5 A Legal Lens into Internet Governance

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Law as a Flexible System

In the field of Internet governance, the fast-changing technological and political environment challenges the suitability of traditional regulatory regimes; this assessment is justified even if the emphatic pronouncements in John Perry Barlow's (1996) *Declaration of the Independence of Cyberspace* have turned out to be not realistic. The dichotomy between the global reach of the infrastructure and the national embedment of the normative framework occasions the need for new legal research concepts and methods. Issues such as legitimacy, regulatory quality, technical standardization, and accountability are to be addressed (Weber 2016a). As I show in this chapter, legal scholars need to tackle these challenges.

Traditionally, the legal order was based on a communal, later on a national, normative framework that was complemented by self-regulatory instruments and, since the 19th century, partly by multilateral agreements. This regulatory framework, developed for the real world, is exposed to limitations if applied to the online world designed by the new information technologies. Therefore, the traditional understanding of political structures as command by a specific body that induces people to execute certain actions—in the sense that people think about what to choose and what to do—should be replaced in the Internet governance context by a more inclusive approach. Before discussing the details of such an approach, I outline some basic principles of legal theory and the relevant guiding regulatory strategies for Internet governance.

Structural and Open System

In legal theory, law is seen as a structural system being composed of an organized or connected group of objects (terms, units, or categories) forming a

complex unity. Legal norms are usually expressed in a linguistic form and are designed to give guidance about the desired behavior (Weber 2002, 32). The addressees, be it the whole society or a concerned part thereof, are supposed to take note of the contents of law. Thereby, legal concepts help support adequate normative reasoning and stabilize normative expectations (Mahler 2014, 27–33; Weber 2014b, 33).

The functions of law crystallize in a system of rules and institutions that underpin civil society, facilitate orderly interaction, and resolve conflicts and disputes arising in spite of the rules (Chik 2010). The creation of law can happen by way of different processes—for example, negotiations among the concerned norm addressees (a "social contract," following the concept of Rousseau), imposition of legal rules by the governing body, or evolution in self-regulatory mechanisms (Weber 2014b, 33–34; see also Amstutz 2011, 395).

The legal system is not a predetermined construct—that is, the legal system is embedded in other socially relevant systems. Moreover, exchange and interchange between different social systems make the legal order porous. The open system approach is mainly influenced by the advances in cybernetics and information theory. In principle, the complexity of any system depends on the inclusion of other organized systems.[1] Since modern societies are differentiated into a plurality of subsystems, a framework of sociological "functionalism" must be developed (Weber 2014b, 47).

A "meaningful law" in an open system is composed of norms that are perceived as legally binding, thereby inducing the addressees to acknowledge the authority of the rulemaking body and to comply with the rules (Reed 2012, 70–73, 105, 106). As a result, law should be able to regulate behavior and to allow people in a community to determine the limits of what can and cannot be done in their collective interests (Weber 2014b, 34; see also Mahler 2019, 72–94; and Sandra Braman's chapter 2).

Relative Autonomy and Flexibility of Law

In view of the rapid technological developments that cause social changes, it is imperative to realize a flexible legal framework in an open society. This flexibility presupposes that the legal rules profit from a certain degree of legal autonomy notwithstanding the linkages between different subsystems in society.

The open society approach requires an assessment of the interdependence between normative concepts and other social sciences' perspectives.

In this context, legal theory scholars have defined criteria for the relative autonomy of law (see Post 1991, vii–viii): (1) "Autonomy" means that the law is not equal to and not fully dependent on other social sciences; (2) the word "relative" evidences that exchanges between the law and other social spheres take place in both directions (Weber 2002, 36–37).

The theoretical foundation of relative autonomy shows that other social sciences are not in a position to rule out any legal flexibility being of importance because law needs to be able to react to changing circumstances (Weber 2014b, 49–50). Nevertheless, the autonomy model does not directly find a clear distinction between law and no law. Generally, however, law may draw on insights from some other fields of discourse while retaining its separate entity.

