

The Right to Political Participation and the Information Society

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The right to political participation refers to citizens' right to seek to influence public affairs. Political participation can take many forms, the most notable of which is voting in elections, but also including joining a political party, standing as a candidate in an election, joining a non-governmental advocacy group, or participating in a demonstration. The foundational legal articulation of this right can be found in the UN's 1948 Universal Declaration of Human Rights, and it has been further formalized and elaborated in later treaties, most notably the 1976 International Covenant on Civil and Political Rights. As currently implemented by the UN, various operating entities assess signatory states' respect for this right and, when violations are determined to have occurred, may call on states to change their practices.

One aspect of the right to political participation merits special attention: its status as a *political* right. The right to political participation is restricted to *citizens*. Whereas the other rights recognized in the Covenant inhere in human beings on the basis of their status as human beings, the right to political participation is limited to people endowed with the status of citizen. Such a status does not exist in isolation. A person can be a citizen only in the context of a political community and, most significantly, a government, and thus the right to political participation presupposes the existence of a government.

With respect to the information society, this presupposition of a government raises a potentially thorny issue. Does the information society have a government? Are there citizens in the information society? If there is no government of the information society, then there may be no citizens, and if there are no citizens, then there may be no citizen rights. Thus the right to political participation in the information society hinges on whether that society has a government.

I consider two classes of institutions that might be considered governments of the information society. The first (and less interesting possibility) is that existing political institutions – national governments – constitute the government of the information society. In that case, citizenship and rights in the information society are not different than they are in society generally.

The second, more novel possibility is that the information society is a society in its own right and has its own political institutions. In this second view, public affairs in the information society are conducted in political institutions separate from existing national governments. These new institutions constitute "governments," the people participating in those governments are "citizens," and the right of political participation applies to those citizens. I explore this line of thinking

with respect to two candidate political institutions for the information society: the free and open source software movement (FOSS) and the Internet Corporation for Assigned Names and Numbers (ICANN).

In what follows, I first summarize the international legal instruments that define the right to political participation. Then I consider that right in relation to two conceptualizations of the information society, one as an information-rich society and the other as a distinct society. I conclude with some reflections on the need to define and enforce rights in the new institutions of governance and public affairs.

Right to Political Participation

Two foundational instruments define the right to political participation: the 1948 Universal Declaration of Human Rights (Declaration) and the 1976 International Covenant on Civil and Political Rights (Covenant). The Declaration is a statement of general principles. Since it is not a treaty, the standards of behavior that it defines have the status of only non-binding norms, but the document is nonetheless of enormous legal and political importance, for it provided the foundation not only for later legally-binding international treaties but also for many national governments' rights frameworks.

Ratified almost three decades years after the Declaration, the Covenant is similar to the earlier document in its content but enjoys the status of international law. As a binding treaty, the Covenant imposes some obligations on signatory states and includes some compliance mechanisms.

The right to participate is spelled out in similar language in the Declaration (Article 21) and the Covenant (Article 25). Article 25 of the Covenant states:

“Every citizen shall have the right and the opportunity, without ... unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” (quoted in Steiner, 1988)

This right has some distinguishing characteristics. As noted above, it is a political right that presupposes a political community with individual members (citizens) and with an organizational form (government). The Covenant and the Declaration refer to this political status differently, with the Covenant referring to “citizens” (“Every *citizen* shall have the right ...”) and the Declaration referring to “government” (“Everyone has the right to take part in the *government* of his country...”; emphases added.) With both formulations conditioning the right to participation on the existence of political institutions, it is clear that the right to participation does not exist as a human right per se but only in the context of the political institutions of citizenship and government.

The Covenant refers to participation in both a general and a specific form. Participation in its general form is “to take part in the conduct of public affairs”. Public affairs might include the activities of civic associations, neighborhood groups, social movements, and social clubs, as well as formal procedures of governments. Thus although participants in public affairs must be citizens, the domain of action is not restricted to formal political institutions but also includes social activities of a public nature. The second form of participation is more specific: elections. Elections are just one mode of public participation, but they are widely recognized and utilized. Whether a central element in a political system or just a limited one, whether open to all citizens or just some, most governments incorporate some kind of elections in some part of their system. As the one mechanism specifically identified in this treaty, elections are assigned a special importance for participation.

