-523.

¹⁸ See also P Weirich, "Rousseau on Proportional Majority Rule" (1986) 47 *Philosophy and Phenomenological Research*, 111-126.

With a society as large as the Internet community, a proportional majority is necessary in order for the decision to be supported and effectively carried out. If a decision has extensive consequences for civil society, it needs to be supported by a large part of it. At this time, only a minority of active netizens control the functioning of the Internet and take decisions relating to Internet governance. More netizens need to be included in these processes in order to achieve legitimacy of taken decisions. Otherwise, as awareness and activeness of netizens increases, but not their inclusion, these netizens will have the power to boycott the respective decisions taken by a minority.

(2) According to Rousseau, the faster a decision has to be taken, the less agreeing voices are necessary.¹⁹ If a decision needs to be taken within a short period of time, it may not be possible to consult the entire Internet community. Therefore, a smaller number of agreeing voices should be sufficient to take the necessary actions.²⁰ With respect to the Internet, such an incident might, for example, be the emergence of an aggressive virus threatening the functioning of the framework.

3. Adaptability of the Social Contract Concept

3.1 Inclusion of Civil Society in All Areas

3.1.1 Bottom-up Approach

All aspects of the Internet may have an impact on its daily use by civil society. Without any doubts, civil society is the most active user of the Internet and therefore the most concerned player. Individuals not only have to be able to contribute their impact to the decision-making matters, but they are also charged with carrying out the respective decisions in practice. Therefore, whether the organization of the Internet, its governance, access or other topics are concerned, the understanding of members of civil society thereof as well as wishes regarding these issues have to be taken into account.

The inclusion of civil society calls for a bottom-up process. Even if the various actors of civil society are independently organized, common strategies and goals can be developed as well as new networks are creatable. The bottom-up approach also facilitates the enlargement of the fundament for active participation of Internet users.

This bottom-up approach may be implemented in practice by establishing a hierarchical framework, in which representatives from all regions are elected by the population. These representatives may have to, in a second phase, elect individuals amongst themselves who then are legitimate representatives of the whole population and have the power to govern the Internet.

Already Aristotle explained the best regime to be a combination of various features for the sake of the common good, however, he did not perceive democracy as the

¹⁹ J Rousseau, note 7, book 4, ch 2, para. 11.

²⁰ See also E Putterman, "Rousseau on Agenda-Setting and Majority Rule" (2003) 97 *American Political Science Review*, 459-469.

mandatory best regime, but rather aristocracy.²¹ In aristocratic regimes, only a few are able to act as representatives for the benefit of the communal good. In order for this regime to fulfil the expectations of the whole community, these ruling persons have to be the best and they should act “with a view to what is best for the city and for those who participate in it.”²²

In deciding who shall be admitted as a representative and whether specific requirements need to be applied, valuable inputs could be derived from supranational organizations such as the European Union, which also has to balance the interests of the organization against the interests of the individual States.²³ As representation only has a legitimising effect if the outcome of decision-making processes reflects the values of the represented stakeholders, according to such a shared power mode, where civil society becomes a participating stakeholder group on an equal footing with governments for example, the consensus-making processes need to come under scrutiny. In particular, attention has to be paid to equal bargaining powers, fair proceedings, as well as enhanced transparency and review mechanisms.²⁴

While the initial participation of civil society in the Internet is important, the follow-up processes are also to be considered. Information to the public regarding ongoing issues, as well as possibilities for active involvement in decision-making processes, have to be provided.²⁵ Insofar, transparency and accountability are important pillars of an adequate structure.

Transparent procedures allow for a certain level of democratic legitimisation and credibility through active involvement of citizens as well as through certain controls over the decision-making processes.²⁶ Accountability is a pervasive concept according to which one must give account of, explain and justify his or her actions or decisions, as well as take responsibility for any fault or damage. However, accountability of Internet governing bodies is not only important for the public to oversee the organisations’ activities, but also serves the self-interest of the respective entities. A clear definition of the authority of each governing body and a justification for actions taken contributes to their respective effectiveness and credibility.²⁷

The inclusion of civil society also means that responsiveness is a decisive criterion. Responsiveness of the concerned actors improves democratic quality, particularly in

²¹ Aristotle, *The Politics of Aristotle*, translated into English with introduction, marginal analysis, essays, notes and incises by Benjamin Jowett, Oxford 1885, Vol. 1, available at <http://oll.libertyfund.org/title/579> (accessed on 23 March 2009), Book III, Chapter 7, at 1279b.

