

## **IMPROVING ICANN'S DECISION-MAKING ADOPTION, IMPLEMENTATION, APPLICATION, AND REVIEW PROCESSES**

ICANN's current 'judiciary' seems to be focused almost exclusively on providing mechanisms to resolve disputes. However, a judiciary can also play an important role in preventing conflicts from arising. A well-developed process of judicial review can invalidate rules and policies which are shown to be incompatible with fundamental norms before these rules and policies give rise to a conflict.

In my view, there is room for improvement in ICANN's relationship with the judiciary. Below, I discuss how this improvement could be realized, and how such an improvement would contribute positively to ICANN's decision-making and review processes.

I distinguish three mechanisms for judicial review to strengthen ICANN's decision-making process.

These mechanisms can be distinguished on the basis of when they should be brought into play during the decision-making process, *i.e.*, (i) prior to the adoption of new rules and policies, (ii) within a specific time period after such adoption, or (iii) at the time of their implementation and application. At the moment, there is a formal mechanism for (iii) only – the IRP. Mechanisms (i) and (ii) are not in place.

### **a. Mechanism (i) : Judicial Review Prior to the Adoption of New Rules and Policies**

First, ICANN can create of a new independent advisory body, designed to perform a judicial review of newly proposed rules and policies. This independent body would advise ICANN and its Board on the legality of the newly proposed rules and policies in view of ICANN's primary norms, the provisions of its Bylaws and Articles of Incorporation, and its obligations under domestic and International law.

In many jurisdictions, this system usually involves constitutional or administrative courts. It is commonplace in multiple liberal democracies.

A review mechanism such as this can be either mandatory or optional, and either advisory or binding. For the ICANN Board, I would support the introduction of a mandatory advisory system.

The introduction of a mandatory system would imply that, absent exceptional circumstances, the ICANN Board would have to seek the advice of the independent advisory body.

The introduction of an advisory system would keep the Board free either to accept or reject the advice. The ICANN Board would remain responsible for adopting rules, policies, amendments, etc.

A formal mandatory advisory system would contribute to enhanced decision-making and encourage a more developed rationale.

To prevent the system blocking the adoption of new rules and policies, I would recommend the introduction of a set period of time within which the review authority would be required to issue its advice (*e.g.*, two or three months following receipt of the draft policy by the Board). Were no advice to be given within the set time period, the Board would be free to proceed without it.

On the timing, adjustments can be made to particular circumstances. Some situations/policies may require additional time for review; for others it may be clear from the outset that no negative advice will be issued. The independent review body could adopt a screening method to estimate the time needed to issue its advice on a particular policy and allow for emergency advice proceedings, if circumstances so require.

The success and stature of an independent advisory body such as this very much depends on the independence, impartiality and competences of its members. In my view, members of the advisory body should have no other role within ICANN. The advisory body should be made up of eminent legal scholars from different continents and legal traditions, appointed either for life or for a significant period of time, and selected through objective and transparent procedures.

I would have no objection to including *former* active members from stakeholder groups in the advisory body.

#### b. Mechanism (ii): Judicial Review upon the Adoption of New Rules and Policies

Second, ICANN can create of a new independent review body; this time empowered to annul rules and policies at the time of their adoption, if those rules and policies conflict with fundamental principles.

Such a body is again quite common in many jurisdictions, where a constitutional or administrative court is tasked with this review. This would allow anyone affected to request the annulment of the rule or policy in question. If the independent review body agreed to grant the annulment, it would apply *erga omnes*.

An independent review body such as this is necessary in addition to the independent advisory body described above. A party negatively affected by a rule or policy must have the opportunity to raise a challenge and request annulment. ICANN and its Board should be aware that the adoption of a new rule may violate a higher value or fundamental norm, even if the independent advisory body (described above under a) did not identify the fact.

An independent review body such as this has significant power (*i.e.*, the annulment *erga omnes*), and the conditions laid down for requesting such a review should be strict, well defined and limited. Also, there should be a time limit for requesting the annulment. This would help prevent there being a lack of legal certainty that would clearly not be in the interests of the Internet community.

