

# Who governs the Internet? Implications for freedom and national security

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**T**HE SECOND half of last year has been quite momentous for Internet governance thanks to Edward Snowden. German Chancellor Angela Merkel and Brazilian President Dilma Rousseff became aware that they were targets of US surveillance for economic not security reasons. They protested loudly. The role of the US perceived by some as the benevolent dictator or primary steward of the Internet because of history, technology, topology and commerce came under scrutiny again. The I star bodies also known as the technical community - Internet Corporation for Assigned Names and Numbers (ICANN); five Regional Internet Registries (RIRs) ie. African, American, Asia-Pacific, European and Latin American; two standard setting organisations - World Wide Web Consortium (W3C) & Internet Engineering Task Force (IETF); the Internet Architecture Board (IAB); and Internet Society (ISOC) responded by issuing the Montevideo Statement on the 7th of October. The statement expressed “strong concern over the undermining of the trust and confidence of Internet users globally due to recent revelations of pervasive monitoring and surveillance.” It called for “accelerating the globalization of ICANN and IANA functions...” - did

this mean that the I star bodies were finally willing to end the special role that US played in Internet governance? However, that dramatic shift in position was followed with the following qualifier “...towards an environment in which all stakeholders, including all governments, participate on an equal footing.” Clearly indicating that for the I star bodies multistakeholderism was non-negotiable. Two days later President Rousseff after a meeting with Fadi Chehadé, announced on Twitter that Brazil would host “an international summit of governments, industry, civil society and academia.” The meeting has now been dubbed Net Mundial and 188 proposals for “principles” or “roadmaps for the further evolution of the Internet governance ecosystem” have been submitted for discussion in São Paulo on the 23rd and 24th of April. The meeting will definitely be an important milestone for multilateral and multi-stakeholder mechanisms in the ecosystem.

It has been more than a decade since this debate between multilateralism and multi-stakeholderism has ignited. Multistakeholderism is a form of governance that seeks to ensure that every stakeholder is guaranteed a seat at the policy formulation table (either in consultative capacity or in decision making capacity depending who you

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ask). The Tunis Agenda, which was the end result of the 2003-05 WSIS upheld the multistakeholder mode. The 2003–2005 World Summit on the Information Society process was seen by those favouring the status quo at that time as the first attempt by the UN bodies or multilateralism - to takeover the Internet. However the end result ie. Tunis Agenda clarified and reaffirmed multi-stakeholderism as the way forward even though multilateral governance mechanisms were also accepted as a valid component of Internet governance. The list of stakeholders included states, the private sector, civil society, intergovernmental organisations, international standards organisations and the “academic and technical communities within those stakeholder groups mentioned” above. The Tunis Agenda also constituted the Internet Governance Forum (IGF) and the process of Enhanced Cooperation.

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The IGF was defined in detail with a twelve point mandate including to “identify emerging issues, bring them to the attention of the relevant bodies and the general public, and, where appropriate, make recommendations.” In brief it was to be a learning Forum, a talk shop and a venue for developing soft law not international treaties. Enhanced Cooperation was defined as “to enable governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the Internet, but not in the day-to-day technical and operational matters, that do not impact on international public policy issues” – and to this day, efforts are on to define it more clearly.

Seven years later, during the World Conference on Telecommunication in Dubai, the status quoists dubbed it another attempt by the UN to take over the Internet. Even those non-American civil society actors who were uncomfortable with US dominance were willing to settle for the status quo because they were convinced that US court would uphold human rights online more robustly than most other countries. In fact, the US administration had laid a good foundation for the demonization of the UN and other nations states that preferred an international regime. “Internet freedom” was State Department doctrine under the leadership of Hillary Clinton. As per her rhetoric – there were good states, bad states and swing states. The US, UK and some Scandinavian countries were the defenders of freedom. China, Russia and Saudi Arabia were examples of authoritarian states that were balkanizing the Internet. And India, Brazil and Indonesia were examples of swing states – in other words, they could go either way – join the good side or the dark side.