²² *Ibid.*, at 1279a36.

²³ K Komaitis, “Aristotle, Europe and Internet Governance” (2008) 21 *Pacific McGeorge Global Business & Development Law Journal*, 57-77, at 69 ss, with reference to “Enhanced Cooperation” as a particular approach.

²⁴ R H Weber and M Grosz, “Legitimate Governing of the Internet” (2009) 2 *International Journal of Private Law* (3), 316-330; S Antonova, *Powerscape of Internet Governance, How was global multistakeholderism invented in ICANN?* (Saarbrücken: VDM Verlag Dr. Müller, 2008), at 8/9, 14-21, 97, 187-226.

²⁵ See also R H Weber and R Weber, “Inclusion of the Civil Society in the Governance of the Internet” (2009) *Computer Law Review International*, 9-15.

²⁶ R H Weber, note 3, at 343-345.

²⁷ J Malcolm, note 1, at 260-266, 493-504.

the context of “negotiations,” since it best captures the legitimacy of the policy output.²⁸ In the deliberative approach to democracy, a rational discourse based on responsiveness of the actors would be an indicator of justification for the viability of the chosen system.²⁹

3.1.2 Realization of an Open Society

In 1945, Karl Popper postulated the necessity of an “open society” that evolves in a perpetual process of attempt to ameliorate and correct errors.³⁰ Aims of this openness are the preservation of individual freedom as well as the ideal of a political-ideological pluralism. Openness and acceptance of other approaches and solutions for problems should be available leading to a comparative environment and allowing the best approach to establish itself.³¹

This theory of an “open society” is particularly true for the Internet. As technical progress is enormous, new possibilities for participation may be discovered and former involvement processes could be ameliorated. The acceptance of other individuals’ opinions is also extremely important considering the fact that persons from all over the world participate in negotiations, having a different background and manifold ideas.

This “openness” also presupposes that public forums remain accessible for a certain period of time so that members of civil society have to opportunity to make several statements, also responding to inputs by other actors. Furthermore, all persons interested in Internet matters should be able to ask for information on particular subjects without having to prove a specific interest; a distinction between directly involved persons and third persons does not need to be made. Special attention has to be given to include under-represented groups (e.g. indigenous peoples, disabled persons, people from developing countries).³² The removal of access and linguistic barriers to negotiations are necessary. It is particularly important to include these minorities as they are the ones most affected by the digital divide.³³

Only time can show which proposals are effective, but in order to find out which methods should be pursued several theoretical approaches should be tested in practice.

3.2 No Authority of an Individual through the Creation of a Contract

The Internet is accessible from everywhere for everyone. At least theoretically, each member of civil society has the same opportunities and chances to profit from this

²⁸ C Dany, “Civil Society Participation under Most Favourable Conditions: Assessing the Deliberative Quality of the WSIS” in: J Steffek, C Kissling and P Nanz (eds.), *Civil Society Participation in European and Global Governance* (Basingstoke: Palgrave Macmillan, 2008), 53-70, at 54.

²⁹ *Ibid.*, at 54.

³⁰ K Popper, *The Open Society and Its Enemies* (London: Routledge, 1945); see also M Hacohen, *Karl Popper – The Formative Years, 1902-1945* (London: Cambridge University Press, 2000) at 462.

³¹ See also K Salamun, “K Popper – Aufklärungsethos und kritische Rationalität” in: J Henningfeld and H Jansohn (eds), *Philosophen der Gegenwart* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2005), 49-67, at 65 s.

³² R H Weber and R Weber, note 25, at 13.

³³ C Dany, note 28, at 60.

framework. However, this assumption only realises if access to and active participation in the decision-making processes should be open to all interested individuals.

Consequently, every user of the Internet should have the same opportunity to be heard and to influence the decision-making processes. Members of civil society believe that the internationalisation of Internet governance is a first step in overcoming the digital divide.³⁴ In addition, ideas and recommendations are to be considered equally, irrespective of their source.

As the Internet needs to be governed and as it may be difficult to establish a framework in which it is possible for the entire community to fulfil that task together, a body (or bodies, respectively) performing this function needs to be appointed by civil society. Furthermore, the technicality of certain aspects of the Internet might not be easily manageable by a large part of civil society. Thus, a solution acceptable for all members needs to be found, as well as a recourse system for the community to intervene in case of disaccord with the actions of this body.

