



**SIGMA**

**Support for Improvement in Governance and Management**

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**KOSOVO (under UNSCR 1244/99)<sup>1</sup>**  
**ADMINISTRATIVE LEGAL FRAMEWORK**  
**ASSESSMENT MAY 2009**

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<sup>1</sup> In accordance with UN Security Council Resolution 1244, since June 1999 Kosovo has been governed by the UN Interim Administration Mission in Kosovo (UNMIK).

## Summary

### *Main Developments since last year*

During the period under review, intensive legislative activity has engaged mainly the government and the Assembly of Kosovo. It is supposed that such activity will continue in the coming years so as to put in place a comprehensive and coherent legal framework, aligned with the Constitution and with European and international standards.

The government recently adopted a draft Law on Civil Service and a draft Law on Salaries for Civil Servants. These drafts will now be sent to the Assembly for approval. Their preparation was followed by Sigma and some international donors. After approval by the Assembly, several pieces of secondary legislation will still be needed to implement the regulations of these laws. If the secondary legislation has at least the same quality as the laws adopted by the government and if the whole set of legislation is properly implemented, then one may conclude that reasonable conditions exist for building a professional civil service in Kosovo.

Other basic laws related to the functioning of the government and the organisation of the public administration have been drafted. This is the case, for instance, of the Law on the Organisation and Functioning of the Government (adopted by the government by mid-April) and the Law on the Organisation of Public Administration Institutions. The adoption of these two laws is urgent.

The legal framework related to decentralisation – which is one of the priorities according to the Ahtisaari Plan – has almost been completed and is being implemented. The transfer of responsibilities and resources is being carried out but, in spite of the training, concerns remain about the capacity of ensuring the delivery of similar standards of quality of services to citizens across municipalities.

### *Main Characteristics (strengths and weaknesses)*

The new Constitution provides a sound basis for a democratic system based on the rule of law, protection of human rights and separation of powers. As only a short portion of the Constitution is devoted to setting guidance for the organisation and management of the public administration, ordinary laws on these matters will require special attention from drafters, lawmakers and the international community.

Regarding the distribution of power, the situation in Kosovo is very special due to the presence of some international organisations which, prior to the full implementation of the Comprehensive Proposal for Kosovo Settlement, hold executive powers and share areas of public authority: This is the case of the UN Interim Administration Mission in Kosovo (UNMIK), the EU Rule of Law Mission in Kosovo (EULEX), and the International Civilian Office (ICO). The transitional provisions of the Constitution assign a special role to the ICO as the ultimate authority in Kosovo regarding the civilian aspects of the Kosovo Status Settlement<sup>2</sup>.

Even considering that the situation is tending to improve, for the time being the legal framework in Kosovo is still confusing as three different sources of legislation<sup>3</sup> are still in place.

Basic legislation related to the administrative legal framework is being adapted, adopted and developed. The Law on Administrative Procedures was adopted in 2006, but its implementation has

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<sup>2</sup> Article 147 [Final Authority of the International Civilian Representative] states that:

*“Notwithstanding any provision of this Constitution, the International Civilian Representative shall, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007, be the final authority in Kosovo regarding interpretation of the civilian aspects of the said Comprehensive Proposal. No Republic of Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations referred to in Article 146 and this Article.”*

<sup>3</sup> The three sources are: 1) Yugoslav laws in force prior to the 1990s war in the Balkans; 2) UNMIK laws, adopted by the Special Representative of the Secretary-General of the United Nations (SRSG); 3) laws adopted by the Assembly of Kosovo.

been imperfect and unsystematic. Although the law is generally accepted as being of good quality, some amendments are being prepared in order to align it with the new constitutional reality.

In the area of justice, the law regulating the organisation and functioning of the State Prosecutor is still the old Yugoslav law of 1976 (which is not considered to be adapted to the new role and needs of the State Prosecutor). The law establishing the Prosecutorial Council (created by the Constitution) is still missing.

The institutional set-up for ensuring the accountability of political and administrative entities is in place. However, misunderstandings regarding its role and relevance persist. For instance, recommendations of the Ombudsperson and of the Auditor-General have had little impact: their reports are not discussed by the Assembly, and there is no feedback regarding their recommendations. Moreover, the failure to appoint an Ombudsperson since this institution was “kosovarised” in 2006 (an acting Ombudsperson has been in charge since then) shows the weak interest of political actors in this relevant institution.

