



ICANN: A Global Administrative Law Perspective

Aishani Gupta

Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute

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Department of Law

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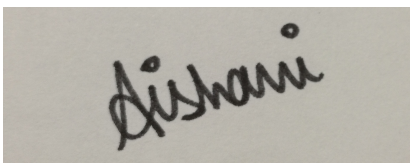
Statement of inclusion of previous work (if applicable):

I confirm that chapter II, Section D was the result of previous study I undertook at New York University School of Law, under Professor Benedict Kingsbury.

Statement of language correction (if applicable):

This thesis has not been corrected for linguistic and stylistic errors.

Signature and date: October 2, 2017

A rectangular box containing a handwritten signature in black ink. The signature is written in a cursive style and reads "Aishani".

Thesis Summary:

This thesis is an attempt to understand the multistakeholder model of governance within the Internet Corporation for Assigned Names and Numbers (ICANN) through the lens of Global Administrative Law (GAL). ICANN is presented within GAL scholarship as a successful example that has incorporated principles found within GAL. This thesis questions that notion, and presents a narrative of ICANN that demonstrates some of the normative issues underlying the incorporation of GAL principles. In this thesis, I argue that ICANN does not neatly fit into the GAL narrative and is in fact an attempt akin to fitting a square peg into a round hole, by ignoring the salient features of ICANN. Ultimately, I believe that this enquiry will contribute to GAL scholarship as well as the present understanding of ICANN. For the former, this thesis discusses the most important principles of GAL, namely accountability, transparency, participation and engagement, and publicness. For the latter, this thesis highlights the shortcomings of ICANN and gives a yardstick on which ICANN could be measured.

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ACKNOWLEDGEMENTS

When I started my time at EUI I saw my research there to be a stepping stone to an eventual doctorate, as a beta test. I wanted to ensure that I would be able to successfully complete a lengthy research project while still staying motivated and engaged with the work I was doing. Working on this at the EUI, with other researchers at similar stages in their careers showed me that I could successfully complete a lengthy research project in this particular field without losing my way.

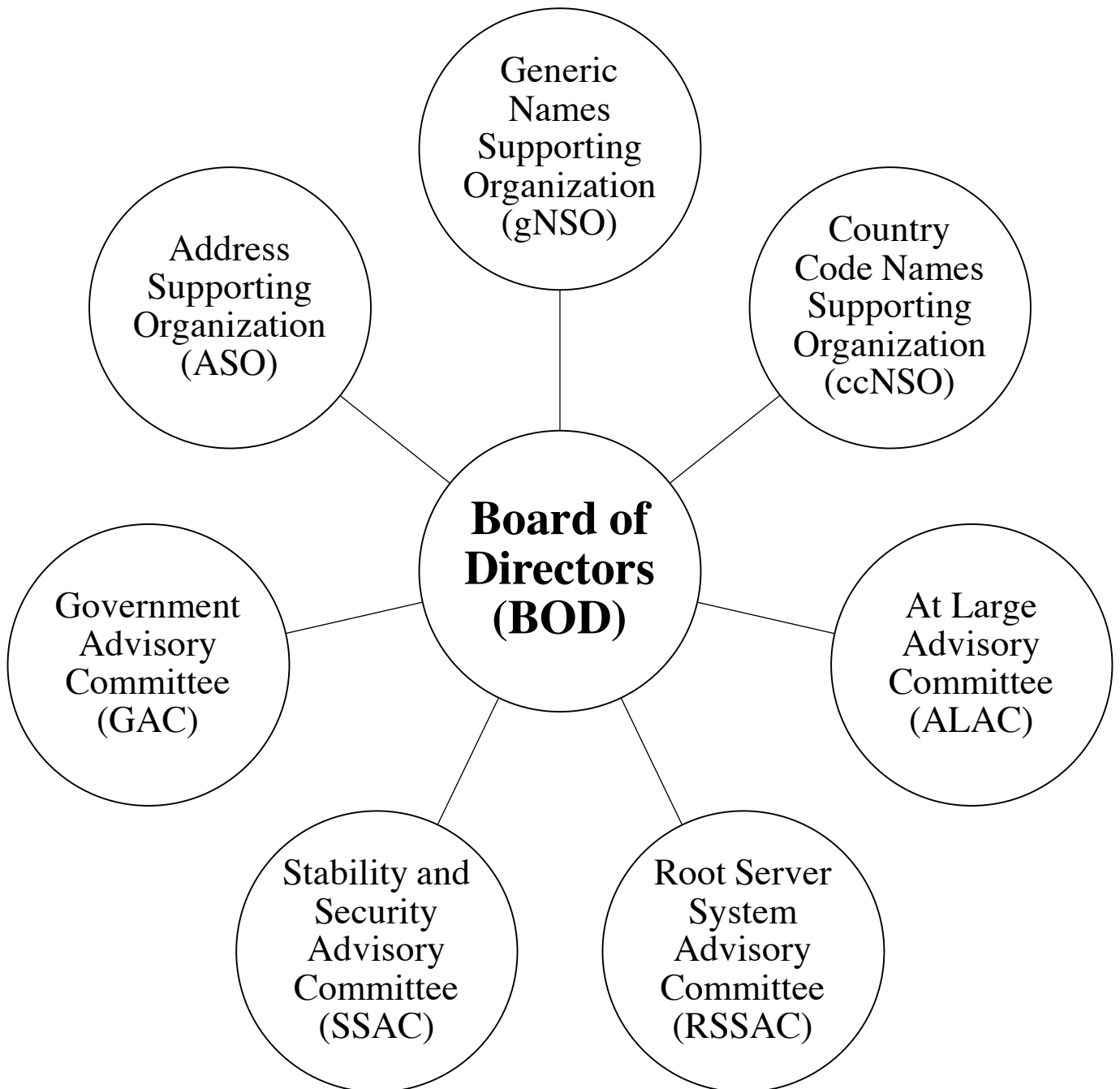
For the past few years I have seen my life as a journey, trying to find ways to explain the world we live in. I saw an explanation for that through GAL. This obsession for understanding GAL would not have been possible without working under Prof. Benedict Kingsbury after graduating from NYU. I would be remiss if I didn't mention the impact that he has had on me. It was partly due to his encouragement that I came to EUI to work under Prof. Nehal Bhuta. Prof. Bhuta has been a wonderful supervisor and I could not have completed what seemed like a herculean task in September 2016 without his support, insightful comments and ever prompt replies. The structure of the LL.M at EUI was a huge benefit for my work, giving me enough time to work on it while still pursuing new avenues through the interesting courses provided by the Law Department. I would especially like to express my gratitude to Emma Nyhan, who was unbelievably supportive despite her own workload, both as a friend, and as a colleague.

For me, a task like this would not have been possible without my family, who have been a source of strength in my life, despite the fact that they do not completely understand what exactly I do. Ultimately, this thesis would not exist if it wasn't for my grandfather, who instilled in me a love for reading and a sense of curiosity, perhaps the two things that have contributed most significantly in not just this thesis but the decision to be a part of academia.

GLOSSARY

ACIG	Australian Continuous Improvement Group
ALAC	At Large Advisory Committee
ARPANET	Advanced Research Projects Agency Network
BOD	ICANN Board of Directors
ccNSO	Country Code Names Supporting Organization
ccTLD	Country Code Top Level Domain Names
CRADA	Cooperative Research and Development Agreement
DNS	Domain Name System
DOC	US Department of Commerce
DOD	US Department of Defense
EC	Empowered Community
GAC	Government Advisory Committee
GAL	Global Administrative Law
GAO	US Government Accountability Office
GNSO	Generic Names Supporting Organization
gTLD	Generic Top Level Domain Names
IAB	Internet Architecture Board
IANA	Internet Assigned Numbers Authority
IBSA	India-Brazil-South Africa
ICANN	Internet Corporation for Assigned Names And Numbers
ICG	IANA Stewardship Transition Coordination Group
IETF	Internet Engineering Task Force
IR	International Relations
IRTF	Internet Research Task Force
ISI	Information Sciences Institute
ISOC	Internet Society
ITU	International Telecommunications Union
MOU	Memorandum of Understanding
NSF	National Science Foundation
NTIA	National Telecommunications and Information Administration
PTI	Post-Transition IANA/Public Technical identifiers
RFC	Request for Comments
RIR	Regional Internet Registrars
RoL	Rule of Law
RSSAC	Root Server System Advisory Committee
SSAC	Stability and Security Advisory Committee
TCP/IP	Transmission Control Program/Internet Protocol
TLD	Top Level Domain Name
UCLA	University of California, Los Angeles
USC	University of Southern California

ORGANIZATIONAL CHART OF ICANN



Each of these seven constituencies provides advice to the BOD before a decision is taken.

“We reject kings, presidents and voting. We believe in rough consensus and running code”¹

-David Clark

CHAPTER I – INTRODUCTION

the Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit entity formulated under Californian state law that usually caters to varied stakeholders by granting domain names on the internet. The main aim of this paper is to understand ICANN within the realm of Global Administrative Law (GAL). In other words, this paper seeks to appraise ICANN in GAL terms. ICANN is widely used as an example within GAL scholarship.² In fact in the GAL framing paper³ five categories of global administration were discussed, “(1) *administration by formal international organizations*; (2) *administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials*; (3) *distributed administration conducted by national regulators under treaty, network, or other cooperative regimes*; (4) *administration by hybrid intergovernmental–private arrangements*; and (5) *administration by private institutions with regulatory functions*.”⁴ ICANN was used as an example under the fourth category of hybrid intergovernmental-private arrangement. However, as will be seen in chapter III of this thesis the story of ICANN, as complex and it is doesn’t really fall under that category at all. The main purpose of undertaking this enquiry is to test the notion that ICANN fits within the normative paradigm of GAL. This exercise would require focusing on outlining and analyzing GAL scholarship, distilling its most essential norms, and then determining whether ICANN actually fits into this normative paradigm.

In this thesis, I argue that ICANN does not neatly fit into the GAL narrative and is in fact an attempt akin to fitting a square peg into a round hole, by ignoring the salient features of ICANN. Ultimately, I believe that this enquiry will contribute to GAL scholarship as well as the present understanding of ICANN. For the former, this thesis discusses the most important principles of GAL, namely accountability, transparency, participation and engagement, and publicness. For the latter, this thesis highlights the shortcomings of ICANN and gives a yardstick on which ICANN could be measured. To these ends, the main research question posed for this paper is a simple yet important

¹ David Clark, *A Cloudy Crystal Ball: Visions of the future/ Apocalypse now*, 24 Proceedings Internet Engineering Task Force, 539 at 543 (1992), available at: <https://www.ietf.org/proceedings/24.pdf> accessed on September 21, 2017.

² Benedict Kingsbury, Nico Krisch and Richard B. Stewart, *The Emergence of Global Administrative Law* 68 L. & CONTEMP. PROBS. 15 (2005) [Kingsbury et al.]; Nico Krisch, Benedict Kingsbury, *Global Governance and Global Administrative Law in the International Legal Order* 17(1) EUR. J. OF INT’L L. 1 (2006) [Krisch and Kingsbury]; Sabino Cassese, *Administrative Law without the State the Challenge of Global Regulation*, 37(4) N.Y.U. J. OF INT’L L. & POL. 663 (2005) [Cassese]; Richard Stewart, *Remedying Disregard in Global Regulatory Governance* 108(2) AM. J. OF INT’L L. 211 (2014) [Stewart]; Lorenzo Casini, *The Expansion of the Material Scope of Global Law*, in RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW (Sabino Casese ed., 2016).

³ Kingsbury et al. *id.*

⁴ Kingsbury et al. *supra* note 2 at 20.

one:

Does ICANN fit within the GAL paradigm?

A. Methodology

The main aim of this project is to essentially perform a GAL appraisal of ICANN. In a project like this it is nearly impossible to utilize traditional sources of international law because the subject matter of this project is not traditional. First, because ICANN is a hybrid entity and constantly changing. Second, the body of scholarship that I plan to engage with – GAL, is relatively new. Therefore, it draws on a wide range of literature to forward arguments. I will look at primary sources such as ICANN founding documents i.e. the agreements between ICANN and the US government; its rules; and its Bylaws. Given the fact that the main subject matter that ICANN deals with is the internet in keeping with the principle of openness most information is freely available. Thus, I will be using numerous webpages as sources. I will also delve into doctrinal work dealing with internet governance. Additionally, it is imperative to attempt a first-hand understanding of different structures and mechanisms within ICANN through observations of their functioning. To do so I engaged with ICANN during their meeting number 58 and 59.

I would forward five main reasons why ICANN should be examined through the GAL narrative. First, it is erroneous to assume that ICANN neatly fits into the GAL narrative without understanding its complexity. Secondly, as will be seen in detail in this thesis, ICANN has a defined public, its stakeholders were outlined in its foundational documents as ‘the internet community’,⁵ which includes private companies such as any company with a domain name on the internet, and companies that either ICANN or the US government has outsourced part of the domain name function to such as VeriSign; states; civil society organizations; and the internet technical community also known as the Regional Internet Registries (RIRs). As will be noted in Chapter II while dealing with publicness some issues are less complicated with respect to ICANN because of its predetermined public. Third, ICANN functions through an exceedingly interesting bottom-up multistakeholder model of governance. The rules pertaining to this decision-making process regularly undergo review processes leading to changes in its rules and Bylaws. Fourth, ICANN performs a public function, even though ICANN itself is a private entity. Arguably, since the internet, unlike the globe, is devoid of territorial obstruction, ICANN has managed to become a truly global entity. Finally, ICANN is at an exciting time in its evolution because the US government no longer holds a position of oversight within

⁵ NAT’L TELECOMM. & INFO. ADMIN., MANAGEMENT OF INTERNET NAMES AND ADDRESSES (1998) 63 Fed. Reg. 31,741.

ICANN as of October 1, 2016. Making it imperative to note the impact that this transition has on ICANN's model of governance.

The thesis itself is divided into three substantive chapters. The first will analyze GAL and outline the underlying normative principles of GAL by referring to the main scholarship within this field. Herein, I will briefly discuss the foundations of GAL and the core underlying norms at its heart, accountability, transparency, participation, and publicness. The next chapter will discuss ICANN. I will briefly outline the history of the internet, which will assist in detailing the history of ICANN. I do not believe that it is possible to comprehend how ICANN presently functions without analyzing how it came to exist. I believe that understanding its past will enhance the narrative of its present. Consequently, I will undertake a detailed examination of policy papers by the US government, ICANN's founding documents, amendments to the contracts between ICANN and the US Department of Commerce (DOC). Thus, I will essentially construct a narrative of the history of ICANN. This is especially valuable as ICANN does not have any kind of authoritative history of its own. I will then discuss the organizational structure and the multistakeholder governance model followed by ICANN in its decision-making process. This last part will be complemented by the firsthand observations I have made by attending ICANN 58 and listening to the recordings of sessions at ICANN 59. The final chapter will deal with answering the research question with the help of analyses of the previous two chapters. Herein, I will test ICANN against metrics laid out in chapter II, namely, accountability, transparency, participation and engagement, and publicness. Eventually I conclude by demonstrating that in fact ICANN does not neatly fit into the GAL paradigm.

This thesis brings up two main issues that I believe need to be reconsidered. First, the hermetic categorization of five types of organizations that come within GAL. In my opinion these categories should be more amorphous rather than impermeable. Consequently, it is time for GAL scholarship to move forward from this typology of organizations in the global space. Second, ICANN has moved forward in some senses with respect to the norms outlined under GAL as it has matured as an organization through different stages of evolution. However, ICANN still has much work to do to actually enshrine these norms in a way that is not only true to these norms, but also enhances ICANN's model of bottom-up multistakeholder participation.

Ultimately, through this thesis I point out that the normative hurdles that principles face when placed from the well settled domestic space to the global can be attributed to differences in structure of these two spaces. I would argue that rather than transplanting these principles from one space to another it is much more logical to understand their normative underpinnings and see how they would function in the global space so that their essence is not lost.

CHAPTER II – GLOBAL ADMINISTRATIVE LAW

This chapter does not propose a comprehensive or cohesive framework of GAL. Rather, I look at four distinct norms that I believe occupy an important place within GAL scholarship. The first section deals with an issue at the heart of GAL, accountability. The second section analyzes transparency, which is intertwined with the concept of accountability. The third section discusses participation and engagement. Finally, the last subsection analyses the value of publicness and what it means within GAL. Herein, I discuss that any law in the global space that comports with GAL must be public at the very least, in four senses, deliberation, creation, promulgation, and application. This chapter simply aims to provide certain parameters that ICANN will be tested against to determine whether it actually fits within GAL or not in chapter IV. However, before proceeding to a discussion of those normative values, it would be prudent to understand the global space, governance within that space, and thus, GAL itself.

The structure of the global space is different from the traditional structure of the ‘inter-national’ space. It is fragmented and works through formal and informal networks of strategic cooperation.⁶ It is characterized by its decentralized nature.⁷ As discussed in detail in this chapter though states exist in this space and function as public entities as dubbed by GAL, they are no longer the only players. There has been a proliferation of entities within this space, creating multiple overlapping regimes. Consequently, without a global government or without a concrete idea of roles that various players perform, making and implementing rules is difficult at the global level.⁸ Due to the increase in the number and roles of stakeholders in any entity functioning within this space, equality among them is a fiction. This inequality among stakeholders can be noted, for example in ICANN, as will be demonstrated by the subsequent chapters of this thesis. This kind of governance has led to a dissolution of boundaries between the national and international; international and global; and private and public. This is a product of the proliferation of public entities in the global space and the expansion of the extant regulation in this space. The global space is dependent on the functioning of the multiplicity of entities involved in global governance. In a post-westphalian world it is difficult

⁶ Kingsbury et al., p 31 *supra* note 2; Nico Krisch, *The Pluralism of GAL* 17 EUR. J. OF INT’L L. 247, 275 (2006) [Krisch, 2006].

⁷ Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. OF INT’L L. 23, 26 (2009) [Kingsbury, 2009].

⁸ Robert Keohane, *Global Governance and Democratic Accountability*, in TAMING GLOBALIZATION- FRONTIERS OF GOVERNANCE 130, 133 (David Held & Mathias Koenig-Archibugi eds., 2005) [Keohane].

to understand the notion of a global space where the dichotomy between domestic and international has broken down and one impacts the other.⁹ Thus, this global space is functionally determined.¹⁰

GAL arises from the understanding that in this global space, administration typically dominates interactions.¹¹ GAL is not insistent on having the status of ‘law’, rather that procedures employed in the global space must be accountable.¹² It reflects the heterogeneity of arrangements and procedures followed in the global space. Most questions GAL tackles are procedural, dealing with transparency, accountability, consultation, participation, rationality, and legality.¹³ GAL analyzes entities that wield public power, perform public functions, make rules through publicly deliberative methods, and apply these rules to a self-designated public.¹⁴ Thus, other than the procedural issues mentioned GAL predominantly deals with publicness,¹⁵ in that its main concern is public entities. It begins with the notion that if an entity is exercising public power, then it should be accountable. Within these public entities, GAL attempts to ascertain and evaluate mechanisms of accountability. Though it should be noted that the principle of publicness is complicated in the global space due to the difficulty in defining the public.

A. Accountability

Though I believe that there are many problems with the present version of accountability as envisaged within GAL this section is not a detailed exploration of those issues, though they will be briefly mentioned. The main focus of this section is to give an overview of the meaning of accountability within GAL. I will begin by briefly outlining its origins; I will then discuss how accountability functions in the global space through two lenses, the structural and the normative; lastly, I will discuss the problem that the present conception of accountability faces in the global space. This is a problem of transplanting a principle from one setting to another without comprehending the structural differences between the two spaces.

⁹ Krisch and Kingsbury *supra* note 6 at 1.

¹⁰ Ming-Sung Kuo, *Between Fragmentation and Unity: The Uneasy Relationship Between Global Administrative Law and Global Constitutionalism*, 10 SAN DIEGO INT’L L.J. 439 (2009) [Kuo].

¹¹ Kingsbury et al., *supra* note 2 at 16.

¹² *Id.*; Kingsbury, 2009 *supra* note 7 at 34.

¹³ EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* 22 (2011).

¹⁴ These are a few categories of what publicness entails within the framework of GAL. I am grateful to the various conversations with Prof. Kingsbury on this issue while doing research under him for a paper entitled *The Value of Publicness in Global Administrative Law*.

¹⁵ See generally, Kingsbury, 2009 *supra* note 7; Benedict Kingsbury, *International Law as Inter-Public Law*, in XLIX NOMOS: MORAL UNIVERSALISM AND PLURALISM 167 (Henry Richardson and Melissa Williams eds., 2009) [Kingsbury, 2009 b]; elaborated in Section D of this chapter see *infra* page 18.

Originally accountability was a term of art, developed in political science literature dealing with controlling the exercise of power.¹⁶ It originated from the language of the counting house, put to use in the political arena.¹⁷ Today accountability is connected to principles of good governance.¹⁸ But the connection of this concept with funding should not be overlooked, in many cases in the global space the stakeholder that an entity must be accountable to is one that financially contributes to it.¹⁹ This limits the notion of accountability by requiring accountability merely to the most powerful states and economic actors.²⁰ Essentially, regulatory bodies that have such power and discretion are required to be accountable. Accountability generally manifests around those who have the power to make a decision and those who would have to bear the burden of that decision.²¹ Where there is an exercise of public power there should be accountability mechanisms. Given that there are different constituencies in the global space²², there must be different accountability mechanisms for them as well. Such mechanisms ensure that different constituencies are fairly treated by taking the inequalities among them into consideration.²³ GAL scholarship references International Relations (IR) literature to understand accountability, thereby overemphasizing the relational or structural aspect of accountability.²⁴

Another facet of accountability is that it functions in an ex post facto manner, only after the accouter engages in problematic conduct, can the account holder take issue with it.²⁵ Legal accountability requires that when conduct outside the mandate of the accouter has taken place, the law prescribes a legal remedy for this action. In this situation, the entity whose decisions are being reviewed must provide account for its conduct.²⁶ To some extent, this explains the reconsideration mechanism used by ICANN to infuse accountability into its system, which literally requires a decision to be reconsidered. This mechanism will be discussed in more detail in the subsequent chapters.