Substance and Change of Law

Legal rules usually contain information having a guiding or even coercive effect on the members of civil society. The legal framework is composed of different instruments (for a general overview, see Weber 2002, 56):

- Multilateral or bilateral agreements binding the ratifying countries within the scope of the agreed regulations
- Fundamental norms stating substantial values and policies governing the life of the citizens and organizations in a country (usually the constitution)
- General rules applying to individuals and organizations in the form of a law or ordinance
- Specific decisions ruling on certain aspects of a legal relation

To avoid a legal system becoming rigid, mechanisms must be introduced that allow a change of the law according to social needs and circumstances. Notwithstanding that the predictability of the law requires a stable structure, the adaptability of legal rules, resilient to change, keeps the law intact in case of a relevant social change.[2]

However, before adapting existing laws, lawmakers should consider that legal changes are economically not without cost and do have a social impact: Laws are not created in a vacuum. New legal rules can be risky and costly. Addressees of legal rules may have a limited capacity for attention. New legal rules impose learning costs on the legal profession (see Weber 2002, 39).

The development of appropriate guidelines for potential changes of law is particularly important in the Internet field since the technological

environment is fast evolving and the global reach of the infrastructure is inherent.

Regulatory Strategies

Regulatory strategies cannot be implemented without regard to the political landscape that is in the process of being established in the Internet governance field.

Political Visions of Rulemaking

Looking at the experience of the last few years, it seems obvious that the identification of the relevant political structures and their shortcomings as well as the assessment of the international legal order's potential merit greater attention (see Rioux 2013, 37, 49–54, for an overview of the constellations of regulatory instruments in global governance). The appropriateness of the legal framework encompassing Internet governance depends on the ability of the policy makers to embrace new approaches using different normative tools. Therefore, the implementation of legal instruments must be done with great care and prudence to avoid undesired effects (Weber 2014b, 102).

Two visions of political power can be distinguished: the dominance of the state power as founded on the sovereignty concept and the power distribution relying on various stakeholders (Klimburg 2013). The two competing models have an impact not only on the international rulemaking agenda but also on the design of supranational institutions and the role of sovereign states. Therefore, the decision for one of the two models influences the decision-making processes and, indirectly, the outcome of deliberations. An example can be seen in the different approaches pursued at the World Conference on International Telecommunications in Dubai in December 2012, organized by the International Telecommunication Union, and at the plenary conferences of the Internet Corporation for Assigned Names and Numbers (ICANN) (see Weber 2013, 95, 98, 101).

The current challenges in Internet governance regulation by nature require a broader and more collective decision-making than in a nation-state. In times of globalization, the movement toward global governance is unavoidable and the structure of international law will need some adaptations. The crucial point concerns the appropriate balance of power between

sovereign states, nonstate actors such as businesses and individuals, and new geographic or functional entities in a power-sharing framework (DeNardis 2014, 23).

As a result, global governance must enshrine collective efforts enabling the concerned persons to identify, understand, and address the global problems that go beyond the capacity of individual states to solve. Political theory may operate at different levels: A global framework needs to be combined with domestic political theory in order to assess the necessary interplay of the different levels. A global political theory must be able to provide guidance as to what principles should be adopted and which principles should be implemented in reality. Rules are needed that help determine how general principles can be applied to specific issues (Weber 2014b, 105).

Quality of Regulation

An important aspect of Internet governance debates and its normative framework concerns the quality of regulation. Several criteria can improve the desired quality of regulation; the following questions should be taken into account (see Baldwin, Cave, and Lodge 2012, 27–33):

- Is the regulatory action supported by legislative authority?
- Does the regime implement an appropriate scheme of accountability?
- Are procedures fair, accessible, and open?
- Is the regulator acting with sufficient expertise?
- Can the regulatory regime be assessed as an efficient system?

In an attempt to improve regulatory quality, the Organization for Economic Cooperation and Development issued *Guiding Principles for Regulatory Quality and Performance* (2005), which encompasses an extended scope of relevant aspects that reflect the social and environmental developments:

- Adoption of broad programs of regulatory reform that establish key objectives and frameworks for implementation at the political level
- Systematic assessment of impacts and review of regulations to ensure that the intended objectives are efficiently and effectively reached in a changing and complex economic and social environment
- Assurance that regulations, regulatory institutions charged with their implementation, and regulatory processes are transparent and nondiscriminatory

- Elimination of unnecessary regulatory barriers to trade and investment through continued liberalization and enhancement of market openness throughout the regulatory processes
- Identification of important linkages with other policy objectives and development of policies to achieve a harmonized regime

In Internet governance, the appropriateness of these elements remains unchanged, but the approach needs to be widened.

