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Good Administration through a Better System of Administrative Procedures

A SIGMA assessment of the current Law on Administrative Procedures and proposals for enhancing the administrative practice in Kosovo* by a better regulatory framework for the relationship between citizens and the public administration

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Introduction

This paper was prepared by SIGMA in September 2012 upon request of the Minister of Public Administration of Kosovo. It is meant to be a relevant step of SIGMA's assistance requested to support the efforts of the government to reinforce the rule of law in Kosovo and to create a better legal administrative environment for the citizens and the business sector. Further steps are already envisaged in this regard.

Proposals for legislative measures made in this paper are based on an analysis of the Law on the Administrative Procedure No. 02/L-28 of 22 July 2005 (hereinafter LAP).¹ Summary

In July 2005, the Kosovo Assembly, based on Chapters 9.1.26 (a) and 5.1 (m) of the Constitutional Framework for Provisional Self-Government of Kosovo (UNMIK/REG/2001/9) of, 15 May 2001, adopted the current LAP intending to align the administrative procedures system in Kosovo with the modern international standards of a good system of administrative procedures; in, particular, with the common values and principles of Good Administration of the European Union and its Member States.

Why is a good system of administrative procedures needed? The political success of a government stands and falls with the quality of its public administration. Therefore, the first answer to the above question has to emphasise the general political importance of public administration for a governance system. "Administration is the exercise of political authority in everyday life."²The best political concepts, aimed at issues such as creating an education system fit for the future, providing social security, protecting the environment, combating unemployment, generating sustainable economic growth, or ensuring law and order, will fail if the public administration lacks the necessary capacity to put those concepts into the reality of the society.

The text of the current LAP of 2005 reflects, in general, the intention of the legislator to provide the legal framework for a good system of administrative procedures. In particular the intention to implement the rule of law is recognisable without doubt.

However, the good intention has not been translated into an appropriate piece of legislation. The current LAP suffers serious shortcomings that can hardly be eliminated by producing selective amendments of the current legal text. Instead, drafting a new Law is recommended.

The major shortcomings of the current LAP are as follows:

- The scope of the Law is too narrow. It is applicable only to unilateral administrative acts and thus does not cover all the areas of today's administrative actions that require on the one hand guidelines for administrative authorities and on the other hand effective legal protection of citizens³.
- The principle of legality of administrative actions is explicitly recognised in the current LAP, but its legislative design is fragmentary. Essential issues are wrongly formulated (*e.g.* discretion) or

¹ Carried out by three external SIGMA experts: João Pedro Freire of Portugal, Wolfgang Rusch of Germany, and Zhani Shapo of Albania.

² Max Weber (1922) *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* (5th revised edn. 1980. Tübingen) p. 28; the original quotation in German reads: „Politische Herrschaft im Alltag ist Verwaltung.“

³ In the following the concept citizen is used as a synonym for both a natural or legal person involved in a relationship with the public administration.

completely missing (*e.g.* the requirement of an authorisation of the administrative action by law when interfering with individual rights).

- Procedures regulated in the LAP are heavily formalised and inefficient for both citizens and administrative authorities. They are not only costly and time consuming but could result in a real obstacle of citizen's legal protection. Simplification tools like the point of single contact approach are missing or, as far as IT based communication is concerned, poorly regulated. This makes the Law non-applicable for many special procedures.
- As to the principle of due process of law, some specific procedural elements are either missing (*e.g.* the right of a party to access/inspect files) or only vaguely treated.
- The principle of citizen-orientation is underdeveloped. Participation of citizens in administrative decision-making processes is not foreseen.
- The system of administrative legal remedies is only partially developed and inconsistent and per consequence not effective.
- The regulation of enforcement of administrative decisions is poor and incomplete. The same applies to costs of administrative procedures.
- As to the principles of good legal drafting the text is:
 - very casuistic and managing technical details that should be better dealt with in secondary legislation or office rulebooks;
 - non-systematic and confusing in its structure;
 - inconsistent in its (Albanian) terminology;
 - sometimes contradictory.

Complaints about non-compliance of Kosovo's public administration with the LAP are widespread within the country. This is not merely a result of the lack of administrative culture, professionalism or integrity of the applicants of the Law, *i.e.* the civil servants, but also of insufficient quality of legislation.

It would be more than difficult to enhance the current LAP by selective amendments. The drawbacks the Law presents are enormous and systemic. Indeed, as far as the regulatory content of individual provisions is concerned, amendments would be possible. However, the overall legislative approach, the confusing structure, as well as the regulatory loopholes would require so many deep alterations of the current text that, in the end, all efforts of repairing the Law would entail an imperfect and illegible patchwork rather than a good, consistent, and comprehensible piece of legislation. Therefore, it is proposed to draft and adopt a new LAP for Kosovo.

In the first part, this paper explains the concept of Good Administration and the European's principles of good administrative procedures. (Chapter II) details the constitutional principles of Rule of Law, Human Rights and Democracy on which a good Law on General Administrative Procedures is based. (Chapter III) proposes key elements for the content and structure of a good Law. (Chapter IV) is followed by some short remarks on the implementation of new legislation. (Chapter V). In its second analytical part (Chapter VI), an assessment is provided of the current LAP of Kosovo measured against the standards and criteria set forth in the first part.

THE EUROPEAN PRINCIPLES OF GOOD ADMINISTRATIVE PROCEDURES

The status of public administration and its adjustment to the rapidly changing needs of society and government is currently a universal debate in European countries. In this political and societal context, “Good Administration” has emerged as an inclusive concept, indicating the overall objective of the modernisation process.

KEY ELEMENTS OF GOOD ADMINISTRATION

The concept of Good Administration redefines administrative operations and citizen-administration relationships. It responds to the expectation and requirement of a balanced approach to safeguarding the public interest while respecting the rights and interests of the citizens. Good Administration is at the service of the community and promotes social trust in the executive power; it thus contributes to political stability and fosters economic development and social wealth. In contrast, malfunctioning administration is an obstacle to productive investments and can lead to citizen’s resistance and protest against the state and in the worst case to a failing state.

The principles and standards of Good Administration derive from EU legislation and jurisprudence⁴ as well as from good administrative practice in EU Member States. Thus, these principles provide policy makers also with baselines in the light of EU membership and cross-border administrative cooperation.

New challenges

Not long ago, the main challenges for Good Administration were: i.) respect for the rule of law and ii) predictability. Administrative decisions had to be based on a valid legal provision circumscribing competence and setting its limits. In this way, decisions could be reviewed and controlled by the hierarchy and the judiciary. Predictability and accountability of administrative actions were ensured.

A more recent and additional challenge for Good Administration is to respond to fundamental social, cultural and economic changes that have occurred during the last decades. These changes affect all countries and state systems, but are particularly relevant for transition countries and (potential) EU candidate countries.

⁴ Article 41 of the Charter of Fundamental Rights of the European Union (2000/C 364/01);

Of fundamental relevance for the public administration are also :

Article 2 of the Treaty on the European Union, according to which the "Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."

Article 197 of the Treaty on the Functioning of the European Union, which refers to administrative capacity of the Member States as a matter of common interest.

For the complete text of these provisions see below Annex I of this paper.

A more equal relationship between state authorities and citizens can be highlighted as a core recent change. Historically, citizens were regarded as subordinated to public authorities. The top-down and unilateral behaviour of public authorities dominated legal patterns as well as everyday administrative practice. This type of relationship was thought to serve the principle of the rule of law, while it guaranteed, *inter alia*, the non-interference by the state unless specifically provided for by the law.

However, modern democratic governance transformed both the role of the state and the citizen. The citizen is not passive and a subject to the exercise of state authority but is seen as an asset: the citizen is given space as an active member, a partner who can contribute to the general welfare. His/her input, cooperation and participation is encouraged and sought after as a necessary condition for democratic and efficient governance, and for economic development.

In this new context, administrative decision-making and the provision of administrative services need to adjust. This involves a new place for values such as transparency, simplicity and clarity, participation, responsiveness and “citizen oriented” performance. They redefine the relationship of citizens as more “horizontal”. Legal provisions and their administrative implementation need to incorporate this redefinition and keep up with these developments.

Current principles of Good Administration

Good administration principles need to respond to old and new challenges. Currently, they include the following elements:

- Good Administration is reliable and predictable. It guarantees legal certainty by respecting the rule of law. Administrative bodies exercise the powers and responsibilities vested in them in accordance with the laws and regulations applying to them. They implement general rules and principles impartially to anyone who fulfils the required conditions taking into account the interpretative criteria elaborated by the courts. When exercising their discretion they remain within the boundaries set by the law, in good faith and in a reasonable and proportionate way, upholding the requirement of equal treatment. They decide in reasonable time. By observing legal rules, administrative bodies realise the minimum requirement of democracy in the form of the rule of law.
- Good Administration is open and transparent; administrative bodies keep matters secret or confidential only in order to protect a legitimate superior interest, *e.g.* national security or personal data of third parties etc. and always within the boundaries established by the law. They even facilitate access in various ways, *e.g.* by electronic means, where feasible, and through points of single contact.
- Administrative bodies communicate actively about their tasks, duties and responsibilities. They use a language that is simple, clear and understandable for the general public. All public authorities identify the responsible civil servant and take care of improper or impolite behaviour *vis-à-vis* citizens.
- They encourage participation of everyone affected by their decisions. Accepting citizens as partners in the decision making process is the first step towards the "horizontalisation" of the relationship. A number of rules promote this role and materialise respect for the citizen. Giving any interested party or its legal representative the possibility to present his/her case and arguments by holding a hearing before issuing a negative decision is an important one.

- Good Administration is accountable. Administrative bodies, their work and its outcome are open to scrutiny and review by other administrative, independent and legislative authorities as well as the courts. Supervision ensures that the public authorities honour the principles embedded in administrative law. Accountable administration further requires the possibility of legal remedies for a decision and the provision of information about them by indicating any preconditions.
- Administrative bodies provide the reasons for the administrative decision, stating the relevant facts and evidence, citing the relevant legal norms and showing how they fit with each other. In case a claim, an argument or some evidence presented by an interested party is rejected, the statement of reasons specifies the grounds for the rejection. Thus, they notify anyone concerned of their decision.
- In order to make accountability and control possible, they document the steps and procedures taken in their records, including the requests and applications, the evidence, and other documents relevant to the administrative proceedings. They allow access to the relevant files.
- Good administration requires, and is fostered by, an accessible and comprehensive system of judicial control of administrative acts and other actions of the administration. This completes the mechanism for the defence of citizens' rights. Courts are provided with adequate power to fully scrutinise the legality of the administrative acts/actions in order to pronounce a final decision on the dispute. In certain cases, this control may even extend to controlling the margins of discretion, without however fully substituting the administration.
- Good Administration is effective and efficient. Public authorities need to be successful in achieving the goals and handling the public problems set for them by law and government; they need to use public resources in a way proportional to the results attained; they set clear objectives, evaluating past experience as well as the future impact of their action. Not imposing unnecessary burdens and costs on the citizens and business is another way to increase effectiveness and efficiency.

ADMINISTRATIVE PROCEDURES: GOOD ADMINISTRATION IN PRACTICE

For putting the principles of Good Administration into practice an appropriate system of administrative procedures is imperative. Such a system sets the rules for the process of making an administrative decision, and the Treaty of the European Union presupposes the existence of a well functioning system of administrative decision making, required to implementing and applying the *acquis communautaire*.

A good system of administrative procedures ensures the quality of administrative decisions, as much as their legal correctness, especially if discretionary powers exist. It also protects citizens' rights and promotes citizens' participation. It further avoids unnecessarily complicated, formalistic and lengthy processes and enhances transparency and accountability. Under these conditions, transaction costs for citizens and per capita government expenditures are reduced. SIGMA's experience has found that governments that move in this direction ensure multiple benefits for their country.

The legal framework for general administrative procedures, i.e. a Law on General Administrative Procedures can be described as a “constitutional law in concrete form”. It regulates for the whole public administration the process of preparing, taking and implementing administrative decisions and provides a set of rules for how administrative authority and citizens should communicate during this process.

Characteristics of a good system of administrative procedures

A good system of administrative procedures is first and foremost general and standardised. Its basic principles are valid for every action of the executive; its rules shall apply to the large majority of administrative actions. The existence of a general and standardised procedural system is critical for an effectively and efficiently acting public administration and hence for the quality of services provided to citizens.

A good system of administrative procedures sets simple and clear guidelines for public administrative authorities and their civil servants in everyday activities. Its rules are phrased in a simple, clear and understandable manner and can thus be accessible and commonly known to citizens. It is “citizen-centred”, taking into account citizens’ expectations and providing guarantees for their procedural rights. It further defines the standards of ethical and practical conduct of civil servants, thus ensuring the proper functioning, the efficiency and quality of the services delivered to the public.

The existence of such a general and standardised system ensures better compliance with the material rules. It further facilitates oversight and control by superior levels in the chain of command (such as the legislator and the ministry in charge of control), which can make sure that the competent public body adheres to law and statute.