The Covenant also suggests criteria for citizenship. Since different political systems have historically conditioned citizenship on various factors, such as wealth, gender, race, age, and mental capacity, the criteria of citizenship are always an important element of participation. The Covenant’s language on elections refers to “universal and equal suffrage,” which

suggests that citizenship should also be universally and equally available. Who can enjoy citizenship and the concomitant right of political participation remains undefined, but the implication is for an inclusive definition.

Nearly 150 states have signed the Covenant, thereby agreeing to respect and implement the rights defined in the treaty. In operational terms, the treaty is implemented in a Human Rights Committee comprised of eighteen individual experts. Signatory states must periodically submit reports on their treaty compliance to the Committee, which then holds additional public sessions where non-governmental organizations can participate. The Committee gives a critical review to the reports and issues its own comments. Although its comments are not legally binding, they can bring public attention to states' practices. Ultimately, the Covenant does not benefit from strong enforcement mechanisms. The treaty did not create a Human Rights Court able to give an authoritative interpretation of the treaty's terms, and the Human Rights Committee has little real power (Nickel, 2003).

In summary, the right to political participation is restricted to citizens but allows them to take part in all public affairs of their country, with special emphasis on participation in elections. Next I consider its relevance to the information society.

Society in the Information Age

People increasingly live in information-rich societies. The creation, manipulation, and distribution of information have become some of the most important activities in today's world, be they in the domains of economics, culture, or politics. The importance and ubiquity of information is striking.

For our analysis of human rights, an important question is how to conceptualize this information-rich society. How novel is it? Is today's society fundamentally the same as it has always been? For example, for a resident of a US city is the society he or she lives in richer in information but still recognizably US society? Or are we experiencing something so novel that it constitutes a new kind of society, something we can call an "information society." Does that US resident now live in two societies – US society and also an information society? Is the information society distinct?

The status of society is important for questions of political rights. Political rights exist in the context of governments, and governments exist in the context of societies. The modern state is defined not only by its territory but also by the society over which it rules. If today's information-rich society is coeval with existing society, then the existing government and the existing rights apply to that society. In this case, the right to political participation exists as we know it: it is a right established by international treaty and enforced by UN entities on national governments. The right to political participation in an information-rich society is not different that it was in less information-rich times. For example, we already know that US society is governed by the US government, and we know (more or less) the status of political rights in the US. As US society adapts to the information age, questions of human rights in the contemporary information-rich US society are still questions about human rights in the US. These are interesting questions, but they are also familiar.

Political participation might consist of seeking to take part in public affairs on information. Citizens might seek to influence tax policies for e-commerce, the regulation of online content, the definition of new forms of intellectual property, or the setting of privacy protections. Despite the novelty of the policies, the nature of public participation could be quite conventional. Citizens could vote (e.g. for candidates promising greater information security,) they could sign petitions (e.g. against surveillance,) they could demonstrate (e.g. against online pornography,) and so forth. In so doing, they would be exercising their right to political participation. Should their government violate that right, the violation might be a candidate for review and possible comment by the UN entities that enforce the 1976 International Covenant on Civil and Political Rights.

It is worth noting that even if the status of a political right is not significantly changed, information systems may create more opportunities to exercise that right. An information-rich society offers powerful new means to exercise the right to political participation. For example, as the technology of voting changes, electronic voting systems offer benefits and risk for elections (Kohno et al., 2004). As the technology of public forums changes, Email lists facilitate the formation of citizen associations (Klein, 1999). Election campaigns are also being transformed by the Internet (Bimber and Davis, 2003). In the information society, the mode of participation changes as numerous new technologies become available. Still, these new modes apply to participation in established institutions according to established rights.

The situation is considerably different if the information society exists in its own right. In that case, existing institutions no longer apply, and we need to reconsider our notions of society, government, citizenship, and right.

The Information Society

The claim that there exists an information society in its own right is most strongly made with respect to cyberspace. A not insubstantial literature makes the claim that when we log on to the Internet we leave physical space behind and enter a different dimension of existence with unique properties and unique social relationships. In cyberspace, personal identity is malleable (Turkle, 1984). We are freed from our physical appearances: “no one knows you are a dog” (Steiner, 1993). We enter an “electronic frontier” where rules of social behavior are not firmly established and there are no law-making authorities (Rheingold, 1993). We find an “Internet community” there that designs its own world through “rough consensus and running code” (Huizer, 1996). This information society is an “unregulable” place of benevolent anarchy (Lessig, 1999), where the sovereigns of the physical world have no power (Barlow, undated). In cyberspace people cooperate and produce information and knowledge in a manner that seems to contradict existing societies’ laws of economics (Litman, 2001). Space ceases to exist as people from around the world interact in immediate relations. Although there have existed systems of global communication that predate the Internet, cyberspace is unique in that it is a global *social* system where people immediately coexist and interact. In all these ways, cyberspace constitutes a distinct, separate, and autonomous “information society.”