Informal Rulemaking and New Regulatory Models

Experience has shown that the traditional legal instruments can hardly cope with the challenges of Internet governance. Therefore, rulemaking through informal social relations based on the human evolution from individuals into members of society must gain importance. The establishment of social structures has already been a line of thought, expressed by the philosophers of the 17th century (Thomas Hobbes, Jean-Jacques Rousseau). On the basis of the understanding of civil society, normative expectation encompassing substantive legal principles can evolve over time (Weber 2016a, 195, 201).

The discussions about Internet governance over the last 12 years have led to a dynamic regulatory matrix, or a hypercomplex structural match (Jørgensen 2013, 22–24). Such kinds of complex structures have been described as polycentric regulation involving different communities in the rulemaking processes (Murray 2007, 47, 234–235). If the participants in a polycentric regulation scheme have a shared set of normative beliefs, notions of validity of the rules and common policies grow; therefore, digitization is in a position for improving connections and facilitating the exchange of communications. However, the polycentric regulation concept's weakness consists in the practical problems of rulemaking pluralism and fragmentation. The Internet is in need of a (at least partially) coordinated set of rules; discretionary pluralism would destroy its value since incompatible legal rules could have a negative impact on its global reach (Weber 2016a, 202–203; for a general discussion of polycentric regulation, see Senn 2011, 31, 170).

Another theory is the concept of the so-called hybrid regulation; the term "hybrid" can be described as a combination of a contradictory difference, marked not by either-or but by both-and (Weitzenboeck 2014, 49, 62). A similar approach is the so-called mesh theory, which is based on the acknowledgment that a paradigm shift occurs with the profound

transformation from a pyramid model of the government at the top to a network model (Ost and Van de Kerchove 2002, 14). Following this conceptual approach, a "network communitarianism" can evolve as a process of discourse and dialogue between the individual and the society (Murray 2007, 68). However, the regulatory legitimacy of these concepts can be challenged because substantial discretion for the assessment of the rule-making's quality is left open (see Weber 2016a, 203–204).

Another approach conceptualizing a world of hybrid legal spaces is the theory of global legal pluralism; this concept intends to encompass more than one legal or quasi-legal regime in the same field (Berman 2007, 1155–1158). The most recent theoretical approach to overcome the problems of previous regulatory concepts pleads for "global experimentalist governance," an institutionalized transnational process of participatory and multilevel problem-solving that frames critical issues in an open-ended way by subjecting them to periodic revisions (de Búrca, Keohane, and Sabel 2014, 477).

Notwithstanding several merits of the newest regulatory concepts, even an ideal model does not address important substantive principles in Internet governance—for example, legitimacy and multistakeholderism—therefore, these two issues are discussed in more detail in the following.

Legitimacy of the Internet Governance Legal Framework

Notion and Scope

The word "legitimacy" can be traced back to the Latin word "legitimus" as meaning "lawful, according to law." Legitimacy reflects an authority's right to rule and embraces the justification of ruling power giving the governed the feeling that their own values are represented in a decision-making context (Weber 2014b, 102–103).

Legitimacy in a wider sense can also encompass an ethical-philosophical dimension that puts legitimacy above positive law. A distinction is made between normative legitimacy theories, setting out general criteria for evaluating the right to rule, and empirical legitimacy theories, focusing on belief systems of those subject to government. As a result, legitimacy can be justified either by formal ideas as the rule of law rationale (legality) or by substantive value rationality based on morality and justice (see also Clark 2005, 18–19).

According to Jürgen Habermas (1992), a source-oriented perception qualifies an authority as legitimate if it refers to the demos, the public.

Procedural steps (or adequate procedures, in the terminology of Niklas Luhmann [1975]) within the different governing entities may enhance the legitimacy of policy-making decisions (see Weber 2009, 109, for a detailed analysis of the legitimacy of policy making from a theoretical perspective). Legitimacy also describes the relevant elements of governance that validate institutional decisions emanating from a right process.