¹⁶ David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law*, ACTA JURIDICA 3,25 (2009) [Dyzenhaus, 2009].

¹⁷ Tony Wright, *The Politics of Accountability*, in THE CAMBRIDGE COMPANION TO PUBLIC LAW 96 (Mark Elliot and David Feldman eds., 2015).

¹⁸ Carol Harlow, *GAL: The Quest for Principles and Values* 17(1) EUR. J. OF INT'L L. 187 (2006) [Harlow].

¹⁹ See generally, *id.*

²⁰ See generally, Stewart, 2014 *supra* n 2.

²¹ *Id.*; Danielle Rached, GAL and Accountability 3 GLOBAL CONSTITUTIONALISM 338 (2014) [Rached].

²² Krisch, 2006 *supra* n 6.

²³ See generally, *id.*

²⁴ See generally Keohane *supra* note 8; Ruth Grant and Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2003) [Grant and Keohane]; Allan Buchanan and Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT. AFF. 405 (2006) [Buchanan and Keohane].

²⁵ See generally, Stewart *supra* n 2.

²⁶ See generally, *id.*

To my mind there are two lenses to look at accountability through, the first is its structure, and second is the normative principles it implies. These two lenses must be taken into consideration for a holistic understanding of accountability.

1. The structural lens:

Accountability generally embodies a classic principal-agent structure where: first, there is a specific accountee (primary party); second, there is a specific account holder (secondary party); and third, the secondary party has the capacity to impose sanctions or some coercive measure if the primary party does not act in an accountable manner.²⁷ Questions that revolve around accountability then, generally place emphasis on (1) delineating these structures; (2) the relationship of the primary party to the secondary party; and (3) who comprises the secondary party for a given entity in the global space.²⁸ Thus, attempting to answer the question, who should an entity be accountable to?

2. The normative lens:

Accountability has come to imply many concepts. It is a normatively rich concept, implying varied contexts.²⁹ However, this kind of commingling of various ideas within accountability adds laxity to its meaning.³⁰ It has come to indicate issues related to power, authority, discretion, legitimacy, transparency, review, participation, due process, consultation, and a dependence on democracy. Accountability is confused, it needs normatively defensible principles for it to be better organized.³¹ Though the words tend to be used almost interchangeably, accountability is not simply about legitimacy but it requires “*a family of specific arrangements for conferring and controlling the use of power*”.³²

Most of what I have described are issues that are common to discussions revolving around accountability in GAL, and global governance scholarship. However, the difficulty in this concept occurs when it is simply transplanted from the domestic to the global without giving specific thought to the fact that the global space is organized differently from the domestic. Traditional mechanisms of accountability as applied to the domestic space are not easily supplanted to the global space. Additionally, these traditional mechanisms of international law are not viable in the global space which is outlined in the beginning of this chapter as a complex domain where states are no longer the

²⁷ See generally, Dyzenhaus 2009 *supra* note 16; Stewart, 2014 *supra* n 2.

²⁸ *Id.* Dyzenhaus, 2009 *supra* note 16; Stewart; Krisch, 2009 *supra* note 6; Kingsbury et. al., *supra* note 2.

²⁹ *Id.* Dyzenhaus, 2009 *supra* note 16; Rached *supra* note 21.

³⁰ Stewart, *supra* note 2 at 255.

³¹ Krisch, 2006 *supra* note 6.

³² Stewart, *supra* note 2 at 245.

main actors.³³ Additionally, accountability is complicated by the fact that in the global space there are numerous accounters, instead of any central global authority.³⁴ Consequently, often global entities are accountable to the wrong constituency.³⁵ Without a well-defined community it is difficult to understand how accountability might work, as there is no way to measure the impact of the decisions.³⁶ This is additionally complicated by the fact that any such community would comprise multiple stakeholders with varied interests it is additionally possible that the same person belongs to multiple constituencies. Hence, determining accountability in such a context is a complicated exercise.

B. Transparency

In this section I will begin by outlining the origins of transparency, then I will briefly discuss the relation between accountability and transparency; next I will discuss two categories of this concept, active and passive; and lastly I will detail why a thin conception of transparency is problematic.

It has been asserted that the concept of transparency emanates from the values of good governance. Since, information and accountability go hand in hand, transparency emerged as a value of good governance.³⁷ It supports the distribution of information to the varied stakeholders, this is important in the global space.

The idea of transparency is intrinsically linked to accountability. Those trying to hold entities accountable must have information about those entities wielding power.³⁸ Providing information then becomes important for the account holder to track the performance of the accounter.³⁹ It would be possible to envisage an entity that has mechanisms for transparency but not for accountability.⁴⁰ On the other hand, if an entity is to be accountable inevitably it cannot do so without mechanisms dealing with transparency. It is important to point out that, unlike accountability, which is an ex post mechanism, mechanisms of transparency are ex ante i.e. targeted prior to conduct that is considered problematic. It should additionally be noted that transparency on its own should not be equated to accountability. If accountability were to merely mean transparency it would mean a very thin conception of accountability indeed. To be truly effective transparency requires other accompanying values such as accountability and participation.⁴¹ Furthermore, specific processes such as notice and

³³ Krisch, 2006 *supra* note 6.

³⁴ Rached *supra* note 21.

³⁵ Krisch, 2006 *supra* note 6.

³⁶ Stewart, *supra* note 2.

³⁷ Harlow, *supra* note 18.

³⁸ Grant and Keohane, *supra* note 24.

³⁹ Stewart, *supra* note 2.

⁴⁰ Stewart, *supra* note 2.

⁴¹ Grant and Keohane, *supra* note 24.

comment, which are categorized as accountability mechanisms are greatly enhanced by providing information in a transparent manner.⁴²

Generally, transparency may be thought of as two types, passive and active. Passive transparency would mean providing information only when it is sought. This is a kind of transparency that is only triggered when a concerned stakeholder attempts to ascertain some information. Active transparency is better suited to the global space and an entity provide information such as proceedings, minutes, transcripts to name a few, be publicly available.⁴³ More transparency is better than too little.⁴⁴ However, an entity must also be aware of the pitfalls of information overload. This tends to happen in ICANN. The amount of information available on the ICANN website is overwhelming. The website it is not the only source of information as the community relays information is other ways as well for e.g., teleconferences, mailing lists, etc. and the website itself is a mine of information.

Interestingly, it has been argued that a combination of transparency, participation and reason giving is enough to constitute a system of administrative law.⁴⁵ However, I would be wary about accepting this claim, on two counts. First, as transparency might enhance mechanisms of accountability, but a system of administrative law cannot properly function without accountability at its core. Second, Stewart's goal is to remedy disregard, for this purpose a limited approach of transparency, participation, and reason giving might be enough. But I would argue, that is not the case for a robust system of global administration.

C. Participation and engagement

In this section I will first outline how participation functions; I will then discuss the correlation that participation and engagement has with the previous two concepts I have discussed; next I will outline the types of participation that might exist; last I will describe the difficulty that this concept faces when transplanted into the global space.

Participation became important for one of two reasons. Either entities adopted these practices because of public and peer reputational influences,⁴⁶ or, these practices emerged as values of good governance, even without a democracy, though perhaps taking the example from the democratic context.⁴⁷

⁴² Kingsbury et al., *supra* note 2.

⁴³ Stewart, *supra* note 2.

⁴⁴ Buchanan and Keohane, *supra* note 24.

⁴⁵ Stewart, *supra* note 2.

⁴⁶ Stewart, *supra* note 2.

⁴⁷ Harlow, *supra* note 18.

Generally, for participation to have an impact, the number of participants would have to be sufficiently representative, so that the views of the active public could be seen as “*reflective of the opinions of people in the world as a whole to a significant extent.*”⁴⁸ Participation in this context does not simply mean allowing groups to participate in the decision-making process. It would require the entity to actively encourage new groups, and individuals to participate and engage with the entity in different and meaningful ways. To some extent, ICANN has managed to do just that by opening its doors to all those who wish to come to the three annual meetings that ICANN holds across the world. For these meetings ICANN also gives a stipend to new people who wish to be involved with the work of ICANN, so that money is not a complete prohibition from being involved and participating in their work. Additionally, ICANN has regional level meetings and workshops to ensure that the underserved regions are not left out. Other than face to face meetings one can also remotely participate in meetings as well through other means.

The concept of participation is linked to transparency. An environment of transparent information assists in better participation and engagement by the stakeholders involved.⁴⁹ Similar to transparency, mechanisms that contribute to enhanced participation must take place both prior to the decision-making process, but also must continue throughout the process. Participation as an element of global administration helps in making a body more responsive.⁵⁰

Generally, participation can be categorized as decisional or non-decisional. Decisional participation entails a right to deliberate, vote, and be heard during the decision-making process. Deliberation enhances participation, this will be analyzed in greater detail in the next section dealing with publicness. Even non-decisional participation assists in remedying disregard.⁵¹ Under this category, submitting evidence, comments, or briefs is an important element even though an individual might not be accorded with decisional participation.⁵² So, this allows persons outside the category of decisional participants to attempt to influence the organization. In the next chapter I discuss how ICANN manifests the idea of decisional and non-decisional participants.

The global space is structured differently to the domestic as I have described in the beginning of this chapter. Individuals have a limited role to play in the former space. The global space in the way it is structured does not allow individuals to participate in the decision-making process in their individual capacity. Participation is then only possible through mechanisms of a specific entity.⁵³ There is no direct mechanism for individuals to participate in the global space as individuals. The

⁴⁸ Grant and Keohane, *supra* note 24 at 34.

⁴⁹ Kingsbury et al., *supra* note 2.

⁵⁰ Stewart, *supra* note 2.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Cassese, *supra* note 2.

only means of participation is through participation in global public entities. So, individuals might be served as a grouping of stakeholders as is the case in ICANN, rather than participants on the global stage itself. All of this is also complicated by the fact that the public is not clearly demarcated when it comes to the global space.

*D. Publicness*⁵⁴

HLA Hart's notion of a 'Rule of Recognition' has a sociological element. It is contingent on the practices of the various players and institutions in any given system. This underlies Kingsbury's argument that publicness is akin to a Hartian 'Rule of Recognition' in the global space.⁵⁵ Essentially, this means that all 'law' that GAL as an enterprise encompasses, should be public in character, because GAL deals with public entities. The main aim of this section is to clarify and crystallize the principle of publicness by discussing the elements that could normatively contribute to this principle in the global space. Publicness connotes different things in the domestic and global space, mainly because of the differences in structure of these two spaces.

I will begin by describing the public sphere. Essentially in this section, I will argue that for a law to be public within the context of GAL it must be public in at least four ways, deliberation, creation, promulgation and application. These elements are thought of as public when it comes to the domestic space. But they may not necessarily be practicable in the global space. Even if viable they might function differently because of the distinct structure of the global space. Publicness means law claiming to stand in the name of the whole society and to speak to the whole society.⁵⁶ In this way voices that remain subaltern in the domestic space can be brought to the forefront in the global space. It must be noted that publicness in the global space is not about simply supplanting concepts from the domestic space. But rather analyzing the underlying norms that contribute to publicness in the domestic space and seeing what they entail in the global space.

To understand the concept of publicness one must attempt to understand the public sphere. Typically, arguments found within feminist scholarship help broaden the notion of the public sphere. The public sphere generally encompasses two issues, first, activities take place in a distinct public sphere; and second, those issues that are about the public, or of public concern are discussed. Fraser tries to discern what is meant when the term 'public sphere' is utilized. According to her this notion conflates three ideas: (1) the state; (2) the official economy of paid employment; and (3) the areas of public

⁵⁴ At the outset of this section I must state that the idea behind this research as well as guidance on these issues was that of Professor Benedict Kingsbury. This is used here with his permission.

⁵⁵ Kingsbury, 2009 *supra* note 7.

⁵⁶ See generally, Kingsbury, 2009 *b supra* note 15.

discourse.⁵⁷ Her focus of the public sphere is on the last idea wherein a public sphere is conceived as a space for the communicative generation of public opinion and debating matters of public interest.⁵⁸ To identify messages of public interest it would be helpful to identify the public, and the arena in which such debate takes place. This of course is a complicated exercise within the global space.

The main question that I deal with in this section is: what characteristics does publicness in the global space entail? Essentially, I outline four principles an entity would have to incorporate to be considered a public entity within GAL.⁵⁹ Publicness is a multi-layered and complex ideal. The answer to this question is complicated because of the difficulty in identifying the public in the global space. The domestic space is territorially confined, hence, the demarcation of the is public far simpler. This is not true in the global space, which is made up by varied entities and multiple regimes. These regimes themselves consist of stakeholders from multiple constituencies who are affected in different ways.

1. Public in deliberation

This subsection outlines deliberation by relying mainly on the elements of democracy. First, I will briefly discuss the concept of deliberation itself; second, I will look at the element of communication; third, I will outline the element of inclusion; then, I will discuss the element of representation.⁶⁰ This section discusses these elements without requiring any overarching democracy as understood domestically. Instead I look at the immanent principles that contribute to democracy in the domestic space and look at how these principles could would function in the global space. In my understanding till now, the work on deliberative democracy and GAL deals with what this concept could contribute to GAL rather than giving a view of what the deliberation itself should entail.⁶¹

Given how differently the domestic and global are structured, as is the case with the other norms discussed in this chapter, it is not truly possible to take democracy out of the domestic space and simply transplant it to the global. Instead a better approach would be to determine those underlying elements of a domestic democratic framework that could be carried over to the global, and how they would best function in this setting. This discussion is demonstrative of the fact that there are a varied range of concepts that contribute to the notion of publicness. I attempt to understand

⁵⁷ Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25 SOC. TEXT 56, 57-58 (1990) [Fraser 1990].

⁵⁸ Nancy Fraser, *Transnationalizing the Public Sphere*, in SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD 76, 76-78 (Nancy Fraser ed. 2009) [Fraser 2009].

⁵⁹ Deliberation, creation, promulgation, and application.

⁶⁰ The elements of recognition, and non-violence also play an important role in deliberation, though they are briefly outlined in the longer version of the paper, they are not discussed in this writing sample.

⁶¹ See generally, Benedict Kingsbury, Megan Donaldson and Rodrigo Vallejo, *Global Administrative Law and Deliberative Democracy*, in THE OXFORD HANDBOOK OF INTERNATIONAL LEGAL THEORY 527 (Anne Orford and Florian Hoffman eds., 2014).

how these elements might contribute to publicness in the global space. In some ways, all elements of deliberation contribute to issues discussed in this chapter, especially on the issue of participation and engagement.

(i) Deliberation

Young's work is particularly demonstrative of the manner in which deliberation can affect democracy and the public in the domestic space. Her discussion is anchored in feminist notions and the description of communication, inclusiveness, and representation of women in politics.⁶² It is necessary to follow this narrative to understand the importance of these elements, and how they might be applied in the global space.

Young tackles these issues by way of deliberation within the democratic sphere.⁶³ This requires citizens to engage with issues that are public in nature. Essentially, pointing to issues that are of public importance. This might also contribute to the understanding of values within the public conscience discussed in the next subsection. The main difficulty lies in the difference of subjects of the domestic and global space. In the former, citizens are the principal subjects; and in the latter, as envisioned by GAL, the principal subjects are public entities. These public entities could be states, but they include international entities such as ICANN, the World Trade Organization etc. as well. Individuals are then subjects only to the extent that they are stakeholders in these organizations and not necessarily as their own separate constituency. As discussed previously individuals never participate in their own capacity on the global stage, rather merely as stakeholders in separate entities.

(ii) Communication

Deliberation requires a shared understanding of the society, only then could it have a productive outcome. It would also specifically require taking into account different methods of argumentation and communication that groups might use.⁶⁴ The type of democracy that this concept leans towards is simultaneously inclusive and reflective of the heterogeneity. The underlying reason for this is because any public will have a plurality of voices rather than one collective voice. To take the plurality into consideration would require access to different points of view within the collective. It would allow reasonably minded individuals to hear arguments that might be more logical than theirs and change their mind,⁶⁵ rather than being dismissive of other points of view or methods of communication. It would also mean lowering thresholds for meaningful engagement so that more

⁶² See generally IRIS MARION YOUNG, INCLUSION AND DEMOCRACY (2001) [Young].

⁶³ *Id.* at 19, 22-24.

⁶⁴ Young *supra* note 62.

⁶⁵ *Id.* at 38-43.

people and groups can access conversations and participate. In the case of ICANN this would mean reducing the technical jargon and acronyms so that participation is increased.

The global space embodies heterogeneity in arrangements among entities as well as its stakeholders. It is possible that states might communicate their arguments in a manner that is different from international organizations. Or civil society as a stakeholder in an entity like ICANN might communicate differently from states that form the Government Advisory Council (GAC) in ICANN. Hence, it is important that one method of communication should not be preferred over the other. It is the substance of the intervention that should be in focus.

(iii) Inclusion

Communication has as an important byproduct – inclusion. If different points of view and methods of communication are taken into account, inclusion would organically evolve. The interaction among diverse individuals comprising the public allows engagement with varied points of view.⁶⁶ This aspect of inclusion lends legitimacy to the framework of democracy. Discussing inclusion, Young envisages the creation of various publics within a society.⁶⁷ However, it must be remembered that inclusion by itself is not enough to ensure that voices are actually heard, principally because inclusion itself is an illusory concept.⁶⁸ Additionally, in trying to make the global space inclusive, it should be noted that ideas might be communicated through different methods as outlined above.

There are varied mechanisms for tackling differences that might exist within sections of society looking to be included in the sense of pluralism. The first tier is simply overlooking differences. In this tier individuals are considered homogenous and differences among them are not taken into consideration. Thereby, artificially reducing the problem of inequality. The second tier is accommodating differences yet mitigating the effect of these differences. This approach is followed in India to solve problems of a plurality of religions and differences in laws among them. The final tier is carving out a zone of differentiation. This is the most problematic, because it is not clear which group gets precedence. Thus, it causes the distinct problem of authority.⁶⁹

An example of inclusion in dialogue is that of Amazon and ICANN. Here, stakeholders within an entity were given the chance to communicate and be included in the dialogue, thereby positively contributing to the global space. Amazon, the online shopping website applied for a top level domain name (TLD), of the variety to be added to the existing .org, .net, .com. Alain Pellet as independent objector filed an objection claiming that .amazon should belong to the amazon rainforest. However,

⁶⁶ *Id.*

⁶⁷ *Id.* at 73.

⁶⁸ *Id.* at 54-56.

⁶⁹ This idea was the outcome of a conversation with Prof. Kingsbury at the time of initially researching these ideas.

the ultimate decision of ICANN was to dismiss the objection filed because Pellet was not truly acting independently and had professional ties with the governments of Brazil and Peru.⁷⁰ Generally, states are not parties to matters concerning ICANN other than in advisory capacity in GAC. Even though the outcome might not have been favorable, in this instance through proper procedures voices that are not generally included in the ICANN dialogue were included.

(iv) Representation

Representation is strengthened by the abovementioned elements. It is through elements of communication and inclusion that any individual who is a representative can better understand the people and ideas that she represents. Representation might take place in different ways. ICANN tackles this issue by creating the empowered community (EC) comprising various different decisional participants who represent the major stakeholders part of the ICANN community. This is discussed in detail in the subsequent chapters.

With representation also comes the burden of accountability.⁷¹ The transparency of deliberative mechanisms can work to greatly enhance accountability, in turn enhancing representation.⁷² This additionally allows the voices of the minority to be represented as they were part of the process of deliberation. In this manner including minorities in the outcome and giving them a sense of autonomy. In a sequence of events representation, should be thought of at a point subsequent to the first two elements of deliberation i.e. communication, and inclusion.

Young discusses the concept of specific representation of minorities and labels this element of a matter of right.⁷³ However, this is problematic because group rights and group arrangements are complicated. Essentially, the level of plurality and heterogeneity in groups as well as the perplexing organizational structures of public entities within GAL reduces the benefit of granting such representation as a matter of right.

These elements should not be looked at individually but as links in a chain where one element fortifies the other. Though they do not form democracy as it is seen in the domestic space, they are representative elements of it. Deliberation could work well in the global space, especially given the interdependence among public entities when it comes to finances, economics and the environment.⁷⁴

⁷⁰ Prof. Alain Pellet v Amazon EU, case number EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15) available: <http://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf> last accessed on 21 September 2017.

⁷¹ Krisch, *supra* note 6 at 252-53.

⁷² Kuo, *supra* note 10 at 459.

⁷³ Young, *supra* note 61 at 29-30.

⁷⁴ Daniele Archibugi and Iris Marion Young, *Envisioning a Global Rule of Law* (Spring) DISSENT (2002).

Additionally, it must be remembered that the global space does not function in isolation from the domestic. Persons in positions of power in the global space are informed by domestic experience. So, there is an upward mobility of elements. But there is also a downward mobility of elements because of the relationship between the global and the national.⁷⁵ Given such interdependence it would be unusual not to have ongoing dialogue and deliberation among these entities, as well as among the groups of stakeholders that are integral to these entities.

2. Law as publically made:

This section briefly discusses the concept that law should be publicly made, in the sense that the public has a hand in the making of the law. I argue that it is not enough that the public is represented in making the law. The law itself also must be oriented toward public ideals.

Kelsen states that essentially there are two kinds of norms, “*those in whose creation the individual to be obligated participates, and those in which he does not participate.*”⁷⁶ He goes on to say that this distinction is an embodiment of consent. He essentially questions whether the obligation to which an individual is subject has been made with her consent or not. When an individual has a say in the norms to which she is subject, it is a manifestation of democracy. When a private contract is established between two parties the obligations that arise therein are democratically made since the individual participates in their creation. Additionally, the law might be made by simply keeping in mind values on which the public places emphasis. I would argue, that both these facets must exist for the law to actually be publicly made.

Waldron talks about jurisprudence in a democracy, and its distinction from jurisprudence that exists in other forms of governments.⁷⁷ He also specifically examines the value of publicness. He notes that the law itself is a body of public concern and deals with issues in a manner that stand in the name of the public, or on behalf of the public.⁷⁸ Law is characterized as a system that promotes public good, or at the very least is oriented in that manner. I do not think that he excludes the possibility that private law relationships also orient themselves with such values by adhering to considerations of public policy. In a similar sense, Dyzenhaus argues that there is an element of public conscience within the law.⁷⁹ He does so by analyzing Hobbes and the reciprocity of the relationships determined

⁷⁵ Whether by funding or through different means.