A proper and modern Law on Administrative Disputes (LAD) is also missing. Its preparation should provide an opportunity for discussing the current system of administrative justice, which seems to be ineffective, and to resolve inconsistencies between the current LAD and the Law on Administrative Procedures.

A very important issue concerns the Constitutional Court, which is supposed to be in charge of controlling the constitutionality of laws. The legal basis for the Court was adopted, but it is not yet operational. The procedure for recruiting judges has just started.

The right of access to public information is recognised by the Constitution and regulated by law, but its implementation is recognised as being unsatisfactory.

A Law on Personal Data Protection is expected to be adopted soon and the creation of an independent agency for controlling its implementation is foreseen.

There is an overall problem of implementation of the legislation. Kosovo has special weaknesses in this regard that require special attention. The lack of qualified staff, lack of resources for information campaigns, lack of training, and weak capacity of institutions for monitoring and co-ordination are just some of the difficulties, which are reinforced by the instability of the legal framework and by a dysfunctional public administration. Training as part of the implementation process must always be ensured.

Considering the ongoing complexity and misunderstandings regarding the different roles of political institutions, the poor capacity of the administration in implementing and enforcing legislation, the difficulties linked to the quality of the legislation (in particular those related to the unchecked secondary legislation and the missing assessment of existing capacity for implementing sophisticated laws and systems), along with the ineffectiveness of the judiciary system, one may conclude that the rule of law is not yet a reality in Kosovo.

### ***Recommendations for Reform***

Intensive training and monitoring capacity are needed in order to increase awareness of the Law on Administrative Procedures by citizens and public servants and to support its implementation.

Regarding the Law on Civil Service and the Law on Salaries, there are deep concerns regarding the capacity for homogeneous and co-ordinated implementation of these laws due to the weak capacity of the Ministry of Public Services (MPS) and of the human resources management (HRM) units in ministries. Reinforcing the capacities of the MPS (for support and monitoring) and of the HRM units in the various bodies (for implementation) must be a priority. A detailed and funded training programme is of fundamental importance for this purpose.

A Law on the Organisation of Public Administration Institutions (currently being drafted) is also urgently needed in order to create a clear legal background for the creation, abolition and restructuring of bodies to perform administrative activities. The requirements for creating agencies – an issue that requires clarification – is one of the issues that should be addressed in this law.

The government and the Assembly are requested to look at the Ombudsperson and Auditor-General institutions carefully and to establish mechanisms that will ensure an effective follow-up of their recommendations. The organisation and competences of the Public Prosecutor's Office, as well as the establishment of the Prosecutorial Council, should also be key priorities for the government and the Assembly.

The procedures for the adoption of a new Law on Administrative Disputes (LAD) should be resumed.

It is urgent to create conditions to ensure that the Constitutional Court becomes fully operational. Without a functioning Constitutional Court, the rule of law cannot be improved.

Close monitoring and consistent support (technical and financial) are needed to ensure the success of the decentralisation reform in Kosovo, considering its specific ethnicity structure and ongoing difficulties.

Regarding the right of access to public information, a better balance between free access and confidentiality needs to be achieved.

Legal drafting and procedures related to the approval of legislation require increased attention. In fact, the intense legislative activity and the urgency in approving new legislation are quite often detrimental to its quality. While recognising that the situation in Kosovo is very specific in view of the internal requirements and the international pressure for new pieces of legislation, the weakness (or even absence, in many cases) of effective participation and discussion, along with the poor expert support in parliament, is leading to a situation where many recent laws will need to be amended very soon, thereby increasing difficulties in understanding and implementing the legal framework. Moreover, secondary legislation should also be controlled in terms of its conformity with the Constitution and other laws. Its publicity also needs to be increased.

## Introduction

Since the Assembly of Kosovo declared independence on 17 February 2008, a new era has begun for Kosovo and its administration. Along with its continuous struggle for enlarged international recognition as an independent country, Kosovo has been devoting a large part of its efforts to building new institutions – or reshaping some existing institutions– and to adopting a wide range of new legislation. Priority has been given to legislation aimed at implementing the Comprehensive Proposal for Kosovo Settlement (“Ahtisaari's plan for Kosovo”).

The Constitution of Kosovo, which entered into force on 15 June 2008, is the main piece of legislation adopted since the declaration of independence, and it is naturally having a strong impact on the renewal and completion of the administrative legal framework.