Normative Principle

Legitimacy must be designed in line with constitutional values and principles. As architectural pillars, three concepts can be put in place: "legal, morality, and constitutionality," which are able to "mark out the terrain within which the practice of legitimacy tends to take place" (Clark 2005, 18). Legitimacy plays, then, the role of a reconciling norm, enabling consensus on how the three pillars are to be accommodated among each other (Clark 2005, 19; for the rule of law, see also Braman's chapter 2).

The assessment of legitimacy can also be done from the perspective of regulatory purposes and standards, regulatory instruments, regulatory effectiveness, and regulatory connection. These perspectives are gaining importance because legitimacy questions are becoming weightier not only for the international society in general but also for the stability of the international order (Weber 2014b, 113).

As mentioned, procedural elements are crucial for the acknowledgment of a right process. However, procedure must be complemented by a substantive conception that looks at the outcome of the legitimizing procedures (a result-oriented type of legitimacy). Such an approach depends on the values deemed as right by the stakeholders concerned, thus in part justifying them as legitimizing procedures. To avoid subjective perceptions of legitimate values prevailing, Habermas tried to link the procedural aspects with specific notions of contents. This "discourse principle" assumes that those norms can claim validity that receive the approval of all potentially affected persons, insofar as they participate in a free and rational discourse (Habermas 1992, 161).

Concretization for Internet Governance

In Internet governance, the implementation of appropriate organizational rules in the concerned social communities is a necessity. The actual process can choose between different avenues. On the one hand, moral norms

falling under the notion of netiquette are relevant for online macrocommunities. On the other hand, the administration of the Internet, seen as a microcommunity, needs some basics of taxonomy (Weber 2014b, 112; for the history of the Internet, see Mueller and Badiei's chapter 3).

ICANN as the main organization in Internet governance is a private organization. However, over time its legitimacy increased, partly due to the less strong ties with the government of the United States, partly due to the increased participation by other stakeholders over the last years. Further improvements of legitimacy are obviously possible, particularly regarding legal remedies (for example, an independent mediation and arbitration system); in general, however, the acknowledgment of legitimacy by ICANN officials is on the right track.

From a theoretical perspective, the original self-regulatory mechanisms addressing legitimacy issues have moved to a more democratic and equally harder normative framework. Thus, the legal impact on governance elements has become stronger, and some quality criteria of regulation are fulfilled to a wider extent.

Multistakeholderism in Internet Governance

Notion and Fundamentals

Before the second World Summit on the Information Society in late 2005, the Working Group on Internet Governance (2005) introduced a widely accepted working definition of multistakeholderism. This definition refers to the "development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet." Therefore, the interests of the stakeholders involved should be designed by participatory mechanisms reflecting the whole society's view. Multistakeholderism is not a completely new phenomenon evoked in the context of Internet governance; earlier developments concerned labor and sustainability fields (Weber 2016b, 247–249; see also DeNardis's chapter 1 and Hofmann's chapter 12).

Four fundamental questions are at stake: How do governance groups best match challenges with the organizations, experts, and networks? How can governing bodies and entities be most able to help develop legitimate, effective, and efficient solutions? How should the flow of information and

knowledge necessary for a successful governance be structured? How can different governance groups approach coordination between geographically different governance networks to avoid conflicting interests? (see ICANN/WEF Panel on Global Internet Cooperation and Governance Mechanisms 2014).

Practical considerations lead to the following additional questions: How can greater transparency and dialogue between different civil society groups and standards experts be introduced? How can standards be developed rapidly with the scrutiny of the increasing multistakeholder arrangements? (Brown and Marsden 2013, 200).

Basic values of multistakeholder models are openness (access to discussions, negotiations, and decisions), transparency (clear formal and substantive regimes with appropriate representation), accessibility (for information sources and procedures), accountability (responsibility of decision makers), credibility (general acceptance of decision makers), and consensus-orientation (acceptability of decisions taken) (Weber 2016b, 251). These basic values should be the foundation for appropriate legitimacy strategies, but the schemes must be broad enough and leave room for adaptations in a given context.

