

Response Paper 3

Legitimacy and Global Internet Governance¹

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The SSRC report, "Global Governance of Information and Communication Technologies" (2004), examines how global governance structures constrain technology-based networking by global civil society. This paper examines the nature of legitimacy and how it applies to one global governance institution, the Internet Corporation for Assigned Names and Numbers (ICANN).

Legitimacy has emerged as a major issue in debates over global governance institutions. The growth of border-crossing systems in business, finance, trade, communications and other areas has led to the creation of supra-national governance institutions to define common rules and to perform system coordination. While most decisions made by these governance institutions are administrative in nature, they often have a public policy component as well, affecting the well-being of people, the environment, and private firms. As awareness has grown of these institutions' role in policy-making, questions have arisen about who are the policy-makers. Who is making global public policy? From whence do they derive their authority? Do global governance institutions possess legitimacy commensurate with their decision-making powers?

I examine these issues in the context of the global governance of the Internet. In 1998 the US government transferred significant responsibility for Internet governance to a newly-created private corporation, the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN was to coordinate technical resources, making global policies for the allocation of unique domain names and numeric addresses and for the operation of Internet addressing services. As has occurred with other global governance institutions, the policy dimension of ICANN's administrative activities quickly became apparent. ICANN defined and enforced new forms of intellectual property in Internet domain names, it regulated market entry and set prices in relevant industries, and it possessed (but did not immediately exercise) the awesome power to disconnect entire country domains from the Internet. With widespread recognition of its policy role came growing calls for a restructuring of ICANN to endow it with a degree of legitimacy appropriate to its powers.

In the five years following its creation in 1998, ICANN underwent two episodes of institutional design for legitimacy. In each episode the constitution of its high-level authority structure was subject to review and in some cases it was explicitly modified.

Legitimacy

Without claiming to offer a philosophically or legally rigorous definition of legitimacy, I offer here some summary concepts about this important characteristic of global governance institutions. Legitimacy can be understood in relation to two additional concepts: power and authority. Power is the ability to realize one's intentions, translating an envisioned future state of the world into an actual state of the world. Relative to public policy, it usually refers to the exercise of power over societal entities, be they people, organizations, or nation states. Authority is power endowed with legitimacy (Friedman, 1990). With the addition of legitimacy, power ceases to be the brute exercise of will and becomes the rightful exercise of will. In an earlier work (Klein, 2002) I analyzed ICANN's powers of regulatory promulgation and enforcement. The discussion here addresses the means by which that power is rendered legitimate, thereby creating authority.

Broadly speaking, legitimacy can be defined in philosophical and psychological terms. Philosophically, legitimacy refers to the grounding of power upon some foundational principle. Such a definition is less helpful than it might seem, since it simply shifts the question about legitimacy to a question of foundational principle, but the set of established principles is limited and therefore sets some limits to the discussion.

Two types of principles particularly relevant to global governance are democratic and technical. The foundational principle of democratic legitimacy is that power is exercised only with the consent of the governed. Governance rests on a social contract, in which citizens affected by a governing entity must consent to being governed by that entity. This principle is most frequently implemented through voting and elections, whereby citizens either decide directly on public policies or select representatives who will make those policy decisions. In political-administrative processes of public policy, this is often conceived of in terms of interest representation: groups with an interest in a policy ought to be represented in the policy process.

The technical foundation for legitimacy derives from the idea of expertise. Certain classes of policies are appropriately made by experts with relevant training and experience in a specialized domain. In its early years, ICANN often sought to establish its legitimacy on the basis of its expertise, claiming that its exercise of power was legitimated by the technical expertise of its staff and board of directors. As that claim was challenged, calls increased to ground ICANN's legitimacy in democratic principles.

A related source of principled legitimacy is the setting of limits on the exercise of power. Not only must power be grounded in principle, it must be constrained in its reach. Majority rule may devolve into a tyranny of the majority, and to protect against that absolute limits can be set on what powers can be exercised. In the case of democratically-based legitimacy, the will of the majority may be trumped by the rights of individuals. In the case of expertise-based legitimacy, the power of experts is appropriately limited to domains where expertise is required.

Psychologically, legitimacy can be grounded in recognition. If the groups affected by a governance institution's policies recognize its right to the exercise of power, then the institution is considered by them to be legitimate. Such "recognized right" (Krasner, 1999) manifests itself in willing acceptance of policies. Recognition may be the result of grounding power in principle, in the case of democratic or expertise-based legitimacy, but recognition may also derive from other sources, such as history or personal charisma. If policy "has always been made this way" – i.e. the governance institution has an established history of exercising power – then affected parties may accept the continued exercise of such power. Likewise, if policy is made by a respected and trusted individual, then affected parties may again recognize a right to govern. For example, in the pre-ICANN era much Internet governance was performed by Dr. Jon Postel, the leading administrator of the domain name system, whose long history of policy making and solid reputation for trustworthiness legitimated his policy decisions.

