



FORUM per la TECNOLOGIA della INFORMAZIONE

# eGovernance and Public Communication for an inclusive Society

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*"Parleranno e toccheransi e abbracceransi li omisi, stanti dall'uno all'altro emispherio, e intenderansi i loro linguaggi"* (Leonardo Da Vinci, *Codice Alatlantico, Profetie*)

## **1. Is Internet a working anarchy?**

There is a strange belief, almost magic and very ingenuous according to whit! Internet works because it works: so, by chance, owing to anarchy. This belief is entirely without foundations. Anarchy, by definition, does not work.

Internet works substantially because people follow some rules.

First of all there are technical rules for the links, the forms of the, messages all the levels of security, completeness and integrity that messages must respect. This is the most typically syntactic part, because bound by the operation of machines, that it is essential, in the former sense of the term, but we will not deal with it. There are other rules, customary, relating to human behaviours, desi<sup>s</sup>ned: to give a minimum organisation without which the network could not function.

We will dealt with them, not in their entirety, that is outside our possibilitie but only with the part that we consider important in the current international debate on the subject. Social rules have not only one syntactic aspect and a sematic one — as we see now — and essentially pragmatic: the rules have only one destiny "to be fulfilled".

## **2. The governance**

In the political matter there is a clear difference, in the dominant literature (the Anglo-American one), between "government", "governability" and "governance".

The first word in Italian (governo) means too many things, but in general, in any language, the concept of government can be related to the organisation of the State that is a part inescapable' in the Constitution.

The governability is on the duration of the Governments (especially in parliamentary systems) and in particular the possibility of governing in situations of parliamentary minority. This means that the rest of the political parties and political actors found more important to run a government - also in the minority - and so strengthen the political system than put it in crisis trying to go to the government, because in the last way they will weak the political system. The examples are numerous, especially in Italy.

The "governance" is in all administrative actions to give the citizens and businesses the actions which need to make their own purposes. Indeed, the "governance" is positive, as the governability and occurs, when these administrative actions tend to the simplification and quality, make it easier, more accessible, more transparent, more rapid obtaining information, the request of a certificate, authorisations and, especially the interaction between administration and citizens.

\* This paper is largely based on the introduction to the Italian contribution for ICANN Internet Governance Forum.

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In a simple way a good definition of governance could be the following:  
"all the actions that must be done by the holder of the power to allow persons and enterprises carry out their action in the society".

It is basically legal rules, but given the current guidance of the doctrine on political and social matters, we have no restraint in dealing with the social practicies and political addresses which go from the various countries to Internet and vice versa. Intend us, if it is a social practice, and it should be laid down with words, then it is a social rules.

We do not want interfere with definitions problems and demarcation of normal territory between and

inside the social sciences. The same word "governance" could be the subject of a doctorate in political science. In Italian there are great resistance - shared - to translate them into "governo" for the many meanings gives that this word has in Italian politics. The Spanish manage very well with "gobernanza", other than "government" and "governability".

### 3. Internet and politics

Internet is a network of networks little structured, but highly pervasive. By now there is not a side of social or individual life where it is not entry. Of course, even policy cannot do without it.

The first one was Al Gore, when he was Clinton's Vice-President: he opened a White House portal offering news and asking the interaction of the public. Many of us participated to that mythical time in which the White House replied in a week. In a short time they were blocked by messages and so the selection started and it lasts until today, but virtually all political systems have their port-nearly all the parties have a portal. The use of Internet increases during the election campaigns.

This year, in July, there was an important experience during the U.S. pre-elections: for two hours the democratic candidates to the Presidency have been subjected to video questions taken by *YouTube* and distributed in direct CNN. Of course it is not at all direct democracy, because the questions were filtered by Anderson Cooper from CNN. David Borman, from the same television channel, said that he cared that the show not deteriorates into farce, but the audience once heard questions that journalists do not know to ask.