Furthermore, the importance of the independent review body's office makes it imperative that great care be taken in the appointment of unbiased and experienced legal scholars, whose loyalty to the rule of law and independent judgment must be beyond reproach. In my view, the selection process and the tenure of these independent judicial reviewers should resemble those of the independent advisory body. However, the two bodies must be kept entirely separate and independent.

c. Mechanism (iii): Judicial Review in the Implementation and Application of Rules and Policies

Third, there is the IRP.

IRP panels should have the power to annul any specific implementation (*e.g.*, a guideline) and application (*e.g.*, a decision whether or not to contract in the framework of the guideline) of rules and policies that violate ICANN's Bylaws or Articles of Incorporation with regard to a particular party. A ruling by an IRP panel should generate effects *inter partes* only, although it may create an incentive for ICANN to amend its rules and policies immediately or in the future with a view to avoiding disparate treatment at the implementation and application level.

A judicial review of the implementation and application of rules and policies will always take place in adversarial proceedings, and claimants must be able to show actual or potential real harm (which is different from actual or potential damages). Because of the adversarial context, and because the circumstances of each case can be quite different, IRPs are best dealt with through arbitration.

This third judicial review mechanism must be independent of the two mechanisms (i) and (ii) described above. Any party with standing should have the right to initiate an IRP regardless of whether or not an independent advisory or review body has previously advised against or decided against the annulment of the rule or policy in question. In other words, an individual IRP panel should be able to set aside a given rule as regards a particular claimant, and that ruling should be binding for ICANN and have precedential value.

### Comparison of the three scenarios

	<b>Mechanism (i)</b>	<b>Mechanism (ii)</b>	<b>Mechanism (iii)</b>
<i>What?</i>	<i>Ex ante</i> Judicial review	<i>Ex post</i> Judicial review	IRP
<i>Who?</i>	Independent Impartial Competent From different continents From different legal traditions Standing panel	Independent Impartial Competent From different continents From different legal traditions Standing panel	Independent Impartial Competent From different continents From different legal traditions Possible standing panel (though not mandatory for the claimant <sup>1</sup> ) Possibility to call upon the Full Panel
<i>When?</i>	Prior to the Adoption of New Rules and Policies	Upon the Adoption of New Rules and Policies	At the occurrence of an injury or harm following an implementation or application of Rules and Policies
<i>Timing</i>	X days following the submission of recommendations by the GNSO	X days following the approval of the recommendations by the Board	X days following event or discovery
<i>Parties</i>	ICANN / ICANN Board	Interested party	Interested party v. ICANN
<i>Authority</i>	Panel Independent from (ii) and (iii)	Panel Independent from (i) and (iii)	Panel Independent from (i) and (ii)

<sup>1</sup> Many claimants affected by an ICANN decision are not active in the community and the standing panel approach cannot be imposed upon them: as the IRP is an arbitration, each party has the right to participate in a free and open nomination process.

	<b>Mechanism (i)</b>	<b>Mechanism (ii)</b>	<b>Mechanism (iii)</b>
<i>Powers</i>	Advice	Annul a rule or policy (and install transitory measures) v. deny annulment request	Declaration as in the bylaws
<i>Mandatory or optional for ICANN or the interested party</i>	Mandatory	Optional	Optional
<i>Advisory or binding</i>	Advisory	Binding	Binding
<i>Effect</i>	On ICANN / ICANN Board	Erga Omnes	Inter Partes
<i>Precedential value</i>	No but authoritative value	Yes	Yes
<i>Global Effect</i>	May enhance stability, legal certainty, legal predictability	Enhances stability, legal certainty, legal predictability	May enhance stability, legal certainty, legal predictability
<i>Impact on rules or policy development</i>	Yes: an affirmative advice confirms the path ahead  a negative advice may be a reason to review a draft rule or policy	Yes: an annulment is a reason to prepare a new rule or policy  a denial confirms the path ahead	Yes: a confirming declaration may be a reason to review a rule or policy  a denying declaration may confirm the path ahead