A standardised system of administrative procedures favours the transparency of the decision making process and enhances the legitimacy of its product. All participants in an administrative operation, be it administrative authorities as well as the parties of a procedure benefit from its existence. More specifically, citizens and businesses directly involved in an individual administrative procedure are able to assess if the administrative authority acts within its legal boundaries, to follow the steps the public body has to take, and more generally to predict the course of administrative process. They have the chance to express their respective interests and views during the process, thus facilitating clarification of interests and improving the rationality of administrative actions.

By prescribing the procedural rights to respect, a general system of administrative procedures sets the standards for a fair decision-making process. It provides for the respect of the rights of all participants in the process (citizens directly or indirectly affected *i.e.* the neighbour in a building case, a competitor in a procurement or recruitment procedure, the market etc.). It thus ensures impartiality and equal treatment. It guarantees among others the right to be heard; the right to receive an answer by an administrative authority; the right to information and access to files; the right to legal advice; the right to protect personal data, the duty of the administration to give reasons for its decisions; the duty of the administration to indicate the possibilities for legal challenge to its decisions⁵.

A standardised system ensures efficient operation by providing deadlines by which the administration has to respond or make a decision and by clearly defining responsibilities (who does what). It makes sure that there are no unnecessary steps resulting in complexity and delay, nor costs involved. Exceptionally, when charged, the cost should be affordable and reasonable. A good system of administrative procedures encourages the use of citizen-friendly forms of communication, such as e-government or points of single

⁵ See Jürgen Schwarze, European Administrative Law, 1992, p.1186

contact. Thus administrative procedures become easier and faster for citizens and economic actors inside the country and from other EU Member States.

The establishment of a general system provides the principles also for any special, new or complex procedure and allows possible gaps to be filled. Thus existing procedures can be rationalised and streamlined while new ones benefit from the existence of general framework rules.

In sum, a system of general administrative procedures materialises the concept of Good Administration, basic elements which include openness, participation, accountability, effectiveness, and coherence of administrative action.

Administrative procedures and judicial control

The judicial control of administrative actions is one of the fundamental requirements of democracy and the rule of law. The imbalance of power that exists between the public administrative authorities and individuals needs to be effectively controlled to restore citizens' rights, which have been infringed by an administrative authority. It is the judicial control of administrative actions, which guarantees that the State is fully subject to the law.⁶

General procedural rules are a precondition for effective judicial control. They constitute standards according to which the legality of a decision is assessed. Procedural rules facilitate the review process providing benefits in terms of time, equal treatment and coherence of jurisprudence. They allow easier formulation of principles of jurisprudence. Finally, it should not be underestimated that general procedural rules make the enforcement of court rulings more efficient, since the administration as well as the parties involved in the dispute benefit from clearer guidelines to redress procedural faults.

CONSTITUTIONAL BASIS OF A LAW ON GENERAL ADMINISTRATIVE PROCEDURES

A Law on General Administrative Procedures shall realise the balance between the public interest and the requirements of an objective and fast decision making process of public administration on the one hand and protection of rights and legitimate interests of individuals participating in this procedure on the other; in other words, between public welfare and social justice. In order to ensure this balance the law shall be in compliance with

- the constitutional order of the State, other principles and values deriving from the national legal tradition;
- the European Charter of Human Rights and international obligations;
- the legal order of the *acquis communautaire* of the European Union;
- the quality standards of modern public administration;
- the positive experiences of national and European administrative culture and practice;

⁶ Council of Europe, The Rule of Law and Justice – Achievements of the Council of Europe, Strasbourg 1997: Judicial Control of Administrative Acts, Madrid, 13-15 November 1996 (p. 93)

- the standards of good legislation.

This section of the paper will focus on the key elements of rule of law, human rights, and democracy as the constitutional basis by which a Law on General Administrative Procedures shall be determined. It follows the final section that proposes key elements of the content and structure of a good Law. Both sections of this paper target mainly law drafters and administrative practitioners but also stakeholders in the legal and business community and civil society ‘actors’, to enable them to measure the current national legal framework of administrative procedures and encourage them to engage in the public debate on its reform.

The rule of law – public administration through law

The Rule of Law is a fundamental constitutional value for the legislature, executive and judiciary of a democratic state.⁷ It constitutes a system of separation of powers, in other words, a system of checks and balances within which public administration is a state power of equal rank beside the legislative branch and judiciary. In such a system, public administration has its own exclusive authority which includes both administrative decisions and their enforcement.

For the administrative decision-making process the Rule of Law provides various principles, amongst others the principles of legality, due process and proportionality.

The principle of legality of public administration

The principle of the legality of administration is a cornerstone of all EU Member States’ public administration.⁸ It does not only aim at protecting the rights of the individuals, but also safeguards the public interest. The principle consists of the following two basic elements: i.) the public administration is bound by the constitution, statutory laws and secondary legislation, *i.e.* every administrative action must be in conformity with the law; ii) every action of an administrative authority, which interferes with the individual rights of the citizen, is legal only if there is an authorisation for this action provided by law.

Furthermore, derived from these two basic elements, the principle of legality also comprises

- the requirement of clearly defined competences and responsibilities of administrative authorities, transparent organisation, and predefined decision-making processes;
- the principle of legal certainty to guarantee that a citizen can rely on the public administration and foresee possible administrative actions affecting him or her (in other words predictability of administrative decisions and protection of legitimate expectations of the individuals);
- the strict interdiction of undue political interference or political motivation in administrative decisions;

⁷ Article 2 of the Treaty on the European Union recites the principles on which the European Union is based and which are common to all member States. Part of these “constitutional principles” is, among liberty, democracy, respect for human dignity and basic freedoms, the State under the rule of law. (Case T-54/99 *max.mobil v Commission* (2002) E.C.R., II-313, note 48, CFI)

⁸ Cf. Case 38/70 *Deutsche Tradax GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, (1971) E.C.R. 145, note 10, ECJ; case 113/77, *NTN Toyo Bearing Company Ltd v Council*, (1979) E.C.R. 2859, note 19, ECJ

- legal remedies against administrative actions including recourse to the administrative court in order to ensure legal control of administration and protection of individual rights as well as of the public interest.

Fairness of procedures (due process)

From the Rule of Law the following procedural rights of the citizen are commonly classified under the notions due process or fair procedure:

- the protection of human dignity and individual freedom, including data protection;
- the guarantee not to be subject to unfavourable retroactive law;
- a fair hearing in all stages of procedure;
- legal aid (*i.e.* exemption of costs of administrative procedures according to entitlements awarded by the law), if needed and requested by the party;
- the right to understand proceedings;
- the right to listen to other participants in their presence, such as officials, witnesses and experts, when oral proceedings are conducted;
- the right to receive all available information on the case;
- the voluntary withdrawal or compulsory exclusion of public officials from the procedure who are suspected of self-interest and prejudice according to strict legal provisions on conflict of interest;
- the right to participate in a procedure initiated by somebody else, if one's interest is at stake;
- the right to obtain a decision within a reasonable time frame;
- the right to receive compensation for damages caused by public administration (state liability).

To summarize, the due process principle establishes a system of “fair balance of weapons”⁹ between the administration and the citizen.

Proportionality

The principle of proportionality means that the administrative authority must not interfere with rights and freedoms beyond what is necessary to achieve the purpose of the respective administrative action. Any administrative action requires the compliance with the proportionality principle. This means that an administrative action may restrict an individual right only if the measure is

- suitable to attain the purpose prescribed by law;
- strictly necessary to obtain the purpose;

⁹ General principle of a level playing field' as referred to by the European Court of Justice, Case T-36/91 ICI v Commission [1995] E.C.R. II-1847, note 93, CFI

- adequate, *i.e.* the administrative intervention does not imply a disadvantage that is out of proportion with the designed end.

Human Rights

For administrative procedures, the principle of human dignity and the body of individual freedoms and rights are also relevant. Human dignity and freedom provisions are the background for a new understanding that it is the citizen who is the centre of all administrative action. The public administration is called upon to equip him/her with basic services and protect his/her rights. The principle of general equality is both a human right and a democracy-element. Protection of human rights includes also data protection and private secrecy. Modern administration is oriented to protect human rights by organisation and procedure, be it by transparent and accessible organisation or by procedural instruments like participation, fair hearing, remedies etc.

Democracy

The principle of democracy comprises – in the context of public administration – three major aspects:

- Every administrative authority, be it at state or local level, derives its power from the people's will.
- The role of public administrative bodies towards citizens, entrepreneurs and wide society is imprinted by democratic elements. Democratic society calls for public administration which should be, on the one hand, perceived as the custodian of public interest and, on the other, as service-oriented activities directed towards citizens and society. Service to citizens, entrepreneurs and the society as a whole, in one word citizen-orientation, is the main goal of a democratic public administration.
- Sometimes “citizen-centred administration” and “regulatory administration¹⁰” are understood as antithetical, and therefore it is said that the “regulatory administration” needs to be “transformed” into a citizen-oriented one. Such understanding is erroneous. Citizen-/service-orientation does not substitute the rule-of-law-based public administration but complements it by introducing a second value of similar importance. In addition to values like legal certainty and predictability, which are fundamental also for a citizen-centred administration, an administrative culture that comprises citizen-orientation allows more informal relationships between public administration and citizen and more flexibility (discretion) for the administrative decision-maker. However, this requires, as a counterweight, not less but new, *i.e.* different, regulatory instruments.
- The practical side and the most direct form of making democratic principles operational is the participation of the citizens and their organisations in public affairs. Open, fully transparent and objective administrative procedures are one of the most important prerequisites for such participation.

Participation may take different forms, ranging from observation of public administrative actions, which is a form of control, to cooperation with administrative bodies through participation in the decision making process. A good Law on General Administrative Procedures shall provide all forms and conditions of such participation. It shall guarantee complete and effective protection of participatory rights of

¹⁰ From the context, the notion of “regulatory administration” is distinct from either administration of regulation or regulatory bodies/agencies.

individuals in administrative proceedings. According to EU Law (Aarhus Convention of 25 June 1998) NGOs shall be admitted to participate in proceedings, when a public interest calls for such participation.¹¹

PROPOSED KEY ELEMENTS FOR THE CONTENT AND STRUCTURE OF A GOOD LAW ON GENERAL ADMINISTRATIVE PROCEDURES

This section of the paper will provide some recommendations for Kosovo's legislator on how the European principles could be transposed in a Law on General Administrative Procedures. The proposals are based on current legislation in force in EU Member States that have the Continental European legal and administrative tradition in common with Kosovo. Furthermore, the proposed key elements also reflect the experiences of some (potential) EU candidate countries had when they recently underwent the challenge of drafting new administrative procedure legislation. However, it is to be underpinned that all recommendations have to be adapted in the light of the specific national legal, administrative, and cultural context of Kosovo.

A list of general goals of a good Law on General Administrative Procedures

A list of general goals of good Law on General Administrative Procedures, very often provided in one of the first Articles of the Law could include the following elements:

- ensuring the protection of both individual rights and the public interest as well as the proportionality of administrative decisions;
- improving the transparency of administrative procedures;
- providing guidance to the delivery of citizen-centred administrative services;
- enhancing the confidence of the citizens in public administration;
- promoting economic development through a professional and good administrative behaviour¹²;
- supporting the effective and ethical behaviour of civil servants involved in administrative decision-making processes;
- contributing to the efficiency (cost-effectiveness) of administrative decision-making to the benefit of both public administration and citizens;

¹¹ In force since October 2001, which forms part of EU Law since the Decision of the EU Council of 17 February 2005.

¹² The notion "good administrative behaviour" is used in the Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public, adopted by the Commission on 1 March 2000

- paving the way and open the use of modern information-communication technologies for the delivery of administrative services (e-administration).

A good Law on General Administrative Procedures minimises the number of special procedures

A Law on General Administrative Procedures shall be applied, as a rule, to every administrative procedure. Transparency, predictability and legal certainty in decision-making, as well as the standards of good legislation, require a coherent, unified system of administrative procedures with a minimal number of special procedures.

Such uniformity also reduces administrative costs, speeds up administrative decisions and increases the effectiveness and efficiency of public administration and of administrative justice. It is opportune for both citizens and civil servants to have all procedural rules in the same law. Therefore special administrative procedures should be subjected to very strict scrutiny and their number reduced as much as possible. The more administrative procedures are covered by the LGAP, the more likely it is that the procedures are known and observed.

Some special procedures may be appropriate to specific areas, but they must be special only in as much as it is absolutely necessary. Those institutions that propose enacting special procedures shall bear the burden of explaining why special legislation is needed. If special administrative procedures cannot be avoided, the degree of such deviation from general procedure must be minimised and special procedures, as far as possible, combined with the legal institutes of the general Law.

Wide scope of the Law on General Administrative Procedures

As already explained above, the range of administrative actions has expanded. Technological innovation, societal and cultural changes and economic trends have entailed new challenges of public administration and in response to them new forms of administrative actions have been developed including the delivery of public services.

