

## *Response Paper 4*

# **The Significance of ICANN**

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Hans Klein  
Associate Professor  
Georgia Institute of Technology  
School of Public Policy  
Atlanta, GA 30332-0345 USA  
Chair, Computer Professionals for Social Responsibility (CPSR)  
Member, Communications Rights for the Information Society (CRIS Campaign)  
Tel: +1 404-894-2258  
Fax: +1 404-894-0535  
[hans.klein@pubpolicy.gatech.edu](mailto:hans.klein@pubpolicy.gatech.edu)

*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 memo takes a high-level look at the Internet Corporation for Assigned Names and Numbers (ICANN) and seeks to identify its larger significance.*

*(I talk about ICANN in the past tense, because I focus on its early design, especially its mechanisms for global user representation through elections.)*

The Internet Corporation for Assigned Names and Numbers (ICANN) was a radical and important experiment in institutional design for global governance. ICANN’s design embodied creative solutions to the problems inherent in the nation state system, including problems of jurisdictional fragmentation, lack of global law, absence of global enforcement capabilities, and lack of legitimacy. ICANN offered a creative solution to each of these problems. Although the solutions did not endure, they merit close study for the lessons they hold for other global governance institutions.

(This is a work in progress. The ideas that follow are still developing, and they are presented in a broad-brush manner.)

### Dimensions of Authority

I begin by identifying three dimensions of authority at the global level: the nation state system, the global economy, and socio-technical systems. Internet governance can be examined in each of these dimensions. ICANN creatively drew on the properties of all three dimensions to realize governance.

Before considering different dimensions of authority, I focus on authority itself. Authority is power endowed with legitimacy (Friedman, 1990). Power is the capacity to change the world in accordance with an envisioned state. Legitimacy is the status of such power, its right to exist and its right to be exercised.

The nation state system institutionalizes political authority. It is the institutional form of global politics. Just as domestic politics plays out in the context of a nation’s *constitutional* system, global politics plays out in the context of the *nation state* system. In both cases, the rules of the game are constituted by a historically inherited institutional order. (Their origins are not so separate in time: the US constitution dates back to 1789, while the nation state system dates back to 1648 – a difference of less than 150 years.)

For my purposes, the nation state is best understood in normative terms. It is the institutional embodiment of political authority, and as such it legitimately exercises power over “political” matters (more below on the term “political”.)

Legitimacy, according to democratic theory, derives from another entity: political society. It is the nation, the *demos*, the body politic that achieves institutional form in the state. Political society creates the state, and political society’s on-going recognition of the state’s right to exercise power gives it legitimacy.

The legitimacy of state power is geographically limited. National territory sets geographic limits: a states' right to make and enforce law extends as far as its borders. Extra-territorial exercise of power is, under normal circumstances, not legitimate.

While the nation state system allows for effective governance within each territory, the system is poorly suited to governance at the global level. The geographical limitations of the nation state create fragmented authority, legal systems, and law enforcement.

The weaknesses of the nation state system may reflect the underlying lack of political society. Without a global *demos*, no legitimate unified governance body can be created. It may be that unified political power cannot be constituted at the global level.

The second dimension of authority at the global level is the economy. For my purposes, I will reduce this to private contract law – “lex mercatoria” (Cutler, 2003). To speak of exchange is to speak of private contract; every exchange is, implicitly or explicitly, a contract committing the parties to take actions. Contracts are powerful in that they can cross jurisdictional boundaries, passing right through the geographical boundaries of the nation state system. They are limited in their content, however: they must not deal in “politics”.

Such private law is a dimension of authority that operates in parallel but largely independently of states' right. Although constrained on the content of its regulation, it can extend globally.

The third dimension of global authority is the socio-technical system. These can also be called “functional systems.” Global socio-technical systems include systems like the telephone system, the Internet, the atmosphere, air travel, and industrial supply chains. These are appropriately studied empirically rather than normatively: they are interesting not for *right* but for *power*. They are systems of command and control. The technical components follow the laws of physics and may be used for action at a distance. The administrative components follow the laws of bureaucracy and may likewise be used for action at a distance. The exercise of power is justified by function: actions are justified because they make the system work.

### Global Governance

With these three dimensions of authority in mind, we can now turn to global governance (and, later, to ICANN.) I begin by framing the logic of the institutional design problem in global governance.

The standard narrative of global governance is functionalist: we begin with a socio-technical system (e.g. the Internet), and we recognize that in order to function properly it requires coordination and perhaps even some command and control; it needs “governance” (Keohane and Nye, 2000). This functional need for governance is considered exogenous, natural, and necessary. (For more about objective features of technical systems, see Perrow (1999).)

The need for governance is addressed by the creation of an organization to perform that function. This is usually some kind of policy-administrative entity that exercises the

power of coordination (or even control) over the socio-technical system. Its authoritative body is usually a board of directors or a council of some sort. ICANN is exactly this kind of organization; it performs Internet governance. Another example of such an organization is the International Telecommunications Union (ITU); it performs global telecommunications governance.

