

## **FUTURE OF INTERNET GOVERNANCE: MULTILATERALISM, MULTI- STAKEHOLDERISM OR A THIRD PATH?**

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### *Abstract*

*Every resource that has been unearthed over the centuries due to human innovation has become subject to extensive regulations, whether formal or informal to control its consumption. The Internet which is an intangible resource has become the latest to join the fray. Be it the self-imposed rules of the developers and users during the early stages or the governmental and organisational restrictions that followed its proliferation in the recent decades, the Internet has also attracted its fair share of norms and deviations. The increasing nature of circumventions of the governance model in place leads us to question the suitability of the paradigm we have adopted. This paper aims to discuss the current models of Internet governance in place, drawbacks of the current models and derive a feasible model that*

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*learns from and builds upon the inefficiencies of the previous ones, a possible Internet Governance 2.0.*

## I. INTRODUCTION

Internet governance is an issue that has been discussed for numerous reasons and has assumed importance due to the widespread usage of internet worldwide. Internet Engineering Task Force (IETF) and Internet Corporation for Assigned Names and Number (ICANN) are two associations that are most common when it comes to the issue of governance. However, the debate on this issue exists simply because of such institutions and our belief that a resource as important as the internet cannot be left in the hands of such institutions, which continue to be manipulated by global powers to a large extent.

The internet has provided for easy accessibility and connectivity amongst people worldwide. It is essential to understand that it has proved to be a tool that has revolutionized communication and has helped facilitate easy access to information. It has allowed people to transcend physical boundaries in mere blips and done away with the barriers which hampered easy interaction in earlier times.

While the internet has proved to be useful in most areas, it has resulted in a sense of fearlessness and this means that it has caused breach of certain norms that form part of an unwritten cyber code. In order to control this unruly and uncensored activity, there has been growing concern over whether the internet ought to be governed or not. This raises a number of questions; who decides whether such governance is required? Who has the right to create a distinction between what information one can access or not? Which model of internet governance would be most appropriate in the current scenario?

## II. MODELS OF INTERNET GOVERNANCE

There are multiple ways that have been suggested and various models proposed on how to govern the internet. They include cyberspace or spontaneous ordering, which talks about a system that is premised on the idea that the internet is a self-governing realm and cannot be controlled by any government.<sup>1</sup> The widely talked about model, which is based on the code or software that governs most internet activity. In Larry Lessig's words '*the Code is Law*';<sup>2</sup> which basically implies that the internet code is written in a way that it controls the way one reacts to the web. It regulates the behaviour of individuals and the manner of their behaviour.<sup>3</sup>

### A. *Multilateralism and Multi-stakeholderism*

The most widely spoken of systems are those of multilateralism and multi-stakeholderism. The former seeks to enforce a system of governance that involves national control by legal regulation over the virtual world; while the latter aims at including nations as well as transnational organisations in the process of governance. In contrast to the multilateralism mode of governance that emphasizes the role of the state, multi-stakeholderism attempts to grant an equal footing to other organizations including the private sector, civil society, intergovernmental and other international organizations, as defined by the Tunis Agenda set during the 2003–2005 World Summit on the Information Society.<sup>4</sup> The model agreed upon sought to reduce the influence of national governments on the global internet policy and

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<sup>1</sup>Lawrence B. Solum, *Models of Internet Governance* 7(25) ILL. PUB. LAW RES. PAPER (2008) <http://ssrn.com/abstract=1136825>

<sup>2</sup>Lawrence Lessig, *Code is Law: On Liberty in Cyberspace*, HARVARD MAGAZINE, <http://harvardmagazine.com/2000/01/code-is-law-html>.

<sup>3</sup>*Id.*

<sup>4</sup>Tunis Agenda for the Information Society, <http://www.itu.int/ws/isis/docs2/tunis/off/6rev1.html>.

recognize the equally, if not more significant contributions of the technological and academic community to the evolution and proliferation of internet over the years.