As opposed to the vision of an information-rich society described earlier, this information society is novel and distinct. No existing governments seem appropriate to exercise sovereignty over it. It presents fundamental puzzles about politics. What are the public affairs in this society and where are they conducted? Does the information society have “information citizens” who conduct their public affairs in an “information government”? Increasingly, we can find answers to these questions. The information society does have its public affairs, and these public affairs are conducted in specific locations.

I consider two settings for public affairs in the information society. The first is the free software movement, and the second is ICANN.

In his book, *Code*, Lawrence Lessig (1999) argues that public decisions about the information society are made in processes of software development. Public policies for the information society are realized not by governmental decision but by technology design. For example, a technical standard may enhance or inhibit the anonymity of the user of a computer network, or copy-protection software may effectively define the fair use rights of copyrighted materials. The properties of cyberspace are not fixed but can be designed (and redesigned) to embed values and governance capabilities in the system. In this way, the design of code is similar to the design of regulations. Code can make some behaviors impossible and others unavoidable, just as laws may make some behaviors legal and others illegal. Code is law.

There is an important difference between code and law, however. Law is produced in political institutions, whereas software is not. Citizens have a right to participate in legislative processes in political institutions; they can have a voice in the production of law-based regulations. In software development they have no such right. The design of software is not categorized as a political activity, and it does not occur in political institutions. It occurs in private forums, such as standards-setting committee, or simply within a single private company (Microsoft, for example). Although the decisions made in such places may have broad social impacts, access to the decision process may be forbidden. There is no right to participate in the internal processes of private firms, even if that firm’s software design decisions shape the information society.

Lessig finds a remedy to this situation in the free and open source software movement (FOSS). Software development processes in FOSS are open and participatory. This transparency makes it difficult for any entity to embed its interests or values into the software. The FOSS software development process ensures that any regulatory features are publicly vetted. In FOSS the characteristics of the process are well matched to the characteristics of the product: code that is law is developed through an open and transparent process that resembles good legislative procedure.

Indeed, public interest political groups have participated in code development. In the US, the Center for Democracy and Technology (CDT) currently operates a project on Internet Standards, Technology and Policy in which it publicizes policy-relevant features of technical standards. That projects seek to “provide the public policy community with a ... window into

the Internet technical standards processes and the possible impact of new technical standards on issues of public concern” (CDT, 2005). CDT has identified and publicized law-like features of code in geo-locational and telephone numbering (“ENUM”) standards.

FOSS processes allow for greater political participation, but they do not define a formal right to participate. Software development activities are loosely structured, and there is no status of “citizen”. Expertise rather than citizenship determines who can shape code. Openness and transparency serve to protect the public interest.

The second example of a governance institution in the information society is the Internet Corporation for Assigned Names and Numbers (ICANN). Created in 1998, ICANN is the global authority for allocating Internet identifiers (including Internet Protocol addresses and domain names). It ensures that no two servers use the same identifier and that Internet addressing operates in a stable manner.

Although frequently described as a purely technical body, ICANN conducts public affairs. Its decisions have policy content. ICANN defines intellectual property rights in domain names (e.g. “apple.com”), it sets the base price for domain names, and it controls access to the domain name retail and wholesale markets (Klein, 2002). Utility pricing, property rights definition, and market regulation are all classic public policy powers. The information society is regulated in important ways by ICANN.

Yet ICANN was incorporated as a non-governmental corporation. As such, with the public affairs of the information society conducted in a non-governmental (private) institution, the right to political participation does not necessarily apply. (At the time of this writing, ICANN remains legally subordinate to the US government, so its non-governmental status was never fully realized. This is addressed below.)

As originally designed, ICANN’s corporate bylaws did take account of its political functions. ICANN’s designers recognized that they were creating a quasi-political institution, and they included mechanisms for popular sovereignty by the inhabitants of cyberspace. The bylaws reserved almost half of the positions on ICANN’s authoritative board of directors for representatives of Internet users. The bylaws gave the people of the information society the right to participate in public affairs via representatives on the board.