Obviously, such governance institutions operate in the socio-technical dimension. A governance institution may control some components of a system and in this way exercises power. Power is legitimated by function: control helps to make the system work properly. Examples of socio-technical power include setting standards for global air traffic systems, allocating identifiers in global networks, and controlling levels of pollution emitted into global environmental systems.

Economics and contracts also play a role in global governance. Entities in a system may have a semi-autonomous relationship to each other, and they may coordinate through contract.

### “Politics”

Functionalism breaks down when it crosses into the political dimension. If the actions of a governance entity are categorized as *political*, then governance enters the realm of state rights and obligations. As described above, the state has the right to make political decisions, but it also has the obligation to secure its legitimacy by winning the recognition of its political community.

The act of categorization is important because “political” actions and institutions are subject to a thicket of norms. Political actions *should* only be performed by a legitimate authority. Actions *should* be consistent with law and policy. Law and policy *should* be formulated through due process, including transparency and accountability. Ultimately, global governance that is political *should* be grounded in the nation state system, because states are the institutionalized form of political authority.

One need only recall the WTO demonstrations in Seattle in 1999 to recognize that this exercise in categorization carries high stakes. Street battles there and in many other cities were fought over this question. Protestors said the WTO’s global governance of trade was political, while others claims it was merely technical.

So we encounter a practical question of taxonomy: how can we categorize political acts? Analytically, we can pursue definitions. Lasswell’s (1958) definition of “Who Gets What, When, How” seems a little meager, while Weber’s (1970) comment on a “monopoly on violence” refers to means more than ends. Social scientists like Cutler et al. (1999, p.18) provide what must be called a casual description, but we will follow their lead: politics is the prescription of behavior for others. For now I will use Cutler’s definition about prescribing behavior for others. (A survey of political thought is needed here.)

Once we have adopted a definition, we need to operationalize it. How do we identify “political” decisions when we observe them? In global governance, the question becomes: when do governance actions cross the line from administration to politics? Protesters in

Seattle in 1999 claimed that the governing institution of the global functional system of trade had crossed the bound and had engaged in politics. (It may be that such acts of contestation are the best evidence we will find.)

Should an act be recognized as political, and should the actor (the global governance institution) be recognized as a political institution, the question quickly follows: what is its basis of legitimacy? By what right does it engage in politics?

For most global governance institutions the question of political right has a simple answer: political right derives from the state. Global governance institutions derive their legitimacy from nation states. Nation states either sit on the board (e.g. the ITU's Plenipotentiary or the UN's General Assembly,) they sign a treaty, or they delegate some authority.

Governance institutions overseen by national governments are legitimate, in this view. Such institutions control some global functional system and may cross the line into politics, but they are accountable to national governments, which are in turn accountable to their political societies, and that renders them legitimate. The governance institution benefits from *derived legitimacy* from national governments and from political society.

### ICANN

Now we come to the Internet Corporation for Assigned Names and Numbers. ICANN's governance of the Internet was initially claimed to be an administrative task ("managing the plumbing of the Internet") but gradually recognition spread that it was a somewhat political task. ICANN policies that seemed political included: setting utility pricing for domain names; regulating competition in the DNS registrar market; operating a global monopoly on domain names; making global policy on some kinds of intellectual property (in domain names); and, most significantly, controlling a critical infrastructure (the Internet).

Global Internet governance was political in nature. A global governance institution for Internet governance would have been expected to be anchored in the nation state system (the institutional system for political authority at the global level.) That would have given it derived legitimacy. But it might have saddled Internet governance with problems of fragmented jurisdiction and weak enforcement.

ICANN achieved global Internet governance of a political nature, but it did so independently of the nation state system. Its exercise of political authority was ultimately anchored in its own independent source of legitimacy.

ICANN was able to overcome the barriers to global political authority imposed by the nation state system. First, ICANN realized a global jurisdiction, surpassing the territorial limits of state-based political authority. Second, ICANN leveraged its socio-technical control over the domain name system to realize a global power of enforcement.

ICANN overcame the geographic limitations of jurisdiction by embedding its political decisions in private contracts. Its domain name registration contract embodied the terms

of global governance, and every network on the Internet had to sign such a contract. (ICANN also had an indirect link to individual users via their terms-of-use-agreements with the network administrators that were directly regulated by registration contracts. However, this final contractual connection was never put into practice.) ICANN's law reached the whole world. *Lex mercatoria* enabled ICANN to overcome the problem of jurisdictional fragmentation that plagues the nation state system.

Second, ICANN possessed the power of enforcement. ICANN realized this through the socio-technical system itself. ICANN's control of an essential resource meant that it could deny that resource to whoever violated its policies. Domain name holders who lost their registration were effectively expelled from cyberspace – “disappeared”, if you will. Although not quite a “monopoly on violence,” this was a monopoly on the power of expulsion. This power was also unconstrained by geography.