A good LGAP needs to cover all administrative actions that could affect the legally protected sphere of the citizen, in order to ensure full implementation of both the rule of law and citizen-orientation. It should regulate not only the traditional top-down and unilateral behaviour of public authorities but also the recently more and more evolving “horizontal” relationships¹³ between the administration and the citizen.

This means for the administrative practice that the scope of the Law is sufficiently wide, if it provides effective legal protection against administrative actions of the following four categories: i) the administrative act; ii) the administrative contract; iii) real acts such as provision of information, warnings, reporting, publishing expert opinions; and iv) the delivery of public services of general interests delivered either by a public or a private service provider. Planning procedures and normative acts, although also actions of the executive power are special subjects that could be better dealt with in special regulations.

¹³ Cf. above section II. 1. a.

Administrative act

In many Continental European administrative jurisdictions the administrative act¹⁴ is the traditional and still as ever the most important instrument of a public authority to act and decide in an administrative matter.

The exact definition of the concept administrative act might in some details differ among the various national legal traditions. But there is a common understanding that the terminus Administrative Act is used for an individual unilateral decision of an administrative authority in the sphere of administrative law that is directed to affecting rights, obligations, or the legal interest of a citizen. Accordingly, the instrument of an Administrative Act is applied when the administrative authority imposes a prohibition, issues a command, grants a right (*e.g.* building licence), rejects an application to grant a right, or changes a legal relationship (*e.g.* by revocation of a licence).

The importance of the legal institute of the administrative act arises from its four major functions:

1. The administrative act is the instrument to apply rights and duties stipulated by material administrative law (*e.g.* building law) to a concrete individual case. It prescribes bindingly what is legal for the citizen. In this way the administrative act has a normative effect: it may be, for example, the legal basis of a citizen's claim against a public authority (*e.g.* administrative act granting a subsidy) or, vice versa, the legal basis for a public authority's claim against the citizen (*e.g.* repayment claim).
2. The administrative act aims at achieving administrative finality. When the deadline of a legal remedy against the administrative act has expired, as a rule the citizen cannot challenge any longer the administrative act, no matter whether or not it is lawful.
3. The use of the instrument administrative act for an administrative operation determines which procedural law is applicable, in other words, which procedural steps the public authority has to undertake. The compliance of every administrative act with the same procedural regulations ensures equality of treatment of citizens within state administration.
4. Administrative enforcement requires (among others) that the obligation to be enforced be specified by a proper administrative act.

It is highly recommended that the Law on General Administrative Procedures provides a legal definition of the administrative act.

Administrative contract

A transparent cooperation between public authorities and citizens necessitates new, in comparison to the administrative act, more participatory means of administrative actions to enable a citizen-centred administrative service. This is true in particular for those administrative matters, for which co-operation between citizens and administration is in the interest of both the acting administrative authority as well as its counterpart. A modern Law on General Administrative Procedures therefore should provide rules for consensual solutions of administrative problems that allow the public administration to match flexibly the

¹⁴ In French language: acte administratif; in the Slavic languages of former Yugoslavia: upravni akt; in Albanian: akti administrative; in German: Verwaltungsakt; the origin of the Administrative Act is traced from the French concept of acte administratif and developed into a German/Austrian concept since 1826 onwards.

public interest related to a certain administrative matter with those of the party. Quite often a consensual approach and its higher flexibility not only leads to more appropriate results but also increases social acceptance of administrative decisions.

The instrument for such a consensual approach is the administrative contract, well proven in many European administrations. Whenever the reform of the system of administrative procedures is on the legislative agenda, the option of including the legal institute of an administrative contract should be considered.

The administrative contract utilizes the freedom of contract for the fulfilment of public tasks regulated by administrative law.

In most cases, an administrative contract will be concluded between a public authority and a private person, but it can also be concluded between two or more public authorities (*e.g.* two municipalities agree on modalities of running a joint school bus system).

By definition, an administrative contract concluded with a citizen is an instrument, for which the public authority would be authorised to otherwise issue an administrative act. It follows from this that a contractual solution of an administrative matter is admissible only if the law leaves the decision on the respective subject matter to the discretion of the public authority. Only in such a case there is space for negotiation and compromise and only within the legally defined limitation of the discretion.

It is to be underlined that the administrative contract is to be distinguished from contracts a public authority concludes under private contract law. The purchase agreement with an office equipment supplier or the service contract with a building cleaning company, remain private law contracts, for which the regulations of the Law on General Administrative Procedures on administrative contracts are not applicable.

Administrative real acts

A Law on General Administrative Procedures that provides full legal protection of citizens should also include “administrative real acts” which are aimed at factual results rather than the legal consequences, which follow from an administrative act or an administrative contract. A modern administration performs numerous and multifarious kinds of real acts. If they relate to the administrative authority’s affairs with citizens, *i.e.* if they can have an effect on citizens’ rights, duties and legal interests, a good Law takes account of them.

Administrative real acts are classified into actions, which are explanatory and actions in the form of factual functions. Actions such as delivery of information, warnings, reporting, publishing expert opinions, or dealing with petitions of citizens belong to the first category while the second category includes actions such as payment of money or giving of protective inoculations. If those actions fall within the provision of administrative law or implement those functions, which are allocated to administrative law, the LGAP should provide legal protection, in cases if those actions interfere with citizens’ rights and legal interests respectively.

Delivery of “services of general interest”

The incorporation of the delivery of “services of general interest” in the Law on General Administrative Procedures aims at ensuring effective and low-cost legal protection of service users even if the service provider is a private-law entity. It is true that with such a regulation in the LGAP the legislator would enter into a new administrative law area. But this novelty is recommended in order to respond to newly emerged needs.

In the past it was exclusively the public sector that provided vital public services to fulfil basic needs of the citizens. But this paradigm has changed. In recent years governments have increasingly transferred the provision of “services of general interest” to the private sector.

The EU describes “services of general interest” as “services covering such essential daily realities as energy, telecommunications, transport, radio and television, postal services, schools, health and social services, etc”¹⁵. According to EU law¹⁶, the Union and the Member States shall take care that these services operate on the basis of shared values of the Union. The shared values include in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

In principle, these values deriving from public law also apply when as the result of “privatisation” a private service supplier provides the service. And it is the responsibility of the public body that commissions a private service supplier, be it a ministry or a regulatory agency, to ensure the private service supplier’s compliance with the shared public law values of the European Union. The responsible public body exercises its responsibility, inter alia, through supervisory and controlling measures towards the private service supplier.

The legal consequence of such public-private constructions is that the direct relationship between the service supplier and the receiving citizen (service user) is based on a private law contract. Through the applicability of private contract law, however, the citizen loses his/her strong and effective legal protection granted by public law (administrative legal remedies, administrative court review) and is limited to the relatively weak legal position of a “consumer”, who can enforce his/her rights through very costly and lengthy civil proceedings only.

To certain extent a Law on General Administrative Procedures can somehow compensate this shortcoming by creating an administrative-procedure-law-relationship between the citizen/user and the supervisory body. Such a public law relationship would give access to the system of legal remedies provided by the Law on General Administrative Procedures. As a result, the user would obtain the right to claim supervisory measures to be executed by the responsible public body, if he/she shows probable cause that the private supplier’s provision of the service is or has not been respectively in compliance with the EU values, such as high quality, safety and affordability, equal treatment, universality, and transparency of procedures.

Delegation of decision-making competence

A good Law on General Administrative Procedures shall allow for and encourage improved delegation of decision-making competence within a given administrative body. The current situation in many transition countries, when almost all decisions are taken at the top level of an administrative body (minister, state secretary, director, etc.) can be seen as one of the key problems of those administrations. This top-authority based organisation of decision-making processes contradicts the rule of good administrative practice, according to which both expertise and the decision-making authority should rest with those who are closest to the user of an administrative service, *i.e.* the citizen.

¹⁵ Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions accompanying the Communication on "A single market for 21st century Europe" - Services of general interest, including social services of general interest: a new European commitment {COM(2007) 724 final} {SEC(2007) 1514} {SEC(2007) 1515} {SEC(2007) 1516}

¹⁶ Article 14 of the Functioning of the European Union and Article 1 of the Protocol (No 26) to the Treaty of the EU

The most important negative consequences of a strictly top-authority based decision-making process are as follows:

- Overloading the top of an organisation with any big or small administrative decision creates bottlenecks that are inimical both to the efficiency and quality of administrative decision-making and to the development of strategic approaches of policy making (policy making becomes devalued and the administration offers poor quality).
- Nobody within a public authority can be familiar with every detail of a subject matter. Thus many decisions taken in a strictly centralised and top-authority based manner do inevitably suffer from lack of familiarity of the decision maker with the special subject matter.
- Even if staff are involved in the internal decision making process, they are neither authorised to take the final decision nor appear as the responsible person through their name and signature. This is de-motivating and a waste of very often qualified and well educated personnel resources. And it is a reason for the lack of accountability of civil servants.
- A strictly top-authority based decision making process implies the tendency to politicise administrative decisions, *i.e.*, decisions tend to be based more on political convenience than on what is established in legislation. This also promotes the blurring of political and administrative responsibilities and a clear distinction of either field.

Discretion

A good Law on General Administrative Procedures should clearly regulate the conditions and legal limits of a lawful use of administrative discretion.

The empowerment of administrative authorities to take discretionary decisions is a relativisation of the principle of legal certainty. But administrative discretion is necessary in cases, when the conditions and circumstances of the field of application of a legal provision cannot be foreseen in detail by the legislator. In a modern public administration discretion is the means to respond flexibly to new developments of the reality.

Proper application of discretion requires self-confident and skilful personnel. Where an administrative authority is empowered to act at its discretion, it shall do so in line with the purpose of such empowerment and shall respect the legal limits of such discretionary powers. Furthermore, a written statement of grounds must accompany the discretionary decision. When giving reasons for such an administrative act, among others, an administrative authority shall indicate the discretionary powers source regulation and list the reasons for reaching such a decision.

Efficient, simple, speedy procedure

A good Law on General Administrative Procedures shall simplify administrative procedures as much as possible. In general, an administrative procedure is not bound to a specific form. It shall be as efficient and speedy as possible. Only in cases prescribed by law shall rules of a more formalised procedure be applicable.

An appropriate tool for an efficient public administration is also the legal institute of “administrative assistance”. It ensures non-bureaucratic cooperation and mutual help and support of administrative authorities.

Inquisitorial principle

The administrative authority shall investigate the relevant facts for an administrative decision *ex officio*. This obligation derives from the rule of law, especially from the principle of legality, and adds to security and reliability of the law and to the public trust in public administration.

Advice and information

One instrument derived from the principle of Democracy as well as the right to due process is the right to obtain advice and information. Since not every citizen is familiar with administrative (procedure) law, the administrative authority shall enlighten the party of its rights and obligations in the procedure and indicate the legal consequences of activities or omissions. It shall allow statements or applications to be made or corrected when it is clear that these were not submitted or were incorrectly submitted due to an error or unawareness only.

Obligation to notify the administrative act and to give written statements of grounds and of legal remedy

An administrative act can only become effective if notification is made to the party to whom it is intended and who is affected by it. As a rule, a written administrative act has to be accompanied by a statement of the chief material and legal grounds, which have caused the public authority to take its decision. Both requirements, the notification and statement of grounds, are essential elements of the system of the protection of citizen's rights.

Furthermore, the administrative act has to state the appropriate legal remedy, *i.e.* the administrative or the judicial remedy, respectively. Only such a correct statement justifies a relative short deadline (*e.g.* one month) for lodging a remedy. Otherwise the administrative act will remain subject to appeal for a longer period of time (*e.g.* one year).

Administrative silence - fictitious administrative act after expiry of deadlines

The "Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006", provides in Art. 13 para. 3 and 4 a regulation regarding administrative silence. In the statement of reasons of this Directive (see Preamble, Recital No. 43) it is explained that one of the fundamental difficulties for a party dealing with public administration "... is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernizing and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification, *inter alia* through (...) the introduction of the principle of tacit authorisation by the competent authorities after a certain period of time elapsed".

The text of Art. 13 para 3 and 4 of the Directive reads:

"3. Authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired.

4. Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.”

It needs to be carefully considered whether and to what extent such a regulation, which is directly applicable on authorising service activity in the internal market, should be transposed in the Law on General Administrative Procedures through establishing the legal institute of a “fictitious administrative act”.

A number of reasons argue in favour of incorporating as many regulations of the Services Directive as possible within the Law on General Administrative Procedures including the rule on administrative silence:

- Firstly, a complete implementation of the Services Directive can be guaranteed better; there is a minor risk of remaining loopholes: since the scope of the Directive is wide, there is a serious risk to overlook special acts to be amended.
- Secondly, incorporating the required national regulations in the Law on General Administrative Procedures guarantees a legal standardisation and unification, while amending or establishing special laws can lead easily to badly-arranged and various different regulations.
- Thirdly, quite a few regulations required by the Directive concern substantial principles, forms and instruments of the existing administrative procedural law system normally stated in the general Law.
- Last but not least, amendments of the Law on General Administrative Procedures will achieve more political awareness of the Services Directive and will alleviate and enhance the practical execution.