⁷⁶ HANS KELSEN, *THE PURE THEORY OF LAW*, (Max Knight Second (Revised and Enlarged) German Edition trans. 2004) at 279 [Kelsen].

⁷⁷ Jeremy Waldron, *Can there be a Democratic Jurisprudence?*, 58 EMORY L.J. 675, 678 (2008) [Waldron 2008].

⁷⁸ *Id.* at 684.

⁷⁹ *See generally*, David Dyzenhaus, *Public Conscience of the Law*, 43 NETH. J. OF LEGAL PHIL. 115 (2014) [Dyzenhaus 2014].

in Leviathan. However, it must be remembered as Fraser points out that the public conscience might not be representative of the voice of each and every individual in the society. There will be some voices that are louder than others.⁸⁰ Even so, a private conscience is not enough, because an individual would not go further to obey the law than she thinks fit.⁸¹ If however, the law has a public conscience (or similar to Waldron is oriented to a public good/quality) then the number of those who consent to be governed, would be higher.

GAL is an enterprise comprising a plurality of regimes⁸² and the recognition of a global administrative space is one of the core issues in GAL. This regime is not a cohesive, uniform one, rather it is based on strategic networks and general cooperation among transnational actors and public entities.⁸³ Whatever this space might consist of, the public entails entities that cater to individuals, as well as other constituencies that exist. This discussion signifies that not only is law thought of as publicly made, but should also be motivated by public values. Consequently, this public conscience is a byproduct of the complex array of relationships that exist in the global space and not simply a reflection of the public conscience from the domestic space.

The global space is a plural one, so, considering the confusing structures and regimes, it is difficult to determine how these values of public conscience might be found within global law. The relationship between national and transnational entities is complex as well. Entities that are engaged in administering law in the global space are not merely mirrors of national entities, but are heterogeneous.⁸⁴ Furthermore, it must be remembered that the institutions are themselves varied, in their nature and roles. The myriad of relationships in the global space makes any kind of a hierarchical structure confusing, creating in many ways a regime complex.⁸⁵ Thus, demonstrating the complex situation in the global space and its deviation from the domestic space. So, this publicness must result from values that the “*interested parties, of a particular regulatory regime, i.e., the regulatory public, hold in common*”⁸⁶

The publicness of the domestic space cannot be transplanted to the global space. The law will not be oriented to the same values in these two spaces. It would require empirical work to demonstrate the differences between the public conscience of the domestic and global. However, I would

⁸⁰ Fraser 2009, *supra* note 58 at 87-90.

⁸¹ Dyzenhaus 2014, *supra* note 79 at 118.

⁸² Krisch 2006, *supra* note 6 at 248.

⁸³ See generally, Karl-Heinz Ladeur, *The Emergence of Global Administrative Law and Transnational Regulation*, INSTITUTE FOR INT’L L. & J. WORKING PAPER (2011/1).

⁸⁴ Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, in TWILIGHT OF CONSTITUTIONALISM 245, 257 (Martin Loughlin et al., eds. 2010) [Krisch 2010].

⁸⁵ *Id.* at 262-263.

⁸⁶ Ming-Sung Kuo, *Inter-Public Legality or Post-Public Legitimacy? Global Governance and The Curious Case Of Global Administrative Law as a New Paradigm of Law*, 10 ICON 1050, 1063 (2012).

hypothesize that given their differences in structure as well as the difference in the subjects of these two paradigms that the public conscience too would be different.

3. Publicity of laws

In this subsection, I discuss the relationship of GAL and Rule of Law (RoL), to demonstrate that there is an overlap of concepts within these two bodies of scholarship. I additionally explore the differences in the conception of RoL in the domestic and the global space.

Fuller forwarded eight principles that would ensure the ‘inner morality’ of the law.⁸⁷ For Fuller each of the eight precepts carried equal weight. If even one of the precepts was missing, the legal system would not have an ‘inner morality’. I will not be discussing each of these eight precepts in turn. For the present discussion of publicness within GAL, I will be focusing on one precept, the idea that laws should be publicly promulgated i.e. the publicity of laws. The average citizen must have knowledge of the laws that govern her. It would be wrong to punish her for a law that she could not have been aware of because it was not properly publicized. According to Fuller, this system would then be devoid of an inner morality. There is an overlap in the Fullerian idea of promulgation and the importance of publicness under GAL.⁸⁸ Thus, some specific attention is required to the relationship of RoL and GAL. This stems from the fact that there is an overlap in the value of publicness in both spheres, GAL (as this subsection indicates) and RoL (as in the concept of Fullerian promulgation).⁸⁹

RoL is a negative virtue. It takes the edge off state power and prohibits arbitrary decision making by state officials.⁹⁰ Domestically, RoL evolved alongside a social contract governing the sovereign and her subjects through a structure of vertical governance. In the traditional statist conception public law relationships play out in a superior-subordinate manner demonstrating the manifestation of state power.⁹¹ On the other hand, the traditional conception of international law with its horizontal consent-based system of states does not look like the domestic space.⁹² Current scholarly thought of an international RoL overemphasizes states as key actors in the global space.⁹³ However, the global space is a much more variegated space, as I outlined at the beginning of this

⁸⁷ General, publicly promulgated, prospective, intelligible, practicable, consistent, not frequently changeable, congruent with the behavior of officials in the system; *see generally*, Jeremy Waldron, *Is The Rule of Law An Essentially Contested Concept (In Florida)?* 21 L. & PHILOS. 137 (2002).

⁸⁸ Waldron 2008, *supra* note 78 at 700.

⁸⁹ It can be argued that the ethos of publicness is really missing in the other elements of Fullers inner morality of law. However, Waldron adds on the requirement of the law being democratically made (a part of RoL that is missing in Fuller).

⁹⁰ Jeremy Waldron, *Concept and Rule of Law*, 43 GA L. REV. 1, 5 (2008) [Waldron 2008b].

⁹¹ Kelsen, *supra* note 76 at 279-299.

⁹² Jeremy Waldron, *Rule of Law in International Law*, 30(1) HARV. J. L. & PUB. POL’Y. 15, 21 (2006) [Waldron 2006].

⁹³ James Crawford, *The Rule of Law in International Law*, 24 ADELAIDE L. REV. 3 (2003); Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331 (2008).

chapter.⁹⁴ In the global space public power is being wielded in a myriad of ways,⁹⁵ so, it would be erroneous to leave this unregulated⁹⁶. Since, domestically RoL is used as a means to constrain state power exercised through administrative agencies and officials, it could provide some useful guidance for developing a theoretical framework. Hence, it seems logical to endeavor to understand how RoL and GAL would function together. I would argue that the RoL in the global space would look starkly different from the one in the domestic space given the dissonance in their structures. Few scholars are actively looking at disentangling RoL from the present statist conception.⁹⁷ I would argue that understanding RoL in a purposive manner demonstrates that removing any one value⁹⁸ from the cluster would not make it an ineffectual framework and it would still stand as something akin to RoL. If, however we removed accountability, the entire framework would fall, like a house without a foundation. In addition, RoL, like GAL includes publicness as a necessary element.⁹⁹ Given the similarity underlying their approaches it is curious that GAL does not frequently draw on RoL.

There exists debate on the subjects of international law. And it is distinctly difficult given the multiple and varied forms of global governance. The subjects of global governance are all types of public entities. It is agreed that the traditional statist conception is not adequate. States are simply a system of legal organization of persons, and their sovereignty is an artificial construct.¹⁰⁰ States are a juridical unit, though an important part of the global administrative space. However, as pointed out by Kingsbury this idea does not capture the quality of states as public entities, or the complex system of relationships within GAL.¹⁰¹ It is additionally complicated because the public in is not known with certainty as it is in the domestic space where it is territorially defined.

The element of publicness might exist in both areas of scholarship (GAL and RoL) this does not mean that quality remains constant in both bodies of law. For a rule to be truly public in the GAL sense would require more than adherence to the Fullerian notion of promulgation. Though it is certainly an important facet. Thus, it should be noted that publicness is not about the decision maker but about the character of the decision itself. The notion of publicness as has been discussed so far would necessitate that a law should be grounded and anchored in publicness.

⁹⁴ Kingsbury et al., *supra* note 2.

⁹⁵ Kingsbury et al., *supra* note 2.

⁹⁶ David Dyzenhaus, *The Rule of (Administrative) Law in International Law* INST. FOR INT'L L. & J. WORKING PAPER (2005/1).

⁹⁷ Gianluigi Palombella, *The Rule of law beyond the State: Failures, Promises and theory*, 7(3) ICON 442 (2009).

⁹⁸ Each scholar has their own clusters, LON FULLER, *THE MORALITY OF LAW* 33-41, 96-97 (1964); Joseph Raz, *Rule of Law and its Virtue*, 93 THE L. Q. REV. 196 (1977); Jeremy Waldron, *Rule of Law and the Importance of Procedure*, in *L NOMOS GETTING TO THE RULE OF LAW 3* (James Fleming ed., 2011).

⁹⁹ Waldron 2008, *supra* note 77, at 700.

¹⁰⁰ Waldron 2006 *supra* note 92.

¹⁰¹ Kingsbury 2009b *supra* note 15; *See generally*, Cassese *supra* note 2; Benedict Kingsbury et al. *supra* note 2.

4. Applied to the public

In this last subsection, I deal with the concept that laws must be applied to the public. This implies first, that rules should be administered to a demarcated public, and second, that this public should have the power to demand the application of rules that do exist. This section presupposes the existence of a demarcated public. The public application of laws has not been analyzed by many scholars as much as other aspects of publicness and is important in any discussion of this concept. This idea of publicness for the purpose of applying rules conveys a two-fold meaning. (1) The law should be applied to an identified demarcated public. (2) The public should have the ability to demand the application of these laws.

(1) In the previous three subsections, I argue that for a law to be public it must be so on three grounds, deliberation, creation, and promulgation. To understand the fourth element of application of these rules it would be imperative to understand first the constituency that produces the rules and second the constituency who utilizes them. These norms are produced by various entities in the global space who function alone or as part of networks along with other entities. These norms are then used by various individuals, states, hybrids, public entities of all kinds. Putting it rather generally, ICANN develops domain names, which are a sorting system of the catalogue of information available on the internet; at the end of the chain specific individuals, known as end-users access a webpage by using a particular domain name. So, in this example, ICANN is the norm producer and the end users (along with other ICANN stakeholders, who form a chain) are the norm consumers. This will become more clear while discussing ICANN's multistakeholder model of governance in the next chapter. In my opinion, it is the entirety of the global space that comprises this public. Application can only take place after a norm has been deliberated, created and then publicly promulgated so the entity involved in its creation is involved in the chain of command.

(2) Dworkin, in a posthumously published paper discusses whether international law really is a legal system. He states "*we identify the law of a community by asking which rules its citizens or officials have a right they can demand be enforced by its coercive institutions without any further collective political decision.*"¹⁰² This quotation implies the ability to demand the application of rules the public has had a hand in forming. This would mean application through courts, but also through non-judicial actors who apply GAL¹⁰³ as well. For example, ICANN is subject to the jurisdiction of Californian

¹⁰² Ronald Dworkin, *A New Philosophy for International Law*, 41(1) PHIL. AND PUB. AFF. 1 (2013).

¹⁰³ Ming-Sung Kuo, *Taming Governance With Legality? Critical Reflections Upon Global Administrative Law As Small-C Global Constitutionalism* 44 INT. L. AND POLITICS 55, 72-73 (2011).

courts under the law which it is registered. But simultaneously it also has a non judicial mechanism in the form of the Uniform Dispute Resolution Policy.

To conclude this subsection, it should be remembered that values of autonomy and dignity of an individual should not be overlooked.¹⁰⁴ One way to ensure this is to use concepts like self-application forwarded in the Legal Process School.¹⁰⁵ Self-application envisages an individual who thinks for herself and comes to her own conclusion about a law and how it should be followed. In this way publicness might be envisioned as a concept that possesses qualities of autonomy, dignity and liberty.

In this section dealing with publicness and analyzing its underlying elements it has mainly been discussed as a quality, an ethos, a value, and in its most rigid form as a ‘Rule of Recognition’. In this sense it must be anchored in existing understanding of “a public”. The idea of ‘Rule of Recognition’ depends on practices and institutions within a particular legal order that create norms on the basis of this rule within a given context. In the global space this is complicated because practices themselves are not uniform and consistent. Similar to the arrangements themselves, the practices are disjointed and at times perplexing. This creates difficulty because without homogeneity in social practice arriving at a Rule of Recognition is difficult. Thus, arguing that publicness is akin to a Hartian ‘Rule of Recognition’ has a much higher burden in the global space. To properly discuss publicness, there should be a public to ground the understanding of this principle in something concrete. Using ICANN to understand the functioning of these principles of publicness then has a great benefit.

At the conclusion of this chapter it is imperative to remember that rather than attempting to give any cohesive framework for GAL I analyzed four principles that are intrinsically linked to GAL accountability, transparency, participation and engagement, and publicness. A one track focus on any of these four issues would overlook important parts of the framework of GAL. Each of these four principles fits and has an important place in the larger scheme of GAL. The principles that I discuss here will have a great significance in Chapter IV wherein I will discuss whether ICANN can truly be thought of as an entity within the GAL paradigm. I would argue that for ICANN to fit within GAL requires cumulative incorporation of these four principles discussed in this chapter. In chapter IV I will use the understanding of the structure and functioning of ICANN discussed in detail in chapter III to demonstrate that ICANN is a long way away from fitting within the GAL paradigm.

¹⁰⁴ Jeremy Waldron, *Legislation and the Rule of Law*, 1 LEGISPRUDENCE 91 (2007).

¹⁰⁵ HENRY HART AND ALBERT SACKS, *THE LEGAL PROCESS* 120 (1994).

III – ICANN

In this chapter I aim to forward a narrative of the history of ICANN from its creation to its most recent ICANN meeting, ICANN 59 in June, 2017. Herein I will first discuss three main aspects of this narrative. First, its creation and evolution through various governing documents. This part will begin by briefly discussing the history of the internet, which is imperative in understanding ICANN as an institution. Second, I will discuss the present structure of ICANN, I begin this part by discussing the kind of organization ICANN is – a private entity performing a public function. Then I will detail its various Advisory Committees (AC), Supporting Organizations (SO), and its Board of Directors (BOD). In the third and final part, I will analyze the model of multistakeholder governance, and bottom up participation that ICANN follows.

ICANN has three meetings a year, in March they hold the community forum, in June the policy forum and in December the Annual General Meeting. I attended ICANN 58 in March at Copenhagen, which was the community forum. This was an overwhelming experience on two counts. First, the number of people that participate in these meetings is staggering. There were over two thousand individuals present at the meeting and a host of others who were present via remote participation. Second, as will be discussed in greater detail in part 2 of this chapter, each of the ACs and SOs have multiple meetings. There are seven to eight parallel sessions running at these meetings. So, it can be fairly difficult to ascertain which session should be attended at the cost of another. The discussion in this chapter is benefitted by observations that I made while engaging with ICANN and the ICANN community at this meeting as well as listening to recordings of the various sessions at ICANN 59. This will be especially noted in parts 2, and 3 outlining the structure of ICANN, and multistakeholder process respectively.

There are many organizations who work on issues related to the internet apart from ICANN. Namely, Internet Society (ISOC); Internet Architecture Board (IAB); Internet Engineering Task Force (IETF); Internet Research Task Force (IRTF). A myriad of organizations in this area begs the question, what makes ICANN central. I would argue that ICANN is central because it has the power to control the Domain Name System (DNS). As has been argued, this confers substantial power to the entity controlling it.¹⁰⁶ It is possibly for this reason that there has been great debate over the years that this power should be vested with an intergovernmental organization¹⁰⁷ and not ICANN, which till recently

¹⁰⁶ See generally, Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution*, 50 DUKE L. J. 17 (2000) [Froomkin]; Johnathan Weinberg, *Governments and privatization ICANN*, 18 MICH. TECH. L. REV. 189 (2011) [Weinberg].

¹⁰⁷ India-Brazil-South Africa Dialogue Forum, (October 2011) IBSA Dialogue Forum Fifth Summit of Heads of State

was under the aegis of the US government. It is telling that the ICANN community believes that the US control of ICANN exists because of the fact that US funds created Advanced Research Projects Agency Network (ARPANET), the precursor to the internet. However, as will be demonstrated in this chapter the story is far more complicated than that.

1. EVOLUTION OF ICANN:

The history of ICANN has been detailed to some extent before by scholars of internet governance¹⁰⁸, but the history available in these pieces is fairly dated, and incomplete as it does not bring us to the present day. Thus, it is necessary for me to discuss the history of ICANN to outline its evolution and how it came to exist in its present form. In this part, I will first outline the history of the internet. It is illogical for me to discuss the evolution of ICANN without first describing how the internet was developed. Mainly because the figures responsible for the internet as it presently functions also had a role to play in the creation of ICANN. To trace the history of ICANN is to trace the history of the internet itself because in many ways, these developments go hand in hand. Thus, I will analyze ICANN through a historical analysis of its contracts and foundational documents. Essentially, I attempt to give a comprehensive narrative of the present structure of ICANN by understanding its history. However, before beginning it is necessary for me to make a caveat. The narrative of ICANN is complicated and haphazard. Partially because of the number of actors involved in its ultimate creation. There are certain relationships between the entities that I have excluded from this narrative, because I do not think it important in the scheme of this paper.¹⁰⁹

A. History of the Internet

This section is not supposed to be a comprehensive history of the internet, rather it is meant to be an overview of the evolution of the internet detailing advances in the context of ICANN. It should be noted at the very outset that the development of the internet is haphazard and complicated.¹¹⁰ These developments have been taking place since the late 1950s and it has gone through many stages in its evolution.¹¹¹ While delving into this I found that there are very few authoritative documents detailing

and Government, Tshwane Declaration. http://www.ibsa-trilateral.org/images/stories/documents/declarations/FINAL_Tshwane_Declaration_18Oct_12h23.pdf

¹⁰⁸ Harold Feld, *Structured to Fail: ICANN and the "Privatization" Experiment*, in WHO RULES THE NET: INTERNET GOVERNANCE AND JURISDICTION (Adam Theiner and Clyde Wayne Crews Jr. eds., 2003); *See generally* Froomkin *supra* note 106; Weinberg *supra* note 106.

¹⁰⁹ I will not be discussing the complex relationship between ICANN and Network Solutions inc. (now bought over by VeriSign), which is the only registry for .com. Nor will I discuss the triangular contractual relationship among Network Solutions inc., ICANN, and DOC.

¹¹⁰ *See generally*, Malte Ziewitz and Ian Brown, *Introduction*, in RESEARCH HANDBOOK ON THE GOVERNANCE OF THE INTERNET (Ian Brown ed., 2013) [Brown].

¹¹¹ Raphael Cohen-Almagor, *Internet History* 2(2) INTERNAT'L J. OF TECHNOETHICS 45 (2011).

the history of the internet. Mostly, what is known about the developments of the internet is found in anecdotal evidence by the persons involved with these projects.¹¹²

The internet was initially developed by the US military through the Department of Defense (DOD) for the main purpose of packet switching¹¹³ and increasing the ease of sharing information among government researchers,¹¹⁴ at that time, it was known as ARPANET.¹¹⁵ However, it was evident that there was wider utility of such a method of communication. Similar experiments and developments were also taking place in England and Europe, in Universities (University College of London), and institutes such as the European Organization for Nuclear Research (CERN). The problem was that among these varied experiments there was no cohesive standardized protocol for sending information.¹¹⁶ Translation from the American protocol to the British/European was necessary to transmit information, so that it could be properly received. Thus, a protocol was required for the translation. This is how Transmission Control Program/Internet Protocol (TCP/IP) came to be. Vint Cerf and Robert Kahn in 1974¹¹⁷ took an unconventional approach. Instead of standardizing the protocols being used in varied places they decided to develop a protocol that could be added on top of any network to basically “*run on top of most other networks*”.¹¹⁸ Once transmitting information became easier because of the TCP/IP the idea of the internet started gaining popularity, mainly through universities (Professors, graduate students, researchers, scientists).¹¹⁹ This culminated in the creation of the ‘World Wide Web’ by Sir Tim Berners Lee in 1989, allowing interaction over the internet in its present form.¹²⁰

At this point, it became imperative to organize the haphazard interactions taking place on the internet. This task was given to Dr. Jon Postel, who was involved with the ARPANET project. He did this work on a grant from the DOD. The narrative of how Postel came to be in charge of this work is curious. The documents that are known as Request for Comments (RFCs) are considered to be the “*working notes of the internet research and development community*”¹²¹ These were developed by Steve Crocker (now Chairman of the ICANN BOD) in 1969 as a way for developing internet protocol.

¹¹² TIM BERNERS LEE, WEAVING THE WEB (1999) [Lee]; Barry Leiner et al., *Brief History of the Internet* available at: <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet> accessed on September 21, 2017.

¹¹³ Packet switching is a method to send data over digital networks.

¹¹⁴ BYUNG-KEUN KIM, INTERNATIONALIZING THE INTERNET: THE CO-EVOLUTION AND INFLUENCE OF TECHNOLOGY 51-54 (2005).

¹¹⁵ Brown *supra* note 110 at 4-5.

¹¹⁶ See generally, *id.*

¹¹⁷ Vinton Cerf and Robert Kahn, *A Protocol for Packet Network Intercommunication* 22(5) IEEE Transactions on Communications COM 637 (1974).

¹¹⁸ Brown *supra* note 110 at 6-8.

¹¹⁹ *Id.*

¹²⁰ See generally, Lee *supra* note 112.

¹²¹ IAB Official Protocol Standards, RFC 1083 (1988) available at: <https://tools.ietf.org/html/rfc1083> accessed on September 21, 2017.