"Be honest: what you will do different from other politicians? What will make you more efficient than the others that promise, and not fulfil?" challenged Zach Kemp, a blond boy from Utah while his face filled up a giant screen of television. And the candidates tried to defend themselves. Hillary Clinton, Barack Obama, John Edwards and the other five democratic pre-candidate had to answer questions that for the first time were in direct thanks to homemade videos and put on the Internet *YouTube*: the mother of a soldier wonder "how many boys have to die before the democratic stop to prioritize the policy above their consciences with reference on Iraq?"

Even if, as already said, this is not direct democracy however it is a means through which many can reach the few who must decide or that arise in the run to govern. The movement of ideas and a space for the debate are the first part of democracy still to be organized. Internet can congratulate with itself, with lights and shadows.

The means it is very powerful and this makes its serious study an imperative: all the things that are technologically possible must be made? What are the criteria for choosing?

### 4. The Internet policy

In political terms it is a problem of power: who does the rules, how they are done, looking for which targets, who interprets the rules for the application, which law is applied, which authority is decisive if there are conflicts, who controls the controllers.

In other words, the problems treated by this paper are very similar to the constitutional ones. A constitution has two parts: a necessary one, on the distribution of powers, the faculties and the courts; and an other one, not necessary, but more important: the statement of values that will be supported, and will support all the

1. See paragraph 4.

2. Direct democracy is a very interesting and wide issue, there is still a lot to discuss, First of all, if it is possible, then if it is desirable, and after the relation between "representation/participation".

legal structure. If you want, the Declaration of Fundamental Rights.

Well, both parties are currently discussed: who does the rules of Internet, as it does, who applies them and who controls, which objectives are to be pursued in order to get to universal solutions, generally accepted, and what makes the network works in a better way.

Some of the problems are rooted in the most ancient legal tradition. And here is a first warning: if Internet is planetary there will be a plurality of legal cultures in competition - solutions must therefore take account of the contexts and customs. For this reason the first right to assert itself in Internet is the one relating to the merchants, the *lex mercatoria*, because everybody used and still use it even before and without Internet. But the network has created new situations that must be addressed in this field, as for example, the Law and jurisdiction in force<sup>3</sup>.

At the beginning the Vienna Convention of 1980 on international sale was much used. Later some firms (especially U. S. companies which are the ones that make more use of electronic commerce) have begun to understand that imposing own Law and jurisdiction to buyers constitutes security for them, provided that a monopoly is retained.

As soon as the first enterprises (some small businesses) have begun to offer buyers' law and jurisdiction, buyers have not had doubts, even with surcharge they felt more quiet buying under these conditions. Today we can say that the iron law market has transformed those exceptions in regulation and instead the undertakings which impose their own law and their competence are exceptional.

However this has led to an unfair discrimination between countries from the point of view of ideal equality, reasonable in front of the practical behaviour. We often see a clause that states that a product will not be sell in the countries X, Z or \_ it is reasonable if a country has not stable laws, nor reliable courts: the mer-ants don't trust and therefore do not sell there.

## 5. The Governance of the network

The need of syntactic rules for Internet is left to a UN body named Commission ISO. There are other United Nations bodies that took care of form that documents must have in the network, currently called EBBS Commission. But who poses the rules of organisations (constituent or constitutional) of Internet is still subject of debate: the North American Ministry of Foreign Trade is historically e of these supporters and controllers, although other organisations are launched, especially for international standard, in these organisations all the governments are represented.

There is a third solution *that follows the second one but which considers that slowly the different countries will reach an agreement in international organisations, but not excluding the EEUU privileged service because otherwise every change would mean a hard battle: and the most important thing is to keep the eration, the diffusion and the growth of the network.*

Internet is a network of networks, therefore it is called the mother of all networks or the Net, with capitalized. Internet operates thanks to the fact that there are the TCP/IP protocols and the attribution of domains is considered matter if governance (in the strict sense), but also of government of the network. This *element* of addressing is the only one that allows guaranteed uniqueness of a global phenomenon. The actors are ICANN, ISOC, LIPU. And on these actors and or ( the representatives of national governments turns the possibility of operate for tablishing the criteria that consent the Network functionality.

How allocate the domains? How assign the IP? What are the Host's responsibility bility?