*B. Issues within Multi-stakeholderism*

*a) Hierarchy among organizations in the Tunis Agenda*

However, paragraph 35 of the Agenda, which dealt with the management of Internet was counterproductive to the very ideals of the model as it divided the resources among the various stakeholders. The States and intergovernmental organizations received the public policy matters while the private scientific community was to continue with advancements in the resource itself. The civil society was relegated to playing an important role in “community matters”.<sup>5</sup> This artificial division between the political and the practical matters created a hierarchy in the control of the Internet. The hierarchy continued with the status quo by placing the national governments on top with broader policy issues.<sup>6</sup>

*b) Conflict between Policy and Technical Matters*

This allocation of specific jobs to stakeholders creates problems in execution due to the interlinked nature of policy and technical matters. For instance, World Wide Web Consortium’s (W3C) tracking preference working group wanted to develop a Do Not Track or DNT standard which would determine how a website would respond to the ‘Do Not Track’ request generated by users when they

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<sup>5</sup>*Id.*

<sup>6</sup>Musiani, F. & Pohle, J., *NET mundial: only a landmark event if 'Digital Cold War' rhetoric abandoned*, 1(3) INTERNET POLICY REVIEW, <http://policyreview.info/articles/analysis/netmundial-only-landmark-event-if-digital-cold-war-rhetoric-abandoned>.

clicked the I Agree button.<sup>7</sup> While consumer privacy activists pushed for honouring the request, the industry took a diametrically opposite stance as tracking user data was the backbone of their customized advertising scheme. This led to an impasse regarding this matter in the W3C as the technological community is restricted to purely technical matters while the standard involves a policy decision regarding user privacy and data collection by third parties.

c) *Power Play*

Within the broadly grouped government and intergovernmental stakeholders themselves, there exists a power play between the developed and developing nations accentuated by the strong presence of the U.S.A since the inception of the Internet. The American Internet Freedom rhetoric depicts authoritarian states as a threat to Internet freedom and access. In reality, its own censorship and security surveillance are much more extensive and affect citizens who live outside its borders.<sup>8</sup>

C. *Issues within Multilateralism*

Multilateralism too has multiple chinks in its armour as argued by Post and Johnson who stated that the Internet required a separate set of 'online only' rules due to the distinct nature of its architecture that makes it beyond the territorial jurisdiction of any one State.<sup>9</sup> Though a given domain name may be related to the actual physical location of

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<sup>7</sup>Jeremy Malcolm, *Advertisers tracking consumers online: Do Not Track at the W3C*, CONSUMERS INTERNATIONAL, <http://a2knetwork.org/advertisers-tracking-consumers-online-do-not-track-w3c>.

<sup>8</sup>Sunil Abraham, *Who Governs the Internet? Implications for Freedom and National Security*, YOJANA, <http://cis-india.org/internet-governance/blog/yojana-april-2014-sunil-abraham-who-governs-the-internet-implications-for-freedom-and-national-security>.

<sup>9</sup>*The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance*, 121(5) HAR. L. REV. 1387, 1390-91 (2008).

the computers, it does not necessarily reflect the physical location in its domain name. For example, a change in the physical address of the computer may not result a corresponding change in the domain name which may still continue to be linked to the previous location.<sup>10</sup> In addition to this, the extraterritorial nature of information flow on the Internet also restricts States from claiming jurisdictions. It is not possible to regulate each bit of information that may cross a border and even if it were possible, the sheer volume of information flow would provide a sufficient barrier to effective enforcement of the same.<sup>11</sup>

Also, the logical nature of information exchange is independent of physical geographical location of the computers and servers. If an argument is put forth to regulate content online due to the effect they have on citizens of a particular country, it is futile as the same content is available to anyone, anywhere as long as they have an Internet connection. Therefore, the territorial jurisdiction could be claimed by almost any territorial authority. This in effect, leads to no State having control over the Internet.<sup>12</sup>

#### *D. The Preferred Model of Internet Governance*

Despite its drawbacks, the model of multi-stakeholderism has been widely favoured as seen in the recent NETMundial<sup>13</sup> conference for a model of wider inclusion, hosted in Brazil. We see both approaches marked with an ulterior motive to establish supremacy in the control over this resource. Therefore it seems apt that a third path must be taken up which eliminates the possibility of concentration of power in

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<sup>10</sup>David R. Johnson and David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STANFORD LAW REV. 1367, (1996).