But Internet freedom rhetoric was deeply flawed. The US censorship regime is really no better than China’s. China censors political speech – US censors access to knowledge thanks to the intellectual property (IP) rights-holder lobby that has tremendous influence on the Hill. Statistics of television viewership across channels around the world will tell us how the majority privileges cultural speech over political speech on any average day. The great firewall of China only affects its citizens – netizens from other jurisdictions are not impacted by Chinese censorship. On the other hand, the US acts of censorship are usually near global in impact. This is because the censorship regime is not predominantly based on blocking or filtering but by placing pressure on identification, technology and financial intermediaries thereby forcing their targets offline. When it comes to surveillance, one could argue that the US is worse than China. Again,

as was the case with censorship, China only conducts pervasive blanket surveillance upon its citizens – unlike US surveillance, which not only affects its citizens but targets every single user of the Internet through a multi-layered approach with an accompanying acronym soup of programmes and initiatives that include malware, trojans, software vulnerabilities, back doors in encryption standards, over the top service providers, telcos, ISPs, national backbone infrastructure and submarine fibre optic cables. Security guru Bruce Schneier tells us that “there is no security without privacy.

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### **The Opportunity for India**

Unlike the America with its straitjacketed IP regime, India believes that access to knowledge is a precondition for freedom of speech and expression. As global intellectual property policy or *access to knowledge* policy is concerned, India is considered a leader both

when it comes to domestic policy and international policy development at the World Intellectual Property Organisation. From the 70s our policy-makers have defended the right to health in the form of access to medicines. More recently, India played a critical role in securing the Marrakesh Treaty for Visually Impaired Persons in June 2013 which introduces a user right [also referred to as an exception, flexibility or limitation] which allows the visually impaired to convert books to accessible formats without paying the copyright-holder if an accessible version has not been made available. The Marrakesh Treaty is disability specific [only for the visually impaired] and works specific [only for copyright]. This is the first instance of India successfully exporting policy best practices. India's exception for the disabled in the Copyright Act unlike the Marrakesh Treaty, however, is both disability-

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neutral and works-neutral. Given that the Internet is critical to the successful implementation of the Treaty ie. cross border sharing of works that have been made accessible to disabled persons in one country with the global community, it is perhaps time for India to broaden its influence into the sphere of Internet governance and the governance of information societies more broadly.

Post-Snowden, the so called swing states occupy the higher moral ground. It is time for these states to capitalize on this moment using strong political

will. Instead of just being a friendly jurisdiction from the perspective of access to medicine, it is time for India to also be the enabling jurisdiction for access to knowledge more broadly. We could use patent pools and compulsory licensing to provide affordable and innovative digital hardware [especially mobile phones] to the developing world. This would ensure that rights-holders, innovators, manufactures, consumers and government would all benefit from India going beyond being the pharmacy of the world to becoming the electronics store of the world. We could explore flat-fee licensing models like a broadband copyright cess or levy to ensure that users get content [text, images, video, audio, games and software] at affordable rates and rights-holders get some royalty from all Internet users in India. This will go a long way in undermining the copyright enforcement based censorship regime that has been established by the US. When it comes to privacy, we could enact a world-class privacy law and establish an independent, autonomous and proactive privacy commissioner who will keep both private and state actors on a short lease. Then we need a scientific, targeted surveillance regime that is in compliance with human rights principles. This will make India simultaneously an IP and privacy haven and thereby attract huge investment from the private sector, and also earn the goodwill of global civil society and independent media. Given that privacy is a precondition for security, this will also make India very secure from a cyber security perspective. Of course this is a fanciful pipe dream given our current circumstances but is definitely a possible future for us as a nation to pursue.

### **What is the Scope of Internet Governance?**

Part of the tension between multi-stakeholderism and multilateralism is that there is no single, universally accepted definition of Internet governance. The conservative definitions of Internet Governance

limits it to management of critical Internet resources, including the domain name system, IP addresses and root servers – in other words, the ICANN, IANA functions, regional registries and other I\* bodies. This is where US dominance has historically been most explicit. This is also where the multi-stakeholder model has clearly delivered so far and therefore we must be most careful about dismantling existing governance arrangements. There are very broadly four approaches for reducing US dominance here – a) globalization [giving other nation-states a role equal to the US within the existing multi-stakeholder paradigm], b) internationalization [bring ICANN, IANA functions, registries and I\* bodies under UN control or oversight],

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c) eliminating the role for nation states in the IANA functions and d) introducing competitors for names and numbers management. Regardless of the final solution, it is clear that those that control domain names and allocate IP addresses will be able to impact the freedom of speech and expression. The impact on the national security of India is very limited given that there are three root servers within national borders and it would be near impossible for the US to shut down the Internet in India.

