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Global Constitution-Building

Essay by Herbert Burkert, January 23, 2009

> *After an unequivocal experience of the inefficiency of the subsisting system of Internet regulation, you are called upon to deliberate on a new Constitution for the Internet. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the **INTERNET**, the safety and the welfare of the parts of which it is composed, the fate of a universal network in many respects the most interesting phenomenon of our times ...*

Only a foreigner, it seems, may be forgiven for bending the first sentences of the Federalist Papers, a set of documents so dear to the political culture of a nation and doing so with no other excuse but to find a rhetorical re-entry into a somewhat ailing debate on Internet rule-making. But why did those setting the framework for this debate evoke these historically loaded documents in the first place? Why this reference to the political history of just one particular country at a moment when this country seems no longer to have the largest amount of Internet users? Why such a debate anyway, and why now - again? What should be the issues? And what could be the desired outcome?

The historic reference may have been chosen for the purely heuristic reason of eliciting responses to the political significance of this current moment by recalling a significant moment in the history of political thought. And the reference to the history of the United States of America may be justified because of the role this country has played in the genesis of the Internet. Some may even hold such a reference to be justified because of an intellectual climate which, they say, this country has provided (while others maintain it is still providing and yet others see it providing soon again) in which people from different cultural backgrounds could experience the limitations of their own prejudices and the opportunities of free exchange while at the same time being given a lingua franca facilitating their exchanges and leaving them free to maintain their identity— all this being experiences and associations which we still sense today whenever we use the Internet even if only for the most mundane purposes.

This somewhat lengthy attempt at justification may, of course, also be read as proof that the "American reference" in all things relating to the Internet should no longer be taken for granted. Even if one of the key organizations of Internet infrastructure, ICANN, is still operating on the basis of a contract with US authorities, the focus of Internet policy and rule-making has been shifting significantly. This is no longer a debate mainly by, among and about US Americans, exclusively within their set of cultural references. Furthermore, this is no longer a debate about the existence of dominance, and how to deal with dominance. This is a debate with global participants about the present and the future of global communication as such.

The Internet is the "space" where we all experience the profound moment between when we have spoken and when we are heard, between the moment we hear and the moment when we set out to answer. The Internet is *the* communicative experience of our time, it is, if we want to continue to use the metaphor of space, *the* Global Communication Space in which we are offered the opportunity to constitute our individual and collective identities - and all of us. We may stay with this metaphor of space, we may take a more functional approach and see the

Internet as a communication tool, or, we may perceive it even as a Public Good, since its global reach gives it its special meaning.

However, it is precisely this globality which is at stake. The "American reference" is not so smoothly being replaced by a new higher "federalist" political reference to the Global. Rather what we see are multiple references, within multiple territorial boundaries— may they be geographical, political or boundaries of belief and culture— which have become increasingly rigid in the last decade. Those seeking to move in the global communication space experience collision, conflicts with habits and values and rules, set for them by what they had thought to be traditional agencies of power slowly losing their relevance. This experience of collision simultaneously meets with increasing doubts about the technical and organizational sustainability and scalability of the technical infrastructure of the Internet itself. A window of opportunity when it seemed politically possible to finally match global technical capabilities with the human need for communication seems to be closing, ironically at a moment when we have just come to understand our natural environment and the health of our bodies to be truly global issues.

Still this moment gives us two options: We can rely on the traditional way of constitution-building, drawing from our past experiences of how to construct national or regional political institutions, procedures and rules. We can discuss and eventually attempt to reset the powers of technical maintenance and scaling, the rules of content and behavior, the powers of exclusion and inclusion. We can look for new—and realign old— sources of legitimacy, and we can construct a new system of checks and balances for such powers. We might, however, be forced to realize that this is not about building just a new box in which we will eventually place and protect a more and more fragile Internet. While we set out to design such a box, the Internet is already being boxed in. While we may find new ways for making new rules, rule-making is happening all the time around us. Since its very beginnings the Internet has seen its communicative potentials domesticated and its potential reach contained.

The other option seems to be to intervene now in the existing political processes and governance structures whenever and wherever the global understanding of the Internet is at stake, defending our communication habitat, just as we are defending our natural habitat by intervening in traditional political processes. To arrive at an Internet living up to its global potential we may have to make direct use of *all* those institutions and processes which are already shaping the Internet.

We might still call this process constitution-building.

But within this option such a task is far more complex. It builds a constitution by intervening at all moments and on all levels in a multi-player, multi-issue and multi-fora environment. Such an approach, with all its decentralized activities, would still require its own legitimacy, its specific focus, as well as subtle organization and synchronization. Much of that might be generated simply from the interaction of the many, harnessing their intellectual and social potential. Also, new bodies might evolve creating new fora, free of at least some of the negative associations which we link with many current global institutions. Given the necessary determination, we could also rely on institutions and processes of traditional legitimacy, on our existing bodies of local, regional and global policy-making and insist on linking them with carriers of acquired legitimacy such as non-governmental organizations. The essential will be to focus - again similar to the environmental debate - on the common and express goal of maintaining and enhancing the Global Communication Space, its infrastructure and its accessibility.

Whatever option is taken, it can build on the experiences of such "Continental Congresses" as the ones in e.g.Marina del Rey, or Geneva, or Tunis, or Athens. And it can take inventories from the environmental debates as long as we keep in mind that all our constitutional efforts are in the end about our current and future will to share and to partake in other peoples' joys and

sorrows in the most direct way currently possible over distances. This is about nothing less than the way in which we intend to deal with hate and violence—as individuals, communities, as societies—within a global framework, and what we are willing to offer, to share and to learn for this aim.

Herbert Burkert *is Professor of Public Law, Information and Communication Law, and President of the* Research Center for Information Law at the University of St. Gallen*, Switzerland. He is also an International Fellow of the* Information Society Project *at Yale Law School and a Senior Research Fellow at the* Fraunhofer Institute for Intelligent Analysis and Information Systems *in St. Augustin, Germany. He has authored and edited numerous publications on information law, technology, and data protection.*

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