<sup>11</sup>*Id.*

<sup>12</sup>JOHNSON AND POST, *supra* note 10.

<sup>13</sup>Leo Kelion, *Future of the internet debated at NetMundial in Brazil*, BBC, <http://www.bbc.com/news/technology-27108869>.

a few hands and is wholly inclusive of the most important stakeholders in this debate; the consumers.

### III. AIM OF MODELS OF INTERNET GOVERNANCE

The most fundamental question that arises is what are these models aiming to accomplish and the answer is simple: the power to define right and wrong. A system of governance is one that regulates activity on the internet based on a pre-established notion of right and wrong. If we conform to any of these models, it could mean that we are complying and accepting with these notions. While it may not be incorrect to do so, it is definitely not entirely right since we are confining ourselves to the boundaries set by such definitions which may be rigid and inflexible. We are allowing organisations or nations to decide what information must be filtered and in what manner. The internet was created with an aim to provide easy access and these norms and regulations defeat the purpose that it was designed for. We, as free individuals are capable of deciding what we require and what we do not. Having our choices governed by anyone is curtailing this fundamental freedom.

#### A. *Issues with Internet Governance*

The most worrying aspect about governance is the means used to regulate and filter the content that we receive. For instance, Deep Packet Inspection (DPI)<sup>14</sup> is a new technology aimed at facilitating better usage of the internet. It tries to introduce the ‘intelligent’ into the ‘dumb’ network.<sup>15</sup> A network is supposed to work on the end to

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<sup>14</sup>Ralf Bendorath & Milton Mueller, *The End of the Net as We Know it? Deep Packet Inspection and Internet Governance* (Aug. 4, 2010), <http://dx.doi.org/10.2139/ssrn.1653259>.

<sup>15</sup>*Id.*

end principle<sup>16</sup> by which, the information has to be delivered across the network without interception at any point and with the assumption that interpretation will occur at the ends of the network. Lawrence Lessig employs a nice metaphor for describing the end-to-end principle

*“Like a daydreaming postal worker, the network simply moves the data and leaves interpretation of the data to the applications at either end. This minimalism in design is intentional. It reflects both a political decision about disabling control and a technological decision about optimal network design.”*<sup>17</sup>

While claiming to be an instrument which would help manage bandwidth better, DPI actually has access to all information and this violates the privacy of all individuals. In fact, any technology deployed to sift through data transfer and internet activity of individuals could be misused. The control of nations or transnational organisations over technology as of now would also imply allowing them in our private spheres and trusting them with personal information. Any system of governance that monitors information, blurs the line between public and private sphere, implying that the right of keeping things private would no longer be ours.

#### IV. SELF-REGULATION

These factors call for self-regulation on the Internet, which may manifest itself in website or ISP introduced guidelines for usage.<sup>18</sup> It

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<sup>16</sup>*Id.*

<sup>17</sup>LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 32 (Basic Books, 1999).

<sup>18</sup>*Supra* note 9 at 1393.

is the basis of the open source approach to Internet Governance. Lessig talks about how users could circumvent existing regulations in open source code merely by rewriting it and thus, frustrating government's attempts at control.<sup>19</sup> Post and Johnson have also put forth the idea of the Internet forming its own legal institutions in lieu of the existing, external ones. In support of this position, they have cited examples of private, non-sovereign imposed and yet effective regulations like those against flaming and mail-bombing in the community.<sup>20</sup> Hence, self-governance is more appropriate to the medium in comparison to the traditional governmental governance.

#### A. *The Need for Self-Regulation*

There is an inherent conflict between the internet's original goal of assuring unfettered global communications and limiting connectivity based on trust relationships.<sup>21</sup> It is our belief that the Internet does not require a centralised authority or institution to govern its functioning or regulate the activity that occurs. In fact, the system of peer-to-peer governance<sup>22</sup> is more suitable to the current situation and would lead to a better organised and more systematic network. The development of tools has to be carried out in a manner that the basic aim is not to decide what information is being exchanged rather, with whom it is being shared. There must be a shift from what matter is transferred, to the people or individuals to who receive this matter.

It does away with the central problem of according an institution to delegate certain matter as harmful and in fact, increases peer accountability. The problems we are faced with today are present because some organisations wish to impose costs on others, who do

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<sup>19</sup>*Id.* at 1395.