The RFC is a publication mainly by engineers and computer scientists, presently under the IETF, it deals mainly with technical and organizational aspects of the internet. Postel was an editor of the RFCs and in 1972 he proposed an internet name and numbering czar.¹²² *“I propose that there be a czar (me ?) who hands out official socket numbers for use by standard protocols. This czar should also keep track of and publish a list of those socket numbers where host specific services can be obtained.”*¹²³ Since there was agreement from the rest of the community at the time, Postel took on this enormous role without much policy intervention by the US government. So, as part of his work first at University of California Los Angeles (UCLA) and then later at University of Southern California’s (USC) Information Sciences Institute (ISI), he assigned *“blocks of IP addresses to computer networks and ... administered the root zone of the Internet domain name system.”*¹²⁴ Furthermore, he had authority over which *“top-level domains (TLDs) were visible in the name space and which entities had authority to operate them.”*¹²⁵ This was the creation of the function, which eventually grew to be the Internet Assigned Numbers Authority (IANA) as we know it today, though it was not known as IANA till 1994.¹²⁶

Despite this lack of policy supervision, in retrospect it would have been surprising if US did not claim its stake over this resource, either geographically or because of its so called ‘inventor’ status. However, US authority over the internet was not obvious to everyone, so it had to make an effort so that the rest of the global internet community would recognize it as so. Consequently, ICANN was born as an organization vested with the main functions of operating the DNS and IANA functions. Till October 2016, it was the steward of the IANA function, which was under the oversight of the US government. But as will be noted in the discussion below, after the transition of the US government, the IANA function is completely handled by ICANN without the intervention of the US government, through the Post-Transitional IANA or Public Technical Identifiers (PTI) discussed in detail later in this chapter.

Certain points from this discussion are clear and worth reiterating. First, the invention of the internet was a community driven effort with many actors around the world. This community comprised computer scientists, engineers and government employees. Second, though there is some interaction with other parts of the world, the early narrative of the internet remains mainly American and driven by persons who were either based in America, or were themselves American or both.

¹²² Proposed Standard Socket Numbers, RFC 349 (1972) available at: <https://www.rfc-editor.org/info/rfc349> accessed on September 21, 2017.

¹²³ *Id.*

¹²⁴ *See generally* Weinberg *supra* note 106.

¹²⁵ *Id.*

¹²⁶ Domain Name Structure and Delegation RFC 1591 (1994) available at: <https://www.ietf.org/rfc/rfc1591.txt> accessed on September 21, 2017.

Though, I would not argue that the US authority over the internet was appropriate, I would say that the internet would look and function very differently if it had been left to its own devices.¹²⁷ Though, given the above account, I cannot see a scenario in which that would have ever happened.

B. Evolution of ICANN- A narrative through contracts

The previous discussion clarifies the role of US government entities in the development of the internet. However, it still begs the question why was ICANN created. What took place in 1997 in the US administration that required the creation of a new entity apart from the burgeoning IANA function, which one individual could no longer handle alone? The answer to this question lies in the relationship between the US National Science Foundation (NSF) and Network Solutions inc. (now known as VeriSign).

Since the initial uses of the internet catered to research and science the NSF played a big role in the inception of the internet. However, it was not long after its inception that the character of the internet diversified. .com was one of the first TLDs to exist, short for commercial. It led to a host of corporations applying for domain names in the early 90s. In 1993, the NSF entered into a cooperative agreement with Network Solutions for granting domain names. This agreement was set to expire on March 31, 1998 (with a six-month outer limit).¹²⁸ The NSF had no intention of extending this agreement. The main reasoning behind this decision was the idea that the internet no longer catered only to issues of research or science, it dealt with issues far outside of the domain of the NSF.¹²⁹ Since, the NSF would not be renewing this agreement there was a need for a stable transition of this domain name function out of the regime of the NSF. Thus, in 1997, the privatization of the DNS began for the purpose of increasing competition, and facilitating international participation rather than being America centric. At this time, complete privatization was not thought to be a viable option and federal oversight by the government was deemed necessary.¹³⁰ However, what seems to be most interesting in this architecture is the fact that Network Solutions was charging a fee for providing domain names. 30% of this fees was being put into a special internet development fund, in 1997 this amounted to approximately \$30 million. Part of this money came from commercial entities outside

¹²⁷ John Perry Barlow, A Declaration of the Independence of Cyberspace, (1996) available at: <https://www.eff.org/cyberspace-independence> accessed on September 21, 2017; Lawrence Lessig, *The Law of the Horse* 113 HARV. L. REV. 501 (1999).

¹²⁸ Cooperative Agreement Between NSI and U.S. Government (through the NSF) effective January 1, 1993, available at: <https://archive.icann.org/en/nsi/coopagmt-01jan93.htm>

¹²⁹ Internet Domain Names U.S. House of Representatives, Committee on Science, Subcommittee on Basic Research (September 25, 1997), Testimony page 3-9 available at: http://commdocs.house.gov/committees/science/hsv268140.000/hsv268140_0.HTM accessed on September 21, 2017.

¹³⁰ See generally *id.*

the United States,¹³¹ yet, the fund was under the auspices of the US government. It was additionally a question of how to most effectively and efficiently use this money.

As will be noted in the next section of this chapter, the story of ICANN was a story of compromises. There were various attempts before the creation of ICANN to privatize the DNS system, that did not work out.¹³² Postel had a large role in the creation of ICANN and the fact that it remained headquartered in California. It did not make sense to move the function geographically out of California at that time, and the US government would not have wanted that, as it would have reduced their capacity to control the internet. Thus, ICANN was headquartered in California and registered as a non-profit entity under the laws of the State of California.¹³³ Its creation in California and under Californian law is partly due to the fact that Postel was based in California who was to be the first Chief Technology Officer of ICANN.¹³⁴

Essentially, there are two types of contracts that ICANN has entered with the DOC over the past two decades. The first category is for the functioning of the DNS system and its privatization. The second is related to the IANA function. The relationship between these two functions is important. I will first discuss the documents and papers leading up to the creation of ICANN. I will then discuss the MOU between ICANN and DOC and its amendments. Herein, I will also discuss the Joint Project Agreement, which effectively replaced the MOU; and the Affirmation of Commitments. Then, second, I will move onto analyzing the contracts related to the IANA function and its present status.

Each agreement between 1998 and 2016 has given increasing control of its function to ICANN¹³⁵, thereby diminishing the oversight of the US government over the internet in a sustained manner. To demonstrate this, I will describe the agreements between the US government and ICANN in a chronological manner. This will eventually bring us to ICANN in its present form.

1. Privatization of the DNS by creating a New co

In this category I will outline two main documents. First, I will detail the ‘green paper’ or the document that outlines the policy that the Clinton administration wanted to undertake. I will then outline the ‘white paper’, which took into account the comments made by actors on the ‘green paper’.

¹³¹ See generally *id.*

¹³² Milton Mueller, *ICANN and Internet Governance Sorting Through the Debris of Self Governance* 1(6) J. OF POL’Y REG. & STRATEGY FOR TELECOM. INFO & MEDIA 497, 499-503 (1999) [Mueller].

¹³³ California Nonprofit Public Benefit Corporation Law.

¹³⁴ Though this never happened due to his untimely demise.

¹³⁵ Michael Fromkin, *ICANN and the Domain Name System after the ‘Affirmation of Commitments’*, in Brown *supra* note 110.

Both of these policy documents were undertaken by the National Telecommunications and Information Administration (NTIA).

As part of the Framework for Global Electronic Commerce the Clinton administration on July 1, 1997 asked the DOC to consider privatizing the DNS. The DOC then published a RFC and gathered comments from various parts of the public. These comments along with opinions of the US government were published on January 30, 1998 on the internet, “*solely as a means to facilitate the public’s access to this document and to provide an additional means of notifying the public of the solicitation of public comment on the proposed rule.*”¹³⁶ Comments were gathered after the publication of this discussion draft or ‘green paper’, which were eventually included in the ‘white paper’. This ‘green paper’ was aimed at increasing the understanding of the operation of the internet and contained a proposal for what was to eventually become ICANN. Hence, it outlines basic notions of various functions of the internet. Additionally, it gives a view of what the US government thought the new company or ‘New co’ might look like in terms of its structure and decision making process. It also spoke of the diversity of ‘internet community’ and the idea that this diversity might increase. Additionally, in this document the US government saw a diminution of its role and complete privatization of the DNS by September 30, 2000. This estimate was of course, off course by 16 years.

On June 5, 1998, the NTIA issued a general statement of policy, known as the ‘white paper’. This paper was the culmination of the work of the DOC and NTIA in receiving two rounds of comments from the public dealing with the DNS. Its main purpose was to consolidate the comments received by the DOC for “*public input on issues relating to the overall framework of DNS administration.*”¹³⁷ In this paper four pillars of what was to become ‘New co’ were detailed as stability, competition, private bottom-up coordination, and representation. The eventual outcome of these moves was supposed to be the privatization of the DNS system. This general statement of policy also spoke of a diverse and heterogeneous ‘internet community’ that used the protocols of the internet. It said that the management of the internet must respond to needs of the entire ‘internet community’.¹³⁸ It is completely possible that these papers were using ‘internet community’ as short hand. But it endured, because all the stakeholders that provided comments on the ‘green paper’ leading up to this general statement of policy were taken into cognizance by the NTIA and their concerns assuaged.

¹³⁶ A PROPOSAL TO IMPROVE TECHNICAL MANAGEMENT OF INTERNET NAMES AND ADDRESSES DISCUSSION DRAFT January 30, 1998, available at: <https://www.ntia.doc.gov/legacy/ntiahome/domainname/dnsdrft.htm> accessed on September 21, 2017.

¹³⁷ *Supra* note 5.

¹³⁸ *Id.*

It is important to highlight that both these documents merely contemplated a ‘New co’ and outlined those features that it would be necessary this ‘New co’ had as well as what its functions could be. The fact that ICANN was going to become this ‘New co’ had not yet taken place. I think it is important to briefly narrate the account of how ICANN became the ‘New co’.

After these two policy documents issued by the NTIA, Postel began working to form what was going to become ICANN. There were some competitors to this effort who also sought to be ‘New co’. Namely, the Boston Working Group, Open Root Server Confederation, and the Internet Forum on the White Paper.¹³⁹ Both of these groups submitted proposals to the NTIA as well and were bottom up and participatory in their formation, as NTIA had necessitated. However, the proposal put forth by Postel had an inside track. On October 2, 1998 Postel submitted the proposal to the Secretary of Commerce outlining the work that he had done on this ‘New co’.¹⁴⁰ Certain persons in the government at the time had even helped select people to be on the BOD of ICANN.¹⁴¹ Since the government was not supposed to be involved in any capacity in the formation of the ‘New co’, this led to complications, and enquiries by the US Government Accountability Office (GAO)¹⁴² and the Subcommittee on Oversight and Investigations¹⁴³. Both these enquiries however turned up nothing and concluded that no laws had been violated. The circumstances leading up to the creation of ICANN can certainly be thought of as suspicious. Though the system of rounds of policy papers and public comments was important, if the conclusion was forgone then it clouds the legitimacy of the organization. At this point there were attempts to be accountable, transparent, and inclusive but whether this was actually achieved is questionable. These kinds of questions surrounding ICANN is possibly what led to the 2002-03 restructuring of ICANN in which it was completely overhauled. Furthermore, it is clear after reading documents that the ‘New co’ was to undertake two main functions, the first related to the DNS and the second related to IANA. At this point it was clear that ICANN had won the bid for forming the ‘New co’. Thus, the DOC began to enter contracts with ICANN. The IANA function at that point in time was effectively the same as the DNS function. The ‘New co’ was additionally supposed to undertake new activities relating to the DNS, such as handing out new TLDs, and generally expand the working of the DNS. Due to the separation of these two

¹³⁹ Froomkin *supra* note 106 at 83; Mueller *supra* note 132 at 507.

¹⁴⁰ Jon Postel, Letter to William Daley (Secretary of Commerce) Regarding Management of Internet Names and Addresses(1998) available at <https://www.ntia.doc.gov/legacy/ntiahome/domainname/proposals/icann/Letter.htm> accessed on April 16, 2017.

¹⁴¹ Froomkin *supra* note 106 at 76.

¹⁴² DOC: Relationship with ICANN (July 7, 2000) available at: <http://www.gao.gov/new.items/og00033r.pdf> accessed on September 21, 2017.

¹⁴³ Subcommittee on Oversight and Investigations, Committee of the House of Representatives, 106th Congress, July 22, 1999 available at: <https://babel.hathitrust.org/cgi/pt?id=pst.000043053599;view=1up;seq=1> accessed on April 17, 2017.

seemingly similar functions there were two separate types of contracts that DOC entered with ICANN. Consequently, I discuss the history of these two streams of documents separately.

2. Contracts for the DNS function

i. Memorandum of Understanding between DOC and ICANN and its amendments

The original MOU granting ICANN a role dealing with the DNS was entered on November 25, 1998.¹⁴⁴ This contract was entered before the IANA function was formally granted to ICANN, which will be discussed later. The MOU detailed a DNS project that would be completed with the cooperation of both parties. Consequently, it detailed the responsibilities of ICANN and the DOC. This document delineated five main functions that ICANN would undertake:

“1. Establishment of policy for and direction of the allocation of IP number blocks; 2. Oversight of the operation of the authoritative root server system; 3. Oversight of the policy for determining the circumstances under which new top level domains would be added to the root system; 4. Coordination of the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet; and 5. Other activities necessary to coordinate the specified DNS management functions, as agreed by the Parties.”

The MOU outlined four principles on the basis of which these functions were to be carried out. Namely, stability, competition, bottom up coordination, and representation. The eventual aim was the privatisation of the DNS system in a manner that the transition would not disrupt the functioning of the internet. It required that the DNS should function in a transparent, reasonable manner that was devoid of arbitrariness. It further required sufficient procedures of appeal by those members of the internet community who were adversely affected. One of the duties of ICANN was to ensure that information is provided to the public. This is in keeping with the value of transparency, though it was only mentioned in passing. They were additionally required to ensure that there were policies and procedures that outlined how this information would be provided to the public.

¹⁴⁴ Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, November 25, 1998 available at: <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en> accessed on April 12, 2017.

The first amendment on November 10, 1999¹⁴⁵ essentially gave the DOC more power by ensuring that ICANN was prohibited from entering any agreement for providing registry services¹⁴⁶ for three TLDs i.e. .com, .net, and .org. In this manner the US government managed to retain its control on what are the most widely used TLDs with its own agent (Network Solutions inc.).¹⁴⁷

The second amendment on September 7, 2000 extended the termination of the original MOU from September 30, 2000 to September 30, 2001. The main changes were to the responsibilities of ICANN. Herein, ICANN was required to have certain independent review processes for addressing the claims of members in the internet community who were adversely affected.¹⁴⁸ Both the third amendment¹⁴⁹ and the fourth amendment¹⁵⁰ merely extended the time period of the original MOU. After these, the contract was set to expire on September 30, 2002.

The fifth amendment, on September 19, 2002 began to look more like a contract than the original MOU that basically only outlined the duties and responsibilities of both parties.¹⁵¹ It extended the time period of the MOU by one year to September 30, 2003. Many of the provisions were the same as the MOU. However, the main change was one that was occurring within ICANN. Due to a myriad of criticisms about the processes within ICANN, the then President of ICANN at the time, Stuart Lynn initiated a dialogue for the restructuring of ICANN. In this amendment, the DOC gave full support for this restructuring. The DOC also took on the role of a liaison with the international community for higher governmental participation within the GAC. Participation in ICANN was not limited to governments but also included the global internet community. This restructuring made way for what is known as ICANN 2.0.

The last amendment on September 17, 2003 built on the previous amendment refining its mission and restructuring the various supporting groups and committees that exist within ICANN.¹⁵² It additionally required ICANN to have a strategy in place for multilingual communication. This is an integral part of the transparency of information. This agreement was supposed to terminate on September 30, 2006.

¹⁴⁵ Amendment 1 to ICANN/DOC Memorandum of Understanding, November 10, 1999 available at: <https://www.icann.org/resources/unthemed-pages/amend1-jpamou-1999-11-04-en> accessed on April 12, 2017.

¹⁴⁶ A registry is like an index of domain names.

¹⁴⁷ This function of the registry for these three domain names was granted to Network Solutions incorporated, now known as VeriSign, which is still the registry for these domain names accessed on April 12, 2017.

¹⁴⁸ Amendment 2 to ICANN/DOC Memorandum of Understanding, September 7, 2000 available at: <https://www.icann.org/resources/unthemed-pages/amend2-jpamou-2000-09-07-en> accessed on April 12, 2017.

¹⁴⁹ Amendment 3 to ICANN/DOC Memorandum of Understanding, May 25, 2001 available at: <https://www.icann.org/resources/unthemed-pages/amend3-jpamou-2001-05-25-en> accessed on April 12, 2017.

¹⁵⁰ Amendment 4 to ICANN/DOC Memorandum of Understanding, September 24, 2001, available at: <https://www.icann.org/resources/unthemed-pages/amend4-jpamou-2001-09-24-en> accessed on April 12, 2017.

¹⁵¹ Amendment 5 to ICANN/DOC Memorandum of Understanding, September 19, 2002, available at: <https://www.icann.org/resources/unthemed-pages/amend5-jpamou-2002-09-19-en> accessed on April 12, 2017.

¹⁵² Amendment 6 to ICANN/DOC Memorandum of Understanding, September 17, 2003, available at: <https://www.icann.org/resources/unthemed-pages/amend6-jpamou-2003-09-17-en> accessed on April 12, 2017.

ii. The Joint Project Agreement (JPA)¹⁵³

The culmination of the MOU and its amendments made way for a more comprehensive document known as the JPA. This was entered on September 29, 2006 and was to terminate on September 30, 2009. This was accompanied by an Affirmation of Responsibilities by the BOD.¹⁵⁴ In this agreement, the values of transparency and accountability were explicitly mentioned, for the first time. Though, apart from that there were not many changes. Additionally, ICANN was charged with the responsibility of reporting its progress by December 31 of each year.

The Affirmation of Responsibilities by the BOD laid down ten principles. (1) Security and Stability; (2) Transparency; (3) Accountability; (4) Root server security and relationships; (5) TLD management; (6) Multistakeholder governance; (7) Role of the government; (8) IP addressing; (9) Corporate responsibility; (10) Corporate administrative structure. These ten principles are important and indicative of the way in which ICANN conducts its functions. It is interesting to note here that in responsibility number (2) ICANN undertakes to innovate and aspires to be a leader in the area of transparency “*for organizations in private sector management*”. What is clear from this statement is that not only was ICANN created for the purpose of privatization of the DNS, it also sees itself as a private entity. This poses an interesting implication for ICANN coming within the GAL paradigm as it requires the presence of public entities. It is also fruitful to note responsibility number (6) wherein, ICANN undertakes to improve its model of multistakeholder governance and have global participation of all its stakeholders. This affirmation of responsibilities has important implications on issues of participation and publicness within the overall research question of this thesis, whether ICANN does neatly fit within GAL.

iii. Affirmation of Commitments (AOC)¹⁵⁵

The AOC is a document that represents the conclusion of the JPA as on September 30, 2009. Though the JPA was concluded, there were certain commitments that both the DOC and ICANN agreed to undertake. Herein, the DOC affirmed its commitment to the model of multistakeholder governance as well as the “*private sector led, bottom up policy development model for DNS technical*

¹⁵³ Joint Project Agreement between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers, September 29, 2006 available at <http://www.umic.pt/images/stories/publicacoes3/JPA-29sep06.pdf> accessed on September 21, 2017.

¹⁵⁴ ICANN Board of Directors Resolution 06.71 September 25, 2006, available at: <http://www.umic.pt/images/stories/publicacoes3/JPA-29sep06.pdf> accessed on September 21, 2017.

¹⁵⁵ Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, September 30, 2009 available at: https://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf accessed on September 21, 2009.

coordination that acts for the benefit of global internet users.”¹⁵⁶ This would demonstrate that ICANN was not being controlled by any one entity, rather that the model they followed would consider all stakeholders. Another important development was that decisions were to be made in a manner such that the internet community was to be taken into consideration through cross community deliberations and not just within specific stakeholder groups. Thus, ICANN would publish the analyses of the impact of the decisions on the public. This is an attempt to make ICANN more inclusive in its deliberations. Furthermore, ICANN agreed to remain headquartered in the US and remain a non-profit entity. It also agreed to a host of review procedures. All these review procedures would be available for public comments before the report was to be finally presented to the BOD.

As can be noted from this discussion, ICANN was created for a two-fold purpose. The first dealt with maintaining and expanding the DNS function as discussed in this section. Section 3 will look at the second purpose of ICANN, which dealt with the upkeep of the IANA function. Within this category of contracts, I will outline the contracts dealing with the performance of the IANA function. I will then outline the transition contracts for ICANN to completely takeover the IANA function and the diminution of the role of the US government, a process that culminated in 2016.

3. Contracts for IANA function

There are two steps that took place before the IANA function was given to ICANN. As discussed before the IANA function was being carried out by Postel at USC’s ISI under a grant from the DOD. Even though ICANN was simply taking over this function a new contract was required for this. The first step was a contract signed on January 1, 1999 for USC to transfer some of its assets and personnel to ICANN. The second step of ICANN taking over the IANA function was the Cooperative Research and Development Agreement (CRADA), which was entered in May, 1999.¹⁵⁷ This agreement was executed so that ICANN could study how to improve the functioning of IANA. A CRADA is an agreement between a private company and a government agency stating that there shall be cooperation on a particular project. The next step was the actual contract for the IANA function.

i. IANA Contracts

The first contract was entered on February 9, 2000.¹⁵⁸ The DOC gave a purchase order to ICANN and contracted this function out to it for a sum of \$0. Under this contract, IANA would function as a

¹⁵⁶ *Id.*

¹⁵⁷ Cooperative Research and Development Agreement Between ICANN and US Department of Commerce, May 15, 1999 available at: <https://www.icann.org/resources/unthemed-pages/crada-2012-02-25-en> accessed on September 21, 2017.

¹⁵⁸ Contract Between ICANN and the United States Government for Performance of the IANA Function, February 9, 2000, available at: <https://www.icann.org/resources/unthemed-pages/iana-contract-2000-02-09-en> accessed on February

subsidiary of ICANN. Herein, ICANN worked in the capacity of a contractor. Four main functions were contemplated. First, ICANN would coordinate and assign technical protocol parameters; second, ICANN would carry out administrative functions associated with management of the root server¹⁵⁹; third, ICANN would allocate blocks of IP addresses; fourth, there was a residuary clause for other services.