In order to prevent disagreement, the established body should consist of individuals coming from different backgrounds, bringing in diverse characteristics and conceptions so that the discussions between the different members of the body resemble discussions of all members of society. The body has the task to take care of day-to-day activities. However, if important questions regarding the Internet have to be addressed, civil society needs to be involved.

The Working Group on Internet Governance (WGIG),³⁵ rather than having one body governing the Internet, proposes governance by different organizations and stakeholder groups, which communicate, coordinate and cooperate when managing their tasks.³⁶ On the one hand, this approach has the advantage of a more balanced governance as there is no organization in a dominant position of taking decisions in itself or deciding which suggestions should be submitted to civil society for evaluation. On other hand, coordination of the different organization involved may be difficult to achieve. Furthermore, an additional dispute mechanism has to be

³⁴ R H Weber and V Menoud, *The Information Society and the Digital Divide* (Zurich: Schulthess, 2008), at 3-20.

³⁵ The WGIG was established in the aftermath of the first phase of the World Summit on the Information Society (WSIS) with the adoption of the Geneva Declaration of Principles (adopted on 12 December 2003, Doc. WSIS-03/GENEVA/DOC/4-E) and the Geneva Plan of Action (adopted on 12 December 2003, Doc. WSIS-03/GENEVA/DOC/0005; both documents are available at <http://www.itu.int/wsiv> (accessed on 23 March 2009). The UN Secretary-General was mandated to set up a working group for the specific field of Internet governance “in an open and inclusive process that ensures a mechanism for the full and active participation of governments, the private sector and civil society from both developing and developed countries, involving relevant intergovernmental and international organizations and forums, to investigate and make proposals for action, as appropriate, on the governance of Internet by 2005” (paragraph 50 of the Geneva Declaration of Principles). The WGIG was furthermore asked to develop a working definition of Internet governance, identify the public policy issues relevant to Internet governance, and develop a common understanding of the respective roles of the different stakeholders involved. For further information on WGIG see <http://www.wgig.org> (accessed on 23 March 2009).

³⁶ W Kleinwächter, “Multi-Stakeholder Internet Governance: the Role of Governments” in: W Benedek, V Bauer and M Kettmann (eds), *Internet Governance and the Information Society* (Utrecht: Eleven International Publishing, 2008), 9-29, at 20 s.

established which decides those cases in which organizations do not agree on a particular course of action.

3.3 Application of the General Will (*Volonté Générale*)

3.3.1 Derived from Everyone

The *volonté générale*, the general will of all individuals in a society, is the core of the social contract. Finding a consensus amongst the entirety of civil society and merging its members into a moral and political collective is the main problem in the context of establishing a State. The better a consensus can be found, the less further regulation is necessary as all members of the society agree on the appropriate rules of behaviour.³⁷

The will of the ruler of a country should be identical to the will of the entire population, only assuming the State authority emerges from all individuals. In case of a divergent opinion related to an important issue, the social reunion and the entire political body would have to be dissolved.³⁸

Applying Rousseau's ideas to the Internet, a first step should encompass the establishment of a public forum to which all interested parties have access. During a certain period of time, the public would then have the possibility to submit ideas, contradict others and generally express its opinion. Based on this active involvement of civil society, groups with representatives having a voice on behalf of them need to be formed. These representatives should regularly meet to find common understandings for questions that have been raised and to bring in the different views of the manifold parts of the society represented by them. The governing body could consist of a number of these representatives. By narrowing down the number of participants with an actual vote during the end phase of a decision-making process, chances of finding a solution acceptable to all members of civil society, i.e. a solution that reflects the general will of all individuals, are increased.

In 2001, Lawrence Lessig describes the Internet as “commons of knowledge” and compares it to an “Allmend,” a medieval collective pasture land.³⁹ The Internet is open to all interested persons. However, it also has to be used by individuals in a manner that is considerate of all other users. This open forum for communication should not be withdrawn from the population and be privatized.⁴⁰ This “openness” needs also to be preserved in the ruling of the Internet framework, letting all netizens participate in the regulation of the Internet.