For a more expansive definition – The Working Group on Internet Governance report has four categories for public policy issues that are relevant to Internet governance:

“(a) Issues relating to infrastructure and the management of critical Internet

resources, including administration of the domain name system and Internet protocol addresses (IP addresses), administration of the root server system, technical standards, peering and interconnection, telecommunications infrastructure, including innovative and convergent technologies, as well as multilingualization. These issues are matters of direct relevance to Internet governance and fall within the ambit of existing organizations with responsibility for these matters;

- (b) Issues relating to the use of the Internet, including spam, network security and cybercrime. While these issues are directly related to Internet governance, the nature of global cooperation required is not well defined;
- (c) Issues that are relevant to the Internet but have an impact much wider than the Internet and for which existing organizations are responsible, such as intellectual property rights (IPRs) or international trade. ....;
- (d) Issues relating to the developmental aspects of Internet governance, in particular capacity-building in developing countries.”

Some of these categories are addressed via state regulation that has cascaded from multilateral bodies that are associated with the United Nations such as the World Intellectual Property Organisation for “intellectual property rights” and the International Telecommunication Union for “telecommunications infrastructure”. Other policy issues such as “cyber crime” are currently addressed via plurilateral instruments – for example the Budapest

Convention on Cybercrime – and bilateral arrangements like Mutual Legal Assistance Treaties. “Spam” is currently being handled through self-regulatory efforts by the private sector such as Messaging, Malware and Mobile Anti-Abuse Working Group. Other areas where there is insufficient international or global cooperation include “peering and interconnection” - the private arrangements that exist are confidential and it is unclear whether the public interest is being adequately protected.

### So who Really Governs the Internet?

So in conclusion, who governs the Internet is not really a useful question. This is because nobody governs the Internet per se. The Internet is a diffuse collection of standards, technologies and actors and dramatically different across layers, geographies and services. Different Internet actors – the government, the private sector, civil society and the technical and academic community are already regulated using a multiplicity of fora and governance regimes – self regulation, coregulation and state regulation. Is more regulation always the right answer? Do we need to choose between multilateralism and multi-stakeholderism? Do we need stable definitions to process? Do we need different version of multi-stakeholderism for different areas of governance for ex. standards vs. names and numbers? Ideally no, no, no and yes. In my view an appropriate global governance system will be decentralized, diverse or plural in nature yet interoperable, will have both multilateral and multistakeholder institutions and mechanisms and will

be as interested in deregulation for the public interest as it is in regulation for the public interest.

### Readings

- 1 Montevideo Statement on the Future of Internet Cooperation <https://www.icann.org/en/news/announcements/announcement-07oct13-en.htm>
- 2 Brazil to host global internet summit in ongoing fight against NSA surveillance <http://rt.com/news/brazil-internet-summit-fight-nsa-006/>
- 3 Tunis Agenda For The Information Society <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>
- 4 Roadmap for globalizing IANA: Four principles and a proposal for reform: a submission to the Global Multistakeholder Meeting on the Future of Internet Governance by Milton Mueller and Brenden Kuerbis March 3rd 2014 See: [http://www.internetgovernance.org/wordpress/wp-content/uploads/ICANN\\_reform\\_globalizing\\_IANA\\_final.pdf](http://www.internetgovernance.org/wordpress/wp-content/uploads/ICANN_reform_globalizing_IANA_final.pdf)
- 5 Mumbai (I Root), Delhi (K Root) and Chennai (F Root). See: <http://nixi.in/en/component/content/article/36-other-activities-/77-root-servers>
- 6 Report of the Working Group on Internet Governance to the President of the Preparatory Committee of the World Summit on the Information Society, Ambassador Janis Karklins, and the WSIS Secretary-General, Mr Yoshio Utsumi. Dated: 14 July 2005 See: <http://www.wgig.org/WGIG-Report.html>
- 7 *Messaging, Malware and Mobile Anti-Abuse Working Group website* See: <http://www.maawg.org/> □

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### Condolences

Yojana condoles the demise of its founding Editor Khushwant Singh. An author of repute, illustrious editor and a popular columnist, he is considered a doyen of Indian journalism. 'Yojana, like the plans themselves will endeavour to embrace the entire field of development, economic, educational, social and cultural'. Writing in the inaugural issue of Yojana in January 1957, he had set the tone of the magazine. His words of wisdom still inspire us.