Since the last assessment<sup>4</sup>, therefore, several legislative acts related to the administrative legal framework have been adopted or drafted. This report updates and develops Sigma's 2008 assessment and is based on information gathered by mid-April 2009.

## Principle of Legality

The rule of law is one of the key constitutional values established in the Constitution of Kosovo (article 7), and the principle of legality is mentioned in several articles of the Constitution as well as in numerous ordinary laws or draft laws. This is the case, for instance, of the Law on Administrative Procedures, the draft Law on Civil Service (adopted by the government on 23 April 2009 and submitted to parliament), and of a number of laws related to the management of public finances and financial control at central and municipal levels – Public Procurement Law, Law on Internal Audit, Law on General Auditor, etc.

Other fundamental principles and rights aimed at supporting legality, such as equality before the law, proportionality, right to a fair and impartial trial, and right to legal remedies are also set by the Constitution and developed by laws. Moreover, the Constitution states that Kosovo ensures full respect for internationally recognised fundamental human rights and freedoms.

The right of citizens to receive all information from administrative bodies and the obligation of administrative authorities to act in the transparent way are recognised by the principle of publicity under the Administrative Procedures Law (article 9).

It is worth mentioning that the control of the constitutionality of legal and other acts is the responsibility of the Constitutional Court. The Constitution of Kosovo and Law no. 03/1-121 on the Constitutional Court of Kosovo set the legal basis for the establishment of the Constitutional Court. The selection of judges to be appointed to the Court is currently underway.

Regarding secondary legislation, there are fundamental weaknesses in Kosovo, since legal sub-acts are usually enacted by ministers without any control. Moreover, secondary legislation is not systematically published and it is often in conflict with primary laws, creating confusion for the public administration and citizens and damaging legal security.

**Legality is formally ensured by the Constitution and by the law. However, the situation regarding the Constitutional Court, the remaining confusion within the legal system, and some misunderstandings related to the practical implementation of the rule of law<sup>5</sup>, along with the**

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<sup>4</sup> See Sigma's 2008 assessment report on Public Service and the Administrative Framework in Kosovo at: <http://www.sigmaxweb.org/dataoecd/48/31/41637624.pdf>

<sup>5</sup> Recently there have been some interesting developments that indicate the fragility of the rule of law principle and of the general accountability of the government. A few months ago the government proposed to parliament to “suspend” the enforcement of some dispositions of the civil service regulation related to the composition of the Senior Public Appointments Commission (SPAC), to replace international members of SPAC by local ones appointed by the President, and to continue this transitory situation until the new Law on Civil Service is approved. Parliament correctly rejected this proposal, but the government nevertheless continued with the replacement of SPAC members, implicitly changing the law by a decision of the

**fragile situation of the judiciary and an inefficient public administration, are clear evidence that major improvements are needed in order to ensure the rule of law.**

### **Accountability Institutions**

As in all democratic countries with a parliamentary system, the Government of Kosovo is responsible for the implementation of laws and state policies and is subject to parliamentary control (Constitution, article 4.4). Several parliamentary instruments serve to control the work of the government, including interpellations, questions (written and question period), motion of no-confidence, enquiries, etc. So far the general view is that parliament has not been active enough in using those instruments to control the government's work.

In terms of financial control, the **Auditor-General** is the highest institution of economic and financial control. The main principles for the competences and status of the Auditor-General as an independent institution responsible for financial control have been set out by the Constitution. The details on the status, mandate and scope of responsibilities have been regulated by Law no. 03/L-075 on the establishment of the Office of the Auditor-General of Kosovo (OAG) and the Audit Office of Kosovo. Until the end of the international supervision of the implementation of the Comprehensive Proposal for Kosovo Status Settlement dated 26 March 2007, the Auditor-General is to be an international expert appointed by the International Civilian Representative (Constitution, article 157). The OAG audits public institutions and issues reports on any mismanagement of officials, including recommendations for redressing the situation. Unfortunately, there is very little engagement on the part of the government to implement these recommendations or even to sanction responsible officials for breaches identified by the OAG. Parliament as well has not used OAG reports to better supervise the government's activity. The reports of OAG are not discussed, and there is no feedback after their submission<sup>6</sup>.

**Internal control** is regulated by the Internal Audit Law (IAL), adopted by the Assembly of Kosovo on 6 November 2006 (Law no. 2/L-74). The law aims to ensure greater operational efficiency, budgetary and financial discipline, and legal and regulatory compliance of public sector entities by requiring each entity to subject its operations, records and management, and control systems to regular, systematic and comprehensive internal audits<sup>7</sup>.

