

Thoughts on Best Practices for Multistakeholder Participation Mechanisms

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Abstract

In order for something to be considered as possibly a “best practice”, it must first be an **acceptable practice**. Anything that is inconsistent with democracy is certainly not an acceptable practice in any area of governance.

The outcome documents of both the recent WSIS+10 High Level Event² and NetMundial³ emphasize both the need for multi-stakeholder Internet Governance (IG) processes and also that these must be democratic.

We seek here to draw attention to some fundamental principles of democracy and their implications for Internet governance: the primacy of democracy implies that certain criteria must be realized in the use of multi-stakeholder processes in Internet governance.

In particular, multi-stakeholder processes must be embedded in a context of democratic decision-making in order to guard against certain common abuses in multi-stakeholder processes. The output documents of multi-stakeholder processes should be treated as having a similar level of legitimacy as industry self-regulation which can be accepted as long as they are judged to be adequate by continual processes of democratic review.

In that context, we offer suggestions on rules of procedure for conducting open multi-stakeholder processes.

The primacy of democracy

Governance arrangements which are not at least formally “democratic” have gone out of fashion in virtually all countries of the world. This is for very good reasons since non-democratic forms of government are seen as lacking legitimacy and as performing worse than democratic governments in facilitating the emergence of a society with well-functioning socio-economic systems.

In fact the principle of democratic governance has, quite appropriately, been accepted as an internationally recognized human right, see below.

Therefore no governance mechanism that is inconsistent with democracy (as outlined below) can be considered acceptable, just as no governance mechanism can be accepted which violates

¹ Both authors are members of the Just Net Coalition, see <http://JustNetCoalition.org> . While this paper is not an output of the Just Net Coalition, portions of it may appear in a future output of the Just Net Coalition.

² Event website: <http://www.itu.int/wsis/implementation/2014/forum/>
Outcome doc: <http://www.itu.int/wsis/implementation/2014/forum/inc/doc/outcome/362828V2E.pdf>

JNC response: <http://justnetcoalition.org/jnc-response-wsis10-hle>

³ Event website: <http://netmundial.br/>
Outcome doc: <http://netmundial.br/wp-content/uploads/2014/04/NETmundial-multi-stakeholder-Document.pdf>

JNC response: <http://justnetcoalition.org/jnc-response-netmundial-outcome-document>

human rights in any other way. In order for something to be considered as possibly a “best practice”, it must first be an ***acceptable practice*** in this sense.

Unfortunately in practice democracy can never perfectly defend against attempts by various interests and powerful groups to gain undue influence in decision-making processes; at times such groups prevent decisions from being made. One way to reduce the threat to the public interest that arises from the influence of special interest groups is to recognize that accountability and transparency are fundamental and essential elements of democratic governance processes.

Among the fundamental principles of democracy are:

- (1) **everyone can in practice enjoy their human rights⁴**, and
- (2) **decision-making by the people** (either directly or through freely elected representatives)⁵ on the basis of the principle “every adult is entitled to one vote.”
- (3) transparency and accountability of decision-making processes
- (4) freedom of expression and of information
- (5) multilingualism, participation and inclusiveness

Transparency and Accountability

Transparency and accountability are tools that can and must be used to implement democracy effectively.

Freedom of Expression

Freedom of expression, and its underpinning of freedom of the media and of information, is critically important as an enabler of, and necessary condition for, democracy. In its absence no genuinely democratic public discourse can take place.

However freedom of expression should not be confused with democracy itself. Freedom of expression is a necessary condition but not a guarantee of democratic governance. For example, regulatory capture⁶ can happen even in societies which have freedom of expression. In such societies, critics are free to speak out, but that alone does not guarantee that those who are in power will pay attention and take corrective action.

⁴ Clearly this is possible only where effective mechanisms are in place to enforce human rights, even those of a small minority or an individual; and when the concerns carry sufficient weight in the public discourse that processes of direct or parliamentary democracy can be relied upon to correct legal provisions that violate human rights. As the NetMundial outcome document <http://netmundial.br/netmundial-multistakeholder-statement/> notes: “Governments have primary, legal and political accountability for the protection of human rights”.

⁵ Article 21 of the Universal Declaration of Human Rights (UDHR) and Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provide that everyone has the right to take part in the conduct of public affairs (and thus in public policy decisions) directly or through freely chosen representatives. Stakeholder-based processes should help widen the participatory base for engaging with such decision making processes, but such a model cannot give corporations rights in policy-making equal to those of people, because that would violate the principles of democracy outlined in the UDHR and ICCPR.

⁶ *Regulatory capture* is a situation where the decisions of a governmental regulatory body are guided primarily by the interests of some of the entities that it is supposed to regulate, rather than by genuinely seeking the public interest and/or aiming to implement the decisions of a truly democratic body such as a parliament.

Multilingualism, Participation and Inclusiveness

The international discourse regarding Internet governance has so far been primarily taking place in a single language, English. This situation is not only undemocratic, it even reflects a form of imperialism. Going forward, full participation must be made possible in all six UN languages in all public policy development processes of international scope.