Forms and Legal Framework of Decision-Making

The concept of multistakeholderism requires at least two classes of stakeholders (Raymond and DeNardis 2015, 572, 575). Different concepts of multistakeholderism can be and are implemented in reality, subject to the types of actors that are involved and the nature of authority relations between these actors.

Depending on the design of the actors and the scope of relations, the combinations in a matrix can be numerous (Raymond and DeNardis 2015, 577, 583). Furthermore, multistakeholder arrangements usually also vary by level. Four ideal-typical structural models have been developed: hierarchy (for example, the case of the International Telecommunication Union), homogeneous polyarchy (for example, the Internet Engineering Task Force, W3C, and International Organization of Securities Commissions), heterogeneous polyarchy (for example, ICANN, the UN Global Compact), and anarchy (ibid., 580, 603). Often, the choice of the models is limited, but some discretion for the involved stakeholders is mostly given.

In general, a multistakeholder decision-making framework should encompass the following main elements:

- Identification of the most adequate set of stakeholders participating in a particular issue
- Definition of the criteria and mechanisms for the selection of representatives from different groups
- Avoidance of capture of multistakeholder processes by corporate power or influential nongovernmental organization
- Implementation of crowdsourcing techniques bringing inputs into dialogue on difficult topics
- Establishment of technologies helping the representatives liaise with their constituencies and monitor reached agreements
- Creation of a technological framework facilitating dialogue to reach a minimum consensus in a multistakeholder body
- Methods for accelerating the decision-making processes in multistakeholder bodies
- Theoretical models supporting consensus building and decision-making in multistakeholder environments (Almeida, Getschko, and Afonso 2015, 74, 78)

In designing the multistakeholder decision-making framework, political context and cultural factors must be taken into account (Weber 2016b, 250). The implementation should also consider the effect of existing standards on the decision-making of an organization and whether to lower potential entry barriers for stakeholders (see also Van Huijstee 2012, 45).

Concretization for Internet Governance

Practical experiences have shown over the last few years that a range of approaches, mechanisms, and tools are available for the realization of multistakeholder objectives, leading to the acknowledgment that a toolbox should be developed with a number of suitable instruments (Gasser, Budish, and West 2015, 2; see also Buzatu 2015, 11–14). This assessment is not surprising since multistakeholder models must rely on an ever-increasing participation by those with interests, capacities, and needs (Doria 2013, 115, 135). Therefore, the multistakeholder concept may not be seen as a value in itself to be applied homogeneously to governance functions—that is, it is not a one-size-fits-all solution (Weber 2016b, 258). However, the development of systems for sharing information, taking decisions, designing checks and balances, and

implementing assurance models is at the heart of effective multistakeholder initiatives (Buzatu 2015, 16).

Multistakeholderism is practiced in reality in, for example, the context of the Internet Governance Forum, which includes a special committee, the Multistakeholder Advisory Group (MAG), whose roughly 40 seats represent the five world regions and also balance gender (Hofmann 2016, 16). The multistakeholder element, addressing participation in different ways and using different terms, also prominently appears in the NETmundial Multistakeholder Statement released at the closure of the NETmundial Conference held in São Paulo in April 2014.[3] Attendees from around the world, in government, the private sector, civil society, the technical community, and academia, crafted this nonbinding statement. In the meantime, ICANN also partly opened the door for some multistakeholder exchanges, mainly in connection with accountability.[4]

Without any doubt, the debates about Internet governance and multistakeholderism must encompass the general and relevant policy issues, in particular legitimacy, transparency, and accountability; topics have been linked only in a limited way (Weber 2016b, 259–262; see also Gasser, Budish, and West 2015, 10–11, 22–23, 26). In addition, topics such as decision-making procedures (Zingales and Radu 2017, 53, 67), formation and operation inclusiveness, and effectiveness need further attention (Weber 2016b, 262–264; see also Gasser, Budish, and West 2015, 11–13, 18–26).

In view of these manifold factors, no standard way to form multistakeholder groups can be established. Depending on the cultural and the contractual factors in shaping the functioning and the outcome of governance groups (for example, the preexisting relationships between the stakeholders, the relationship between the governance group and the governmental institution, the allocation of resources, and geopolitical factors), the dimensions of multistakeholder groups must be designed; therefore, a broad spectrum of purposes can be listed, ranging from open-ended missions to issue-specific tasks (Gasser, Budish, and West 2015, 10, 25; Weber 2016b, 258).