ICANN organisation may be summarized in the graph of Fig. I where it showed how the national representatives interact with the Board of Directors, that there is a specific staff, an Ombudsman and various committees all interacting with the Board.

3. On April 29, the U.S. Court of Appeals for the Ninth Circuit decided to rehear the case of *Gator.com Corp. v. L.L. Bean, Inc.* - which deals with the increasingly important question of how to determine Internet jurisdiction in the era of eCommerce. For a comment set L. Peterson, *Comparing Internet Jurisdiction in the U.S. and the E. U.: A California Federal Case Illustrates the Contrast*, [http://writ.news.findlaw.com/student/20040519\\_Peterson.html](http://writ.news.findlaw.com/student/20040519_Peterson.html).

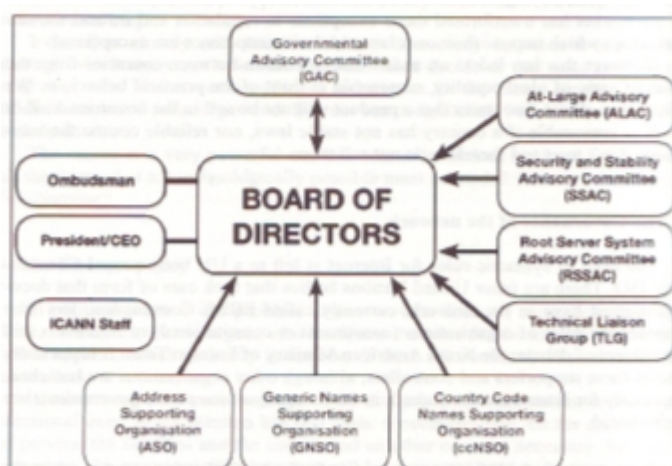


Fig. I—ICANN organizations.

Instead, in the broad sense, Internet governance has to do with all the legal problems that are dealt on its own by

the national States, through transnational structures, or directly through treaties. Cooperation and competition go hand in hand and it is necessary to find solutions that meet the opposing interests, but that at the same time hold the hard objections of history (to say as Hegel).

If it is very difficult for a country to find "the common interest", let's imagine for a global community! Here the actors are UN Internet governance Forum, the OECD, W3C, but we could include many of the national associations concerned with the specific issue of the rules of Internet and more widely the organisations and even the lawyers who are interested in this new law born from new technologies.

And the issues that must be treated are all the issues that have a legal substrate: is a meeting of pedophile in Second Life a crime? If so, where? And it must be judged with what rules?'' also: What should I retain of my data bank to have the right to refund if there is a hacker' attack? which is the Bank's liability? What is the evidence of an electronic funds transfer?

All the interventions on Internet law have a highly technical aspect, so it is not convenient to intervene without prior consultation with experts in the field. The rules, introduced in Italian 2007 Finance Act, destined to remove the cases of online gambling, in the absence of authorization, apply directly to suppliers of connectivity in the network. For this end the Administration provides a list of sites that the provider must filter and make inaccessible changing the record of registration in the addresses area (domains), but the only way to make invisible these sites is to prevent the access (by filtered IP addresses) to names assigned from the authorized registers. In this way, the filter IP prevents access to the whole servers and does not allow to reach hundreds of other destinations different from the ones to be removed<sup>5</sup>.

In the 21st Century there is no place in national governance for technical mistakes such as to make a legal rule unworkable. The legislature has no more those margins of time that in the past allowed also coarse mistakes. Speed is an important part of the concept of the information society and this implies some tolerance limits to the failure by both public and private or civil society.

## 6- The legal rules of the Internet

The central theme consists of rules: which content must have? Who must fulfil them? and if they are not fulfilled what are the penalties? Also in this area one is expected to choose between opposing solutions. This would be really easy, but the choices must be made in the universe of greys ranging from a very obvious solution to another one, opposed, as granted, with a myriad of options which are intermediate — generally the more practicable.

4. See Tribunal de Grand Instance de Paris, ordinance of July 2, 2007, on [www.droit-technologie.org](http://www.droit-technologie.org).