It cannot be assumed that all stakeholders will follow in detail all those public policy processes whose outcomes are potentially of significant importance to them. Public consultations must therefore be held to ensure that the democratic decision-making processes are as well-informed as possible. The principle of *inclusiveness* is of key importance for such consultation processes. Decisions taken in the absence of consultations that are fully inclusive of all relevant stakeholders and their viewpoints will inevitably be based on incomplete information and as such will be distorted and undemocratic. Yet it takes considerable effort to implement such truly inclusive consultations.

Genuinely democratic governance can be achieved and maintained only by positing its democratic nature a primary goal and by continuously monitoring it.

The challenge of systemic global concerns

At the national level (and lower levels), the most common form of democratic governance is parliaments consisting of freely elected representatives of the people. It is challenging to map that governance mechanism to Internet governance in general, because Internet governance has the following properties:

- Some aspects of Internet governance are **global**: While there are certainly national and regional differences, the evolution and use of the Internet is fundamentally a global matter and thus some aspects of its governance will equally need to be global.
- The challenges of Internet governance are **systemic** problems, in which ill-considered governance decisions can easily have profound negative consequences, including consequences that affect human rights.
- There is significant **tension** between on one hand the commercial interests of private companies which own infrastructure and provide services, and on the other hand the public interest perspective on the Internet as a whole as a common good of humanity.

Multilateral Agreements

Traditionally, global public policy concerns have been addressed primarily by multilateral negotiation and intergovernmental institutions such as those of the UN system. It is not obvious that these mechanisms would be adequate for all aspects of Internet governance. In particular it is difficult to see how traditional multilateral policy processes alone could provide sufficiently flexible and nimble governance mechanisms for the very fast changing Internet environment. That said, some aspects of Internet governance are certainly sufficiently stable, when formulated in a reasonably technology-neutral manner, to be addressed by international treaties. This includes issues concerning human rights (including privacy and mass surveillance) and peace and security. Unfortunately recent and current treaty negotiations are often unduly influenced by the interests of the US and its private sector, resulting in undue influence of the US over the Internet⁷. We consider this to be undemocratic and unacceptable.

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See for example http://www.senat.fr/rap/r13-696-1/r13-696-1_mono.html

The decision-making processes of Internet governance concern not only decisions to adopt legally enforceable measures and soft-law instruments. A decision *not to pursue* legally enforceable measures, and/or *not to have* a soft-law itself is a public policy issue. Indeed, the failure to legislate, in particular at the international level, can have profound unintended negative consequences. For example, private companies may seek to increase their profits through tax optimisation schemes⁸ that would be inappropriate at the national level, or they may forum-shop to avoid national rules and regulations that protect consumers and/or workers. Profit maximization is appropriate only if it takes place in the context of a democratic governance framework through which appropriate boundaries for commercial activities are established: those boundaries must protect the public interest, for example by ensuring fair competition.

Industry self-regulation may be sufficient in some contexts, for instance if the self-regulation process is broadly consultative and inclusive to the point that it is not dominated by industry insiders such as technical experts. But there must, in addition, be a carefully designed and democratic process that continually reviews and determines whether the self-regulation is sufficient. Furthermore, if self-regulation turns out to be insufficient or inadequate, the practical possibility and political mechanisms must be in place to design and institute, through an explicitly democratic process, an effective, legally enforceable regulatory regime.

Democratic multi-stakeholderism

“Democratic multi-stakeholder processes for Internet governance”⁹ must involve democratic processes with clear guidelines for multi-stakeholder participation in their respective roles and responsibilities, and with the understanding that the role of the civil society, especially with regard to policy development, must be more clearly stated as contributing to deepening democracy¹⁰ and bringing in perspectives of otherwise under-represented and marginalised groups.

Any open multi-stakeholder processes must be embedded in a democratic framework by which the potential for economically powerful stakeholders to gain undue influence is balanced by a powerful disincentive for such actions. For instance, “stacking”¹¹ of the multi-stakeholder process must, if it is exposed, lead to legal repercussions for the perpetrators, as well as firm actions to return the process to full democratic principles. Yet even then, economic influence is likely to exact a toll on the processes. An alternative to attempting to perfect a system that is entirely immune to undue influence of elite interests is to use a practice of *consensus development* that is weaker than *unanimous consensus*, defined by the absence of any objection at all. Consensus development can include a more subtle and nuanced system for receiving, debating and agreeing written and verbal comments on a proposed consensus and compromise decisions.

Unlike in the equal-footing multi-stakeholder model (which is anti-democratic since it in effect gives veto rights on public policy matters to economically powerful stakeholders), in this democratic multi-stakeholder model substantive outcomes of multi-stakeholder consensus processes – or their absence – would neither be treated as definitive decisions nor in effect rubber-stamped by the formal processes. The outcomes of the multi-stakeholder process would be regarded as having no greater legitimacy than the outcome of an industry self-regulation process.

⁸ See for example http://www.hldataprotection.com/files/2013/06/Taxation_Digital_Economy.pdf

⁹ Democratic multi-stakeholder processes are a demand of the NetMundial outcome document, see footnote 1.