The second contract entered on March 21, 2001 did not materially change anything.¹⁶⁰ The third contract as of March 17, 2003 outlines the relationship of IANA and ICANN in a detailed manner.¹⁶¹ It contemplated the change of regime from the US government and ICANN to a private regime. It once again, outlined the diversity of the stakeholders and persons involved in the working and use of the internet, which made coordination among constituencies imperative. This contract also lays out the structure of ICANN, which proved to be helpful in the next part of this thesis. There were no major, material changes in the contracts on August 14, 2006¹⁶² and October 1, 2012¹⁶³.

ii. IANA Transition

The complete takeover of the IANA function by ICANN is an account that progresses in a fairly haphazard manner. The discussion of the reduction of the role of the US government had been contemplated from the very beginning in the MOU itself. The real question was the manner for doing this so as to cause the least disruption and while guaranteeing the highest satisfaction among the stakeholders. In 2012 there were calls by the governments of India-Brazil-South Africa (IBSA) that the IANA function no longer be granted to ICANN and that a new intergovernmental body should be formed. This body should be either like the International Telecommunication Union (ITU) or the ITU itself.¹⁶⁴ This was tabled at the Dubai Conference organized by the ITU in 2012, wherein the proposed

12, 2017.

¹⁵⁹ When information on the internet is accessed by an end user it is sent through a chain of different technological entities. The root server functions as an essential part of the infrastructure of the internet.

¹⁶⁰ Contract Between ICANN and the United States Government for Performance of the IANA Function, March 21, 2001, available at: <https://www.icann.org/resources/unthemed-pages/iana-contract-2001-03-21-en> accessed on March 28, 2017.

¹⁶¹ Contract Between ICANN and the United States Government for Performance of the IANA Function, March 17, 2003, available at: <https://www.icann.org/resources/unthemed-pages/iana-contract-2003-03-17-en> accessed on February 12, 2017.

¹⁶² Contract Between ICANN and the United States Government for Performance of the IANA Function, August 14, 2006, available at: <https://www.icann.org/en/system/files/files/iana-contract-14aug06-en.pdf> accessed on February 10, 2017.

¹⁶³ Contract Between ICANN and the United States Government for Performance of the IANA Function, October 1, 2012, available at: <https://www.icann.org/en/system/files/files/contract-01oct12-en.pdf> accessed on May 12, 2017.

¹⁶⁴ India-Brazil-South Africa Dialogue Forum, (2011, October) IBSA Dialogue Forum Fifth Summit of Heads of State and Government, Tshwane Declaration. http://www.ibsa-trilateral.org/images/stories/documents/declarations/FINAL_Tshwane_Declaration_18Oct_12h23.pdf accessed on June 24, 2017.

scope of this new organization was fairly broad.¹⁶⁵ For obvious reasons this would have been completely unacceptable to the US government, which was working on the complete privatization of the DNS system rather than letting it be taken over by other governments. 55 states refused to sign the International Telecommunications Treaty tabled at the Dubai Conference.¹⁶⁶

On March 14, 2014, the NTIA announced its intent to transition IANA to the private sector and envisaged its operation through a global multistakeholder model of governance.¹⁶⁷ As can be noted from the above discussion, this is a step that had been foreseen since the beginning of the relationship between the US Government and ICANN in 1998. In this announcement in 2014 ICANN's unique position as the IANA functions contractor was outlined. It is due to this unique position that ICANN was asked to draft a collaborative proposal for the entrustment of the IANA function along with other entities that assist in operating the internet.¹⁶⁸ Four principles were laid down by NTIA that ICANN's draft proposal had to adhere to. First, support and enhance the multistakeholder model; second, maintain security, resiliency, and stability of the DNS system; third, meet the needs as well as expectations of the global customers and partners of IANA services; and fourth, maintain the openness of the internet. It was also categorically stated that NTIA would not accept any proposal that replaced American oversight with another government led or intergovernmental entity. The only possibility had to be a model that embodied the global multistakeholder process and enhanced the already existing model of bottom-up multistakeholder governance.

For this transition, a coordination group known as the IANA Stewardship Transition Coordination Group (ICG) was created in July, 2014. This group was in charge of ensuring the smooth transition of the IANA function. The first step in this process was to submit a proposal to the NTIA outlining how this transition was going to take place. This led to the submission of March 10, 2016.¹⁶⁹ The ICG comprised three community groups categorized on the basis of their function, the domain names community organized around the supporting organizations of ICANN; the number resources community, organized around the Regional Internet Registries (RIRs); and the protocol

¹⁶⁵ FINAL ACTS OF THE WORLD CONFERENCE ON INTERNATIONAL TELECOMMUNICATIONS 20 (2012), available at: <http://www.itu.int/en/wcit-12/Documents/final-acts-wcit-12.pdf> accessed on September 21, 2017.

¹⁶⁶ Jack Snyder et al., IANA: An Extended Timeline with Citations and Commentary, *internetsociety.org*, 7 (January, 2017).

¹⁶⁷ NTIA Announces Intent to Transition Key Internet Domain Name Functions, March 14, 2014, available at: <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions> accessed on February 7, 2017.

¹⁶⁸ The Internet Engineering Task Force (IETF); The Internet Architecture Board (IAB); The Internet Society (ISOC); The Regional Internet Registries (RIRs); TLD operators; VeriSign; and interested global stakeholders.

¹⁶⁹ Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community IANA Stewardship Transition Coordination Group (ICG), March 10 2016, available at: <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf> accessed on February 7, 2017.

parameters community, organized around the IETF. Each of these communities developed proposals that were presented to the ICG. The ICG then assimilated these into one cohesive proposal to ensure smooth transitioning of the IANA function. These proposals were also open to public comment so inclusion and transparency were important ideals embodied in this process as well. The outcome of this proposal was a body known as the Post-Transition IANA (PTI) which would function as an affiliate of ICANN. This entity would be charged with performing all the functions that at that time were under the NTIA contract. This report of the proposal of the PTI was presented to the NTIA.

On June 9, 2016 the NTIA had completed the assessment of the proposal that was submitted dealing with the PTI and found it to be in accordance with the criteria that they had set. It outlined some of the next steps that were to be completed by ICANN for this transition and requested that an implementation report be filed by August 12, 2016.¹⁷⁰

Before filing a report, PTI was incorporated on August 10, 2016 under the same legislation as ICANN.¹⁷¹ and was to be known as Public Technical Identifiers instead of Post-Transition IANA. The articles of incorporation state that the only member of PTI is ICANN. PTI has one sole function, that is to perform the IANA function.¹⁷²

On August 12, 2016 ICANN submitted the implementation report as required by the NTIA.¹⁷³ This report was essentially an updated timeline of the tasks that ICANN had already completed along with dates for completing other tasks, so that the transition would take place as planned by September 30, 2016. On October 1, 2016, the transition of the IANA function took place and the US government stopped having any privileged position in the DNS system, which had been completely handed over to ICANN.

Thus, ICANN is now no longer a contractor of the IANA function. This transition also has implications on how ICANN is situated in the global space.

After tracing this history, four issues are clear. First, it would be incomplete to outline the history of ICANN without outlining the history of the internet itself. Second, ICANN has gone through multiple avatars. Originally, the values of accountability and transparency were not at the forefront when ICANN came to exist. Neither in the ‘white paper’ nor in the original MOU or the amendments to it.

¹⁷⁰ Letter from Lawrence E. Strickling to Dr. Stephen Crocker on the subject of NTIA Assessment of IANA Stewardship Transition Proposal, June 9, 2016, available at: <https://www.icann.org/en/system/files/correspondence/strickling-to-crocker-09jun16-en.pdf> accessed on February 7, 2017.

¹⁷¹ California Nonprofit Public Benefit Corporation.

¹⁷² Article 3 Bylaws, PTI effective September 28, 2016.

¹⁷³ IANA stewardship Transition Proposal Implementation Planning Status Report, August 12, 2016, available at: <https://www.icann.org/en/system/files/files/iana-stewardship-implementation-planning-status-12aug16-en.pdf> accessed on February 7, 2017.

Though the idea of public comments was incorporated from the beginning. The elements of accountability and transparency were for the first time formally outlined in the JPA in 2006, eight years after the inception of ICANN. Third, it is important to note that ICANN sees itself not only as a body that is functioning to privatize the DNS but itself as a leader in the private sector on certain issues. This makes its situation in the global space more complicated, given that states are still stakeholders in ICANN and part of the decision-making process via GAC. Fourth, I discuss the IANA transition and the reducing authority of the US government with the eventual departure of the US government from IANA for the purpose of understanding the unique position of ICANN in the global space. These issues will be discussed in more detail in Chapter IV of the thesis, wherein I evaluate the overall research question of this thesis.

2. STRUCTURE OF ICANN:

In the previous part I argue that it is imperative to understand the historical evolution of ICANN to understand its position in the global space today. It might be similarly contended that it is important to understand the structural changes that have taken place within ICANN since its inception in 1998. The changes that took place in 2002-2003 which are known as ICANN 2.0. I would not be inclined to agree with the latter statement. It is important to understand the nature of authority vested in ICANN to analyze it from a GAL perspective, because the notion of authority has a direct influence on the question of whether ICANN fits within the GAL paradigm. However, in my opinion, it is not important to look at structural changes to the BOD or the Supporting Organizations to understand this. In my understanding analyzing an institution like ICANN from a GAL perspective requires an understanding of its situation in the global space and how it came to be situated as such. However, it is not necessary to analyze structural changes such as the expansion of the BOD, within the organization. Rather, the purpose of this section is to elaborate the complicated structure of ICANN as it presently stands post 2016 transition.

In this section I will first discuss what public and private mean, then I look at what that indicates for the hybridity of ICANN. I then discuss the nature of the ICANN community. This will make clear the subsequent discussion dealing with the complicated structure of ICANN. Herein, I describe three distinct communities that I witnessed at ICANN. Then I will discuss the various constituencies within ICANN beginning with the community based SOs. I will then discuss the ACs and last I will discuss the BOD, wherein I will also discuss the role of Nominating Committee (nomcom).

A. Public, private and hybrids

I will begin this section by discussing how the public and private came to be thought of as two separate realms in the domestic space. I would argue that the hermetic distinction between the two is erroneous, especially with respect to the present conception of a global space. Then, to conclude this section I discuss the hybridity of ICANN. The following discussion demonstrates that in the global space the gap between the public realm and the private realm is diminishing. It is important to note here that in this section I am discussing the bifurcation of the state into different realms and the implication that it has in the global space. This should not be confused with the principle of publicness that I discussed in chapter II, Section D, which was the value of publicness arising out of the public realm.

There is no precise point in history when the public realm of law originated. In fact, there are differing opinions on when the distinction of law into the categories of public and private came about. Various legal doctrines have contributed to what we know today as public law. Horwitz traces this to property in feudal England, where the monarch had different roles as a landowner or as a ruler. He suggests that as a landowner or a feudal lord, the ruler could alienate property privately. However increasingly there was a second category of land similar to present day notion of public land, which the monarch did not have the power to alienate.¹⁷⁴

On the other hand, Loughlin defends an older conception of public law arising from *droit publique*. He argues, similar to, Kelsen that public law is a precursor of the state and it exists within the '*pre-positive conceptual furniture of the State itself*'.¹⁷⁵ Loughlin argues that there is an extremely high emphasis on public law in the positive framework of law and this leads to placing rigid importance on authority and sources.¹⁷⁶ Disagreeing with such an emphasis on sources he wants to underscore the resilience of the deeper foundations of law. For this purpose, he begins his discussion with natural law. He argues that the mode of human thinking greatly changed and became more economic, scientific, intellectual, rational etc. these changes profoundly affected collective ordering; and the domain of the political was recognized as a distinct *modus operandi*. In this conception the work of Pufendorf was especially helpful in eliminating the deity aspect from natural law and expressing it as a dictation of right reason.¹⁷⁷ He additionally examines Rosseau, who makes a distinction between the sovereign and the government arguing that the only way for a successful government would be to have a law that forms the genuine constitution of a state.¹⁷⁸

¹⁷⁴ See generally, Morton Horwitz, *The History of the Public Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

¹⁷⁵ CORMAC MAC AMHLAIGH ET AL., *AFTER PUBLIC LAW* 3 (2013).

¹⁷⁶ See generally, Martin Loughlin, *The Nature of Public Law in id* at 11.

¹⁷⁷ *Id.* at 14-15.

¹⁷⁸ *Id.* at 17-19.

Horwitz seems to argue that public law came from a bifurcation of the role of the monarch. However, Loughlin argues that the law itself has public qualities and changes with the conception of the role of the state. Thus, it might be argued that the quality of publicness emerges as an ethos from the law. It is possible that this ethos of publicness does not flow only from public law, but also has roots in the private law paradigm.

One of the early proponents of the distinction between these enterprises is Montesquieu, this can be noted in his statement:

“[T]he order of succession is not fixed for the sake of the reigning family; but because it is the interest of the state that it should have a reigning family. The law which regulates the succession of individuals is a civil law, whose view is the interest of individuals; that which regulates the succession to monarchy is a political law, which has in view the welfare and preservation of the kingdom.”¹⁷⁹

However, questions and criticisms about this distinction have been raised frequently. Arguments that this is a false equivalency have been asserted.¹⁸⁰ A public law relationship necessitates the existence of a superior and a subordinate, whereas private law relationships are characterized by a semblance of a relationship of equality¹⁸¹ and direct interaction¹⁸² among the parties. Kelsen tries to relativize the distinction between private and public law in contrast to the absolutist notion of law and state. For Kelsen, this dichotomy propagates the dualism between the state and the law.¹⁸³ The paradox is evident, the state is at the same time presupposed by the law, and also a subject of the law.¹⁸⁴

It is essential to note that private law is pervaded with considerations of public policy. The general principle that a contract requires legal subject matter is illustrative of this. This indicates that there are certain elements of publicness that disintegrate this distinction and permeate both the public and the private domain. There are overlapping domains of public and private in the case of global governance. Muir Watt argues that qualities from the private domain have contributed to the public in the global space.¹⁸⁵ So, GAL as a process focused exercise assimilates these principles and

¹⁷⁹ CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* Book 26, Ch. 15 (Thomas Nugent trans., 1751).

¹⁸⁰ Kelsen, *supra* note 76 at 280.

¹⁸¹ *Id.* at 284.

¹⁸² ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 5 (2012) [Weinrib].

¹⁸³ Kelsen, *supra* note 76 at 284.

¹⁸⁴ *Id.* at 285.

¹⁸⁵ Horatia Muir Watt, *Private International Law Beyond the Schism*, 2(3) *TRANSNAT'L LEG. THEORY* 347 (2011).

emphasizes their role as part of GAL.¹⁸⁶ I would argue that this kind of assimilation of principles dissolves the hermetic distinction between public and private.

Putting relations created by way of private contracts on the same level as public law relationships extends the contours of the sphere of political dominion, opening it up to ideas of private law.¹⁸⁷ Instead of maintaining this false dichotomy, perhaps it should be noted that unlike in the private realm, public decisions are not necessarily governed by economic efficiency.¹⁸⁸ So, it might simply be that the aim of private and public law is different. But the dichotomy itself need not be maintained in the global space, mainly for two reasons. First, arrangements that are private in the domestic space need not be characterized in the same way in the global space. Second, values from private law have already pervaded considerations of global governance, through the assimilation of these principles into GAL.

At this point it is pertinent to discuss how this impacts ICANN. In the introduction of this thesis I quoted five types of organizations that GAL looks at, where ICANN fit in a construct of “administration by intergovernmental- private arrangements”. Through the discussion of the history and evolution of ICANN it becomes fairly clear that in fact ICANN is a private entity fulfilling a public function, where governments were brought in to increase the legitimacy of the organization; and so that ICANN was not seen as a completely American organization. As I have mentioned in the previous parts of this thesis, ICANN sees itself as a private entity, created for the purpose of privatizing a system that was created with the help of public funds and programs i.e. the DNS. Thus, it is a self-classified private entity, performing a public function. This is where its hybridity stems from. Generally, a hybrid entity in the global space is thought of as an entity where governments have an equal stake as private interests. This is not the case in ICANN due to the multiplicity of stakeholders with varying interests. The GAL categorization of ICANN implies that both government and private actors have equal stakes, that the entity functions as a partnership. That is certainly not the case in ICANN, where governments have a role to play, but a limited one. Even though there have been frequent calls for a stronger GAC. Privatization should be thought of on a spectrum, where some entities have a greater role of the public, and others less. This would enrich GAL because the scholarship would begin to rely less on the five types of organizations mentioned in the introduction of this thesis.

¹⁸⁶ Lorenzo Casini, *Down the Rabbit Hole: The Projection of the Public/Private Distinction Beyond the State* 12(2) ICON 402 (2014).

¹⁸⁷ Kelsen, *supra* note 76 at 283.

¹⁸⁸ Weinrib, *supra* note 182 at 8.

B. Community

There are three communities worth discussing when it comes to ICANN. From widest to narrowest they are (1) the internet community; (2) the ICANN community or as I dub them, the ICANN club; and the (3) the EC.

1. Internet Community

The internet community is one that I have discussed at length in the previous parts of this chapter. In the foundational documents of ICANN or the New co as it was then called the internet community was explicitly mentioned. It essentially comprises all groups, and individuals that have a stake in the functioning of the internet. This includes the registrars, private corporations, states, individuals as end-users. The internet community is the subset of all categories of persons affected by the decisions of ICANN. Though not all of these categories of people will participate in ICANN meetings or be a part of the ICANN decision-making process.

2. ICANN Community/Club

The ICANN community is the community that truly helps ensure the smooth functioning of ICANN. Persons who comprise this community are not limited to ICANN staff, there are a host of individuals and organizations that are part of this community as repeat volunteers. One of the striking things about this community is that people are involved in the day to day running of ICANN, mostly on a volunteer basis. Most volunteers have a regular day job, which requires them to attend and participate in ICANN meetings. And though they are an indivisible part of the ICANN structure, there is no real certainty that their presence will be continuous or consistent, these jobs extend from staff at registries to government representatives from various ministries. It was conspicuous that though ICANN's founding documents and subsequent documents say that the stakeholders are the 'internet community', there is a distinct category of persons who form the ICANN community.

This community comprises people who are part of what I would label the ICANN club. There is a shared language of individuals who attend these meetings. This is a language of acronyms.¹⁸⁹ There is an acronym for every SO, AC, task force, working group or work stream. And everyone who attends these meetings seems to be completely aware of these acronyms, what they refer to and the individuals involved in them. This can be problematic because it creates a club of people who know and understand this language and outsiders end up being excluded. ICANN made it a point throughout the week to point out that they want newcomers to become part of the community and continue their

¹⁸⁹ One might think that I too have mastered that language by reading the many acronyms that I use in this thesis. But in fact, I have only used those which are absolutely necessary.

engagement with ICANN. But there is a lot of leg work that is required to ensure that a newcomer is actually equipped to become part of this community. ICANN community members claim that ICANN wants participation and engagement from all parts of the community, but this kind of engagement is not truly possible without knowing this shared language and becoming part of the club. If an individual has to engage with ICANN at its meetings, know and understand this language intrinsically, to effectively participate then mechanisms to increase such participation ring hollow. Being part of any community requires some shared understanding of that community and what is expected. In the legal community, we tend to speak in a manner peppered with legal jargon, however, unlike ICANN the legal community in no way purports to be the same kind of open and inclusive body. Within the legal community there is a shared basis for our understanding acquired after years of training, and thrives on the idea of exclusivity. This is definitely not the case with ICANN, nor should it be.

It was interesting to note that those people part of the ICANN club all know each other. Whether as business acquaintances or sometimes on a more personal level as well. Conversations take place over lunch and at the coffee shop to make deals with each other or for the development of certain software or hardware or for cooperation. So, in a way the entire event is a chance for networking but also for taking the next step.

3. Empowered Community

The EC is a community within a community. The empowered community as defined by the Bylaws of ICANN consists of the ASO, the GNSO, the CCNSO, the ALAC, and the GAC.¹⁹⁰ Each of whom are decisional participants. All persons in the internet community are not necessarily part of the five bodies that form the empowered community. Only decisional participants can access certain mechanisms.¹⁹¹

C. Community based Supporting Organisations (SOs):

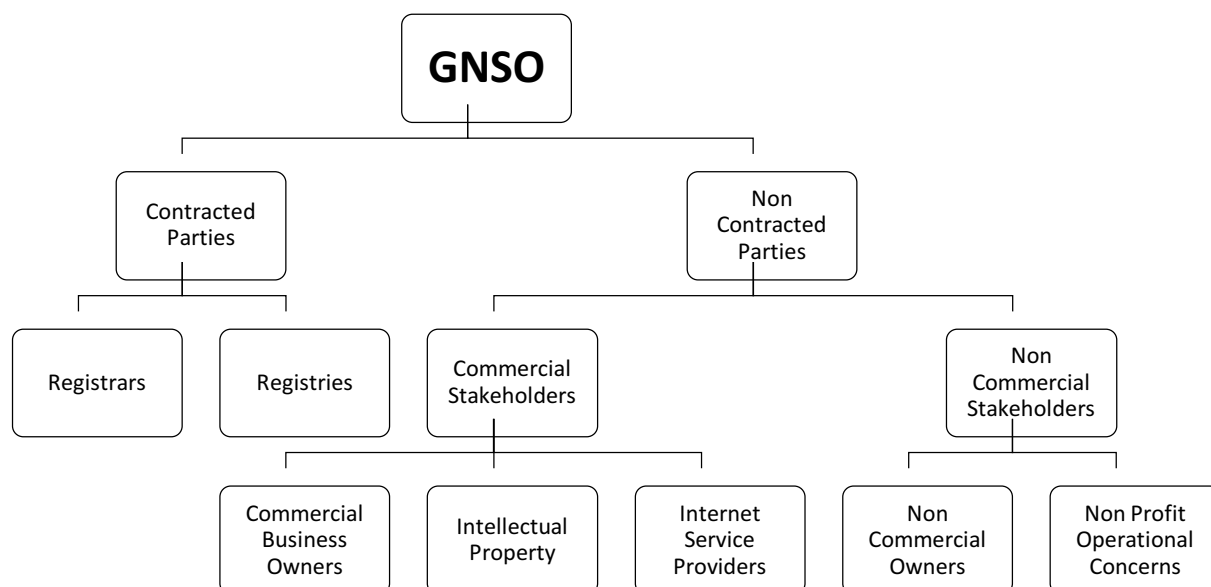
There are three SOs within ICANN, all are formed on the basis of the ICANN community or ‘the internet community’. Each of these SOs have a member who is designated specifically for the purpose of liaising with the other SOs, so that there is constant interaction among them. First, Generic Names SO (GNSO); second, Country Code Names SO (ccNSO); and third, Address SO (ASO).¹⁹² I will

¹⁹⁰ BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation As amended 1 October 2016 Section 6.1 [Bylaws].