In the field of the Internet governance, it might be difficult to realize the idea that all actors or stakeholders of civil society are participating in policy decisions and express their voice in the relevant decision-making processes. Potentially marginalized groups are faced with barriers to be heard; within civil society some groups are likely to be under-represented, for example people from developing countries, indigenous people,

³⁷ J Rousseau, note 7, book 4, ch1, para. 3; for the Rousseau's concept of general will see also GGreenivasan, “What Is the General Will?” (2000) 109 *Philosophical Review*, 545-581.

³⁸ *Ibid*, book 3, ch 1, para. 17.

³⁹ L Lessig, *The Future of Ideas* (New York: Random House, 2001), at 22.

⁴⁰ *Ibid*, at 17 ss.

disabled persons, etc.⁴¹ This fact is a particular concern since those groups may be the ones most affected by the digital divide.⁴² Opportunities and measures need to be worked out in order to increase the likelihood of participation by these stakeholders, as well as to remove barriers to participation and to inclusion of these voices in the democratic process. Technical assistance by developed countries seems indispensable to achieve that goal. The cooperation between governments (contributing with financial aid) and non-governmental organizations (NGOs) (providing knowledge and a workforce) helps to distribute the various efforts of different actors and to increase participation of inhabitants from developing countries, thereby enhancing democracy and legitimacy.⁴³

The commitment to establish participation by civil society based on equal rights in the given legal framework can be considered an expression of the intention to realize participatory democracy. A major role must then be played by the citizen activism, including the possibility of popular discourse and social action.⁴⁴ Individuals can create their own communities of common concern and contribute to the opinion-building process of civil society. The advantage of this participatory model in comparison with professional politicians and bureaucrats is that civil society better knows its own preferences and is therefore able to more effectively express them politically.

Direct elections are seen as a mechanism to improve participation of civil society and reduce the accountability and legitimacy deficit of the Internet. In 2000, the Internet Corporation for Assigned Names and Numbers (ICANN)⁴⁵ introduced the election of five Board Members (so-called At-Large Members) from different geographic regions through open-access Internet-wide elections.⁴⁶ Even though the project looked very promising in theory, in practice the experiment failed due to a very small percentage of participating voters.⁴⁷ Consequently, ICANN abolished this attempt in 2002 and

⁴¹ C Dany, note 28, at 60; R H Weber and M Grosz, "Internet Governance – From Vague Ideas to Realistic Implementation" (2007) *Medialex*, 119-135, at 131 s.

⁴² R H Weber and V Menoud, note 34 at 4 ss.

⁴³ For the importance of access to the Internet see also A Esterhuysen and W Currie, "Open, Universal, and Affordable Access to the Internet" in: W Kleinwächter (ed.), *The Power of Ideas: Internet Governance in a Global Multi-Stakeholder Environment* (Berlin: Germany – Land of Ideas, 2007) 60-67; George Sadowsky, "Internet Governance: The Importance of Access" in: W Kleinwächter (ed.), *The Power of Ideas: Internet Governance in a Global Multi-Stakeholder Environment* (Berlin: Germany – Land of Ideas, 2007), 68-74.

⁴⁴ S Charnovitz, "WTO Cosmopolitics" (2002) 34 *Journal of International Law and Politics*, 299-354, at 312.

⁴⁵ ICANN is a non-profit public benefit organization with the legal status of a corporation, accomplishing vital tasks for the functioning of the Internet. Its mission is to coordinate the unique technical identifiers' allocation and assignment, the operation and evolution of the Domain Name System (DNS) root name server system, as well as the policy developments related to these technical functions (see Article I, Section 1 of ICANN's Bylaws, available at <http://www.icann.org/general/bylaws.htm>). For further information on ICANN see <http://www.icann.org> (accessed on 23 March 2009).

⁴⁶ Art. II Section 1 and 2, Art. V Section 6 *ICANN Bylaws 2000*.