¹⁰ http://hdr.undp.org/sites/default/files/reports/263/hdr_2002_en_complete.pdf

¹¹ “Stacking” of a committee or other group means coordinated efforts to introduce many people with similar views.

Indeed industry self-regulatory processes can be valuable, because industry can contribute specific knowledge and expertise. However, any such self-regulatory processes must be continually monitored by formal democratic processes and, if found wanting, replaced by decisions taken in those formal democratic processes. Further, such self-regulatory processes, and open multi-stakeholder processes, will benefit by facilitating the effective participation of people with developing-country perspectives, since such people are not aligned to the interests of global corporations.

Despite the potential for great improvement, it is not possible to ensure that an open multi-stakeholder process is absolutely robust against the immense influence of economically powerful stakeholders. Economically powerful stakeholders can fund an almost unlimited number of participants to advocate viewpoints aligned with their interests. For example, some companies have a global network of dependent “partner” companies that might see it in their best interest to get involved. Other economically powerful stakeholders create ‘astro-turf’ organisations¹², or they seek to influence the perspectives of a significant number of civil society groups and/or influential individuals by financing some of their activities.

Thus outputs of open multi-stakeholder processes cannot be assumed to have significant or sufficient legitimacy.

Nevertheless, even if such “stacking” of multi-stakeholder groups is in practice impossible to prevent entirely, measures can be taken to make it more difficult to implement in practice, and to increase the political and legal repercussions when it is exposed.

Open multi-stakeholder processes

As described above, multi-stakeholder processes must be embedded in a democratic decision-making context.

Open multi-stakeholder discussions may result in a rich variety of views, but it can prove difficult to reach unanimity when sensitive topics are discussed, at least in the time available for discussions. Recognizing this, we propose that open multi-stakeholder discussions adopt the following principles:

1. Participants must register in advance and indicate their affiliation and contact information.
2. Governments, private companies, and academic and research institutions name their representatives through their established internal processes. Representatives of civil society organizations should be selected through open, democratic, and transparent processes, which should be based on appropriately inclusive, publicly known, well defined and accountable mechanisms.
3. Organizations should make publicly available information on their budget and funding sources.
4. The list of participants of each meeting shall be made publicly available on the web.
5. If possible, meetings should be publicly webcast. In any case, reports and other outputs of the meetings shall be made publicly available on the web.
6. Written inputs shall be encouraged and all inputs shall be made publicly available on the web. Deadlines for written inputs shall be published well in advance.

¹² The term “astro-turf organisation” is a pun on the notion of grass-roots organisations. “Astro-turf” is an imitation of grass. An “astro-turf organisation” pretends to be a grass-roots organisation, and implicitly claims the corresponding legitimacy of the viewpoints that it expresses, but in actual reality it acts as an agent of a powerful stakeholder that funds it.

7. The leadership team shall be proposed by the organizer of the discussion and formally approved by consensus (see below) by the first meeting.

8. Each meeting shall adopt its agenda by consensus (see below).

9. The meeting may decide, by consensus (see below), to stop, postpone, or adjourn discussions of any particular item or topic.

10. In principle, nothing is approved until everything is approved. The meeting may decide otherwise by consensus (see below).

11. When the leadership team is of the view that sufficient discussions have taken place, it shall prepare a draft compromise text and present that text for approval by the meeting. Ample time shall be allowed for input of written and verbal comments on the proposed compromise text.

12. Prior to approval of any text, a formal call shall be made to allow for dissenting statements. If no dissenting statements are made, the text shall be considered to have been approved by unanimity. Alternatively, a text may be approved by consensus (see below).

The consensus process¹³ involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments.

During a consensus process, a series of proposals is made, some of which are modified by subsequent proposals. All of these proposals as well as the objections and the justifications which are given for the objections shall be recorded in the minutes of the consensus process. This can be done by reference to documents published on a web site. All objections shall be supported by corresponding justifications. When (for example in the context of in-person meetings) proposals or objections are stated orally, the speakers should contribute to facilitating the timely compilation of the meeting's minutes by providing written versions of their interventions. That is less important if the meeting is webcast and transcribed.

13. If there is no consensus (see below), the leadership team will reflect the differing points of view in the draft text and/or the report of the meeting. A summary of the differing points of view will be reflected without attribution (that is, in the form "some took this view, some took that view"). Any participant may request that its particular view be reflected exactly; in this case the particular view will be attributed.

14. Consensus is defined¹⁴ as general agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests. Consensus need not imply unanimity. More than 15% would normally be considered to be an important part.

15. Subsequent to approval by consensus, any participant may express a dissenting view and request that it be reflected in the report of the meeting, or as an annex to the approved text. Such dissents will be attributed.

16. The leadership team will prepare its report of each meeting. These reports will be published on the web and time will be allowed for participants to submit written comments on the report. Such comments will be annexed to the report and will be attributed.

¹³ This sentence is taken from the definition of consensus found in the ISO/IEC Directives, Part I.

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