Probably the most fascinating aspect of ICANN was its basis in right. What gave it the right to engage in politics, making decisions that were “political”? What gave ICANN the right to promulgate global policy (via private contracts) and to enforce it (via domain name denial)?

For every other global governance institution, the source of that right would have been the same: the nation state (and, ultimately, the recognition of those states by their respective political societies.) Governance institutions enjoy derivative legitimacy drawn from states. Even where this is contested – e.g. the WTO, IMF, World Bank, G-8 – political authority rests on the building block of the nation state.

ICANN was different. It did not derive its legitimacy from the global political system. Instead, it had a direct relationship with its political society. That political society was called “the Internet user community,” and it, too, was global.

Elections connected the institution to the demos. Held in 2000, ICANN's elections were organized according to five voting districts. Two regions, North America and Europe, elected strong critics of ICANN. Two regions, Africa and Latin America, elected relatively conservative technocrats. Asia experienced state-based competition between two countries, China and Japan, and that region ultimately elected an individual representing corporate Japanese interests. ICANN only held elections once, and shortly thereafter user representation was eliminated from the board. Even though they were short-lived, ICANN's election gave evidence of a global political society.

ICANN was called a “private” entity. But it would be more accurate to call it a public entity of a novel form. Like a nation state, it drew its political right from an underlying political community. But ICANN's political community was global. Such a global political community was a novel development.

## Significance of ICANN

What did ICANN signify? Did it work?

ICANN institutionalized political authority in a novel form, constituting political authority independent of the nation state. In so doing, it realized political authority at the global level, overcoming the greatest problem of the nation state system: jurisdictional fragmentation. ICANN's jurisdiction was global. Moreover, its powers of enforcement were real. Finally, its legitimacy was direct, derived from direct elections from a global political society. A new form of political authority was created at the global level: an autonomous global governance institution, grounded in the will of "its people" and able to make and enforce political decisions.

As to whether it worked – the answer must be negative. The global elections largely worked, but ICANN's board became the locus of conflict. The new political power located in ICANN attracted a backlash from established powers, and the global elections were quickly canceled.

ICANN presented a true democratic possibility for global governance. It seemed able to perhaps escape national control and even corporate control and become truly autonomous. That prospect threatened both the corporations, who had expected to benefit from the privatization of the Internet, and the governments, who did not welcome a rival institutional form of political authority. Ultimately, ICANN went from an experiment in the expansion of democracy to a sorry example of the power and conservatism of corporations and national governments. They rewrote the bylaws to eliminate user elections.

## Conclusion

ICANN's importance goes beyond the Internet. ICANN's design attempted to reconstitute political authority at the global level. While that effort did not succeed, it may have left traces that will inspire future designers to attempt to ground global governance institutions directly in global political society.

It must be noted that the ICANN design was not totally independent of the nation state system. First, its basis in contract was not a legitimate departure from the political dimension. Since ICANN held a monopoly on domain names, registrants did not enter into contracts freely. This use of *lex mercatoria* violated a basic tenet of contract law. Even by the standards of the nation state and the market, ICANN's private power could be considered an illegitimate private monopoly.

Second, ICANN's contracts could ultimately be appealed to national judicial systems. Although its contracts were judged in "courts" of alternative dispute resolution and enforced through domain name denial, this non-state system did ultimately have ties to conventional political institutions. Private law could be appealed to public law and decided in a public court.

Finally, ICANN was incorporated under US law (state of California) and was physically located in the US. This connection to one nation state rendered it vulnerable.

The fact that ICANN never realized its independence from the US government means that it was never truly private. Much of what I have discussed here applies to ICANN *as designed* rather than as realized. ICANN was a radical experiment, but it was also incomplete.

Three elements of ICANN most merit additional study. The first is the experience of global political society. Can there be a global “nation”? Is it possible? Is it as necessary as state theory suggests? And alongside this global *demos*, is there a global aristocracy or governing elite of global capitalism? It seems that the lawyers of the Washington-based law firms were both the architects and the advisors to this new type of political institution. When they realized that global democracy threatened to emerge, they led the decision to eliminate ICANN’s elections. What is the role of these global elites alongside the potential global *demos*?

Second, what is “political”? This question (and its operationalization) goes beyond ICANN and arises in all governance institutions. How can we distinguish when administration becomes politics, thereby triggering the normative demands that accompany the exercise of political power? Are street demonstrations like those in Seattle a methodological tool for identifying acts that are political? Or is philosophy the preferred means of defining categories?

Finally, can *lex mercatoria* really serve as the basis of a global social contract? What were the strengths and weaknesses of ICANN’s system?

Much of today’s debate over globalization, governance, and legitimacy takes place within the nation state system. ICANN, as designed, existed outside those institutions. Once ICANN is understood, its lessons might be brought to bear on other global governance institutions.

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