¹⁹¹ *Id.* at Annex D.

¹⁹² Contract Between ICANN and the United States Government for Performance of the IANA Function, March 17, 2003, available at: <https://www.icann.org/resources/unthemed-pages/iana-contract-2003-03-17-en> accessed on February 8, 2017 [2003 Contract].

describe each of these in turn. Each of the SOs has a liaison member from the other SOs for enhancing interaction among these structures as well as understanding the work being done in the other SOs.¹⁹³



The GNSO was created in 2003 after the restructuring of ICANN to replace what was then known as the Domain Names SO. The main function of the GNSO¹⁹⁴ is to recommend changes to the policies for governing gTLDs.¹⁹⁵ This advice should be presented to the BOD by consensus of the GNSO members. Within the GNSO there is representation of four stakeholder groups. Each of these groups is granted seats on the GNSO council. These groups are (1) commercial stakeholders, further sub categorized into commercial business owners; intellectual property; and internet service providers; (2) non-commercial stakeholders, which comprise non-commercial users and non-profit operational concerns; (3) the registrars; and (4) the registries.¹⁹⁶ Per its website¹⁹⁷ the Council is structured like a parliament, with two houses. One for the non-contracted parties i.e. (1) and (2) mentioned above. And the other house is that of contracted parties i.e. (3) and (4). There are 23 members of the Council of the GNSO, out of which 18 are appointed by its stakeholder groups, six each from (1) and (2) and three each from (3) and (4); three representatives are appointed by the nomcom who can participate but are not eligible to vote. The last two are themselves representatives of the nomcom – one per

¹⁹³ GNSO Wrap-up meeting, March 16, 2017 page 18-25, available at: http://schr.ws/hosted_files/icann58copenhagen2017/7d/Transcript%20GNSO%20Wrap%20up%2016%20March%20copenhagen.pdf accessed on May 12, 2017

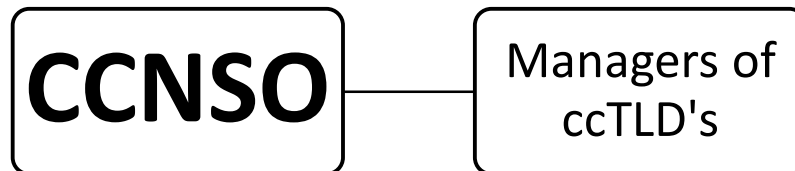
¹⁹⁴ Bylaws *supra* note 190 at Article 11.

¹⁹⁵ See generally, About the GNSO available at: <https://gns0.icann.org/en/about> accessed on February 8, 2017.

¹⁹⁶ Stakeholder Groups and Constituencies available at: <https://gns0.icann.org/en/about/stakeholders-constituencies> accessed on September 21, 2017.

¹⁹⁷ GNSO Council, available at: <https://gns0.icann.org/en/about/gns0-council.htm> accessed on September 21, 2017.

house.¹⁹⁸ At one of the sessions of GNSO at ICANN 58 it was mentioned that it was important for the GNSO to distinguish itself and its function from the other SOs and ACs. This was especially critical to reduce overlap in functions.¹⁹⁹



The ccNSO was created in 2003²⁰⁰ and comprises the managers of the ccTLDs.²⁰¹ Its main function is “to nurture consensus, technical cooperation and skill building among ccTLDs and facilitates the development of voluntary best practices for ccTLD managers.”²⁰² It also provides recommendations for issues related to ccTLDs. Membership is open to all ccTLD managers who are responsible for managing a ccTLD.²⁰³ As of now, there are 161 members of the ccNSO, including entities that are not considered countries, such as Christmas Island (.cx); entities that are multilateral in nature such as the European Union (.eu); and other organizations such as the Asia Pacific TLD Association.²⁰⁴ The ccNSO did not have many sessions that were accessible for newcomers. Some of them were closed sessions, and others were a chance for the ccTLD managers to meet and greet each other, known as ‘ccNSO Members Meetings’. They did have a joint meeting with the GAC, this was especially important because there are issues that would fall under the domain of both of these bodies such as having three letter country codes. Additionally, they organized a series of sessions during ICANN 58 known as ‘How it Works’. This was a useful resource for an attendee to understand the more technical side of things within ICANN.

¹⁹⁸ Bylaws *supra* note 190 at Section 11.3.

¹⁹⁹ Intervention by Rueben Kuhls, gNSO Wrap-up meeting, March 16, 2017 page 15, available at: http://schr.ws/hosted_files/icann58copenhagen2017/7d/Transcript%20GNSO%20Wrap%20up%2016%20March%20Copenhagen.pdf accessed on May 8, 2017.

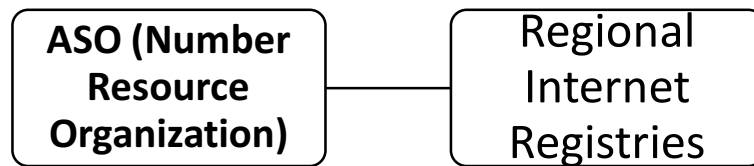
²⁰⁰ Contract Between ICANN and the United States Government for Performance of the IANA Function, March 17, 2003, available at: <https://www.icann.org/resources/unthemed-pages/iana-contract-2003-03-17-en> accessed on February 8, 2017.

²⁰¹ Bylaws *supra* note 190 at Article 10.

²⁰² About, available at <https://ccnso.icann.org/about> accessed on September 21, 2017.

²⁰³ the ccTLD must match the ISO 3166 standards to be eligible for membership in the CCNSO, Bylaws *supra* note 190 at Section 10.4.

²⁰⁴ ccNSO Members available at: <https://ccnso.icann.org/about/members.htm> accessed on September 21, 2017.



Lastly, the ASO's main function is to develop recommendations for the IP address policy.²⁰⁵ It has 18 members, it is essentially a representative of the five RIRs, who get three members each.²⁰⁶ There are two members from the at large community and one appointed by each the RIR's board. Each of the RIRs has its own process for selecting members.²⁰⁷ RIRs are not registries in the sense of an index of IP addresses, their role comes within the IANA function. They are allocated blocks of unallocated IP addresses which they then allocate to internet service providers or individual users.²⁰⁸ Given its stakeholders and the functions that the ASO performs it is mainly a technical body. The ASO did not have many sessions at ICANN 58, only two of these were open to the public. The ASO only meets once every calendar year. I attended the public session of the ASO, where they gave an overview of their functions and tasks. The main point that I took away from this session was that the ASO and the Number Resource organization are one and the same. Though the website says that these two are connected but not the same²⁰⁹ at the meeting it was stated that when the Number Resource Organization works within ICANN they change their name to the ASO. Additionally, it was mentioned that they wear different hats when working inside and outside ICANN. ASO has an MOU with the Number Resource Organization and so I find it rather curious that they say that they are essentially one and the same.

C. Advisory Committees (ACs)

There are four ACs within ICANN. First, the Governmental AC (GAC); second, the Security and Stability AC (SSAC); third the Root Server System AC (RSSAC); and last the At-Large AC (ALAC).²¹⁰

²⁰⁵ Bylaws *supra* note 190 at Article 9.

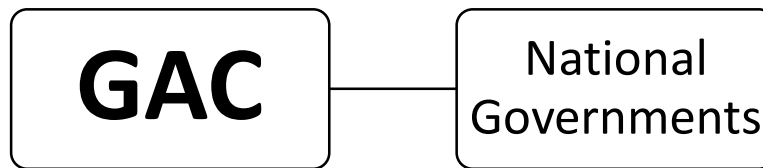
²⁰⁶ Address Supporting Organization available at: <https://aso.icann.org/> accessed on September 21, 2017.

²⁰⁷ Address Council Members available at: <https://aso.icann.org/advisory-council/address-council-members/> accessed on September 21, 2017.

²⁰⁸ Mueller *supra* note 132 at 56.

²⁰⁹ Address Supporting Organization and Number Resource Organization available at: <https://aso.icann.org/about-the-aso/address-supporting-organization-and-the-number-resource-organization/> accessed on September 21, 2017

²¹⁰ See generally, 2003 Contract *supra* note 192.



The main role of the GAC is to “provide advice on the activities of ICANN as they relate to the concerns of the governments and where they may affect public policy issues.”²¹¹ GAC’s advice might range from concerns of governments or matters where there maybe interaction with laws and international agreements.²¹² The members of GAC are national governments; multinational governmental organizations and treaty organizations; and public authorities.²¹³ Hence, GAC has representatives from nation states as well as entities such as the European Commission. There are 162 entities with full member status. GAC has additionally granted observer status to 35 bodies such as the African Telecommunications Union, the European Space Agency, the ITU, Organization for Economic Cooperation and Development to name a few. It should be noted that the GAC is not without power in its relationship with ICANN. If the BOD does not take the advice of GAC then they must give reasons for not taking the advice as well as attempt to reach a mutually acceptable solution.²¹⁴ Unlike the other ACs, the GAC has operating principles, though they are in flux at the moment after the transition of 2016. whereas the other ACs are contained essentially within the ICANN Bylaws. The GAC also has a separate website within the ICANN domain. However, the other ACs only have webpages. Perhaps this is demonstrative of the fact that the GAC truly does have more power than the other ACs.

Many sessions at ICANN 58 and 59 dealt with GAC or mentioned GAC and their function. During the joint session between GAC and the BOD it was stated that GAC no longer has any closed meetings. Another pertinent issue at this meeting was about the proceeds from the most recent round of auction of TLDs (approximately \$5.5 million). The BOD in clear terms stated that the use of this money would be decided by a cross community working group. During this session there was extensive discussion on the management of the GAC secretariat and how to reduce spending. In the previous financial year (2015-16) the secretariat had approximately 500,000 Euro, however this year

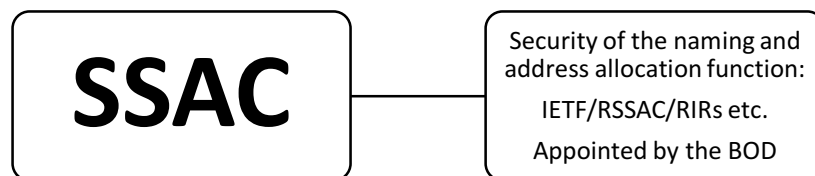
²¹¹ GAC operating principles (6) as amended in June 2015, available at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles> accessed on May 16, 2017 [GAC operating principles].

²¹² Bylaws *supra* note 190, Section 12.2(a).

²¹³ GAC operating principles, *supra* note 211 at Principle 14.

²¹⁴ About the GAC, available at: <https://gacweb.icann.org/display/gacweb/About+The+GAC> accessed on September 21, 2017.

they will be unlikely to cross 400,000 Euro from donor contribution. Some light was also thrown on the functioning of the GAC independent secretariat, which I found very revealing. I noted that (1) an entity can be a member of the GAC secretariat, but not of ICANN; (2) GAC has no legal personality separate from ICANN, so ICANN enters into contracts on behalf of GAC; (3) the GAC secretariat is assisted by the Australian Continuous Improvement Group (ACIG)²¹⁵; (4) donors give money to the GAC secretariat, which is based under Swiss law for the purpose of having a Swiss bank account. This money is then transferred to ICANN, who in turn transfers this money to ACIG under the contract in return for services for working with GAC. It seems like a slightly convoluted way for GAC to conduct business, but it makes sense under these conditions. It might prove to be problematic to give GAC too much flexibility and power as they might fall back into the intergovernmental organization functioning and the debate about ICANN being under the auspices of such an organization might recommence.



The SSAC advises the BOD on matters of security as well as integrity of the systems used for naming and allocating addresses on the internet.²¹⁶ It came into existence after the restructuring of 2002-2003.²¹⁷ According to their webpage the SSAC has a three-fold function: (1) advice on operation matters such as the reliable operation of the root name system; (2) administrative matters such as allocation and number assignment of addresses on the internet; and (3) registration matters such as matters pertaining to registry and registrar services. The main responsibility of the SSAC is to communicate with those who have the actual responsibility of the security of the naming and address allocation function such as the IETF, RSSAC, RIRs etc.²¹⁸ The SSAC consists of 32 members, that represent these other bodies. There are also representatives of registries such as Godaddy.com and VeriSign, and websites like Google.com. These members are appointed by the BOD. I attended two

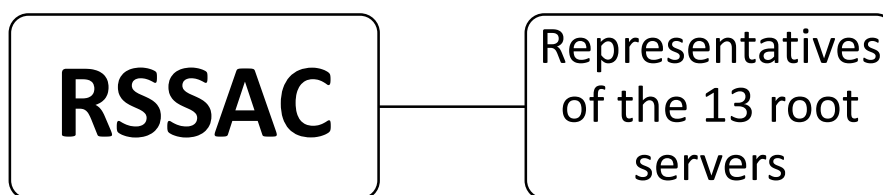
²¹⁵ GAC Secretariat and Support Team available at: <https://gacweb.icann.org/display/gacweb/GAC+Secretariat+and+Support+Team+-+Contact> accessed on September 21, 2017.

²¹⁶ Bylaws *supra* note 190, Section 12.2(b).

²¹⁷ Security and Stability Advisory Committee, available at: <https://www.icann.org/groups/ssac> accessed on September 21, 2017.

²¹⁸ Bylaws *supra* note 190, Section 12.2(b).

sessions hosted by the SSAC, they discussed what their agenda would be going forward. A part of the discussion was about how to ensure that domain names don't get confused with each other. They also discussed how they maintain transparency of their function, wherein they mentioned they address the ICANN community through the release of reports, public meetings, and social media presence. Since their main function is to give advice to the BOD, they prioritize that over other work. They also asserted that their advice "*stands on its own*" and it is legitimate advice because it is good advice. I find it odd that they appraise their own advice in such qualitative terms when a good indicator would be whether the BOD takes their advice or not.



The RSSAC advises the BOD on matters dealing with the root server system.²¹⁹ Its function is very similar to the SSAC except that it looks at the security and integrity of the root server system rather than the allocation and number assignment of addresses on the internet.²²⁰ Unlike the other ACs, the chairs and members of the RSSAC are assigned by the BOD.²²¹ The RSSAC comprises representatives from organizations that are responsible for operating the 13 root name servers in the world.²²² The role of the RSSAC is to provide the BOD with advice so, the fact that the BOD itself appoints the members and chairs of this AC is questionable. An individual in this capacity should be independent and objective, but it might be that she is loyal to the BOD and her decisions are motivated by the interests of the BOD rather than the interests of the root server system. The RSSAC meets at every even numbered meeting of ICANN. At this public meeting it was mentioned that RSSAC published document 23, which is an informative document about the history of RSSAC.²²³ However, it contains technical jargon as that is the main work of this AC.

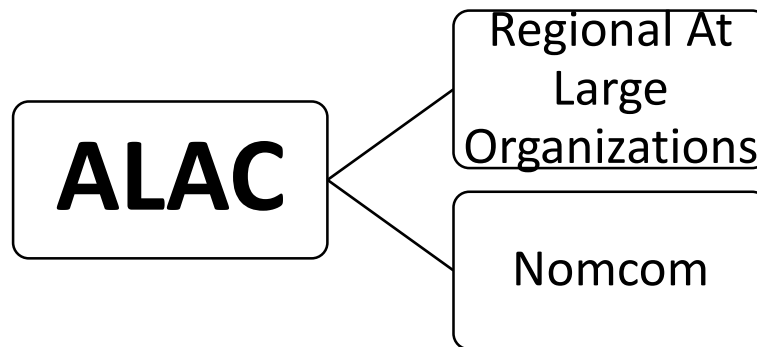
²¹⁹ Bylaws *supra* note 190, Section 12.2(c).

²²⁰ *Id.*

²²¹ *Id.*

²²² Root Server System Advisory Committee, available at: <https://www.icann.org/groups/rssac> accessed on September 21, 2017.

²²³ RSSAC023: History of the Root Server System A Report from the ICANN Root Server System Advisory Committee (RSSAC) 4 November 2016 available at: <https://www.icann.org/en/system/files/files/rssac-023-04nov16-en.pdf> accessed on September 12, 2017.



The last AC is the ALAC²²⁴, again this committee came into existence after the restructuring of 2002-2003.²²⁵ This AC focusses on the individual internet user, or technically individuals known as the end-users. The members are selected from the Regional At-Large organizations and five members are appointed by the nominating committee.²²⁶ It emphasizes the needs of the end user of the internet.²²⁷ Any policy that is proposed by ICANN is publicized, analyzed and commented upon by the members of the ALAC. It can also provide advice by responding to input requests from other parts of ICANN.²²⁸ I attended many sessions of ALAC at ICANN 58, mainly because I was curious to see how they fit in with the more technical architecture of ICANN. Consequently, I attended a session for the regional leaders, a joint session with the BOD, and what is known as a topical discussion about the end users of the internet. I got the impression that ALAC is not pressed for money, despite perhaps having the most members and highest engagement of the different structures within ICANN. This was highlighted at the last ALAC session that I attended. During the joint meeting with the BOD the CEO left in the middle. Though it is regular for panel members to shuffle between meetings since there are numerous parallel sessions taking place at the same time, I found this perplexing. Perhaps I am reading too much into this. But at this meeting the members did speak about scheduling conflicts. By far the most interesting session that I attended at ICANN 58 was the topical discussion. This discussion revolved around three main concepts, accountability; jurisdiction; and diversity. When the floor was opened to questions I asked what they conceptually meant by accountability. In no uncertain terms, they answered that accountability is defined by the scope and breadth of the ICANN mission and mandate. As will be established in the next chapter I find this to be a very narrow definition of accountability. The discussion about jurisdiction concluded that ICANN would certainly remain in California as this was one of the mandates according to the

²²⁴ Bylaws *supra* note 190, Section 12.2(d).

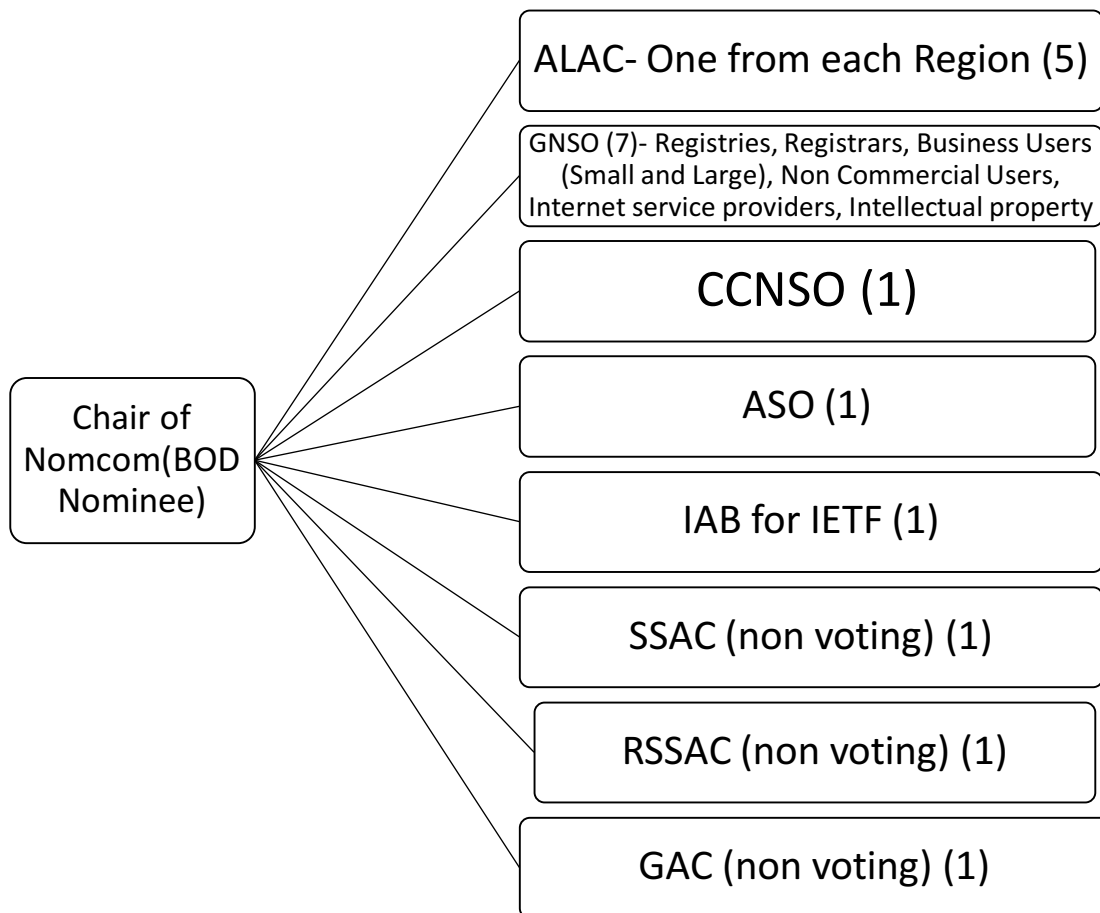
²²⁵ 2003 Contract *supra* note 192.

²²⁶ I will discuss the role of the Nominating Committee when I discuss the BOD as their main role is to nominate eight directors to the BOD.

²²⁷ At-Large Advisory Committee available at: <https://atlarge.icann.org/alac> accessed on September 21, 2017.

²²⁸ About us, available at: <https://atlarge.icann.org/about/what-does-alac-do> accessed on September 21, 2017.

transition documents. The discussion on diversity dealt with ICANN still being a mainly US organization, not only in where it is based but also in terms of its staff members who are overwhelmingly American.



