

ICANN and Human Rights: A Background Briefing

1. Overview : what are fundamental and/or “human” rights?

1.1 Terminology

The term 'fundamental rights' may be preferred to 'human rights' although both terms are found in the literature and jurisprudence and are pretty much interchangeable. The reason for this is that legal persons have fundamental “human” rights in the same way as natural persons, except for rights that can only apply to individuals, such as the right to marry and found a family. See *Yukos v Russia* in the ECHR. (Similar thinking also appear to have informed the reasoning of the US Supreme Court in *Citizens United* and *Hobby Lobby*.)

So, it is clear, for example, that a corporation has definitely the same right not to be deprived arbitrarily of its property (whether tangible or intangible) as a natural person.

However caution in the use of the terminology is advised: terms of art such as “human rights” are often given very precise but subtly differing definitions by different commentators and in different jurisdiction.

For example: according to Wex, a US-centric definition might be: *“Fundamental rights are a group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment. These rights are specifically identified in the Constitution (especially in the Bill of Rights), or have been found under Due Process.”*

So, forward the instant discussion, and in the related work of the Working Group, I propose the WG use the term “human and fundamental rights”, and in this discussion draft, propose the adoption of following common understanding of the meaning of the term.

1.2 Definition

Human and fundamental rights

Human rights and fundamental rights are those rights inherent to all people and peoples, whatever their age, disability, marital status, maternity or pregnancy, race or ethnicity, religious belief or lack thereof, gender, gender reassignment, sexual orientation, nationality, place of residence, language, or any other status. We are all equally entitled to fundamental rights without discrimination. Such interrelated, interdependent and indivisible.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. They may also be protected in domestic laws (e.g. the United Kingdom's Equalities Act or Human Rights Act).

International law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

2. The essential nature of Fundamental and Human Rights

Human rights are basic rights and freedoms that all people are entitled free of discrimination.

They include civil and political rights, such as the right to life, liberty and freedom of expression; and social, cultural and economic rights including the right to participate in culture, the right to food, and the right to work and receive an education.

2. Absolute vs. Qualified Rights

Some fundamental rights are regarded as absolute. The right to life, the right to freedom from slavery, the right of freedom from torture.

Other fundamental rights are regarded as 'qualified' rights. Such as the right to free expression and the right to a private life which can both be interfered with providing the interference is in accordance with law, necessary, and proportionate. Indeed the balancing of exercise between competing fundamental rights often requires this to be carried out, delicately.

3. Two sides of the coin – fundamental rights obligations

Rights imply corresponding obligations. That is, if a citizen has rights, the public authority has obligations.

4. Fundamental rights obligations and international organisations

Overview of how international organisations relate to human and fundamental rights.

(TBS)

5. Fundamental rights obligations and the private sector

Overview of how private sector organisations relate to human and fundamental rights.

To the layman, this is non-obvious. But simply put: private sector organisations have no human rights obligations, unless they adopt them voluntarily. Human rights obligations are, by definition, part of the relationship between the citizen and the State.

6. ICANN - where we are now.

As an international, private sector organisation, what human rights obligations does ICANN currently have?

Actually, despite section 5, above, ICANN does have obligations. It has adopted them in Article 4. What we need to do is provide colour and depth to the commitment of Jon Postel and the founders of ICANN adopted in 1999.

7. ICANN - where do we want to be at the point of transition

High-level objective - new bylaw.

At the very least we need a high level statement of objective. If properly agreed between us, a new fundamental bylaw will almost write itself.

NR to send draft to mailing list.

8. ICANN - where do we want to be on the anniversary of transition (High level WS2 plan)

For discussion

9. ICANN - five year plan - where do we want to be 5 years from today (High level WS2 plan).

For discussion