It is true that the four arguments above are mainly related to proper transposition of the Services Directive. However, as the text of the Directive reads¹⁷, the principle of tacit authorisation by the competent authorities after a certain period of time elapsed follows the example of certain modernizing and good administrative practice initiatives undertaken at Community and national level and is necessary to establish principles of administrative simplification. So it is obvious, that we are dealing with a general principle of Good Administration, the scope of which goes beyond the limited field of application of the Services Directive.

On the other hand, if the legislator decides to include this principle, as all the others, in the LGAP, the Law should provide a well balanced system of various tools, safeguarding on the one hand the public administration’s interest in having sufficient time to investigate facts, comprehensively examine the legal situation and take the appropriate decision, and on the other hand the party’s interest and right to receive a response on its request within a reasonable time frame. Moreover, interpretation of such regulation has to take into consideration the public interest in legal certainty and last but not least the interest of a third party involved in or affected by the procedure. The possible impact, positive and negative, of the tacit authorisation on corruption should also be assessed and taken into consideration.

¹⁷ See Preamble, Recital No. 43

Legal remedies and judicial control

Legal control of administrative actions belongs primarily to the administrative courts. However, internal control by administrative bodies is also needed, not to substitute administrative disputes but to provide an additional system of protection, proof and correction. Therefore, the Law on General Administrative Procedures should provide a system of internal legal administrative remedy procedures to be conducted prior to the parties' appeal to administrative courts. The scope of both the administrative legal remedies and the judicial control has to correspond to the wide scope of the Law on General Administrative Procedures and its overall concept of administrative actions.

Administrative legal remedies are not only an instrument in the hands of the citizen to defend his or her rights versus an administrative body. It is also a tool of self-control of administrative authorities because it gives them the possibility to identify systemic mistakes and thus improve the administrative practice in general concerning similar cases.

Accordingly, the main aims of the legal remedies in a Law on General Administrative Procedures are:

- to institute an effective, easy and non expensive way to protect legal rights of the parties before appealing to the administrative courts;
- to provide the possibility and duty of an efficient self-control of the administrative authorities;
- to lighten the burdens of administrative courts by settling cases within the internal legal remedy procedures.

As a rule, procedural decisions should not be separately challenged but only in the context of an appeal against the substantive administrative decision, *i.e.* the final ruling (*e.g.* administrative act) deciding on the issue in question. This would substantially simplify and shorten the administrative procedure and avoid the legal situation, where repeated appeals against procedural decisions lead to a delay of the administrative decision without improving the citizen's legal protection in substance.

As a rule, administrative legal remedies as well as actions before the administrative court should have a suspensory effect, which means that the challenged administrative act cannot be executed before a final decision on the legal remedy is taken either by the administrative authority and the administrative court respectively. This is necessary to avoid that the execution of an illegal administrative act could create a *fait accompli* and in certain cases cause irreparable damage.

Notification and Delivery

Regulations on notification are vital for fast and effective administrative procedure. A Law on General Administrative Procedures should provide informal procedural measures, since in most cases it is sufficient for citizens to take notice of administrative action. Formalized delivery should remain the exception. Speedy communication takes precedence over establishing evidence of notification for the procedure.

Point of single contact and IT based communication

The principles of point of single contact approach as well as IT based communication between the administrative authority and citizens are also regulated in the above mentioned EU Services Directive¹⁸ and should be incorporated in the Law on General Administrative Procedures in a general manner, so as to leave details to special laws and secondary regulations.

IT based communication should cover both: i) “e-assistance” (*e.g.* dissemination of information for the general public, public relation activities, etc.); and ii) “e-administration” that is to say electronic communication between the administrative authority and a participant in an individual administrative procedure.

E-assistance should be provided through the general legal framework for an integrated “portal” that facilitates the access to information of public interest in connection with the legislation on free access to public information.

E-administration should be regarded as an additional option in work of public administration. The Law on General Administrative Procedures should guarantee that this technical option of easy communication would not be to the disadvantage of those citizens who do not have access to online systems or who are not familiar with information technology.

Costs of administrative procedures

Regulation of costs of administrative procedures shall guarantee a fair balance of costs between parties and administrative authorities and enhance cost effectiveness of administrative procedures. It shall shift costs in favour of the parties by providing that as a rule the administrative authority bears the regular costs of administrative procedures.

Methodological aspects of legislation

Avoiding overregulation

Good law drafting techniques favour general norms rather than detailed legislation. This is not a mere technicality. The tendency of overregulation is still widespread, in particular in transition countries. This tendency reflects an obsolete understanding of the role of a law on the one hand and its applicant - the civil servant - on the other, based on a concept of law, which stems from the early 20th century philosophy of legal positivism.

Nowadays, good law drafting techniques favour general norms rather than detailed legislation for the following reasons:

- Even the best legislator is not able to foresee every single concrete fact in detail whilst formulating the law. This has two likely consequences: an “over-regulating” law contains gaps and sooner or later parts of the law become obsolete and non-operational.
- Long and too detailed laws become complicated and thus, difficult to read, understand and learn. Incorrect application could be the immediate result. Social disrespect of the law may be a longer-term consequence.

¹⁸ See above Section IV. 10.

- Casuistic laws, *i.e.* laws that prescribe every simple step of an individual case, shape the mentality of the applicant of the law, in particular the applicant of the administrative law, *i.e.* the civil servant. He or she is inclined to function in an automatic way; neither seeing him/herself urged nor even allowed to consider the practical consequences of his or her actions. Such laws do not improve the accountability of law applicants, instead, users of such laws are more likely to think and act only in a very formalistic (bureaucratic) way.
- Details, in particular those subject to technological developments, will need frequent adaptations through amendments. The more details are regulated in the law, the more amendments and changes of the law would be required, which in turn unnecessarily overburdens the legislature.

The legislative approach based on a more general legislation brings the following advantages:

- Laws are shorter, they have a clearer structure and are easier to comprehend and apply.
- General legal terms, may cover a wider range of cases, *i.e.* also those cases the legislator was not able to anticipate. Such laws remain operational for a longer period of time; gaps in the law are less probable.
- Laws using general terms expect the applicant not to stick with the words of the law but to find the purpose of the law (“*ratio legis*”) by using teleological interpretation.
- The application of procedural law relies on professional civil servants, who do not require prescription of every technical detail of a procedural step. Today’s civil servant is capable enough (or, if necessary, has to be enabled) to choose the appropriate technical solutions for individual cases on the basis of the meaning and purpose of the law.
- Admittedly, the demands on the applicant, when deciding on the basis of general and abstract legal terms, are high. They require a responsible civil servant but they are also an absolutely necessary precondition for the development of a citizen-centred civil service in which every individual civil servant is aware of his or her importance and accountability.

General laws may be complemented, when necessary, with secondary legislation, handbooks, instructions and other support materials.

Language Structure, Definitions

The Law on General Administrative Procedures should be as short as possible. The language should be concise, brief and easy to understand. The Law should set priority on clear and transparent regulation and terminology. This applies in particular to competences and responsibilities. The systematic order has to be logical. The Articles should have short and precise titles, in order to facilitate the implementation of the law, contribute to its intelligibility for citizens and raise the level of legal certainty.

ENSURING GOOD IMPLEMENTATION OF NEW LEGISLATION

The drafting process

The provisions to be adopted need to be assessed with regard to their ‘implementability’, *i.e.* the capacity of public administration to observe the procedural obligations they introduce. This is particularly important, when it comes, for example, to deadlines for response, and, consequently, deadlines for appeal and review of decisions. There needs to be a balance between the requirement for speed and that of accuracy and fairness of administrative replies and decisions.

It is important that at the preparatory stage stakeholders (*i.e.* courts, administrative practitioners [civil servants], the Ombudsman, NGOs, the business community and legal experts) are substantially involved. Their participation not only ensures that they contribute their experience and point of view but also allows a) to reach realistic compromises between the principles to be respected and their practical formulation; b) to be aware from the start of the possibilities offered and limits to be respected; and c) to be better prepared to support the implementation process, particularly by providing the relevant information to the groups they represent.

Eventually remaining special procedures have to be screened against the general principles and guidelines of good governance adopted by the general law. It should be underlined that too many special procedures create unnecessary complexity and red tape, and raise administrative costs.

Putting the new LGAP into practice

Planning in terms of time and financial resources is very important for the successful implementation of a new legislation. A period from 6 months to one year should be allowed between adoption of the law and its entry into force in order to prepare implementation. Monitoring the implementation for a period of up to 5 years would also be necessary.

Furthermore, it might be useful to set up a standing advisory committee (of experts and civil servants) to which the various services implementing the law can refer in order to clarify their practice and seek solutions. This committee could also identify and review the existing special procedures and monitor and evaluate annually the implementation progress. This will allow enough time until courts come to examine relevant cases and make their contribution to the implementation of the new Law, by applying, interpreting and completing the legislative provisions. Such a committee should also create a database containing the main problems related to the implementation of the law. This material will be very useful for a medium-term review of the law.

A budget will be necessary for the training of civil servants and judges and for informing citizens and businesses, in order to make the implementation of the law as effective as possible. Training of civil servants is an essential part of smooth and correct implementation. This may involve manuals to which they may refer to in everyday practice.

Close cooperation with law faculties and other relevant faculties is necessary to develop and implement a training programme for civil servants. Moreover, it is the task of the law faculties to include the new administrative procedure law as a substantial part into their law studies curriculum.

Parallel to the training of practitioners, it is important to undertake actions for raising citizens’ awareness of their rights and strengthen their trust in effective legal protection. Public promotion

campaigns, leaflets, modern technology (social networks, twitter) and cooperation with NGOs and the media are some of the ways to achieve this.

REVIEW OF THE LAP OF KOSOVO

The Law on Administrative Procedure (Law no. 02/L-28) was adopted by the Assembly of the Republic of Kosovo on 22nd July 2005, and promulgated by the Special Representative of the Secretary-General of the United Nations, through Regulation 2006/33 of 13th May, which also introduced some minor amendments to the text voted by the people's representatives.

The constitutional framework of the LAP

An analysis of the LAP requires a few basic insights into the Constitution of the Republic of Kosovo, particularly into its rules and principles immediately pertaining to the organisation of the public administration and administrative procedure.

The territory of Kosovo was placed under the authority of the United Nations Interim Administration Mission in Kosovo (UNMIK) by the United Nations Security Council Resolution 1244 of 1999. In May 2001, UNMIK enacted a Constitutional Framework for the Provisional Self-Government of Kosovo, which established the provisional institutions of self-government and remained in force until it was replaced by the current Constitution of the Republic of Kosovo. The latter was approved in the aftermath of the 2008 declaration of Independence, and came into effect on 15th June 2008.

The Constitution of the Republic of Kosovo establishes an independent democratic republic, of unitary structure, based on the principle of equality and non-discrimination, separation of powers, separation of state and religion, and a free market economy. In Chapter Two, Kosovo's Constitution specifies a wide set of guaranteed fundamental rights and liberties, including, as regards to the administration, the right to legal remedies against administrative decisions that harm one's rights or interests (Article 32)¹⁹, the right of access to public documents (Article 41)²⁰, and the right to judicial protection of one's rights and effective legal remedies (Article 54).

In its preamble, the Constitution of Kosovo proclaims Kosovo to be a place for all its citizens, regardless of their ethnic backgrounds. In Chapter Three, it identifies the specific rights of non-Albanian communities, and their members, by establishing Kosovo as a multi-ethnic state. Members of the several recognised national, ethnic, linguistic or religious communities are entitled to, among other things, use their own language (the official languages of the Republic of Kosovo are Albanian and Serbian, though Turkish, Bosnian and Roma hold the status of official languages at the municipal level or shall be used officially at all levels as provided by law, pursuant to Article 5) and alphabet in their relations with the

¹⁹ Article 32 states that "every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law".

²⁰ Article 41(1) grants everyone the right of access to public documents, while 41(2) lays down the rule of the public nature of the documents of public institutions and organs of state authorities, except when they contain information of limited access in accordance with the law, due to privacy, business secrecy or security issues.

municipal authorities or local offices of central authorities in areas where they represent a sufficient share of the population in accordance with the law. The costs incurred by the use of an interpreter or a translator shall be borne by the competent authorities, according to Article 59 paragraph 6. The composition of the civil service itself is required to reflect the diversity of the people of Kosovo, according to Article 101.

The government, as in other countries, plays the role of head of the public administration, entrusted with the powers of making decisions and issuing legal acts or regulations necessary for the implementation of laws, guiding and overseeing the work of the administration bodies, as well as the activities of public services (Article 93 paragraphs 4, 6 and 7).

Beside the central administration, it is to mention the local government bodies (municipalities) that pursue administrative competences at the local level and whose acts are subject to review by central authorities, though exclusively on grounds of compliance with the Constitution and the laws (Article 124 paragraphs 1 and 7).