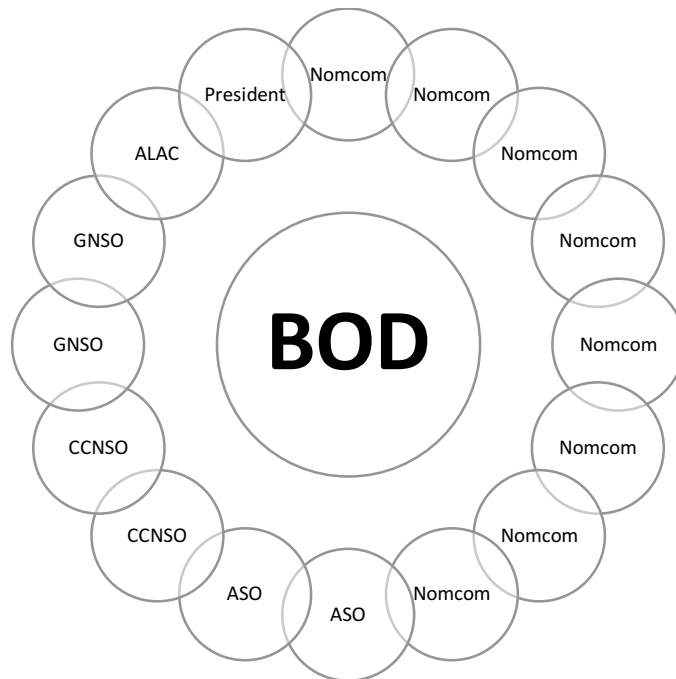
D. BOD

ICANN functions through its BOD, who gets recommendations and advice on different issues from all the bodies mentioned above. This BOD has 16 members and four liaisons who do not have voting privileges. The BOD is supposed to represent all the stakeholders in the 16 voting members.

Before describing the composition of the BOD, it is imperative to outline the Nominating committee (nomcom) and the role it plays.²²⁹ This nomcom itself comprises members of the other bodies. Members of the nomcom might be non-voting or voting. In the former category are the Chair, who is appointed by the BOD; a chair-elect also appointed by the BOD; an associate chair who may be appointed by the chair; a liaison appointed by the RSSAC; a liaison appointed by the SSAC; a liaison from the GAC. In the latter category are, five members from ALAC (one from each region); seven members from the GNSO (Registries, Registrars, small business users, large business users,

²²⁹ Bylaws *supra* note 190, Article 8.

non-commercial users, ISPs, and intellectual property; one member each from the CCNSO, the ASO, IETF.²³⁰ In total, there are five non-voting members and 15 voting members.



Now, turning to the composition of the BOD: eight members are nominated by the nomcom and fill seats 1-8 on the BOD. Two directors are nominated by the ASO, filling seats 9 and 10. Two directors are nominated by the ccNSO, filling seat 11 and 12. Two directors are nominated by the GNSO, filling seats 13 and 14. One director is nominated by the ALAC, filling seat 15. The President is an Ex-officio director and fills seat 16.²³¹ By representing each of the abovementioned bodies within ICANN the BOD in turn represents all the stakeholders collectively.

The BOD acts on a majority vote of all directors.²³² The quorum of the BOD is a majority of all voting members.²³³ The Bylaws additionally enumerate many qualifications that a person must have to qualify for nomination as a director; including, being persons with objectivity and sound judgement, geographic diversity, familiarity with ICANN as well as operation of the DNS, IP and intellectual property.²³⁴ It is important to note that there is a prohibition on BOD members being officials of a national government or a multinational entity or intergovernmental organizations.²³⁵

²³⁰ *Id.* at Section 8.2.

²³¹ *Id.* at Section 7.2

²³² *Id.* at Article 2.

²³³ *Id.* at Section 7.17

²³⁴ *Id.* at Section 7.3

²³⁵ *Id.* at Section 7.4

The role of the BOD became somewhat more clear after attending ICANN 58. ICANN truly is a community driven effort symbolizing bottom-up participation, this will be discussed in detail in the next section relating to multistakeholder governance. The BOD provides oversight and ensures that ICANNs community is acting within its mission. While elucidating the role of the BOD on ‘Newcomers Day’ at ICANN 58 the CEO mentioned that the main function of the BOD is to approve community policy wherein the members of the BOD must act in the best interests of the global community. It is for this purpose that before making a decision the BOD receives advice from the various constituents in the organization. Though at ICANN 59 some interventions were made in the GAC sessions noting that GAC advice in policy development is given at a very late stage when BOD might have made up its mind on an issue in a way that is reflective of the community. Demonstrating that there are certainly problems with the decision-making process.

Certain things are clear from the discussion of the structure of ICANN. First, each of the varied bodies that I have described has within it a group of stakeholders that it represents. These groups of stakeholders are not homogenous, instead they are rather diverse. The various bodies functioning within ICANN should be thought of as different constituents with their own constituencies that are represented by the decisions that the elected members/appointed members make.

Second, the contracts between the DOC and ICANN discussed in the previous part outlined the diversity of the stakeholders who are generally known as the ‘internet community’. The question whether each of the components of this ‘internet community’ is adequately represented is still open. There are generally four stakeholders outlined as comprising the ‘internet community’ – private companies, states, civil society organizations and the internet technical community. ALAC, which is the only body focused solely on the needs of the individual user can only appoint seat 15 on the BOD. Additionally, the ALAC has voting privilege within the nomcom where the ALAC represents one-third of the voting members. Though it has a seemingly large number of representatives in the nomcom, each of the five represents a specific geographic region, which does not seem to be proportional to the number of end users in these regions, which would be very different.

Third, the power of GAC is rather striking, clearly there is internal discussion on how to extend its own power. At sessions during ICANN 59 some interventions clearly desired a much stronger GAC. In my opinion, this power should not be taken lightly and should be analyzed because it creates a context where there is no level playing field among the various ACs. Though at present governments are one constituency of many.

Fourth, ICANN really is a community organization. It would not be able to function without presence and engagement by this community. Individuals part of this community come from varied

walks in life and work for ICANN, mostly on a voluntary basis. This could reduce the stability of the organization, because some people can work some of the time, but all the people cannot work all of the time.

Fifth, despite trying to be inclusive, I do not think that ICANN does a particularly good job. When attending an ICANN meeting the first thing that is evident is that people speak a different language, filled with acronyms and jargon. It becomes clear who knows this language and who doesn't. In a way this makes it easier for clubs to form within the ICANN participants. A newcomer can't really join this club without speaking the language. To actually make ICANN inclusive would mean reducing the emphasis on acronyms, which is noted even by the CEO.

3. MODE OF GOVERNANCE

The idea of a multistakeholder decision making process implies that there are multiple actors involved in the decision-making process at ICANN. As I have outlined above in the context of ICANN these multiple actors are the 'internet community'. My experience of ICANN 58 was overwhelming, due to the enormity of the event. Perhaps even more so because this meeting is known as the 'community forum' so all parts of the ICANN community are represented here. ICANN 58 saw participation from more than 2000 people in person and many more through remote participation. At any given time during the week of this meeting there were multiple parallel sessions in different rooms at the venue. I will begin by making a few general observations, then I will delve deeper into how the issues relating to the concepts of accountability, transparency, and community driven participation and engagement were discussed at ICANN 58 and 59.

One of the first things that is evident as soon as registration for the ICANN meeting takes place at the venue hall is that the meeting has numerous sponsors pledging different amounts of sponsorship on the basis of which they are divided into gold and silver sponsors. For example, VeriSign is a gold sponsor and Nominet is a silver sponsor. Several sponsors means that there is abundant branding merchandise given to the participants who attend. I was given a t-shirt, a bag, a luggage tag, stationery including multiple notebooks.

The sessions are generally open for everyone, though certain sessions are marked closed, where only those part of that constituency are permitted to enter. Most of the participants were those involved with the technical side of the computer and internet. After understanding the evolution of ICANN it is not difficult to see why that is the case. Though to my mind the lack of policy analysts and lawyers was significant to my mind. This creates complications for the understanding of normative concepts such as the ones I discuss in this thesis.

A. Accountability

This subsection is not meant to be an appraisal of the accountability mechanisms provided by the Bylaws of ICANN.²³⁶ However, to understand what accountability means within the ICANN context I will need to briefly outline some of these mechanisms. At ICANN 58, when I asked a question about what accountability conceptually means during one of the sessions, I was referred to the Bylaws. It was explained that accountability in the ICANN context means what the Bylaws say it means. I got the distinct impression that the underlying question of normative elements of accountability is certainly not something that has been given much thought. Perhaps this is a byproduct of the fact that persons involved in the decision-making process are mostly technically trained and do not think about underlying norms as the most significant part in a discussion of this nature. But rather focuses on how ICANN works in practicality

The Bylaws state that the accountability mechanisms must be for the entire community.²³⁷ There is reconsideration of actions or inaction by the BOD or staff, and there are complicated mechanisms for each of them. Suffice it to say, that only a member of the ICANN EC can file such a request.²³⁸ If an individual wishes to file a reconsideration request she must do so through one of the decisional participants of the EC community. There is additionally a separate process for independent third party review.²³⁹ There are mechanisms for periodic²⁴⁰, annual²⁴¹, and specific²⁴² reviews as well. One of the specific reviews contemplated by the Bylaws is known as an Accountability and Transparency Review Team.²⁴³ This review is fairly broad and includes assessing and improving the governance by the BOD; assessing the role and efficacy of GAC; evaluating mechanisms by which ICANN receives public input; measuring the extent of acceptance of ICANN decisions by the internet community; assessing the independent review process etc.

B. Transparency

The Bylaws of ICANN discuss transparency, in some detail.²⁴⁴ Article 3 of the Bylaws discusses the existence and maintenance of the ICANN website, as well as certain documents that must be publicly available on its website. These documents range from schedule of meetings and agendas relating to

²³⁶ *Id.* at Article 4.

²³⁷ *Id.*

²³⁸ The process for an individual who wants to file a reconsideration request would still have to come from one of the EC members. This is discussed later in chapter IV.

²³⁹ Bylaws *supra* note 190 at Section 4.3.

²⁴⁰ Bylaws *supra* note 190 at section 4.4.

²⁴¹ Bylaws *supra* note 190 at section 4.5.

²⁴² Bylaws *supra* note 190 at Section 4.6, review of SOs, ACs.

²⁴³ Bylaws *supra* note 190 at Section 4.6 (b).

²⁴⁴ Bylaws *supra* note 190 at Article 3.

these meetings²⁴⁵, to budget and funding documents. Importantly, this article mandates that the website must also contain the documents on which ICANN requires comments.²⁴⁶

Another important element of transparency within ICANN and one that I observed firsthand is that documents and meetings take place in multiple languages. This is especially important in an entity like ICANN given that the ICANN community represents all parts of the globe. There are translators at the sessions (though not all sessions) translating in real time into seven languages. (French, Spanish, Arabic, Russian, Portuguese, Chinese and English). All of the sessions are additionally recorded and transcribed. The recordings are available on the ICANN website.²⁴⁷ If the aim of transparency is to reach a wider audience then it certainly is important to have documents and meetings in multiple languages.

C. Participation and Engagement

I observed the kind of bottom-up participation that is involved in ICANN. This too is in consonance with the Bylaws.²⁴⁸ As is the case with all ICANN meetings there was remote participation during this meeting. Remote participation was encouraged for those who could not attend the meeting in person. Those who join via remote participation are not excluded and are encouraged to ask questions and give comments in a chat room. Those questions are then answered in the sessions.

It is a significant model of community driven decision making. Every decision has to be required by the community and the BOD has the power only because it is empowered in certain respects by this community. It is additionally inclusive and participatory, ICANN realizes that governance of the internet is not in its hands alone and there are other entities that it must cooperate with. This too is contemplated by the Bylaws.²⁴⁹ The fact that ICANN has liaisons to other bodies (IETF, IAB) shows how important cooperation and the consensus driven model are for ICANN's continued existence.²⁵⁰

Another facet of the concepts of participation and engagement is that an entity should actively seek to increase it. I saw this taking place in two ways within ICANN. First, by way of the 'how it works series' as organized by the SSAC. This series was an introduction to the inner workings of the technical side of the internet. I suppose that is the positive side of having so many individuals who understand the inner workings of the internet. Second, for the purpose of actively seeking new

²⁴⁵ *Id.* at Section 3.1 and 3.4.

²⁴⁶ *Id.* at Section 3.6.

²⁴⁷ For each meeting in the schedule of the meetings, for e.g. <https://icann59johannesburg2017.sched.com/> accessed on September 21, 2017.

²⁴⁸ Bylaws *supra* note 190 at Section 1.1a(i).

²⁴⁹ *See generally*, Bylaws *supra* note 190.

²⁵⁰ Bylaws *supra* note 190 at Section 1.1a(iii).

participation and engagement from younger individuals ICANN runs two different program for this kind of recruitment, one is known as the ‘next gen’ program and the other is the ‘fellowship’ program. Newcomers were asked to help by contributing their expertise in whatever way possible and encouraged to ask questions and comments during the sessions. I presume that this kind of encouragement would be beneficial for an individual who wanted to join the ICANN club. There is certainly an air of recruitment at the entire meeting. Most of the young people are involved in the next-gen or fellowship program. There also weren’t many observers like me, most people were participants and there for networking or for getting involved in a more substantial way then I was. However, despite these efforts, the old people outnumbered the young people. Even though they make a concerted effort to try and attract young people it doesn’t seem like it is working yet.

The decision-making process at ICANN is a community driven bottom-up process. It is a unique example of multistakeholder governance. Given the subject matter that the decisions are being made about, i.e. the internet and its importance in an increasingly globalized world, the way in which ICANN makes decisions is important to comprehend. No one entity should be able to capture the internet. One of the ways in which ICANN attempts to ensure this is through its process of bottom-up multistakeholder decision-making. Deciding how the budget will be handled is a matter for the community and they should have a cross community working group to give recommendations on what to do with the proceeds from the gTLD auction.

However, for true engagement with ICANN in addition to attending the meetings that occur thrice a year, one must also participate between the meetings, via email lists, teleconferences, public comments, reviews, task forces... the list seems endless. It made me question whether true participation is possible in such a burdensome context especially when a number of individuals in the community merely work on a volunteer basis.

In this chapter, I have discussed ICANN through its evolution up to the present day. By analyzing foundational documents fortified by an understanding of ICANN through observation. I have discussed all the aspects that contribute to making ICANN the global regulatory entity at the heart of the internet. To appraise ICANN in GAL terms it was necessary to outline its history and its structure. I do not wish to argue that ICANN is doing a subpar job at the role that it plays, rather I simply argue that the present way in which ICANN functions does not fit neatly into the GAL paradigm. This is what the next chapter of this thesis will focus on demonstrating.

CHAPTER IV – A GAL APPRAISAL OF ICANN AND CONCLUSION

In the beginning of this thesis I set out one research question that I wanted to answer: does ICANN fit within the GAL paradigm. I hypothesized that ICANN does not fit neatly into any of the five types of entities that GAL set out to cover in its original framing paper.²⁵¹ Though GAL has certainly grown since the time of its inception in 2005²⁵², it still emphasizes five main types of administrative models as quoted in the introduction of this thesis, i.e. formal international organizations; collective action through cooperative arrangements; distributed administration through cooperative regimes; administration by hybrid intergovernmental private arrangement; and administration by private institutions with regulatory functions.

In this chapter I will answer that question and set out some brief concluding remarks for my thesis. But before that, a brief recapitulation is in order. In chapter II of this thesis I laid down four distinct norms that occupy an important place within GAL scholarship and would be an integral part of any framework that attempted to encapsulate GAL. Therein, I discussed the principles of accountability, transparency, participation, and lastly publicness. In chapter III of this thesis I analyzed ICANN from the time of its inception till 2017. I did so by discussing primary sources such as the foundational documents of ICANN, contracts demonstrating changes within ICANN over time. Additionally, I discussed issues I observed first-hand at the community forum hosted by ICANN in March, 2017. In the present chapter, each section will begin by briefly reiterating these four GAL parameters and then discussing how ICANN measures against them. To do so, within each part of this chapter I will first reiterate what each of these GAL norms entail; I will then discuss how these norms are manifested within ICANN; finally, I will analyze whether the manner in which these norms are envisaged within ICANN incorporates the core of these norms within GAL. Thereby, using the main principles of GAL as a yardstick to measure ICANN. The culmination of this chapter lays out some concluding remarks to the thesis itself.

1. GAL APPRAISAL OF ICANN

A. Accountability

In this section I argue that though on the face of it ICANN seems to be an accountable entity given that its Bylaws incorporate multiple accountability mechanisms, in fact ICANN falls short of accountability as would be required within the GAL paradigm. I find the manner in which

²⁵¹ Kingsbury et. al, *supra* note 2.

²⁵² Benedict Kingsbury, *Three models of "Distributed Administration": Canopy, baobab and symbiote*, 13(2) ICON 478 (2015).

accountability is embodied in ICANN to be superficial, and devoid of clarity on this conception of accountability.

In the section dealing with accountability in Chapter II²⁵³ I demonstrated the expansive nature of the concept of accountability by observing it through two lenses within GAL scholarship. Namely the structural and the normative. Within the former, accountability is viewed in its classic principal-agent structure. Within the latter, accountability is thought of through the varied norms that it embodies, such as power, authority, discretion, legitimacy to name a few. Subsequently, in Chapter III relating to ICANN while discussing its model of multistakeholder governance²⁵⁴ I discussed how accountability functions within ICANN. I narrated an incident during the community forum wherein I asked for clarification on the conceptual aspect of accountability, and I was directed to the Bylaws. Then, I went on to detail the mechanisms of accountability that were laid down by the Bylaws of ICANN. I looked in some detail at the reconsideration mechanism contemplated within the ICANN Bylaws, which is a mechanism that grants discretion to ICANN to make decisions, and reconsider these decisions only when challenged.

To answer whether ICANN follows the notion of accountability as required within GAL it is imperative to first answer certain questions. (1) I will discuss who is the accouter within this relationship. (2) I will discuss who the account holder is supposed to be. (3) I will examine whether the mechanisms of accountability within ICANN can actually be accessed by any individual or entity from the internet community. Herein, I will also discuss that there are preconditions such as damage that must be demonstrated before access to the accountability mechanisms is provided. (4) I will consider the idea, that if ICANN does not have distinct mechanisms of accountability for the different stakeholder groups is it actually accountable. (5) I will consider whether the account holders in the ICANN context have the power to impose sanctions, as required by accountability within the GAL context. (6) I will discuss what underlying norms, if any, ICANN uses for its version of accountability. I believe that by answering these questions a clear idea of how ICANN embodies accountability emerges. Additionally, it explores whether that notion comports with the type of accountability embodied within GAL. Thinking of accountability in this manner allows the normative concerns to be taken into consideration. It should be noted that ICANN documents do not provide any direct answers, instead through meticulous effort in understanding ICANN I have attempted to answer these questions.

²⁵³ *Infra* at 12-14.

²⁵⁴ *Infra* at 60-64.

(1) To answer the first question, in the structure I laid out for accountability in chapter II where there is an accounter (primary party) and an account holder (secondary party), the accounter is ICANN staff and BOD. Essentially, pointing out that the primary party, who is to be held to account is the one that makes decisions to begin with. These decisions are then reviewed by the secondary party, or the account holders.

(2) After reading the Bylaws it is fairly clear that ICANN is supposed to be accountable to its community. The community that I am referring to is the entire internet community as mentioned in every document since the inception of ICANN, or at that time a New co. Thus, the account holder is the entire internet community. This follows the principal-agent notion of accountability. But it is complicated by the idea that the internet community is a vast, heterogeneous group of individuals and entities. However, it should be noted that distinguishing constituencies is not an easy process. The use of the internet is ubiquitous in the world we live in, and the DNS as handled by ICANN impacts a myriad of constituencies. So, there is no distinct demarcation of this secondary party, as it literally includes every individual that uses the internet; corporation that does business on the internet; governments; and internet technical support community. This demonstrates the difficulty in a simple principal-agent relationship.

(3) For answering the next question on the issue of accessibility of accountability mechanisms, it should be emphasized that there are multiple mechanisms for accountability. There are three that I have touched upon in chapter III of this thesis. first is the concept of reconsideration where an individual making a request must show that they have been “*materially affected by action or inaction*”²⁵⁵ of the BOD or staff of ICANN. The wordings of the Bylaws seem to suggest that any person could access this mechanism. It is specified that ICANN must have mechanisms for reconsideration for, “*any person or entity*”. However, Annex D where such mechanisms are supposed to be found discusses mechanisms for decisional participants through the EC. So, if an individual wants to file a reconsideration request, it would have to be done through the EC. The second is the independent review process. This process is generally initiated when ICANN acts outside its scope. In this process a claimant is not limited to the EC.²⁵⁶ Unlike in the reconsideration mechanism it is explicitly mentioned that the claimant in the independent review process can be anyone, however this individual or entity too must show that they have been materially affected. Most of the requests dealing with independent review deal with the gTLD program and its functioning. The last

²⁵⁵ Bylaws *supra* note 190 at Section 4.2 (a).

²⁵⁶ Bylaws *supra* note 190 at Section 4.3 (b)(i).

mechanism that I discussed previously entails specific reviews. Access to this mechanism is not because of a complaint or a claim as in the other two mechanisms. Rather, specific review teams are established where members of the various SOs and ACs partake.

Thus, only the first mechanism contains certain ambiguity with regard as to who can access it and the standard that they must show. It is unclear how ICANN would judge who is materially affected, though in Section 4.3(b)(i) it is mentioned that this standard requires a causal connection between the injury or harm and the alleged violation. Apart from that the Bylaws seem to give no guidance on this standard.