<sup>20</sup>*Supra* note 9 at 1392.

<sup>21</sup>David R. Johnson & Susan P. Crawford and John G. Palfrey, *The Accountable Net: Peer Production of Internet Governance*, 9(9) VA. J.L. & TECH. (2004).

<sup>22</sup>*Id.*

not possess the same views on how governance must be carried out. Regulating a group of deviant actors seems more reasonable than creating rules on a global scale which seek to manage the activity of people on the internet. If such rules are formulated, it will result in a conflict of opinions and dissent against the institution involved in the process, since they will have absolute power to determine what constitutes harmful or undesirable information.<sup>23</sup>

It is essential to understand that the end-to-end principle has worked efficiently for certain reasons and continues to do so. This is because it encompasses the function of the internet as it was originally aimed to be. It was supposed to serve as the technology that assisted in the relay of information without any restrictions and with absolute power placed in the hands of the users. It is necessary to revert to that model of governance where, the use of virtual resources is in the hands of its users. It is their right to decide what information to accept and what to discard.

Emphasis must be laid on the fact that our ISP's must accept traffic only from "peers" or trusted sources. This ensures that while we are the ones governing ourselves, we are also entirely accountable. The internet is not like the television, where we have no control over the data that we receive. There are routers and firewalls which can be set in a way to refuse all packets that are not from trusted sources. Any model of governance aiming at regulating activity is likely to be wrong about the real desires of the individuals when compared to the people themselves.<sup>24</sup>

### *B. Tragedy of the Commons*

The very design of the Internet architecture provided 'commons' (the end-to-end network design or the internet code) for its subsequent

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<sup>23</sup>*Supra* note 9 at 1392.

<sup>24</sup>*Id.*

development and innovation through a decentralized process. This commons is now constrained by restrictions imposed by various external organizations as a part of their individual agendas. How do we prevent this seemingly imminent tragedy of the Commons<sup>25</sup> due to the counteractive nature of these restrictions on the Internet?

The most crucial point that we have understood is that in order to find a solution to the tragedy of commons, is to acknowledge that the most important stakeholders are the people or the global population. Thus, we cannot simply assume that any of the models that have been used till date are valid until we assess them critically keeping in mind the masses.

a) *Actor Centered Institutionalism*

In order to analyse the policies that are currently in use and can be improved, the approach that should be taken is that of 'actor centred institutionalism' (ACI).<sup>26</sup> It has its roots in rational choice institutionalism; accepting the fact that the decisions to be taken in this sphere cannot be mathematical as in the case of the game theory, but must be guided on interactions and orientations of the various actors involved.

b) *Game Theory*

Game theory has been used to explain ACI, emphasising the need to understand the role of actors and their mutual interactions as central to the process of deciding upon policies to govern the internet.<sup>27</sup> For instance, as seen in pure coordination games i.e. initiating coordination amongst a large group of people, self-governing

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<sup>25</sup>Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 3859 (1968).

<sup>26</sup>FRITZ WILHELM SCHARPF, GAMES REAL ACTORS PLAY: ACTOR CENTRED INSTITUTIONALISM IN POLICY RESEARCH (Westview Press, 1997).

<sup>27</sup>BENDRATH, *supra* note 14.

arrangement ensure efficiency. On the other hand, games involving harm caused due to free riding need binding mechanisms for collective action. Therefore, it can be concluded that different aims need different approaches or different “modes of interaction”.<sup>28</sup>

## V. CONCLUSION

The internet was a common resource which was meant to be used by common people in order to suit their common requirements. The onset of the struggle to control has somehow led to the tragedy of commons and order needs to be restored by assessing the situation impartially. This requires initiation of coordination as well as a binding mechanism, both of which can be achieved through a model that incorporates peer governance and self-regulation.

Our position can be best summed up in the words of Judge Easterbrook who said

*“If you don't know what is best, let people make their own arrangements.”*<sup>29</sup>

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<sup>28</sup>*Id.*

<sup>29</sup>Frank H. Easterbrook, *Cyberspace and the Law of The Horse*, 2 U. CHI. LEGAL F. 207 (1996).