ICANN subsequently elaborated a right to participate. It defined election rules to fill the user positions on its board through elections in which Internet users from around the globe could vote. Anyone over age 16 who possessed an email address and a physical mailing address had a right to vote for ICANN directors. These “citizens” (whose legal status was that of an “at large members” of a California-incorporated non-profit corporation) were thus allowed to participate in its public affairs. Although non-governmental, ICANN met a standard for public participation comparable to governments of other societies. The information society had citizens, a government, and elections.

Unfortunately, citizens’ right to political participation in the information society was short-lived. In 2002, in what was the US-based Carter Center called a “palace coup,” the industry representatives on ICANN’s board eliminated user elections and representation. ICANN’s board of directors radically modified its corporate bylaws, reducing citizen participation to an advisory committee whose members were appointed by the board of directors. Citizen participation in public affairs was rendered meaningless, and industry’s control of public affairs was consolidated.

ICANN offers mixed lessons. As with FOSS, we can see that public affairs in the information society occur in novel institutional settings and are deeply intertwined with technical activities. Yet norms of participation did carry over to this new setting, where they were implemented in ICANN’s bylaws. Unfortunately, political dynamics of interest and power already familiar in existing societies manifested themselves in the information society, and the information society’s fledgling democracy was toppled within two years of its first election. Citizen participation in public affairs largely ceased.

Conclusions

Our understanding of the right to participate depends on our conception of the information society. Conceived as the *information-rich* society, the information society is governed by the familiar institutions of national governments, in which citizens have a right to participate in the conduct of public affairs. The 1976 Covenant guarantees that right, and should states violate it then its (weak) enforcement mechanisms could be brought to bear. On the other hand, if we conceive of the information society as a distinct society with distinct, emergent governance institutions that do not conform to the established definition of “political”, then the notion of citizens’ right to participate is more problematic. When public affairs are conducted in non-governmental institutions, the right to participate is not guaranteed by laws binding upon governments.

Both FOSS and ICANN indicate the possibility of establishing a right to political participation in the information society. In FOSS, rights may be established through precedent and customary practice. As groups like CDT participate in software development processes, they raise awareness of the appropriateness and utility of such participation. Public awareness and established practice give substance to claims of right. Over time, participation in software development may come to be seen as right and natural and in this way it may someday win formal recognition. This is an admittedly lengthy process. Also, it is relevant only if FOSS becomes a widely used mechanism for software development. FOSS offers us the *prospect* of a right to participation. Participation could also be formalized by articulating it in rules for participation on standards bodies.

ICANN offers a clearer lesson. ICANN defined a right to participate, but that right suffered from too little legal protection. Expressed only in the bylaws of the corporation, it was eliminated by a majority vote of the board. Additional, less formal protections also failed: the national governments that oversaw ICANN in its early years could probably have used their influence to prevent the board’s action. They failed to do so. Without sufficient protection, the right was eliminated, and meaningful public participation ceased. Yet the need for it did not decrease. ICANN remains in effect a global public utility and a global regulatory agency, and without user participation ICANN suffers from a legitimacy deficit.

The right to participate could be re-established in ICANN, but it would have to be in a more robust form. Were the right to be embedded in ICANN’s corporate charter, it would be more robust, for charter revisions require a super-majority of the board. This would offer greater protection. A more strongly secured right to participation could be effective.

Such suggestions for securing rights in emergent governance institutions may be irrelevant, however. A different evolution of governance in the information society seems more likely. National governments are likely to chip away at the autonomy of the information society and to integrate its governance into existing institutions. The ICANN “coup” largely discredited the emergent political institutions of the information society. Following that event, movement toward ending US oversight of ICANN slowed and may have ended. Simultaneously, the UN launched its World Summit on the Information Society (WSIS), in which national governments asserted their authority over ICANN and the information society generally. As traditional political institutions increasingly take over, the traditional rights of participation that inhere in national governments will serve as the legal framework for citizen participation.

The challenge of political participation in ICANN is increasingly the same as that for other global governance organizations (e.g. the World Trade Organization). It is less a challenge of a unique information society than of a functional system that crosses national boundaries. Global governance needs legitimate political authority, and currently that seems available only through inter-governmental organizations like the UN. The right to political participation is formally guaranteed in such settings, because the national governments that are the building blocks of inter-governmental organizations recognize it. True, the right is even weaker and more attenuated here than in national governments, but nonetheless it exists. To the extent that mechanisms and rights of political participation develop, they will likely be in the traditional context of national and inter-governmental political institutions.

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