⁴⁷ Of the estimated 375 million Internet users at the time, less than 0.01% actually voted.

established internal selection processes instead,⁴⁸ which provide for certain rules on geographic diversity.⁴⁹

However, it may be questionable whether the termination of the experiment was in fact the right decision or whether other means of encouraging the public to vote could have been found, enabling proper elections and therefore actually contributing to accountability enhancement. Information about the 'election' could have been disseminated through the Internet itself, but also through other channels such as newspapers, radio and television. Therewith, a broader public might have been approached. If individuals only use the Internet for specific purposes, or very infrequently, they most probably do not visit ICANN's webpage and therefore may not have known about the elections. However, these individuals might still be interested in the subject and likely to vote if they were informed of the respective possibility.⁵⁰

Even if a method for participation of netizens that effectively includes all interested persons in decision-making processes can be found, it should not be overlooked that multi-stakeholderism (as the term suggests) cannot circumvent the big differences between the different individuals involved; influential states (mostly developed states) will remain very powerful actors in the Internet framework. Unlike developing states or individual representatives of civil society, these states will have the necessary power to implement their ideas of good governance.⁵¹

3.3.2 Aimed at Everyone's Welfare

According to Rousseau, through the establishment of a society, each individual is protected by the whole of the community. As a single person, the individual may not have the necessary forces to protect him or herself from outside attacks, but the entire society together is strong enough to resist such incidents.⁵²

The efforts put forth in order to find a consensus can also contribute to the development of an individual's character. During negotiations, others have to be respected, their views and ideas need to become objects of deliberations and compromises have to be made. It is indispensable to define standard rules of behaviour to be followed by individuals participating in a forum allowing the exchange of views. These rules, too, must take into account the cultural diversity of the Internet society.

Through the Internet, the exchange of views and ideas is facilitated. Online forums accessible for everyone can be established. By way of these forums, individuals from all over the world can communicate and nothing more than Internet access is needed. The Internet can therefore serve as a framework for innovations and help civil society

⁴⁸ C de Vey Mestdagh and R Rijgersberg, "Rethinking Accountability in Cyberspace: A New Perspective on ICANN" (2007) 21 *International Review of Law Computers & Technology*, 27-38, at 29; R H Weber and M Grosz, note 24, at 318/319; R H Weber and R Weber, note 25, at 14.

⁴⁹ Arts VI-X *ICANN Bylaws* and Art. VI Section 5 *ICANN Bylaws on geographic diversity*.

⁵⁰ See also C De Vey Mestdagh and R Rijgersberg note 48.

⁵¹ K Komaitis, note 23, at 57; S Antonova, note 24, at 11-21, 82-102 on collaboration as a mode of shared power, and 187-226 on the implementation of multi-stakeholder consensus.

⁵² J Rousseau, note 7, book 1, ch 6, para. 2.

to progress in its development. Cross-cultural dialogues broaden individuals' horizons and help to create a common understanding.

By enhancing access to and participation in the Internet, better use can be made of the public service value of the Internet. No other medium is able to spread information within such a short period of time, making it possible for netizens all around the world to communicate on current topics. Furthermore, organizing events and helping persons in need is facilitated because information flows are faster and details on what is needed can be transmitted more easily.

A problem related to responsiveness and participation calls into question whether or not input actually leads to impact. Obviously, the multi-stakeholder approach is not accomplished by merely providing the preconditions for the participation of civil society; it also requires the provision of a real opportunity to shape policy output.⁵³ In so far, an evaluation of the influence that the voices of the various stakeholders have on the decision-making process should be conducted. Listening to the voices of the members of civil society should not become an alibi since in such case the outcome of the deliberations will not result in everyone's welfare.

The governing body has to effectively take into account inputs by civil society and justify why it departs from a particular request of the community in a specific case. Only if reasons have to be given for the comportment of the governing body can civil participation in fact be democratic and have a legitimising effect.

Online deliberations are realisable at a much lower cost than offline deliberative democracy, are more synchronous and also less limited in practice. Group discussion, collaborative authorship as well as decision-making can be improved in an online framework. Audio and video conferencing software already exists (e.g. Skype); further technical improvements are scheduled and should be supported in order to allow large groups of netizens to access debates synchronously.⁵⁴

4. Enshrinement of Fundamental Rights

4.1 Right to Freedom

4.1.1 Continuing Freedom for Everyone

Rousseau, with his concept of a social contract, envisages overcoming all inequalities and bondages and establishing a system in which everyone has the same rights and obligations so that individuals can feel as free as they did in their natural state. For each part of liberty that the individual has to give up when a society is established, it receives a corresponding part of another individual's liberty, so that in the end, after the society has been established, each member gets adequate compensation or even additional forces and strengths to preserve what he or she owns.⁵⁵ Therefore, the

⁵³ C Dany, note 28, at 61.

