

## (Draft) Thesis paper on the Public Interest\*

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The Internet has become an important part of our global public sphere. Internet provides access to a wealth of information and knowledge, and the possibility to participate, create, share and communicate. This public space made up of internet infrastructures is increasingly threatened from two sides; by the centralization and commercialization through the dominant positions held by giant telecom and Internet companies, as well as by an increasing trend in state regulation and censorship of the net. This poses important questions about how we choose to organize and shape our digital societies, and how Internet governance models can be developed and implemented to ensure fair and democratic participation.

When it comes to the future of the Internet, a key discussion is one of infrastructures; who owns, runs and controls them. The question of regulation, and who oversees the regulators, is made complicated by the transnational nature of the net. The debates around net neutrality, infrastructure neutrality and Internet monopolies reflect the important choices that are to be made. Stakeholders involved need to formulate a comprehensive vision on the internet that addresses the protection of civil liberties such as free speech and privacy, but also the growing commercialization of our digital public spaces and the commodification of personal data with the effect of the market encroaching on all aspects of our daily lives. Only then can it make relevant interventions regarding the Internet and its governance.

In ICANN's regular consultations and policy developments (PD) the notion of the Public Interest is often contested by stakeholder groups and constituencies arguing that there is no common understanding or clear definition of the Public Interest when occasionally referred to. Some people even neglect the relevance of this term or pretend some ideological connotation or bias – thus contesting its significance for decision making by the ICANN Board.

However, various documents refer to it like the NETmundial Multistakeholder Statement by arguing "the Internet is a global resource which should be managed in the public interest". Section 2 of ICANN's Bylaws clearly name the Public Interest as a "core value". ICANN's Bylaws and Affirmation of Commitments (AoC) employ the term three and five times, respectively. ICANN's GAC has invoked the term to underline some of its positions, and applicants for new gTLDs are asked to undertake Public Interest Commitments (PIC). The question is what does the Public Interest really mean in regard to critical Internet resources? So far, there has been no collective effort to clarify the standard to be followed. ICANN's new Strategic Plan prioritizes developing "a common consensus based definition of public interest" for the organization.

In the global context of ICANN's mandate, ambit and role the Public Interest may have different meanings and interpretation due to historical, cultural and political or legalistic backgrounds. This makes it difficult to find some "common grounds" and to agree on a mandatory definition of the PI not only for the ICANN sphere and policy. However, in the European region and history there are plenty of sources and references for tracing the provenance, evolution and adaptation of the Public Interest in various European countries, histories and societies. Likewise, there are plenty of citations in European public law(s) and constitutions. Tracing the Public Interest in a European context is one approach by listing some baselines or key elements of its evolution (and as a matter of fact, it is far from being exhaustive or complete).

### **Historical background**

The term of Public Interest finds its equivalents in various European languages: German "*Gemeinwohl*", Greek "*koiné symphérón*", Latin "*salus publica, bonum commune, bonum generalis*", French "*bien public*", Italian "*Il ben comune*" or English "*common good*". "*Gemeinwohl*" is also understood as an antonym of mere personal ("*Eigennutz*"), group or particular interests within a community or society while there is no a priori determination or warranty of its quality. Usually, pursue of the PI means weighing of interests or how best to serve the interest of the general public and by which means.

In the history of ideas and referring to the Antique, Aristotle created the concept of "*Polis*" and its goal "the happiness of its citizens". But an individual cannot achieve happiness solely through private life and personal satisfaction of needs. Fulfilment of happiness was seen in public participation, knowledge acquisition and the wellbeing of the citizenship as such. For Aristotle political justice and public utility were basics of any common weal. A Roman equivalent of this concept evolved around the term "*civitas*". When tracing the Public Interest it becomes clear that its concept is rather old or ancient while its proper implementation is an enduring process.

More recent, comprehensive references and analyses were published by Michael Stolleis, a German law historian, in his "Gemeinwohlformeln". Several references point back to the Italian city-states (middle ages like Genoa and Venice) and usually quote the Greek *Polis* or the Roman *Civitas*.

Peter Blickle, a German historian, in his detailed history of "Kommunalismus" tried an archaeology of "Gemeinen Nutzen". He claims that the notion evolved from smaller communes and communities; kings or the aristocracy at the time had not contributed much to its evolution. Only after communally organized societies in the Middle Ages postulated "Gemeiner Nutzen" besides "Frieden" (peace) as superior values of political communication, it was successively adopted by monarchs to legitimize their rule. The notion aimed at the configuration of public spaces via laws (statutes and union) and to replace feud by adjudication. It became a conceptual pillar of "gute Policey" (Germany) and the "bonne police" (France). "Gemeiner Nutzen" emerges from discursive procedures, weighting of interests between individuals or groups and stipulates a superior utility in the best interest of the majority or the public. Throughout centuries it became a guiding category of policy-making in many parts of Europe.

The list of thinkers and philosophers who worked and elaborated on the PI is long, comprising Thomas von Aquin, Gottfried Wilhelm Leibniz, Emanuel Kant, Jean-Jacques Rousseau, Adam Smith etc. and the whole period of enlightenment.

### **Related terms or Equivalents**

The "Allmend" or the "commons" are the cultural and natural resources accessible to all members of a society, including natural materials such as air, water and a habitable earth. These resources are held in common, not owned privately – likewise the Internet as a "global public resource".

Mayo Fuster Morell proposed a definition of *digital commons* as "as an information and knowledge resources that are collectively created and owned or shared between or among a community and that tend to be non-excludable, that is, be (generally freely) available to third parties. Thus, they are oriented to favour use and reuse, rather than to exchange as a commodity. Additionally, the community of people building them can intervene in the governing of their interaction processes and of their shared resources". Current and well-known examples of digital commons are Wikipedia, a type of Free Software and Open-source hardware projects.

In economics, a *public good* is a good that is both non-excludable and non-rivalrous in the sense that individuals cannot be effectively excluded from use and where use by one individual does not reduce availability to others. Gravelle and Rees: "The defining characteristic of a public good is that consumption of it by one individual does not actually or potentially reduce the amount available to be consumed by another individual".

### **Constitutional basements**

Several European constitutions refer to the Public Interest such as the German Constitution, Article 56 (as well as several constitutions of federal states), the Swiss Constitution (1874), Article 2, the French Constitution (1958), Article 1, or the Spanish Constitution (1978), Preamble. The PI has always been crucial for sensemaking of policy in various European countries. And there are plenty of traces in European public law.

### **Conclusions**

Since its creation EURALO always advocated for related principles like Open Access, Free Software or new licensing models as Creative Commons etc. There is a shared understanding about public goods or what is paid by the public (taxpayers) must be accessible to the public. From a EURALO POV the Public Interest is traceable like a red line through European history, culture and policy. And therefore it should become the **guiding principle** for ICANN's policy making.

We would like to invite other RALOs and regions to verify and trace the relevance of the Public Interest in their regional context what may deliver further proof and thereby strengthen concept and realities of the **Global Public Interest**.

This approach and effort may become a shared exercise between RALOs / ALAC, the NCUC and the GAC while underlining our shared values. From an ALAC POV, we specifically express concerns about whether the GNSO can properly defend user and public interest, if and when it may conflict with contracted party special interests and needs.

\*This paper is an extract and abstract from a detailed working paper "Tracing the PI", compiled in 2015 for Swiss OFCOM. For reasons of lucidity and compactness the various sources and references were not noted / listed here.