(4) To answer the fourth question discussing the distinct mechanisms of accountability for distinct stakeholder groups, I would argue that ICANN's mechanisms for accountability are too general and superficial. First, the ICANN community is not a well-defined group due to its size and so there are multiple account holders. Second, ICANN does not have distinct mechanisms for different categories of stakeholders. Each of these groups of account holders have different overarching interests and function in varied manners. Additionally, some individuals are part of multiple stakeholder groups. It is evident, that the interests of private corporations and that of end users would be distinct. For e.g. a person might come be the representative of Google to the SSAC, but is also an end user, and in these different contexts, her interests would be different. As I discussed in chapter II, in the domestic space it is not difficult to ascertain accountability because the relationships between the accounter and the account holder are inhered with far more clarity. Furthermore, in the domestic space there is no ambiguity as to the identity of the accounter or the account holder. Within ICANN, there are multiple groups of account holders. The community that attends ICANN meetings is merely representative of the community. The community itself is hard to pin down due to its breadth. It would be difficult to measure the efficacy of the accountability mechanisms without a well-defined community. Given the varied interests of the stakeholders, I would argue that not having distinct mechanisms for stakeholder groups is a conceptual problem. This might not be a problem for a smaller organization, but given the size of the internet community and diverse interests, to be truly accountable I would argue that ICANN should have distinct mechanisms for each of the stakeholder groups. ICANN limits the meaning of accountability as there are merely general mechanisms for all stakeholders. It demonstrates that ICANN has not thought about the role of each stakeholder community enough. There are no separate mechanisms for distinct stakeholder groups. There is a power dynamic even within the stakeholder groups that ICANN would need to acknowledge to ensure that its accountability mechanisms function properly. In other words, I do not think that is it possible for an entity to have the same mechanisms of accountability for all groups, when there are power

disparities among them. Each AC and SO in ICANN is created to present advice to the BOD on issues that impact the community. But there are struggles among these seven constituencies for resources, support, volunteers etc. On each of these issues there is a disparity among them. These disparities lead to power imbalances. With such issues pervading ICANN, accountability needs to be thought of in a way that addresses such disparity while at the same time addressing the core concern of particular constituency.

(5) This question deals with the issue of whether the account holders actually have the power to impose sanctions on ICANN. In the preceding discussion, I demonstrated that ICANN has a variety of stakeholders, each group has their own interests, which need not intersect on any given issue. Within accountability as discussed in GAL, it is important to comprehend whether the account holder, in this case the internet community has the ability to impose sanctions on the accounter (ICANN's staff and BOD) if they do not function in an accountable manner. This is a pertinent question for two reasons, first, answering it demonstrates where the power lies. Second, it completes the structural relationship of accountability with the necessary third element as discussed within GAL scholarship.²⁵⁷ If ICANN through its staff and BOD is not acting in an accountable manner, the individual or entity materially affected can invoke either reconsideration proceedings or, it can request an independent review process. I would argue that an actual sanction would be in the form of some penalty, not simply requesting the particular staff member or BOD member to reconsider their action or inaction. Similarly, the independent review process is for dispute resolution and there are no sanctions of any kind attached. Thus, I would argue that if accountability is to be more than an illusory concept, the account holders should have some power to impose sanctions or penalties on those parts of ICANN that are unaccountable. This grants power to the account holder to actually hold the accounter responsible for issues arising from action or inaction. Thereby, creating a more accountable atmosphere.

(6) The final question that must be answered with respect to accountability is what are the underlying norms of the accountability within ICANN. In other words, do the normative underpinnings of accountability within ICANN comport with the accountability within GAL? I would argue that the concept of accountability is woefully underdeveloped within ICANN. The only conceptual clarity with respect to accountability seems to be that accountability is what the Bylaws say it is. This is an extremely narrow understanding of the concept of accountability, especially when the Bylaws give no definition of the term accountability. The reconsideration mechanism embodies discretion because

²⁵⁷ *Supra* note 253.

it gives ICANN BOD and staff the ability to make decisions. In my opinion however, this discretion granted to them is not tempered with any guidance other than the foundations documents and Bylaws of ICANN. I would argue for greater guidance to ICANN within the Bylaws.

To conclude this section, I would argue that ICANN incorporates a rather superficial notion of accountability. As has been discussed in this section, article 4 of the ICANN Bylaws dealing with accountability is fairly general. In my opinion, ICANN's version of accountability does not fulfil the high standard of accountability as is present within GAL. Accountability is at the heart of the notion of GAL and forms its very core. Certainly, it is a high burden to fulfil for any entity. Furthermore, a clear conceptual definition would immensely help both ICANN in understanding its own mandate, and the internet community for properly holding ICANN to account. Mechanisms of accountability are generally created for increasing the legitimacy of an entity in the global space. Simply putting in place certain procedures without comprehending the totality of the concept is not enough. I believe that ICANN fails to actually realize accountability through its three general mechanisms.

B. Transparency

In this section I argue that though ICANN has robust mechanisms for transparency as per its Bylaws, there is some danger of information overload weakening this concept. In the section related to the concept of transparency in chapter II²⁵⁸, I detailed the origins of the concept as emanating from values of good governance. I then explored the link between accountability and transparency and asserted that one principle is directly proportional to the other. Hence, increased transparency will in turn increase accountability. At the same time, it should be noted that transparency is not equivalent to accountability and they are different both structurally and normatively. I also outlined two types of transparency, active and passive. In chapter III while discussing the concept of transparency within ICANN I referred to article 3 of the Bylaws, which discuss this concept in some detail. Therein, I discussed the types of documents that are required to be on the ICANN website as per the Bylaws.

To answer the question of whether ICANN's version of transparency conforms to the notion of transparency within GAL certain questions must be explored. First, I will discuss how transparency is thought of within ICANN. Then, I will discuss the active type of transparency that the Bylaws of ICANN enact. Finally, I will discuss the underlying norms that ICANN's version of transparency embodies, and discuss whether this comports with the understanding of transparency in GAL.

²⁵⁸ *Infra* at 15.

I found article 3 of the Bylaws dealing with transparency to be comprehensive and helpful in understanding ICANN's notion of this concept. It is pertinent to discuss the matters that ICANN notes in its Bylaws for transparency. The measures for transparency relate to providing notice for the purpose of facilitating deliberations within the community. Information is provided on issues such as, schedule and agenda of meetings as well as minutes once the meetings have been concluded, the ICANN budget, comments received from the community etc. There is also a special provision dealing with notice and comment on policy actions. The aim of transparency is to disseminate information so as to help increase accountability within an entity. Achieving transparency would also be beneficial in increasing participation. Transparency lowers the access threshold by allowing information in easily accessible manner thereby increasing participation.

In ICANN, transparency is achieved mainly through its website. This seems fitting considering it is an entity working in the subject area of the internet, and those who would want to understand how it functions and participate in these processes would first look online. The Bylaws mandate certain types of documents and information be available on the website. This demonstrates an active type of transparency within ICANN. In addition to the website being available in multiple languages, at the meetings there is immediate translation into multiple languages as well. Though it did seem a little odd that the website is not available in Portuguese when there is separate translation for that during the meetings. If there are enough individuals at meetings that there needs to be separate translation, then it should follow that the website should also be available in that language.

Similar to the concept of accountability, there is no clear conceptual definition of transparency. Having such a definition would be very beneficial for ICANN as it would clarify the vision of transparency and be a yardstick to measure mechanisms of transparency within ICANN, and if ICANN was in fact acting in accordance with its mandate. After reading the various documents relating to ICANN, in my opinion the ICANN version of transparency is contingent on the purpose that it fulfills. It seems to embody the consequential idea that transparency must ensure fairness. I would argue that a conceptual definition of transparency that relies on norms, must emphasize more than simply a purposive account that incorporates fairness. A robust form of transparency constructs a narrative of how a decision is taken by giving information at every stage. ICANN's version of transparency seems to be simply placing everything online. In the beginning, when I started the work for this thesis going on the ICANN website was challenging because it was like falling down the rabbit hole. The amount of information on the ICANN website is mind-boggling and it takes weeks of mining the website to ensure that you have a handle on everything. Even then, you cannot be sure that you have all the information that you might need. This kind of information overload is a danger that ICANN must keep in check. An entity must ensure that it does not give too much information. It

is problematic to overshare information because it might mean that important things could get buried in the extensive amount of information being provided on the website. In a way, transparency is subject to marginal utility.²⁵⁹ This is an issue that ICANN must try and keep in mind. Additionally, the numerous meeting where documents are continuously being updated by each work stream, task force, working group, sub-team etc. All the information from these groups is not available on the website rather, only the final document is put up. So, even diligently keeping up with the website is not enough. I do believe that ICANN is a transparent organization, even if the vision of transparency is limited to the purposes that it fulfills. However, I would suggest that ICANN ensure that it does not overwhelm a new participant by providing so much information that it becomes overwhelming.

C. Participation and Engagement

In this section I argue that ICANN does fairly well on the concept of participation and engagement, though the community itself is wide with diverse interests, and therefore incurs the risk of becoming chaotic. In the section related to participation and engagement in chapter II²⁶⁰, I began by outlining how participation functions, what its underlying purpose is. I further I specified that it requires both actively encouraging new participants and seeking out mechanisms for engagement by those already participating in new and meaningful ways. Additionally, I argued that transparency enhances participation because better information assists the participants in meaningful engagement. In chapter III, I outlined the truly unique mode of participation and engagement that is followed within ICANN. I discussed how this was a bottom-up community driven process of multistakeholder governance. Additionally, I emphasized the importance of the ICANN community to its functioning. Earlier in that same chapter I discussed the three different types of communities that exist within ICANN and the role that each of them play. However, in the context of this present discussion to understand whether participation and engagement in ICANN is consistent with GAL in regard to the internet community. I will begin by discussing the type of participation that takes place within ICANN. However, the main focus will be on arguing that the ICANN community can be extremely chaotic.

For an entity that governs itself in the way ICANN does, the concept of participation and engagement are important. ICANN embodies both decisional as well as non-decisional participation. The five constituencies that make up the EC are the only decisional participants. Most individuals who want to engage with ICANN start out by being volunteers. They then work their way up to positions of power, which requires consistent and intentional effort to do so. You must bring something unique to the table. From my observation, ICANN seems to favor those individuals who

²⁵⁹ LON L. FULLER, *THE MORALITY OF LAW* 49 (1969).

²⁶⁰ *Infra* at 16-18.

work and understand the technical side of the internet. You must be an effective member of the community constantly participating, during the teleconferences, email lists in between the three meetings that take place as well. As I have established in preceding discussions, the ICANN community is large. And the burden of engaging with ICANN is fairly high. It requires constant attention, whether you are part of the staff or a volunteer. I have observed first-hand the confusion with such a large community simply in terms of scheduling, and even then, having people attend multiple meetings simultaneously. Chaos seems to be a byproduct of the way the ICANN community functions. There are seven ACs and SOs, in each of these constituencies members participate in taskforces, working groups, work streams, and sub teams. They participate through teleconferences, video conferences, face to face meetings, remote participation, and mailing lists. The number of documents created and amended is colossal. This begs the question how participation is really possible in such a chaotic environment? Is it truly possible for a large entity like ICANN to effectively function amidst such an environment? I believe that the high access threshold of the information, whether due to the number of acronyms being used or the varied ways in which participants communicate, can be problematic for the issue of participation and engagement. Despite this, ICANN fares seems to be doing fairly well on this issue, mainly due to the volunteers who are eager to participate. If participation requires specialization and repeat participation on behalf of people who are not ICANN staff but volunteers, then this time/resource commitment is challenging to comprehend. Participation is a very heavy burden indeed requiring a high allocation of time and resources. I would argue that the objective of participation and engaging with an entity is to have your voice heard and be part of the process. ICANN must ensure that the breadth of the community does not produce an unwieldy and unmanageable community, else chaos ensues. In such a situation, ICANN must also ensure that all voices are being taken into consideration. Consequently, it is important for ICANN to prioritize and streamline its functioning as it would lead to more effective participation.

D. Publicness

ICANN is particularly good at integrating certain aspects of publicness. Perhaps because the internet itself is a public good. However, this is also surprising because at its core ICANN is a private organization created for the purpose of privatizing the DNS system. In this section I begin by discussing the four underlying principles of the value of publicness and how ICANN fares on these issues. I concluded by arguing that the concepts of public and private are not hermetic compartments. In the global space, public and private should be thought of as a spectrum. I would hypothesize that no entity is entirely public on a strict interpretation of the four parameters I discuss. I began the

analysis in that section by discussing the differences between the public sphere in the domestic and global space and attributed the distinctions on the structural differences between the two spaces. Then, I briefly discussed the arguments found in feminist scholarship to broaden the understanding of public sphere. This section itself was divided into four subsections that comprise the principle of publicness. Each of the principles discussed in these four sub-sections contribute to the idea of publicness as it stands in GAL, i.e. deliberation, creation, promulgation, and application.

1. Deliberation

In chapter II, in the subsection dealing with publicness in deliberation I argued that the concept of deliberation relies on principles generally associated with democracy. Namely, deliberation, communication, inclusion, and representation. I discussed how each of these elements fortifies the other. In this subsection, rather than discussing each of these underlying elements in turn, I will detail how ICANN fares holistically on this concept. The first stage of deliberation would require engaging in a deliberative spirit. Through observing ICANN's functioning and mode of governance I got a distinct impression that in their own eyes they see themselves as deliberative. Perhaps this is due to the volume of documents prepared by ICANN members. However, I would argue that ICANN still has a lot of work to do on this principle to actually be an entity that deliberates in the manner as is required within GAL.

First, it is important to reiterate that the public is not properly demarcated. The internet community could be thought of as fairly fluid, changing and growing all the time. Without a properly demarcated public it is difficult to ascertain the issues most important to them. It then follows that it is complicated to have any kind of shared understanding of this public. This makes the ensuring deliberation a complex undertaking. Second, deliberation requires that the public engage with issues that are of public importance. This is problematic due to two contributing factors because as I have been discussing there is no properly demarcated public. Additionally, deliberation could be hindered by ensuing chaos. In the preceding discussion on the issue of participation and engagement I pointed out that chaos is a byproduct of the community consensus model that ICANN follows. Consequently, engaging with issues pertinent to the public becomes a problematic exercise. Third, deliberation requires that the plurality of the voices should be considered. I am not convinced that this is the case with ICANN. As I have mentioned before, there is a high burden on those who wish to participate in ICANN. In my opinion, those community members who engage with ICANN consistently and become part of what I labeled the ICANN club in chapter III of this thesis, are taken more seriously. If that is the case, then the plurality of voices is not being considered in its totality and some voices are given more credence than others. The ICANN community/club should be representing the

interests of those who are unable to participate or participate meaningfully. But, I am not convinced that the ICANN community/club actually thinks of themselves as representatives or functions in that manner. Representation of this type would require communicating with those you represent to understand their interests and objectives. I do not see that, that is the case with the ICANN community/club.

Overall in my assessment, ICANN has a long way to go to actually live up to the principle of deliberation by incorporating its underlying norms within their bottom-up multistakeholder driven process. If some of the burdensome requirements to engage with ICANN were reduced, I believe that deliberation would arise more organically. I posit that this could take place by better prioritization of ICANN's time.

2. Creation

In the subsection dealing with the law being publically made in chapter II, I forwarded a two-fold argument, firstly, I argued that the public should have a hand in making the law; secondly, that the law itself should be oriented towards public ideals. I concluded this subsection with a hypothesis that the public conscience in the domestic space and the global space would be different because of their structural differences. In this subsection, I will address these two arguments by turn.

For the first argument, it would be problematic if the public did not have a hand in creating the laws it must abide by because it forces individuals to consent to norms that they had no opportunity to help create. In my opinion, ICANN does a fairly good job on this front as it grants the opportunity to get involved. Through varied mechanisms, such as the public comment period on regulations and other opportunities to assist more directly in rule making within ICANN. However, it still suffers from the complications because those who might want to help in making the laws/rules might not be able to due to the factors I have already mentioned. high burden of engagement, high access threshold, and the ICANN community/club. With respect to the second argument, the problem arises that there is no way of delineating the internet community with complete certainty. If there is no sure method of determining the public, then it follows that it would be complicated to discern the conscience of this fluid public. Additionally, in the domestic space, the stakeholders are individuals. However, in the global space and within the internet community of ICANN the stakeholders are corporations, internet registries, individuals, civil society, as well as states themselves. Each of the stakeholders within the internet community have varied interests and values that matter to them. Thus, in such a heterogeneous context it would be almost impossible to ascertain any kind of collective public conscience among them. I would argue that there is a shared understanding of the overarching

mandate of ICANN. However, for having a public conscience based on which rules are created within ICANN, there needs to be more than a shared understanding.

I believe given these difficulties it would be difficult to ascertain if ICANN is actually living up to this principle.

3. Promulgation

In this subsection, I discussed the interaction between the scholarship in GAL and in RoL. I argued that publicness would necessarily require the law to be made public so that individuals (or in the global space constituencies) understand what is expected of them. I discussed the notion of an inner morality of law that Fuller posited, specifically the precept of promulgation requiring the publicity of laws. Additionally, I argued that our present conception of the RoL is inadequate for the global space. For RoL to properly function in the global space would require disentangling it from domestic notions. In fact, it has been argued that democracy too is intrinsically tied to the RoL ideal. Democracy could be thought of as a pre-requisite to RoL, in the first sub-section on the issue of deliberation, many of the principles discussed have their roots in democratic theory. RoL deals with obedience to the law, a law cannot be justified and obeyed if it emanates from a system that is undemocratic.²⁶¹ I would argue that though true in the domestic space in the global space no true account of democracy is fitting, so other underlying norms take its place, as I have argued in the subsection dealing with deliberation. These are norms that make up democracy in the domestic space. In my opinion most of these values are encompassed within the elements of publicness.

In my opinion, ICANN does fairly well on this ideal. The concept of transparency as formalized by its Bylaws emphasize the idea that information be publicly available. I would however argue that Fuller's notion of promulgation would require more than the availability of information. The objective of this precept is to ensure that stakeholders have knowledge of what norms and regulations govern them so that they can properly conduct themselves in accordance with those norms. Thus, this would require actually publicizing that this information is readily available on the internet. ICANN has a series of documents for beginners²⁶² to explain how some of the technical aspects of ICANN function. I would contend that a similar series for the Bylaws could be created and dispersed within the internet community.

²⁶¹ Joseph Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 547 (2004).

²⁶² Beginners Guides, available at: <https://www.icann.org/resources/pages/beginners-guides-2012-03-06-en> accessed on September 21, 2017.

4. Application

In this last subsection, I dealt with the principle that laws must be applied to the public. This required a two-fold focus. First, that the laws that have been created keeping the previous three subsections in mind must be administered to a demarcated public, and second that this public should have the power to demand that the laws so created be applied. In the context of the first argument, as I have previously discussed it certainly is difficult to delineate a public. However, I would contend that using the example of ICANN as the norm producer and the stakeholders as norm consumers it becomes slightly easier to understand who comprises this public even if it is a fluid categorization, and simultaneously fairly chaotic. I would contend that the second idea that the public should have the power to demand the application of regulations is complicated. As I have previously discussed, the question of who has the power within ICANN is ambiguous. The BOD and ICANN staff would argue that the power lies with the community because the model of governance that ICANN follows is a bottom-up model where the community takes the initiative. However, if the community does not have the power to penalize the ICANN staff or BOD, as I discussed earlier in this chapter while dealing with the principle of accountability, then the community lacks true power. In turn, it follows that this community cannot really demanding anything. The community has the ability to initiate requests for reconsideration, but that is where the power ends. In fact, the mechanism for requesting a reconsideration request, seems fairly burdensome.²⁶³ I would argue that it is difficult to successfully argue that ICANN rules and principles are applied to the public as required within the GAL paradigm.

To conclude this discussion about the four elements that comprise publicness, I would argue that ICANN has a long way to go on this front. It does alright on certain issues within the parameters I have discussed in this section, such as the concept that the public should have a hand in making laws; or that ICANN makes its regulations publicly available. But on the whole ICANN doesn't truly succeed on any parameter. I do believe that ICANN makes a concerted effort to enhance deliberation, but in my opinion the fluidity and the unwieldiness of the community make it difficult to make any real progress on this front. One of the reasons for this might be that ICANN perceives itself as a wholly private organization working for the privatization of the DNS. However, as they are vested with public power and perform an essentially public function they must adhere to the norms within GAL.

As I have demonstrated in this chapter, ICANN is accountable merely in a superficial manner. It has limited its conception of accountability to merely what can be found in the Bylaws. ICANN does

²⁶³ Bylaws *supra* note 190 at Annex D.

better on transparency, though it must be aware of the problem of information overload. On the principle of participation, ICANN must lower the burden of access if it wants meaningful engagement by those involved. Finally, on the issue of publicness, I find it fairly easy to conclude that ICANN doesn't do well on the element of publicness either. I believe that ICANN still has a very long way to go if it wants to achieve the twin goals of efficiency and effectiveness.

2. CONCLUSION

In a way, measuring ICANN against the norms discussed under GAL is akin to a conclusion. So, concluding this thesis in its entirety is a somewhat difficult task given the breadth of the issues discussed. In the beginning of this thesis I asked one main research question, Does ICANN fit within the GAL paradigm? To answer that question, I argued that for an entity to truly fit within the GAL paradigm, it must be incorporate four parameters that I discussed. Namely, accountability, transparency, participation and engagement, and publicness.

I then detailed the creation and evolution of ICANN itself to better understand the how ICANN functions in the present day. I fortified this narrative with first-hand observations that I made while engaging with ICANN. I found that ICANN functions in a way that gives precedence to its community since the rules are created by the community. The emphasis on the role of this broad community has increased over time. There are no clear lines of demarcation among the various groups of stakeholders each of which is considered to be fairly homogenous which is not the case at all.

In the final chapter I attempted to discern how ICANN fares on the four main GAL principles. I found that ICANN does not do well in terms truly of incorporating GAL principles. So, the answer to the overall research question is that ICANN does not neatly fit within the GAL paradigm. Any attempt to do so erroneously ignores the salient features of ICANN.

I believe that this thesis brings out two pertinent issues. Firstly, ICANN has many stages of evolution left to actually be an archetypal example within GAL scholarship. There are many principles that it needs to incorporate in a manner that is not limited, such as accountability. ICANN is still a nascent organization that has recently undergone a massive change in its context. It will be interesting to understand how it sees itself in this new paradigm, one free of American oversight. Secondly, GAL scholarship must evolve to pervade the hermetic typology of entities given in its original framing paper if it is a body of scholarship that will remain relevant over time. Though GAL is evolving as well, it is imperative that GAL see its typology of entities as inclusive.

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