A quasi-judicial body – **Procurement Review Body** (PRB) – competent to review administrative decisions issued by central procurement institutions (the Public Procurement Agency – PPA – and the Public Procurement Regulatory Commission – PPRC) was established in 2008 by the new amendments of the Law on Public Procurement. The PRB is responsible for the conduct of review of appeals from bidders in the review procedure<sup>8</sup>.

The Constitution establishes the **State Prosecutor** as an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law. The State Prosecutor is an impartial institution and acts in accordance with the Constitution and the law (Constitution, articles 109.1 and 2). The Constitution establishes the Kosovo Prosecutorial Council as a fully independent institution ensuring that the State Prosecutor is independent, professional and impartial and that he/she reflects the multi-ethnic nature of Kosovo and the principles of gender equality (Constitution, article 110.1).

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government. Recently the Prime Minister dismissed all acting permanent secretaries in several ministries (seven in total) on the grounds that their appointments were not in compliance with the law. On the other hand, the decision of the Prime Minister does not have a legal basis.

<sup>6</sup> For further information on this topic, refer to Sigma's 2009 assessment report on External Audit in Kosovo.

<sup>7</sup> Additional information on the public internal financial control system can be found in Sigma's 2009 assessment report on Public Internal Financial Control (PIFC) in Kosovo.

<sup>8</sup> Detailed information on this topic can be found in Sigma's 2009 assessment report on Public Procurement in Kosovo.

The organisation and jurisdiction of the Public Prosecutor Offices in Kosovo are still based on the Law of the Public Prosecutor's Office of the Socialist Autonomous Province of Kosovo no. 32/76 and on several amendments that were issued later, since the Law on the State Prosecutor is still being drafted. The Law on Establishment of the Prosecutorial Council is also in the drafting phase. The procedures applicable to judges, which refer to the appointment, dismissal and promotion of judges, are also applicable to prosecutors pending the establishment of the Prosecutorial Council. This provisional situation has now lasted for several years and creates a number of problems due to the lack of communication between the Kosovo Judicial Council, the Ministry of Justice and the Prosecutor General. The government is urged to complete this legislation as soon as possible in order to delimitate the functions of the State Prosecutor and to set up proper management mechanisms. All of these will contribute to further increasing the accountability and effectiveness of this institution as well as to controlling legality.

With regard to **judicial power** in Kosovo, it is established as unique, independent, fair, apolitical and impartial, and it ensures equal access to the courts (Constitution, article 102). The Kosovo Judicial Council is to ensure that the courts are independent, professional and impartial and that they fully reflect the multi-ethnic nature of Kosovo and the principles of gender equality (Constitution, article 108 para. 2). However, the judicial system is considered to be very ineffective in performing its functions. This weakness may be derived from the improper legal framework, the unclear situation regarding the responsibility for this important function of the state, the transition of competences from international institutions to domestic institutions, and the lack of capacities, in terms of both numbers and quality of staff. Poor salaries are also mentioned as undermining professionalism and integrity in the judiciary as a whole.

The **Agency on Anti-Corruption** (KACA) is responsible for finding and investigating corruption cases in Kosovo, making efforts to prevent and fight the phenomena of corruption, and helping to build a healthy and advanced society based on law. As part of the Anti-Corruption Strategy, the Assembly of Kosovo adopted the Anti-Corruption Law in April 2005, which was promulgated by the SRSG in May 2005. The law foresees measures against corruption in the area of administrative investigations of public corruption and publicising the most serious violations of the law, nepotism in recruitment, conflict of interest, standards for giving/accepting gifts in the public administration, etc. A draft law amending the Anti-Corruption Law has been prepared and is in the approval procedure. This new law is expected to address several gaps in the current law, including the issue of the Council on Anti-Corruption and its relations with the KACA. This issue was already stressed in the EC's 2008 Progress Report on Kosovo, and the need for its clarification was even highlighted by the disagreements regarding the latest KACA report. The Agency, an independent body reporting to the Assembly, co-operates closely with the government on issues related to anti-corruption strategies and on the search for common ways to combat corruption. It seems that this double relation with the Assembly and the government is raising some concerns about the real accountability lines of the KACA<sup>9</sup>.