The Constitution also provides for “independent agencies”, which may be created by the parliament and operate independently from any other body or authority (Article 142).

Lastly, it is worthy of note that the Constitution elevates the Comprehensive Proposal for the Kosovo Status Settlement of 26th March, 2007 (casually known as the Ahtisaari Plan) at least to constitutional level²¹, as it not only takes precedence over all other legal provisions in Kosovo, but also provides the frame of reference with which the interpretation of the Constitution, the laws and all other legal acts of the Republic of Kosovo are required to comply; and the provisions of the Plan actually prevail in case of any inconsistency between them and the constitution itself (Article 143 paragraph 2).

Overview of structure and basic regulatory elements of the LAP

This section provides an overview of the structure and the basic regulatory elements of the administrative procedures as regulated in the LAP. As an excursus it also touches in subsection b) very briefly the interdependencies between the administrative procedure and its judicial control as regulated in the Law on Administrative Conflicts (hereinafter LAC).

The overview in section 2 will show the intention of the Kosovo’s legislator to design a system of administrative procedures that is in line with the rule of law and standards of good administrative practice.

Administrative procedures according to the LAP

The LAP consists of 143 Articles and is structured as follows:

PART I Definitions and general principles (Articles 1-10)

Chapter I The scope and definitions (Articles 1-2)

Chapter II General principles (Articles 3-10)

²¹ For some background information on the Ahtisaari Plan, as well as a discussion on its hierarchic role within the Kosovan constitutional system, see Dren Doli/ Fisnik Korenika, What about Kosovo's Constitution: Is there anything special? – Discussing the grundnorm, the sovereignty, and the consociational model of democracy, at http://www.internationalconstitutionallaw.net/download/d3af15babd8a7c517040e2e4a62d25cd/Doli_Korenika.pdf.

- PART II Administrative competences (Articles 11-28)
 - Chapter I General provisions (Articles 11-18)
 - Chapter II Delegation of competences and replacement (Articles 19-25)
 - Chapter III Resolution of conflicts of competences (Articles 26-28)
- PART III Procedure to guarantee impartiality of public administration (Articles 29-34)
- PART IV Administrative procedure (Articles 35-81)
 - Chapter I Commencement of and participation in administrative proceeding (Articles 35-52)
 - Chapter II Administrative proceeding until issuance of administrative act (Articles 53 – 81)
 - Section I Investigation procedure (Articles 53 – 72)
 - Subsection I General provisions (Articles 53-62)
 - Subsection II Expertise and other actions (Articles 63-66)
 - Subsection III Hearing of the interested parties (Articles 67-72)
 - Section II Intervention (Article 73)
 - Section III Mediation decisions (Articles 74-75)
 - Section IV Termination of administrative proceeding (Articles 76-81)
- PART V Administrative activity (Articles 82-140)
 - Chapter I Administrative act (Articles 82-136)
 - Section I Validity of administrative act (pages 82-86)
 - Section II Entry into effect of the administrative act (Articles 87-90)
 - Section III Invalidation of an administrative act (Articles 91-96)
 - Section IV Conclusion (Articles 97-99)
 - Section V *Untitled* (Articles 100-108)
 - Section VI *Untitled* (Articles 109-113)
 - Section VII Implementation of individual and collective acts (Articles 114 – 120)
 - Subsection I Voluntary implementation (Articles 114-115)
 - Subsection II Implementation (Articles 116-120)

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| Section VIII | Deadline for implementation of administrative act (Articles 121-125) |
| Section IX | Administrative appeal (Articles 126-136) |
| Chapter II | Real acts (Articles 137-138) |
| Chapter III | Administrative acts of discretionary nature (Articles 139-140) |

Unnumbered division: Provisional and final provisions (Articles 141-143).

Regarding its organisation and overall contents, the LAP of Kosovo bears notable affinity with the codification tradition of the German *Verwaltungsverfahrensgesetz*, of the 25th May, 1976, the Portuguese *Código do Procedimento Administrativo* (Decreto-Lei no. 442/91, of the 15th November)²², and the Spanish *Régimen Jurídico de las Administraciones Públicas y de Procedimiento Administrativo Común* (Ley 30/1992, of the 26th November). Similarly to those, it not only sets out to provide a comprehensive legal framework to the administrative procedure, from its initiation to its completion, but also lays down substantive rules, such as those pertaining to administrative acts, their validity and legal force, and rules pertaining to administrative organisation, such as those concerning the delegation of powers.

The law starts out by defining its scope of application, mostly gravitating around the central concepts of administrative act and administrative body; it presents legality, balance of public and private interests, equality, proportionality, objectivity and impartiality, sustainability and predictability as general principles of administrative activity. It lays down rules regarding competence, delegation and replacement, resolution of conflicts of competence, and impartiality-impairing circumstances and means of reaction against them.

The general administrative procedure, as devised by the Law on General Administrative Procedures, comprises five stages:

5. *Initiation* – either as a result of a request from interested parties or of a public body;
6. *Preliminary verification of facts that impede or affect the continuation of the procedure* – including competence of the administrative body, the proper statement of rights or interests by interested parties, their legitimacy, compliance with legal deadlines, and the possibility of grouping a particular request with others from other persons for joint consideration;
7. *Investigation* – generally conducted by the same administrative body that is in charge of the final decision at the end of the administrative procedure; this part of the procedure is dominated by the burden of proof that weighs in on the interested parties, although seemingly a weak version of this principle, as it is balanced by the duty of the administrative body to use all evidence at its disposal, obtained through its own means or through the cooperation of interested or third parties;
8. *Hearing of interested parties* – the interested parties are entitled to produce their allegations, either written or oral, before a final decision is reached. This is a right of the parties, regardless of prior subpoenas in the course of the evidence-gathering stage, and may only be dispensed with when such a step is reasonably believed to jeopardise the effects intended with the decision;
9. *Final decision* – the main cause of termination of procedures (although they may also terminate by abandonment, due to the object of the procedure being subsequently rendered impossible, or due to failure to pay due tariffs or charges) is generally required to occur no later than three months upon the initiation of the procedure.

²² Actually, quite a significant amount of provisions have noticeably been adapted from the Portuguese code with few changes, such as the section on the revocation of administrative acts.

Finally, administrative bodies are required to inform the interested parties on decisions that pertain to them, generally within eight days upon their issuance, either through mail, in person, through telegram, telephone and other means, or through public notice.

At any point in the course of the procedure, pre-emptive measures²³ may be taken in order to prevent irreparable damage to public or private interests. Also, in administrative procedures involving two or more private parties with opposing interests, the administration is required to attempt to reconcile them. The law prescribes no specific time at which this step is to be taken, it merely states that it shall be performed “in the course of the procedure” (Article 52), thus suggesting that the right time to attempt conciliation is left to the best judgment of the administrative body in charge of conducting the procedure.

Interested parties are entitled to request the administrative review of acts that affect them, on grounds of law violation (but not on grounds of merit or convenience regarding the public interest – one can infer that from provisions such as Article 127 paragraph 3, Article 134 subparagraph c and Article 136 subparagraph a), by applying to the body that issued the challenged act (a similar situation to that of the *recours gracieux* of the French law, referred to as *reclamação* in Portugal) or by appealing to the hierarchic superior of the author of the contested act. As a general rule (with a few notable exceptions), administrative appeals do not result in the suspension of the enforcement of the challenged act.

In addition to the revocation or modification of an administrative act, the interested party may also request the issuance of a denied or simply omitted act. In the case of administrative silence the interested party is given the right to demand an explicit decision through administrative or judicial appeal (the latter, upon exhaustion of administrative remedies), according to Article 130 paragraph 2 and Article 131 paragraph 2.

The enforcement of administrative acts is an administrative bodies’ responsibility, once the act has entered into effect, generally after the interested party has failed to comply with it voluntarily. Acts whose effects have been “cancelled” (suspended) as a result of an appeal with a suspensive effect, as well as acts that depend on the approval by another body in order to produce any effects, cannot be enforced.

Affected parties may react against unlawful enforcement of administrative acts by requesting the suspension of the enforcement actions to the administrative body or to the court. They may also appeal to a higher body or to the courts against the enforcement, though the grounds admitted by law are limited – one may only appeal “when the actions employed in the course of implementation are illegal or disproportional, provided that the illegality of the said action shall be the consequence of illegality of the implemented act” (Article 119), thus one is apparently not entitled to react against *ultra vires* enforcement acts.

The law also deals with the substantive aspects of administrative acts, notably with their requirements in terms of contents, rationale, and form. An administrative act enters into force upon its approval (rather than upon its communication to the interested parties, except in cases where publication is required, under Article 90 paragraph 3), unless it has been attributed retroactive effects or produces delayed effects as a result of the need for any additional act or fact.

Violation of the law through an administrative act might result in either absolute or relative invalidity:

- Acts issued by an unidentified or non-competent administrative body, in contradiction to the legally prescribed form or the legally established procedure are absolutely invalid. Absolutely invalid acts produce no legal effect; the declaration of absolute invalidity may be requested by

²³ The English translation of the Law refers to them, somewhat oddly, as “mediation decisions”.

any interested party, subject to no time limit, to a body with competence to revoke it; partial absolute invalidity is accepted, as long as the affected parts are not vital to the purpose of the act.

- Acts whose contents contradict the law, or that are issued on the basis of an illegal act from a higher body, or issued under the influence of threat, violence or “temporary mental instability” are deemed relatively invalid. Their challenge is subject to the same deadlines established for the means of review, and they produce effects until they have been annulled (thus, such annulment applies *ex nunc*).

Finally, on the topic of revocation of acts:

- Valid acts whose revocation is specifically forbidden by the law that assign unrenounceable rights or obligations to the administration or that grant legal rights to any person may not generally be revoked, though the latter may exceptionally be revoked “when they affect the rights of their addressees”, and when all interested parties have agreed upon their revocation, provided that they do not grant unrenounceable rights.
- Invalid administrative acts (regardless of the absolute or relative nature of the invalidity in question) may be revoked or abolished on grounds of invalidity within the same deadline that is legally established for judicial appeal.
- Any revocation of valid or invalid acts shall generally only apply to the future (*ex nunc*), except when performed on grounds of absolute invalidity or when all interested parties have agreed upon the revocation with retroactive effects in writing, and as long as the act in question grants no unrenounceable rights.

The administrative justice system in Kosovo

Attempting to survey the situation as regards the administrative justice system in Kosovo can be a difficult task; a new Law on Administrative Conflicts has been adopted in late 2010²⁴, but all attempts to find online literature that might help to understand and interpret this law did not succeed.

Notwithstanding, acquiring some notions on the administrative justice system is important in order to understand how the overall system of administrative activity operates as a whole, even though the following overview shall be far from exhaustive and perhaps even somewhat incomplete.

There is no separate administrative court system.

The LAC focuses mostly on the violation of rights and interests (as opposed to the breach of the law for its own sake), both private interests of natural and legal persons, and public or collective interests, which may be defended in court by administrative bodies, the Ombudsperson, associations and other organisations (Articles 10 and 18 of the LAC).

Under the administrative justice system in Kosovo, one may apply for the annulment or the declaration of nullity of administrative acts (that is, for judicial review proper, which is the case most thoroughly dealt with by the law); for a judicial order to issue an administrative act addressed to a body that has failed to do so within the legally established deadline; and the return of seized objects and establishment of compensation for damages originated as a result of the enforcement of a contested act (Article 26 of the LAC).

²⁴ See <http://www.kuvendikosoves.org/?cid=2,191,561>

The judicial review of administrative acts is subject to the principle of prior exhaustion of administrative remedies (Article 13 of the LAC and Article 127 paragraph 4 of the LAP).

The initiation of a judicial review process does not suspend the enforcement of the contested administrative act, unless otherwise provided by law or if the court decides to suspend such enforcement until a final judicial decision has been delivered (Article 22 of the LAC). The initial application (referred to as “indictment” throughout the law) is to be submitted within 30 days after the notification of the “final administrative act” (*i.e.*, the one that exhausts all legal remedies), according to Article 27 of the LAC – this provision does not differentiate between cases of absolute and relative invalidity, thus appearing to contradict Article 93 of the LAP, which states that an absolutely legal act shall produce no effect and may be declared void at any time. The court’s decision is limited by the request of the plaintiff, but not by the alleged causes.

The court’s decision is binding to the administrative body that has issued contested act; if an act is annulled; the procedure is handed back to the competent body, which shall be required to issue another act in compliance with the court’s rule (Article 65 of the LAC). Should this second act fail to comply with the judicial decision, the court, upon request of the interested party, shall issue a new decision that replaces the act by the competent body (Articles 67 and 68 of the LAC).

The LAC does not deal with injunctions or any other precautionary remedies against potentially harmful administrative action, neither does it establish an accelerated procedure to deal with such requests, based on presumption of sufficient legal basis (“*fumus boni iuris*”) and the risk of irreparable damage – although one such remedy, as regards the enforcement of administrative acts, is provided in Article 115 of the LAP.