⁵⁴ J Malcolm, note 1, at 277-278; see also J Zittrain, *The Future of the Internet and How to Stop It*, (London: Yale University Press, 2008), at 162-163.

⁵⁵ J Rousseau, note 7, book 1, ch 6, para. 8.

social contract helps to secure the self-determination of all individuals.⁵⁶ Kant follows the same ideal by arguing that individuals remain free because they only have to submit their will to the law representing the public will. Only if they had to obey to another person would individuals have to give up their freedom.⁵⁷

Looking from the angle of this ideal, deductions for the Internet community can be made from Rousseau's social contract by analogy. On the one hand, the members of civil society may have to give up a part of the decision-making powers to a specialized governing body (for example ICANN). This fact may limit the freedom of the individual insofar as a direct influence on certain decisions is excluded, even though the individual might be affected by them. On the other hand, this body also supervises and guarantees the permanent functioning of the Internet; such an activity is to the advantage of the individual, who, on his/her own, could not manage the respective tasks.

4.1.2 *Socialization Harmonizing with the Right to Freedom*

Each individual, according to Rousseau, dissolves completely, with all his rights, into the collective without any reservation whatsoever.⁵⁸ The group of individuals concluding the social contract is replaced by a collective body.⁵⁹ Only if power, freedom and rules coalesce in one authority, then a "republic" – the ideal constitution according to Immanuel Kant⁶⁰ – can be guaranteed.

However, concerning personal rights, each individual stays as free as before and only obeys to himself/herself. In particular, all property rights are preserved. Unlike socialist convention, Rousseau does want to protect the institute of personal property and not abolish it.

The same conclusions can be drawn for participation in the Internet. Obviously, certain compromises are inevitable and decisions of the majority have to be accepted by the minority. However, personal self-determination as well as all other fundamental rights are preserved. Other than the social contract, the Internet only touches upon a part of an individual's right, such as the fundamental aspects of dignity, integrity and equality of individuals, as well as the right to freedom of expression and information and privacy rights. Therefore, its effect is also less far-reaching than the establishment of a society. Nevertheless, in light of the tendencies towards an increased humanization of Internet governance, a social contract could be perceived as a basis for a comprehensive human rights architecture for the Internet.⁶¹

⁵⁶ K Herb, "Jean-Jacques Rousseau – Ein Moderner mit antiker Seele" in: Lothar Kreimendahl" (ed.), *Philosophen des 18. Jahrhunderts* (Darmstadt: Primus Verlag, 2000), 141-156, at 146 s.

⁵⁷ I Kant, note 9, at III 492; see also C Niebling, *Das Staatsrecht in der Rechtslehre Kants* (München: Meidenbauer, 2005), at 51 ss.

⁵⁸ J Rousseau, note 7, book 1, ch 6, paras. 5 and 6.

⁵⁹ *Ibid.*, para. 10.

⁶⁰ I Kant, *Anthropologie in programmatischer Hinsicht*, 1798, 330 s.

⁶¹ See for example, W Benedek, "Internet Governance and Human Rights", in: W Benedek, V Bauer and M Kettemann (eds.), *Internet Governance and the Information Society* (Utrecht: Eleven International Publishing, 2008), 31-49.

4.2 Equity and Equality

Rousseau departs from the idea that every individual has a natural dignity, a right to self-determination and a demand for equality. By equality, Rousseau does not necessarily mean material equity, but rather the same chance to development for everyone.⁶²

In Internet matters, too, each interested party has the same rights and obligations. All inputs and opinions have the same weight and are considered by the rest of the Internet community, whatever their source may be. Discriminatory treatment based on origin, religion or any other reason of individuals' comments by the governing body may not be tolerated.

This theoretical concept, of course, implies that the possibility to access the Internet in all geographical areas is equal; since this is actually not the case for the time being, access needs to be increased. This may require developed countries to provide technical assistance and financing to less well-situated regions.⁶³ For a large part of the world's population, technical and financial barriers impede effective use of the proposed strategies. Practical and monetary support needs to be given to developing countries in order to increase access to the Internet. Experienced and skilled countries, international organizations and civil society have to share their knowledge with less-developed countries.⁶⁴ Official development assistance programs, the International Monetary Fund, the World Bank Group, public-private partnerships or the Global Digital Solidarity Fund could contribute to the financial means needed for spurring worldwide access to the Internet.⁶⁵

4.3 Fairness

Apart from equity and equality, a further principle needs to be introduced in the discussion, namely the notion of fairness. Decision-making processes are by far not always fair to persons. For example, in the present international landscape, two principles are compromising the fairness of decision-making processes, namely the fact (i) that the rule of each State with one vote does not consider the size of the population and (ii) that only governments, not stakeholders of civil society have a vote in the relevant processes. This fairness deficit, coming close to the perception of clientelism, creates problems of legitimacy for the international system, in particular due to the discrepancies between the claimed values (such as equity, justice, protection of weak persons) and the vehicles of practical actions and programmes.