The **Ombudsperson institution** in Kosovo, established by UNMIK Regulation no. 2000/38, officially opened its office on 21 November 2000. It is responsible for defending, protecting and monitoring the rights and freedoms of individuals confronted with unlawful or improper acts or failures to act on the part of public authorities. Currently the institution has 41 staff members, including support staff. Since its establishment, the Ombudsperson institution's staff have been multi-ethnic; at present the majority of the staff is of Albanian ethnicity, while the other staff members are of Serbian, Turkish and Roma ethnicity. The Ombudsperson's Office was "kosovarised" as from January 2006. At the same time, the remit of the Office was limited to Kosovan institutions. A Kosovan Ombudsperson has not yet been appointed by the Assembly; the latest attempt by the Kosovo Assembly to appoint a new Ombudsperson failed in February 2009.

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<sup>9</sup> Additional information on this topic can be found in Sigma's 2009 assessment report on the Public Integrity System in Kosovo.

Both UNMIK Regulation no. 2000/38 and UNMIK Regulation no. 2006/06 provide the Ombudsperson with the mandate to accept and investigate complaints from anyone in Kosovo who believes that his/her human rights have been violated by a public authority in Kosovo. The institution conducts investigations, issues reports and provides legal services and public advocacy. The general role and competences, qualification, election, dismissal and reporting requirements of the Ombudsperson institution are set out by the Constitution. During the period 1 July 2007 – 30 June 2008 a total of 523 cases were registered in the Office of the Ombudsperson, 436 of which were lodged by Albanians, 64 by Serbs and 23 by other ethnicities. The Ombudsperson during this period examined 684 cases. Based on the subject of complaints, 130 cases concerned access to the courts (civil proceedings); 86 concerned administrative silence and related issues; 58 related to abuse of authority; 53 to economic, social and cultural rights; 49 to employment-related issues; 39 to property-related issues (other than the Kosovo Property Agency, ex UN Housing and Property Directorate); 38 concerned issues related to a fair hearing (criminal proceedings); 35 related to KPA issues; 28 to impunity of authorities; 23 to other rights protected by the European Court of Human Rights (ECHR); 7 concerned the right to liberty; and 6 concerned the failure to investigate a crime.

In cases where the Ombudsperson institution finds that a general practice or situation affecting the public as a whole – not only one person or group of persons – has violated international human rights' standards, it may issue a special report, with recommendations to the Kosovo Assembly. The Ombudsperson provides annual reports to the Assembly and interim reports upon the request of the Assembly. The annual and special reports are also published. Based on the Constitution, the Ombudsperson may refer matters to the Constitutional Court, in accordance with the provisions of the Constitution. Unfortunately, to date the Assembly has never debated the Ombudsperson's reports, and neither the Assembly nor the government has provided feedback to the Ombudsperson on the institution's reports and recommendations.

The **Independent Oversight Board (IOB)** is in charge of overseeing implementation of the legislation related to civil service and mainly of ensuring legality in recruitment and dismissal procedures. It is accountable to the Assembly and is now recognised in the Constitution (article 101, para. 2). During several months in 2008 the IOB performed with only three staff members (out of the seven foreseen) and thus without a quorum for taking decisions. The IOB sends recommendations to the Assembly, which are later forwarded to the government. However, no feedback has been provided regarding its implementation. It remains to be seen whether this institution will be useful and effective within the legal and institutional framework in Kosovo.

**The institutional set-up to ensure accountability is being completed, and institutions have, with few exceptions, sufficient powers to fulfil their role. Staffing is also progressing, although slowly. However, the effectiveness of these institutions is a matter of concern and requires full attention. Better co-ordination and mutual support, as well as better understanding of the specific roles and powers of the various entities, are still necessary for achieving a proper and effective system of checks and balances.**

### **Distribution of Competences and Organisation of the Administration**

The organisation of the administration in Kosovo and the distribution of power are special compared to other countries and determined by the large presence of international organisations holding executive powers, which is not common in other countries. In Kosovo at the moment three such organisations hold certain segments of public authority, i.e. UNMIK, EULEX and ICO. Recently UNMIK altered the –dimension of its role by transferring a number of competences to Kosovan institutions, while still maintaining some competences. EULEX has large competences in the areas of justice and police. Unfortunately, co-operation with local authorities is not always at the desired levels. (N.B. This observation does not refer to the political dimension.)