The LAC has its exclusive focal point in the reaction against administrative acts (or lack thereof, when legally required), with no references to public contracts or regulations-related disputes, or to real acts action that do not involve administrative acts, to judicial declarations concerning the acknowledgment of situations or rights, to restraining orders, etc. The law is also rather sparse as regards the enforcement against the administration of judicial decisions, notably those that condemn the administration to provide compensation for damages incurred by private parties as a result of public actions.

Any gaps in the LAC are to be filled by resorting to the provisions of the law on civil disputes.

In conclusion, in spite of the references to affected personal rights and interests as the main source of legitimacy to react against unlawful acts, which would be typical of a subjectivist administrative justice system, one cannot help considering that the system in Kosovo seems far from eligible to be classified as a full jurisdiction system (*contentieux de plein jurisdiction*), *i.e.* a system in which the judge has wide-reaching powers to annul, condemn, declare with legal force and impose pre-emptive measures in order to ensure a timely and effective judicial protection of citizens’ rights and interests against any type of harmful action from the administration²⁵. From the observation of the applicable rules, one concludes that the idea that no administrative violation of rights and interests should remain uncovered by the catalogue of available judicial remedies is a principle that is still essentially foreign to the administrative justice system of Kosovo, in spite of the constitutional provisions that grant everyone the right to legal remedies against harmful administrative decisions (Article 32 of the Constitution) and to judicial protection of one’s rights and effective legal remedies (Article 54 of the Constitution).

²⁵ See José Luis Rivero Ysern, “Via administrativa de recurso y jurisdicción contencioso-administrativa”, in Javier Barnes Vazquez (coord.), *El Procedimiento Administrativo en el Derecho Comparado*, Madrid, 1993, pp. 213-222; José Carlos Vieira de Andrade, *A Justiça Administrativa*, 6th edition, Coimbra, 2004, p. 24.

Completeness of the regulatory content of the LAP related to principles and key elements

In this section of the paper the LAP is checked for completeness on the level of principles, *i.e.* it is scrutinised if the text of the LAP fulfils the requirements of a law that ensures the implementation of the European principles and covers the proposed key elements for the content and structure of a good law on general administrative procedures as explained in the first part of this paper (Chapter II to IV).

It will be explained (and furthermore also in the two following sections 4 and 5) that the good intention of the legislator to create a good system of administrative procedures has not been translated into an appropriate piece of legislation.

The Rule of Law – legality of public administration

Missing: the principle of the requirement of the law

The principle of legality derived from the Rule of Law is generally recognised in Article 3 and finds its further specification in provisions such as Article 5 “The principle of equality before the Law”, Article 7 “The principle of objectivity and impartiality”, Article 8 “The principle of sustainability and predictability” and the set of rules on competences/jurisdiction in Part II of the Law. Moreover, it can be said that the LAP also includes according to Article 3 paragraph 1 the principle of Primacy of Law (negative legality), which means that an administrative action must not conflict with the constitution, statutory laws and secondary legislation.

However, another basic element, which is a “requirement of law” (positive legality), is missing. The requirement of law specifies the principle of legality in the sense that every action of an administrative authority, which interferes with the individual rights of the citizen, requires the authorisation by law as a pre-condition for the exercise of any administrative power. This principle is nowhere reflected in the text of the LAP.

Missing: clear conditions and legal limits of discretion: The Articles 139 and 140 of the LAP dealing explicitly with discretion lack regulatory substance. The definition of discretion in Article 2 is wrong, legal limits of discretion are not set.

Missing: the principle of legal certainty in “extraordinary situations”

Article 3 paragraph 3 allows “contradiction of the law in extraordinary situations”. The vagueness and lack of clarity of this provision is a highly dangerous gateway for administrative arbitrariness. The definition of extraordinary situations in Article 2 is incomplete and at the same time even wider than the concept of “state of emergency” in Article 56 of the Constitution of Kosovo.

Furthermore, even if “extraordinary situations” were defined precisely enough and in accordance with the principle of legality, a clarification of the legal consequences would be necessary related to administrative actions undertaken under those circumstances when the situations have changed to the better and are not “extraordinary” anymore. Finally, it is important that the Law emphasises that administrative actions undertaken in extraordinary situations are also – as a minimum standard of legality – subject to the principle of proportionality and must be inline with the public interests.

Missing: the principle of complete and effective legal protection of citizens through a comprehensive system of legal remedies

As explained more in detail below (in section VI, 4. a.) the scope of the LAP covers mainly administrative actions falling under the definition of an administrative act. As one of the adverse results of

this too narrow scope of the Law is the lack of any legal protection against other administrative actions that could interfere with citizens' rights and legal interests respectively, although an incomplete definition of real acts is provided in Article 137 of the LAP. But actions such as delivery of information, warnings, reporting, publishing expert opinions, or dealing with petitions of citizens or actions such as payment of money or giving of protective inoculations are not subject to legal remedies. Citizens are defenceless if those administrative measures, which are more and more used in administrative practice of today, violate their individual rights.

Missing: reopening of the procedure

When the time limit for an appeal against an administrative act has expired, the public authority that has issued this act shall reopen the proceeding on request of the party for exceptional reasons to be specified in the Law. Such a regulation is not provided by the LAP.

Missing: legal protection against administrative silence

Another shortcoming is the insufficiency of legal protection against administrative inaction (administrative silence). The regulations in Article 81 Article 130 paragraph 2 are unclear and subject to wide interpretation.

Missing: the principle of the requirement of full legal protection from the moment, when an administrative act becomes effective

According to Article 87 of the LAP the administrative act becomes effective, as a rule, upon its issuance/approval and the deadline for its voluntary implementation starts running from its issuance. This is in contradiction to the principle according to which an administrative decision must be notified before it can have any effect vis-à-vis the person concerned. This principle follows imperatively from the Rule of Law and the requirement of legal protection against the exercise of public power (*c.f.* also Article 297 paragraph 2 of the Treaty on the Functioning of the EU). The regulation in the LAP allows the administrative authority to start the enforcement of an administrative act without the addressee of the administrative act having cognizance of it.

The Rule of Law – fairness of procedures (due process)

Missing: the right of the parties to access/inspect the files of the case

Article 9 regulates the principle of transparency and open administration however the right to access the files is not mentioned.

The wording of Paragraphs 2 to 4 of Article 9 is to be understood as regulating everybody's general right of access to public information. This general right ensures the transparency of the public sector in general. Usually, such a right is dealt with not in a law on general administrative procedures but separately in a special piece of legislation, because this issue requires some legislative specification.

Something different (in legal terminology also called an “aliud”) is the right of a party of an administrative procedure to examine the administrative files that could contain information relevant for the party to prosecute the party's rights in an individual case. Ratio legis of this right is the legal protection of procedural rights of participants of an administrative procedure and not the general transparency of the public sector. But even if the legislator had (also) in mind this administrative procedure-related right, the party would have – according to the wording of paragraph 2 - just the right to “obtain” information granted by the administrative body but no direct access to the source of information, *i.e.* to the files of the concrete procedure.

Missing: adequacy of duration of procedures

Article 81 paragraph 1 provides a general time limit of 3 months for the completion of a procedure, in other words for the response to a request of a citizen. This general rule applies to any kind of simple administrative matter notwithstanding its complexity, unless special law provides for a shorter time frame. However, an allowed period of 3 months for every simple administrative matter is too long and therefore does not comply with the citizen's right to obtain a decision within a reasonable time frame.

Democracy – citizen-oriented administrative behaviour

Missing: the principle of active assistance of the party

A citizen-centred public administration shall ensure that all parties and other persons involved in the proceeding are able to pursue and protect their rights and legal interests as effectively and easily as possible. It shall inform the parties of their rights and obligations including all proceeding-related information and warn about the legal consequences of their actions or omissions. The only provision that is somehow related to this issue is Article 39 of the LAP regulating the administrative authority's obligation to correct the party's request. Beyond this the LAP does not provide for a cooperative behaviour of administrative authorities, neither on the level of principles nor in the section dealing with procedural steps.

Missing: fair regulation of costs of the administrative procedures

Provisions on costs of procedures are scarce and the one that exists rather unfavourable for the party (e.g. Article 62 "Expenditure for acquisition of evidence"). There are neither provisions to ensure a fair regulation of costs in general nor the possibility of waiving the party from bearing the costs in case of the party's financial need (provisions on legal aid).

Missing: participation of interest groups (NGOs) without legal personality

The definition of "interested party" in Article 2 is quite unclear, but Art. 73 paragraph 1 confines the involvement ("Intervention") of third parties to natural and legal persons. As a consequence, NGOs or *ad hoc* established interest groups without legal personality are excluded, which is not in line with EU Law (Aarhus Convention of 25 June 1998).

Missing: administrative contract

The legal institute of an administrative contract expresses the goal of a legislator to provide for transparent cooperation between public authorities and citizens. It is in comparison to the unilateral administrative act a more participatory means of administrative actions to enable a citizen-oriented administrative service.

The administrative contract is not foreseen in the LAP. Even if this true also for some other national administrative laws in Europe, the inclusion of an administrative contract should at least be taken into consideration, if Kosovo puts the reform of the system of administrative procedures is on the legislative agenda.

Appropriateness of the regulatory content of the LAP

In this section a number of areas and single provisions are listed that would require a thorough review to enhance the quality of the Law. The standards for this review go beyond the minimum level dealt with in the previous section.

Needs for improvement on the level of general character, sections, and subsections of the LAP

Scope of the Law

The scope of application of the LAP is too narrow when covering only unilateral administrative acts issued by public bodies.

- The scope requires widening, in order for it to cover also administrative acts issued by non-administrative public bodies.
- Other important aspects of administrative actions, such as real acts (e.g. material actions, provision of information, advice, warnings and promises) are not regulated.
- The situation of private entities entrusted with administrative and public interest functions must also be clarified, as well as the rules applicable to public bodies whenever acting under private law organisational forms and mechanisms.
- The inclusion of the instrument of an administrative contract (see above) should be considered.
- Finally, the legal position of the user of a public service of general interest (electricity/water supply, etc.) should be strengthened by dealing with this issue through the LAP and its system of legal remedies.

Efficiency and simplification

A good Law on General Administrative Procedures should contribute to the efficiency (cost-effectiveness) of administrative decision-making to benefit of both public administration and citizens.

Instead, in the current LAP, the provisions regarding the administrative procedures are in general very detailed and formalistic. It seems that no attention was paid to the need for efficiency and simplification, in other words, to the “principle of proportionality of the proceeding”. Heavily detailed and formalised administrative procedures, as regulated by LAP, might sometimes be necessary in complicated cases, but in the administrative reality complicated cases can be found only as exceptions. In every-day procedures, the detailed regulation in the LAP makes the procedure slow by imposing useless and costly procedural steps. One of the adverse consequences is that the legislator is forced to increase the number of special procedures in order to avoid applying the general law on administrative procedures.

Some examples of deficiencies with respect to efficiency of procedures are the following:

- Successive appeals against intra-procedural decisions, which do not actually harm the interested parties’ interests, (see Articles 18 paragraph 3, Article 49 paragraph 3, Article 50 paragraph 2, and Article 70 paragraph), can stall the procedure. In a good law, the parties may appeal only against decisions and acts within the procedure if those directly or indirectly decide on the substance of the issue, determine the impossibility of the procedure to carry on, or generate a reduction of the party’s means of defence or irreparable damage to legitimate rights and interests.

- The formality of “conclusion” (part V, Chapter I, Section IV) serves no useful function and unnecessarily adds bureaucratic weight to the procedure.
- The regulation on the form and content of the initial request (Article 38) and of the appeal (Article 133) are heavily regulated and quite cumbersome. Actually, any request, however formulated by the citizen, should be considered as such if it simply succeeds to identify the submitter and the purpose of the request. Any appeal should be considered as such if the intention of the party to challenge or attain an administrative act is clearly expressed.
- Simplification tools, which might enhance the efficiency, such as the points of single contact are totally missing in the LAP. Other tools such as electronic communications are poorly regulated in Article 42 of the LAP. Both tools are regulated by the Services Directive (EU Directive 2006/123/EC; *c.f.* above section IV, 13.).
- There are no provisions on joint-decisions. For complex procedures involving different administrations organs, the possibility to concentrate their decisions, replacing several procedural steps with a single common decision, should be accommodated in a comprehensive law on general administrative procedures. Which form to adopt (whether a joint meeting form “*conferenza dei servizi*” (Italian model) or a joint decision (German model) is a matter of policy choice.
- A careful use of the silent-consent rule in cases of administrative silence, if prudently introduced for appropriate areas (*e.g.* licencing), would contribute to speeding up certain procedures.
- The rules on the burden of proof and fully gathering (*c.f.* Article 56 paragraph 1) require revision, as to reinforce the inquisitorial nature of the administrative procedure, not only but also for the sake of procedural simplification.