Designers of institutions who seek to endow a governance institution with legitimacy may draw upon all these different kinds of legitimacy. Democratic legitimacy can be

realized by locating decision-making power in representative bodies and by defining limits on the scope of policy. Expert-based legitimacy can be realized by giving power for technical decisions to organizational units populated by qualified experts. Historical legitimacy can be realized by grafting policy making powers onto an existing governance institution (assuming such an institution exists.) Personal legitimacy may be realized by involving a recognized community leader to make the decisions affecting that community.

The Case of ICANN

The history of global Internet coordination manifests an evolution in the legitimacy of governance. Before the creation of ICANN in 1998, coordination was performed by a small group of technical experts joined together in the Internet Society (ISOC) and headed by Dr. Jon Postel. They defined new domain names, delegated authority to administrators to perform Internet addressing operations, and oversaw the operation of root addressing servers. Both Postel's personal reputation and the technical expertise of the community in which he worked legitimated his decisions. Furthermore, over time his role became endowed with historical legitimacy. Postel had performed the function since being a computer science graduate student in the 1970s, and in the course of two decades the Internet user community came to recognize Postel's right to make such decisions. Finally, for much of his tenure his exercise of power was limited by the narrow diffusion of the Internet. The number of users affected by his decisions was relatively small, since the Internet did not experience explosive growth until the 1990s, while the financial effects of his decisions were also limited, since commercial use of the Internet was only allowed after 1994. The result of all this was that Postel's exercise of governance functions was widely accepted by affected parties around the world.

With the creation of ICANN in 1998 and the near-simultaneous death of Postel, Internet governance was put on a new basis of legitimacy. In this first round of institutional design, the authority previously vested in an individual came to be vested in an institution. Policy-making power was located in ICANN, specifically in its nineteen-member board of directors. This legitimacy-giving body combined both democratic and expertise-based legitimacy. In ICANN's original design, nine directors were to be selected by technical communities with expertise in Internet identifiers. Nine more directors were to be selected by Internet users through global elections. (The remaining position was reserved for ICANN's top administrator.) In terms of expertise, this arrangement combined expertise in technology and expertise in user issues. In terms of interest representation, this arrangement balanced the interests of users and those of the Internet supply industry. As designed, the board of directors would have final authority.

Unlike other global governance institutions, ICANN was not to derive its legitimacy from national governments. Indeed, governments were barred from having representatives on the ICANN board and were instead relegated to an advisory body, the Governmental Advisory Committee (GAC). In a what was presented as a temporary arrangement, the US government would exercise top authority over the Internet's core technical resources, but only until ICANN's design was fully implemented.

However, ICANN's board never was fully implemented. The full complement of user directors were never seated, and four years later ICANN's bylaws were modified to

eliminate user representation altogether. The ensuing outcry gave evidence of ICANN's loss of legitimacy. Representatives of the user community, industry, and government questioned ICANN's right to make policy, denying ICANN the recognized right to govern. ICANN's policy making was decried as the exercise of power rather than as the expression of consensus in the Internet community.

ICANN's revised institutional design of 2002 brought to the fore the role of the United State government. Despite its original commitment to cede its authority to ICANN, shortly after ICANN's founding the US Department of Commerce published a contradictory notice that it had "no plans to transfer to any entity its policy authority to direct the authoritative root server" (NTIA, 1999). Decisions by ICANN would have to be validated by the US before being implemented; ultimate power lay with the US and would remain there. As the perceived legitimacy of ICANN's board eroded, the US government was increasingly seen as legitimating ICANN's decisions. This constituted an important shift. Whereas ICANN's original design had embodied a novel form of legitimacy, based in large part on the direct election of user representatives from around the world, the emergence of the US as the supreme authority endowed ICANN with a more traditional source of legitimacy: the nation state. The ICANN experiment in private, non-governmental authority was stillborn, and traditional political authority reasserted itself.

For the purposes of this analysis, I consider the emergence of the US as the supreme authority as a second episode of institutional design. The original ICANN design gave way to one in which a national government legitimated the exercise of power.

US authority suffered from its own weaknesses, however. ICANN's powers were global in scope, but US political institutions were those of a single nation state, representing the will of a subset of the world's people. ICANN lacked adequate democratic legitimacy. US control of the Internet extended that country's policy making powers well beyond its borders, arguably constituting an illegitimate exercise of national power at the global level. Internet governance remained without a solid basis in legitimacy.

The 2003 World Summit on the Information Society (WSIS) marked the beginning of a third round of institutional design for legitimacy. Concerned about US control of a global system, national governments from around the world endorsed a plan in which the UN would make recommendations about Internet governance. Although couched in diplomatic language, the intent was clear: the powers of ICANN would be reviewed with an idea towards rendering them more legitimate. Other national governments wanted a new institutional design that would give them representation in the decision-making process. This process is not complete, however.

The growth of border-crossing systems like the Internet has focused attention on the legitimacy of global governance institutions. By understanding the nature of legitimacy we can both evaluate existing institutions and design new or reformed institutions.

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Endnotes

¹ This memo draws on "Working With the Resources at Hand: Constraints on Internet Institutional Design," *Continuum: Journal of Media and Cultural Studies*, Vol.9 No. 3, Sept. 2004, 403-410.