5 Keuleers E., *On line gambling and electronic commerce in Europe: the wind is Filing*, [www.gamblinglicenses.com](http://www.gamblinglicenses.com), and Verbiest T. *Internet gambling. The European legal framework*, [www.droit-technologie.org](http://www.droit-technologie.org).

Internet, as a global phenomenon<sup>6</sup>, involves many problems of contextualization of law and internationalisation. The *lex mercatoria* is a good example but law is moving quickly according to social change and new technologies, not only the commercial law, but also the administrative law, and an intermediate area that is deleting the old boundaries between public and private law, for example Sumer rights.

Internet has a history that has determined, as often happens in the legal systems terms - a form of government and a way of governing. At the same time, the enlargement of a network, born as an academic network, for universal medium involves many and so profound changes that are worth examining where we are and where we would be.

Multilingualism is a fact and more countries are involved, more urgent becomes the problem. We cannot avoid multilingualism.

Another problem not worthless is to give a correct legal solution to the new figures, born from Internet:

provider, host, web pages, blog. It is like classic. new problems using the old theories. For example there is a computer crime? If what is the legal thing that we want to protect? Or rather we must talk to each other of the old crimes that are now committed through the network, for example the fraud now is "Phishing", etc.

But without hand the bush, who governs Internet is still an *urgent* issue and, how are the relation between the national and supranational policies, also related to that privileged interlocutor that it is the government of the network'. In the middle there are a myriad of issues that are born precisely from this new situation of a means which jumps the borders and that puts in discussion the already treated theme of national sovereignty.

A stand of shields from national sovereignty would end up Internet, but net has the technical means to pierce the shield of national sovereignty. An agreement must be found: it is a curious case of opposite forces of a different nature that cannot be balanced nor joining the final battle.

First and foremost the new rights and duties - always whereas if there is a someone is obliged to do something, otherwise this is a mere declaration, but **them** new rights born like this: at the beginning are declarations, in practice then are finding specific properties that the legal efforts ontologies are allowing. The theme is of primary importance for the number of persons involved and for the compulsion that these require as a condition for the network expansion.

## 7. Internet has an entirely material support

Then an issue that was lethal for lawyers till now: all Internet, from hard **disks** where messages born, to the many forms of transmission until they reach an host the derivation to a user, is damned material. Material is the orientation of ferri which constitute the document in the hard disk, material is the conformation packages of transmission and material is the transmission, material the place of the host, material the recipient's address. Material means that has a corporeity in tin and space, and it can travel, through a medium that is material too (energy).

For many experts these are obvious. It is not the same in the legal world when is assumed a sort of incorporeity intrinsic to digital, which involves terrible mistakes in legal ontologies. Since materials, the electronic documents fall within the definition of a document given by Carnelutti<sup>8</sup>, they can be damaged, lost, stole etc. and they need a physical location of reference: if you have a web page you must have a domain.

This involves very serious problems related to control and security on the one hand, related to privacy<sup>9</sup> on the other hand.

6. We will not discuss the existence of globalisation. We are persuaded that Internet self demonstrates the existence of globalisation.

7. See Lerouge J. F., *Internet effective rules: the role of self-regulation*, *The EDI Kaw Review*, Vol. 8, No. 4, pag. 197 f.

8. According to the teachings of Carnelutti, a document is something that makes us un and something else, Carneluttig F., *Documento (teoria moderna)*, in *Novissimo digesto iano*, UTET, Torino, 1960, vol. VI, pag. 86.

9. The Uniting and Strengthening America by Providing Appropriate Tools Required Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56), known as the USA F<sup>1</sup> TRIOT Act or simply the *Patriot Act*, signed into law on October 26, 2001. It pass whit minimal debate only 43 days after the September 11, 2001 attacks. The Act dramatically expanded the authority of U.S. law enforcement agencies for the stated purpose of fighting terrorism, among its provisions, the act increased the ability of law enforcement agencies to search telephone and email communications and medic ffiancial, and other records; eased restrictions on foreign intelligence gathering within the United States. This Act is a demonstration till which extent the individual rights can wished in favour of national security, also in a traditionally liberal Country.