Administrative legal remedies

In addition to the aforementioned incompleteness of the legal remedies system, the regulations, which are included in section IX Part 1 of the LAP, are written in an overcomplicated and contradictory way. Good provisions dedicated to the administrative appeal, should cover rules on: the submission of the appeal (form, deadlines, effect of the appeal), the procedure of the appeal, and its scope and intensity. Without entering in the merits of each provision of this section (see also below the comments article-by-article), the regulation of overall appeal procedures is not clear enough and quite confusing: the main confusion relates to the procedure and involved bodies: Article 126 and Article 129 of the LAP seem to recognize two distinct instruments of appeal against the administrative act (including the unjustified refusal): 1) request for redress (a sort of the Italian *ricorso grazioso*) to be submitted to and considered by the competent administrative body (the one that issued or refused to issue the act), and 2) the appeal (submitted to and considered by the superior organ of the competent one). In contradiction to that, Article 132 seems to consecrate a single and unique appeal instrument, which wherever submitted shall be considered at the first place by the competent organ (the one that issued the challenged or refused to issue the requested act), which, if deciding to fully endorse the appeal, issues the requested act, or if deciding not to fully endorse the appeal, should send the file for final decision to the superior organ. The confusion becomes even bigger by the use of the term “may” under Article 129 paragraph 3 (the superior organ “may transfer the file to the body that issued or refused the issuance”). Furthermore, as OSCE has pointed out in

its 2007 *Report on the Administrative Justice System in Kosovo*²⁶, the law does not enable one to make out if the interested parties are entitled to resort to either of them alternatively, or if only one of them may be used in relation to a given act. As access to judicial review relies on the prior exhaustion of all administrative remedies (according to Article 13 of the Law on Administrative Conflicts and Article 127 paragraph 4 of the Law on Administrative Procedure), the situation leaves doubts as to when one may consider that the condition for initiating a judicial dispute has been met.

Revocation of administrative acts

The provisions on revocation (Part V, Chapter I, Section V of the LAP) are confusing, incomprehensible and wrongly placed (revocation has nothing to do with legal remedies) and due to its disturbing structure and content, it is almost impossible to comment.

Other important issues missing

- Missing: rules on the use of the official languages of Kosovo in administrative procedures.
- Missing: rules on general deadlines and their methods of counting, as well the regulation on the reinstatement (“*Restitutio in integrum*”), if a party has missed a deadline to perform an action under the proceedings with no fault of his/her own.
- Missing: comprehensive regulatory framework for the enforcement of administrative acts; in particular means of forceful execution are not provided.
- Missing: the obligation to notify when an administrative act has been communicated orally to the interested parties and when the interested parties demonstrate full knowledge of the contents of the administrative act. Moreover, the law does apparently not foresee any consequence for the lack or insufficiency of notification.
- Missing: general rules on the administrative assistance; this issue is regulated only in Article 60 of the LAP, which refers to a special case (provision of evidence, in case of inability of the competent administrative organ). Administrative assistance is an important institute of the general law of administrative procedures and should be regulated thoroughly. The regulation should cover the general regulation, the duty to assist, the procedure of requesting such assistance as well as the limits and the provisions on bearing the costs of the administrative assistance.
- Missing: rules on the representation of the party. The only existent provision (Article 35 paragraph 2) refers to the rule of the civil procedures for both the capacity to act and the representation. By experience, the laws on civil procedures contain a broad range of representation forms, which are sometimes very formal and at a certain extent cumbersome for the administrative procedures (although the principles should be the same). A general law on administrative procedures should, at least, regulate which forms of representation are possible in an administrative procedure and aim to ensure more flexible forms of such representation (*e.g.* legal representatives; ex-officio-representatives; joint representatives; appointed representatives/proxy).

²⁶

See Organisation for Security and Cooperation in Europe/ Mission in Kosovo/ Department of Human Rights, Decentralisation and Communities/ Legal System Monitoring Section, Report on the Administrative Justice System in Kosovo, April 2007, pp. 8-9, at <http://www.osce.org/kosovo/24637>.

- Missing: rules on the delegation of decision-making authority within the administrative authority. Article 54 paragraphs 2 and 3 and Article 72 of the LAP regulate “the ... right to conduct investigation... orspecific investigation duties to a subordinated administrative **body**”. However, the provision should have regulated the delegation of the decision-making *within the competent administrative body*. There are no rules assigning an official, the responsibility for the procedure and, if possible, for issuing the final administrative act. Such officials should be responsible for the respect of time limits and the fulfillment of all procedural steps; she/he would stimulate the fulfillment of the steps for which other organs are competent; she/he would, as well, be the person of reference for the interested parties. The failure to regulate properly the “procedural delegation”, in the above mentioned Article, could explain the current, very high concentration of decision making at the head of the institutions in Kosovo, which contradicts the very spirit of the modern administration of public functions and has disadvantages for all: politics, administrative bodies as well as for the citizens.

(Art. 19- 24, of the LAP contain regulations related to the delegation of competencies from one administrative organ to another. Such delegations are of course of great importance, but they systematically belong to the laws on organizational and functioning of public administration because they have no relation or impact on the legal relationship between citizens and the administration. A law on administrative procedure should regulate only those relationships.)

Deficiencies on the level of single provisions

In this section single provisions are specifically commented as far as they are not already dealt with in previous sections of the paper.

Article 1: In Article 1 paragraph 2 the expression “have been vested the power to exercise duties and competences of importance to the public” is too broad and indeterminate and it does not make the intended point. In Article 1 paragraph 3 the expression “.. when such activities affect the public interests” is also too broad and indeterminate. In Article 1 paragraph 4 the expression “administrative acts issued by the public administration bodies within private transactions, to which the public administration is a party” is rather problematic: administrative acts issued within private transactions is a *contradictio in terminis*.

Article 2: The definition of the administrative act is not complete, important elements (unilateral regulation of a concrete legal relationship; within the sphere of the administrative law; intended legal effect, etc) of such an act are missing in the given definition; the definition is also too narrow because it excludes the general acts²⁷.

Article 4: The regulatory substance of this Article is redundant since it is actually covered by the principle of proportionality.

Article 10: This Article is redundant since it just repeats the Roman law principle “*lex specialis derogat legi generali*” that applies to every law.

Article 13 paragraph 2: This provision raises two questions marks: the first relates to the expression “administration municipal bodies”. This wording could refer to both local self government units and/or territorial/local organs of the state government (de-concentrated services). In any case, the provision regulates a principle of the material competency that is usually dealt with in a law on organization and functioning of public administration but should not be included in a catalogue of procedural principles.

²⁷ “A general act shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics, or relating to the administrative aspect of a physical object.”

Article 17: In this section of the Law this Article is misplaced. Its content belongs to the section regulating the course of the administrative proceeding.

Article 18: The proceeding is too complicated and not citizen-friendly. A citizen-oriented regulation ensures that in all cases a wrongfully submitted request should be forwarded to the competent organ, and the submitter should be notified thereof.

Articles 19-24: The regulatory content of these provisions does systematically belong to a law on organization and functioning of public administration (see also above comment on Article 17). The LAP might regulate, who within a competent authority shall be the public official responsible for conducting the proceeding.

Article 26: The territorial competency is a matter to be decided on by legislation, and should not be at the disposal of the public administration bodies. In addition to that the provision is too indeterminate.

Article 27: The Article is agreeable in substance, but the order of the letters “a” to “c” should have been inversed. The principle should be that “the conflict should be resolved by the immediate higher joint superior organ” whilst the court should be competent to resolve the conflict of competencies only as a last resort, when there isn’t any joint superior organ.

Article 29, letter “h”: should also apply to cases, where the acting public official or a person mentioned in letter b) has initiated a judicial process against one of the interested parties; letter “j”: the wording “friendly or hostile” are too vague and can hardly be used as legal terms. In general the whole provision should be simplified.

Article 33 paragraph 4: the legal consequence is unclear. It needs to be specified if the acts are absolutely or relatively invalid.

Articles 35, 36: The regulatory content is in the best case unclear and incomplete as far as representation is concerned. In the administrative law doctrine two connecting factors for the concept of the “party” are identified: the formal connecting factor, in accordance to which a party is a person (natural or legal), upon whose request an administrative procedure has been initiated or against whom an administrative procedure is in progress; and the substantial connecting factor, in accordance to which a party is the person, whose rights or legal interests are touched by the proceeding.

Whether these conditions (formal or substantial) are fulfilled has to be derived from material law. The procedural law should identify the criteria, which make somebody an “interested party”.

Provisions on representation are missing; the reference to the civil procedural law is not sufficient. The formulation of paragraphs 3 and 4 is also too general and vague. The meaning of the text of Article 36 is hardly perceptible (in both the Albanian and English version). It should be reformulated to clearly state that the administrative proceeding is initiated either *ex officio* or upon request.

Article 37: The notification of the initiation of an administrative proceeding (started *ex officio*) is a matter to be discussed. Some legislators (*e.g.* Italy) consider it as the base line of the “participation”, whilst others (*e.g.* Germany) consider it as sufficient to ensure the opportunity of the party to be heard before the final decision is taken, without necessarily going for a preliminary notification. It is a matter of finding the right balance between formality and efficiency of the proceeding.

Article 38 (as well as the following ones: 39, 40, 41, 42, 43, 44 and 45) regulates the content, form and submission of the initial request. However, most of these elements should be treated in a separate chapter and should apply not only to requests but to all the communications of citizen to the administration

(appeal, requests related to the execution, request for disqualification, request to claim the incompetence of the administrative body and other forms of communication of the party to the administration). That would make the law more readable and easy to follow and would avoid the repetition of the same identical provisions for each kind of communication. The way the party communicates with the administration should be unique; of course special requests might have special requirements in terms of form or content.

The general approach of Article 38 (dealing with the initial request) is too formalistic. A request should be considered as such (as a rule) if it succeeds to identify the submitter and the purpose of the request (what is the request for). The formalisation of the request as it is done by Article 38 is a too heavy burden for the access of an administrative service.

Paragraph 2 of Article 38 regulating “the obligation for the submitter to send copies of the request to all interested parties who have either direct or indirect interests in the action requested by the administration” is problematic in two aspects. Firstly, the identification of other interested parties is a genuine obligation of the administrative authority and must not be imposed on the submitter of a request. Secondly, for the first time in the text we find here the term “indirect interest”. What does it mean?

The formal requirements of paragraph 4 of Article 38 go far beyond of what is necessary. What the public organ should do at this stage of the proceeding is to just register internally the request and without delay confirm its reception vis-à-vis the party (*c.f.* Articles 43 and 44, but less formalistic).

Article 39 raises several questions, not only due to its vagueness. In a citizen-oriented law, this would be a typical case of application of the principle of information and assistance. Accordingly, the law should stipulate the rule that it is the administrative authority’s obligation to correct any mistake in the party’s application. Only if *ex officio* correction is impossible, the authority shall ask the party for specific clarification. The purpose of the authority’s obligation is twofold: firstly to ensure that the authority makes every effort to identify the object of the request (which is an important step for a proper and lawful result of the administrative proceeding), and secondly to ensure that the party’s rights are not negatively affected due to ignorance or a mistake. Finally, the communication between the authority and the party related to the clarification of the request should not require the written form, but could be done in any appropriate and efficient form (*e.g.* phone call).

Article 52: If the legislator wants to include such a “consensual instrument”, more detailed regulation would be recommended.

Article 54: The way the Article is formulated does not fulfil the presumed intent of legislator to regulate the delegation of the decision-making within the competent administrative body (see above page 39)

Articles 53, 56, 57, 58, 58: The principle of *ex officio* investigation should be one of the essentials of a good general administrative procedure law. The LAP provides on the one hand an explicit recognition of this principle scattered in different Articles (*e.g.* Articles 53, 56, etc.). But in the same subsection it contains provisions on the obligation of the parties (art. 56, 57, 58 and 59). All these latter provisions, interpreted systematically and in their integrity, are rather problematic and seem to contradict the inquisitorial principle as stated by the previous provisions. The inquisitorial principle requires the public authority to act as a trustee of both the rights of the party, the public interest and to use all the means at its command to ascertain facts in order to issue the right decision. Not only, but particularly when the public interest is at stake, the procedure must not be based only on evidence offered and produced by the parties. The party shall be obliged to supply evidence, provide information, give a statement or appear personally before the public authority only, where this is required by law or the public authority has no other means for establishing the facts.

Article 63: The relevance of this Article is more than doubtful. As a rule, it should be the competent administrative authority itself that has got the “specialized expertise” for the investigation of the facts and circumstances related to the resolution of an administrative case. The use of external expertise, engaged by the administration should be an exception.

Articles 68 – 69: The regulations of the procedure to ensure the right of the party to be heard are unnecessarily detailed and formalistic.

Article 70: As an exception of the rule, the cases in which the party may be excluded from the right to be heard should be precisely defined. Paragraph 1 is not clear enough and thus opens the possibility of misuse by the authority. Paragraph 3 letter “a” is redundant, because a party was heard in the meaning of Article 67, when it has given its comments during the course of the proceeding.