In order to overcome this "fairness deficit" a new forum should be created "in which people rather than governments are directly represented."⁶⁶ Such a new forum could help to establish an adequate correlation between population and representation. This objective would "provide an opportunity for institutionalising the democratic

⁶² *Ibid*, para. 8.

⁶³ See above ch 3.3.1.

⁶⁴ R H Weber and V Menoud, note 34, at 179.

⁶⁵ *Ibid*, 63-177.

⁶⁶ T Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press 1995), at 482.

entitlement and certifying the authenticity of the link between people and their representatives.”⁶⁷ Through the expression of voices by the multi-stakeholders, the concept of a general will (*volonté générale*) is more likely to be achieved than in a system with a strict political structure in the traditional sense.

An example for such a public discussion forum is the Internet Governance Forum (IGF),⁶⁸ which has the objective of collecting the voices of civil society and bringing forward proposals for the improvement of Internet governance.⁶⁹ Participatory processes and regular, democratic elections enhance accountability within the IGF.⁷⁰

5. Outlook

In the historical and philosophical discussion, the model of a social contract has been developed (mainly by Rousseau), encompassing all individuals of a society voluntarily unifying themselves since otherwise they could not originate new forces. Therefore, a positive outcome of societal processes calls for implementation of common interests.

Similarly, civil society as the most active user of the Internet needs to be included in the participatory and decision-making processes of its governance. Relevant aspects to be properly tackled encompass transparency, accountability, stability, and sustainability of participants' activities. Procedurally, the inclusion of civil society requires the implementation of a bottom-up process allowing responsiveness of the concerned actors in a rational discourse that improves the democratic quality of the structures. In practice, e-inclusion must be enhanced on all levels; this means that approaches with e-voting should be revitalized again in a better (more adequate) way, that avenues of discussion need to be implemented, and that the building of new coalitions merits to be tested. Thereby, policy and legal decisions are to be accompanied by empirical investigations based on a solid research methodology.⁷¹

Through the establishment of a civil society each individual is protected by the whole of the community, thereby which each individual should be granted with the same rights and obligations and the same chance to develop. This relates in particular to the use of freedom via the social contract, which secures the self-determination of all individuals. A new forum following the Internet Governance Forum in a more

⁶⁷ *Ibid*, 482.

⁶⁸ The IGF was established in the aftermath of the second phase of the WSIS in Tunis under the auspices of the United Nations. The forum is “constituted as a neutral, non-duplicative and non-binding process”, having no involvement in day-to-day technical operations of the Internet, but featuring a “multilateral, multi-stakeholder, democratic and transparent” structure (see paragraphs 73 and 77 of the Tunis Agenda [adopted on 18 November 2005, Doc. WSIS-05/TUNIS/DOC/7–E, available at <http://www.itu.int/wsisis>]). For further information see <http://www.intgovforum.com>. On the establishment process of the IGF see C Masango, “The Internet Governance Forum: its Development, Function and Future” in: W Benedek, V Bauer and M Kettemann, note 36, 63-77; on multi-stakeholder governance and the IGF see J Malcolm, note 1.

⁶⁹ R H Weber and M Grosz, note 41, at 124-127.

⁷⁰ J Malcolm, note 1, at 498.

⁷¹ This article is based on the discussion of philosophical concepts and is not suited to include empirical investigation within the conceptual approach; obviously empirical studies remain important in parallel.

structured framework could be suitable for the realization of fairness in all decision-making matters.

All these ideas related to the creation of a sound civil society in the Internet world are not completely new. Historical and philosophical theories have already laid down many valuable thoughts, mainly related to the creation of social contracts, which could be revitalized in the context of the discourse on Internet governance. Insofar, much room is left for further interdisciplinary academic research.