Being interested of the rights we cannot ignore the fact that for a large part mankind the access to Internet does not set itself up to the law because it does n exist: they do not have networks, nor computers. In cases of extreme poverty, t] famous consumers rights become a right to consume, although there is not yet consisting literature on the theme.

An additional comment: some rights, as the consumer's right, cross all the leg disciplines from private to administrative law demonstrating that social change pr faces profound changes in social disciplines governing it. An elementary consideration is that every important human invention is both dangerous. Almost one cou say that the importance of scientific invention it is measurable in terms of its danger.

The greatest discovery of the last century was the atomic fusion and at the same time, it was the more dangerous. Internet cannot escape this logic. Internet can be dangerous and through Internet damages to things and people could be committed (crimes, of which we have an incomplete panorama).

### 8. Internet operates also thanks to solidarity and collaboration

There are not only problems, as in life, also in Internet there is the rivalry competition that involves a watchful eye to the abuse, but also cooperation which makes possible many goals with the aid of the many and work techniques not conflicting where the profit of one is not necessarily the loss of another, but the gain (not necessarily joint) of all. Cooperation in discussion forums and joint working groups are an important means to achieve goals of which all benefit from.

Internet is a part of modern life, so it has the characteristics of the fight between the regulation and the force. The Aristotelian position of *horror vacui* was confuted by an explanation of Torricelli on atmospheric pressure, but in the political and legal world perhaps we can say that there is still a *horror vacui*: when the private sector can make a space for itself, inside, alongside or against the law it does. Then the problem is to restore the balance which is difficult. The theme of the allocation of domains seem to be a purely register problem, but it hides much more<sup>10</sup>: ruthless battles for a symbol as for example "EU" and Latin America-where will the next conference, not and never managed to obtain the equivalent the resolution contrary to the symbol "xxx", only for a few votes, and the disputes that there are currently in Chile because a man, Andrés Chaperó has obtained the site *youtu.be*, challenged today by the important American company, *YouTube*.

### 9. Do new technologies change also the right?

As regards the other disciplines should be recognized that the new technologies have changed the world, by changing the conditions of time and space. In a globalised world is always 12 a.m. somewhere, which means you can be continuously because the time does not oblige the network.

A very important application is related to transactions that first had to wait some time before be formed instead today are virtually instantaneous. The same can be said with reference to space. Many years ago — in the middle of the 80's — came in Stefano Trumpy's office in Pisa, at CNUCE. He was in front of a console and he was very busy and as an absent mind person said, "wait a moment I am working with my data in Huston".

The phrase leave us dumb because it was obvious that he was in front of us Pisa. Was he became crazy? No, it was true, he was one of the first users of the ARPANET network and he had a data bank in Huston, where he was operating. As today we operate in our bank in London transferring funds into a Swiss account pay for certain services.

Changing the concept of time and space, it is easy to understand that our concept of the world is changed because in Kantian terms these categories are gnoseological and transcendental. And if the conception of the world changes, so law will change too, it is inevitable. Is this: the new technologies change the idea of the world, but at the same time they impose changes to the law that does nothing else than regulating behaviour in real historical contexts designed according to our ways to see the world.

The electronic government is changing radically the way to see and to implement the government in this way it is changing the administrative law and the current extent of private law rules about consumers' protection shows that private law is invading fields that first never would be of private law, including the administrative law. Many things change in law in a world changing thanks to new technologies.

The profound changes that have been produced in the way to create, to circulate, spread, collect, order, to make of the actions legally relevant to the information have transformed the world and necessarily are transforming the right. We must not and we do not want talk of a new law, but it is surely more attentive to globalisation, looking for the more universal possible solutions, instead deeply marked from a single culture.

Break down old divisions of disciplines, growing new ways to look at relationships. Should be used old and new theories to old and new ways of conceiving the rules, which continue to be the best way to resolve conflicts peacefully.

10. In the off line world there is a little or no problem in two or more people using the same or similar name, because it is the context in which the name is used that prevents confusion from occurring.