Article 71 seems useless, since the administration can always take the necessary measures.

The Article 73 provides an unnecessarily formalistic and complicated procedure by introducing the legal concept of an “intervenient” that is known from civil court proceedings. However, what is called intervenient in this Article is in an administrative procedure just a “third” or “interested” party, to which all the general rules on a party apply.

The list of causes for the termination of the proceeding stipulated in Articles 78-80 should be completed. Missing are cases such as the death of a party and termination of a juridical person and the withdrawal of the request (if no public interest is at stake); the latter is regulated in Article 51 but it systematically belongs under this section.

Article 81: Paragraph 1 establishes a general time limit of three months for the administrative procedure, unless special laws do not provide for a different time limit. On the one hand, a three-month time limit for each and every simple administrative matter seems to be too long. On the other hand, for cases of high complexity, the authority requires the right to extend the period of three months in order to have sufficient time to investigate facts, comprehensively examine the legal situation and take the appropriate decision. Paragraph 2 does not provide a legal consequence when the authority does not respect the time limit. In this way an effective protection of the party’s rights (*e.g.* through the silent consent rule or at least through direct access to judicial control) is lacking.

Section I, Chapter I, Part V: The title of the section “Validity of Administrative Act” does not correspond to its content, because the Articles 82-86 deal with the form of the administrative act and the formal requirements of the written administrative act.

Article 83: The obligatory written form for the exteriorisation of an administrative act does not meet anymore the requirements of an efficient public administration. Nowadays an administrative act may be issued in any appropriate form (including technical means) unless a special law provides otherwise.

In the list of Article 84 paragraph 2 the information needs to be specified with which administrative authority and court respectively a legal remedy can be lodged.

The regulatory contents of Articles 85 and 86 on the one and Article 84 on the other hand overlap (at least partly). The whole systematic of this section is hard to comprehend.

Article 87: The administrative act should enter into force upon notification (and not from the date of its approval) by way of exception it could enter into force at a different moments but always after the notification.

The purpose of Articles 88 and 89 could not become accessible to the reader. They either regulate matters which are obvious or matters that are regulated elsewhere in the text of the LAP.

Article 90 paragraph 1 sets a deadline of 30 days but does not say when this deadline starts running. When the legislator had in mind “within 30 days from the approval” how can the law expect that the party voluntarily implements the act within 15 days from the approval as provided for by Article 121, paragraph 1? Another contradiction exists between the said provisions and Article 112.

Article 92: It is very questionable, if the legal doctrine of absolute invalidity and its very theoretic legal consequence (which is mainly a legal fiction) is really relevant for the administrative practice. In other countries that have had this doctrine for decades, it has become obvious that court decisions based on absolute invalidity of an administrative act play a completely marginal role. Just using the concept of unlawfulness of an administrative act could also solve all of these cases. Even if the theory of absolute invalidity should be conserved for this Law, the cases should be restricted to absolutely extraordinary cases of grave or obvious legal defects. Including very frequent and relatively minor defects as dealt with under letter “c” and “d” overstates the case by far.

Article 94 follows the technique of enumerating a limitative number of cases of relative invalidity. The use of this technique in this very case is dangerous, because if a cause that should lead to invalidity was forgotten and is not explicitly mentioned, the act would be valid and could not be repealed or revoked because of its invalidity. A general wording able to comprise any relevant defect of the act is highly recommended.

Article 96 and 108: This Article seems to be repeated by Article 108. What is the difference between the two provisions?

Articles 97 – 99: The distinction between procedural acts, here called conclusions, and a final decision on an administrative matter is a legacy of the old Yugoslav Law on Administrative Procedures. One of the reasons of this legal tradition was that the old law didn't provide a definition of the administrative act. Now, when the LAP defines the administrative act, and in particular when the “conclusion” is part of the chapter dealing with the administrative act, there isn't anymore need for the provisions on conclusion. The problem of legal protection and remedies against procedural measure taken by the authority affecting the party's rights is to be solved elsewhere in the Law.

Articles 100 -106 deal with the revocation and abolishment of an administrative act as the result of both the appeal of a party or upon the initiative of the competent authority or its supervisory body. In this way it mixes two legal instruments that need clearly to be kept apart. The revocation is by definition an *ex-officio* instrument of the administrative authority, whilst the abolishment of an act is the possible legal consequence of a legal remedy lodged by the party. As a result of the different legal interests involved and affected, the legal conditions and the legal consequence must be different as well and they must correspond to the respective interests. Due to the mixture of the two instruments the whole section is confusing and one of the weakest parts of the legal text. And in addition to that this section comprises numerous inconsistencies and doubtful legislative solutions in detail.

Section VI Notification of the administrative act: The section on notification should be a horizontal section covering any kind of administrative actions, of which the party needs to obtain cognisance, such as final administrative acts, interim acts, procedural measures, acts resolving the appeal, the warning of the execution, etc. It appears that Section VI of this Law is dealing with the notification of final administrative acts only. Therefore the scope of application of notification needs to be broadened in order to cover every form of communication by an administrative body *vis-à-vis* the party. As a consequence for the systematic

of the Law, notification should be dealt with not under the Chapter “Administrative Act” but in a separate Chapter preferably at the end of the LAP, before the part dedicated to the execution of administrative acts.

Article 109 and 110: Notification is commonly defined as the intentional utterance of the will of an administrative body *vis-à-vis* the party. So, by definition every administrative act must be notified to the parties, otherwise it does not enter into force and/or produce any effect. The LAP seems to have opted for a different understanding of the concept notification.

Article 110 paragraph 1/a states that the notification is not necessary if the act is communicated verbally. The sentence is a *contradictio in terminis*, because according to the common understanding verbal communication is a form of notification: the notification can be done in written or verbal form.

Article 111: Even after repeated reading the meaning of this Article remains untold. Does the provision mean that in addition to the act some other information is to be notified too? This Article has to be congruent with the provision regulating the content of the administrative act (*c.f.* Article 84)

Article 112: What is the purpose of this provision? An administrative act, once issued must be notified with no delay. Furthermore the contradiction to Article 90 paragraph 1 was already mentioned above.

Article 113: This Article provides a “catalogue” of available forms of notification. There are several problems with this Article:

a) The catalogue is not complete, The other forms of electronic notification of an written act such as email are not included.

b) As a rule, the administrative organ should have the freedom to chose the appropriate form of communication (in accordance with the principle of the efficiency of the procedure);

c) Some forms of notification require more detailed regulation. For instance the personal notification provided for by letter “b”, is a formal delivery and should follow a certain procedure.

d) Provisions establishing the presumption on when the act is deemed to have been notified are completely missing.

The meaning of Article 115 is not accessible. Is it meant to be a new special instrument through which the party could acquire the suspension? Commonly, as a rule the submission of the appeal suspends the execution. Is there a need of a special instrument allowing the party to request the suspension of execution on a different ground than the usual ones, which are the asserted unlawfulness of the administrative act or the asserted unlawfulness (*e.g.* dis-proportionality) of the means execution (the latter is regulated by Article 119)?

Article 116 paragraph 2: As a rule the administration should be entitled to execute its act without an endorsement by the court.

Article 117: A general rule is missing about the time, when the administrative act becomes executable and when it loses its executability for effluxion of time (*e.g.* 5 years after the day when the administrative act has become executable).

Articles 122-125: Provisions on deadlines such as calculation of deadlines, extension of deadlines, reinstatement should apply not only to voluntary “execution” of the party (the concept execution should actually be used for measures of an administrative authority only) but are required as general rules for the

whole scope of the Law. Therefore these Articles are not only inadequate with respect to their regulatory details but also misplaced in this section of the LAP.

Articles 126, 127 and 129: These three Articles are understood as providing two different instruments of legal remedy (the distinction is made by where the submission is done): the request for redress/review (to the organ that issued or unjustifiably refused to issue the requested act) and the appeal (submitted to the superior organ). These Articles appear to contravene with the meaning of Article 132. By the language used in the text of the three above-mentioned Articles, they seem to refer only to remedies against an administrative act or against the unjustified explicit refusal to issue an administrative act (in other words against an administrative act which explicitly refuses to issue the act requested by the party). Against complete administrative silence the party remains without any legal protection. Moreover, paragraph 3 of Article 127 reads “administrative body... shall review the legality and consistency of the challenged act”. What does “consistency” mean? Was the word used as a synonym for expedience, merit or opportunity?

Article 128: The Article regulates the suspension. It raises a number of question marks in terms of completeness and appropriateness: Is it the way how paragraph 2 is formulated the best way to provide for the exceptional cases in which the appeal has not any suspensory effect? It would be recommendable to prefer a more general formulation that allows for special law to provide case by case the exceptions from the suspensory effect of the appeal and that in the same time gives the administrative authority the possibility to abolish the suspensory effect on the grounds of overriding public interest or overriding interest of a third party. Some of the cases provided for by paragraph 2 are disputable or at least questionable: what does “police actions” or “collection of budgetary income” mean? Is a fine (monetary fine) classified as a budgetary income? If so, does it make sense that the appeal against a fine for traffic offences or else does not suspend its execution?

Article 129: Paragraphs 1 and 2 repeat the provisions of Article 126 paragraph 2. Paragraph 3 of this Article is not only very difficult to comprehend. The use of the term “may” in this paragraph is wrongfully used leaving it to the completely free discretion of the superior authority to either review directly the challenged act or transfer it to the competent authority.

Article 132: It is unclear whether the deadline of 15 days in paragraph 2 is in addition to or part of the deadline of 30 days provided for by Article 131 paragraph 1.

Article 133: The title of the Article “Formal conditions for conduct of the appeal procedure” suggests a broad regulation, but the regulation in the text of the provisions refers only to the form of the appeal request. In addition the regulation is too formalistic. A modern law should be more flexible. If the intention of the party to challenge or attain an administrative act is clear enough than it should be considered as an appeal.

Article 134 combines formal admissibility conditions (letters “a” and “b”) with a material condition provided for by letter “c”. As a material condition the wording of letter “c” is too indeterminate. The legality of an administrative act cannot be established on the basis of a “*prima facie*” assessment, meaning of an assessment at first sight.

Article 136: The letter “d”, of this Article does not make sense. When the administrative body reviewing the appeal has full jurisdiction, why shouldn’t it have the power to directly issue the refused act? The letter “d” might apply in case of the appeal against the administrative silence, but the latter is not regulated in this section.

The Articles 137-138 do not contain a comprehensive regulation of the real act. The definition of the real act does not allow a distinction from the other forms of administrative action; the words “such as

information, warnings, coded signals, etc.” are just examples and only partially reflect the typology of the real acts. Remedies against a real act are not provided. These two Articles seem to be almost useless: defining a term is useful only if the matter is regulated, and this is not the case, neither here nor in other parts of the Law.

Articles 139 – 140 are provisions expressing general principles, therefore they should be moved to Part I of the law. As to their content the provisions leave much too wide space for discretion to the administration. In order to protect the rights and legal interests of the citizen the empowerment and the limits of discretionary power have to be specified by law.

Nomo-technique aspects

The analysis of the LAP in Chapter VI of this paper has shown various shortcomings that are affiliated to methodological aspects of law making. In general the text is difficult to read and comprehend.

It was repeatedly noted that either single Articles or sections/subsections are misplaced. Those systematic deficiencies make the text not only confusing and ambiguous. Sometimes an Article or section set in the wrong context gives this text unintentionally a wrong meaning.

The language is sometimes vague, imprecise and inconsistent. This assessment is valid not only for the English but also for the Albanian version of the text. In both versions some legal terms are used with a different meaning than commonly understood.

Some parts of the Law are very casuistic and dealing with lengthy technical details that should better be regulated in secondary legislation or office rulebooks.

Finally, some Articles have a contradictory content.

Amendments or a new law?

Changes of the current Law on the level of single provisions or by adding some sections/subsections could be done through amendments of the text. However, all attempts to widen the scope of the Law and eliminate the enormous systemic and terminological deficiencies by mending the existing text would entail an imperfect and illegible patchwork rather than a good, consistent, and comprehensible law. In particular the structural problems cannot be repaired by selective amendments. New administrative institutes such as IT-based communication, point-of-single-contact approach, administrative contract, and a legal remedy against incorrect delivery of services of general economic interest would not find an appropriate systematic place in the existing LAP. Therefore we come to the conclusion that the need of a fundamental review of the current LAP should lead to drafting and adopting a new Law on General Administrative Procedures for Kosovo. This also seems to be the will of the Government of Kosovo which is an additional incentive regarding this proposal.

ANNEX I. PRIMARY EU LAW RELEVANT FOR A GOOD SYSTEM OF ADMINISTRATIVE PROCEDURES

Article 2 of the Treaty of the EU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 197 of the Treaty of the EU

Administrative Cooperation

(1) Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.

(2) The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.

(3) This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.

Article 41 Charter of Fundamental Rights of the European Union

Right to good administration

(1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

(2) This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

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(3) Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

(4) Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.