Even if multistakeholderism is not a value as such, it must be considered as a possible approach for meeting salient public interest objectives by determining what types of decision-making are optimal in the given functional and political context (Raymond and DeNardis 2015, 610). The following elements and action points support effective multistakeholder governance (Buzatu 2015, 28–31; Weber 2016b, 265):

- Identification and articulation of purpose and objectives (appropriate setting of the stage)
- Identification of the players (adequate and precise definition of the stakeholders)
- Development of the applicable multistakeholder governance model
- Definition of the envisaged procedural formation and operation principles and description of the scope of inclusiveness
- Determination of the appropriate level of transparency
- Implementation of accountability standards
- Provision of guidance for the implementation of the agreed standards
- Identification of a sustainable and credible funding model for the multistakeholder processes
- Development of oversight and assurance mechanisms

In a nutshell, multistakeholder initiatives can be seen as fora multipliers through manifold platforms for dialogue. Furthermore, such initiatives are suitable to establish fora for evolving standards and governing mechanisms (on the human rights issue, refer to Braman's chapter 2 and Jørgensen's chapter 8). But many factors in multistakeholder initiatives need further research; in particular a multidisciplinary examination of the relevant questions incorporating socio-legal, economic, policy-oriented, and game theory studies, as well as interdisciplinary information studies drawing on political analyses appears to be indispensable (Brown and Marsden 2013, 200–201). Developing a multidisciplinary catalog of methodologies as well as the corresponding multidisciplinary tools can improve the chances for the existence of an appropriate tool kit as well as the comprehension of challenges of better participative decision-making and configuration of governance concepts (Weber 2016b, 265).

Conclusion

If a legal lens is applied to Internet governance, then the original quite soft law has become much harder. Normative principles gain importance, and quality criteria of regulation are more closely taken into account.

On the one hand, the legal framework has been strengthened concerning the substantive Internet governance principles such as legitimacy, transparency, and accountability. The described developments in the legislative

context show the awareness of the involved stakeholders in broadening the foundation for policy decisions. In addition, the more frequently chosen multistakeholder approach has been concretized, and its applicable elements are hammered out to achieve an appropriate regulatory environment.

On the other hand, sovereignty considerations have gained much higher attention in many countries—that is, national control of infrastructure becomes increasingly important. As a consequence, legal fragmentation causes obstacles that jeopardize cross-border data flows (see Braman's chapter 2; Mueller 2017; Voelsen 2019). The politically envisaged fragmentation contradicting the objective of legal interoperability (see Palfrey and Gasser 2012; Weber 2014a) must mainly be seen as a power struggle over the future of national sovereignty in the digital world (Mueller 2017, 5).

These new movements increase the challenges for the legal profession. More interdisciplinary research is imperative, thereby widening the perspective for an overarching perception of Internet governance in all social sciences (for a good example, see Kerr, Musiani, and Pohle 2019). Following Rousseau's social contract concept, a legal framework for Internet governance must establish open communication channels leading to "commons of knowledge" (Weber 2016a, 214). As a consequence, policy makers are now confronted with cross-sectoral concerns simultaneously combining socioeconomic, political, and ethical dilemmas. The capacities of the current institutional patchwork to deliver on transborder challenges have become questionable, not at least because other issues such as climate change or international migration flows determine the political agendas (Radu 2019, 196). Therefore, advocates of Internet governance are called on to regain confidence in their willingness to uphold a normative framework that guarantees that rules for Internet use are designed in a way to be trustworthy in the eyes of civil society.

Notes

1. The most influential and ambitious attempt to describe an interchange paradigm goes back to Parsons (1991), who distinguishes four social subsystems: adaptation, goal attainment, integration, and pattern-maintenance/latent tension management (AGIL).

2. The relevance depends on the circumstances: fundamental principles (for example, human rights) are less likely to be subject to substantive adaptation.

3. The statement is available at http://netmundial.br/netmundial-multistakeholder-statement/.

4. For an overview of the information given by ICANN on accountability, see https://www.icann.org/resources.accountability.

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