The Constitution of Kosovo sets out general principles for the activity and competences of the **government** and other independent bodies. UNMIK Regulation no. 2001/19 (as amended) sets the number and competences of the ministries and of some executive agencies. However, the legal framework does not entirely regulate the organisation of the administration. The existing rules do not

cover either the creation of new ministries or executive agencies or the internal organisation of these institutions. In practice no analysis and financial impact assessment are carried out. Also, there is no clear definition of the types of public administration institutions. There is a concern as to how institutions are organised internally, i.e. what are the management levels, the span of control, the units created and the distribution of functions for these units. Furthermore, it is not clear in many cases if agencies are only executive or if they also have a policy-making and co-ordination role. Even if agencies have a clear executive role, in many cases there is no policy support from the ministries to which these agencies are attached. The current system of reporting directly to the minister in practice isolates the agencies, whose strategic objectives, work plans and achievements are not analysed. In some ministries it is hard to find a policy unit working in the same area of activity, which often results in agencies setting policies instead of ministries. A number of recommendations in this respect were provided by the team of experts engaged in the functional review of the Government of Kosovo (FRIDOM project)<sup>10</sup>.

The government has currently drafted two laws, the Law on the Organisation and Functioning of the Government and the Law on the Organisation of Public Administration Institutions. The first draft law sets out provisions on the organisation and functioning of the government, its working methods and decision-making procedures, co-operation between the government and other institutions, and the type of normative acts that are issued by the government and by ministers. It also specifies the competences of the Prime Minister and deputy prime ministers and the rights and obligations of ministers. The second draft law defines the types of public institutions that can be created in Kosovo, the relationship between ministries and their subordinated institutions, the role of independent regulators, and the general framework of functioning for all of these institutions. To date no early draft has been available, and it is therefore not possible to judge the quality of the regulation and the opportunity of its provisions.

General principles for the organisation and operation of **municipalities** in Kosovo are provided by article 123 of the Constitution. The administrative review of the actions of municipalities by central authorities in the area of their own competences is to be limited to ensuring compatibility with the Constitution and with the law (Constitution, article 124.7). The Law on Local Self-Government no. 03/L-040, which is part of the Proposal for the Kosovo Status Settlement, defines the legal status of municipalities, their competences, general principles of municipal finances, organisation and functioning of municipal bodies, intra-municipal arrangements, inter-municipal co-operation, including cross-border co-operation, and the relationship between municipalities and the central government (article 2).

UNMIK Regulation no. 2007/30 increased the responsibilities and competences of municipal mayors, as the highest executive office elected directly by citizens' votes; the approval of this regulation is considered as the first step towards local government reform. A number of competences have been transferred from central to local institutions (13 so far). Recently the competence on providing social services was transferred to local government authorities, including the budget and the current 800 staff. There are some concerns regarding the capacity of municipalities to manage their new responsibilities. To support the implementation phase and ensure the common quality of services provided to citizens, the transfer of competences is being accompanied by training.

**The missing laws related to the organisation and functioning of the government and the public administration are of fundamental importance in establishing clear rules for both. The draft laws should take into consideration the recommendations of the functional review of the government (FRIDOM project). The process of decentralisation needs to be closely monitored and strongly supported.**

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<sup>10</sup> The FRIDOM project report, "Whole of Government Review", can be found at: <http://www.fridomks.org/?page=5&lang=2>

## Quality of Legislation

The policy-making framework and the legislative drafting process are regulated in the government's Rules of Procedure (RoP). The RoP foresees a number of stages for the drafting of legislation. It provides for a system of working groups in the sponsoring institution and later on in the process an inter-institutional working group. The latter is the final consultation body before the draft law is sent for approval to the Office for Legal Support Services in the Prime Minister's Office (PMO) and subsequently submitted to the government. This practice has proved to be ineffective, because the institutions usually nominate to the working group civil servants from their legal departments, which results in all of the discussions being limited to legal drafting techniques and ignoring policy options and co-ordination issues. This has led to legislation that is inconsistent or even conflicts with policies.

The RoP requires ministries to produce a Regulatory Impact Assessment (RIA), Financial Impact Assessment (FIA), and Declaration of Approximation with the *acquis communautaire* for all legal drafts. The FIA is reviewed by the Ministry of Finance and Economy (MFE), while the Agency for Co-ordination of Development and EU Integration (former Agency for EU Integration) reviews or provides the Declaration of Approximation with the *acquis communautaire*. The capacity to carry out FIA and RIA in ministries is considered to be very low and the quality of these assessments is therefore too poor. In the MFE only one official reviews the FIAs for all draft laws. There is also an overlap between the two impact assessments. Maybe the adoption of soft impact assessment tools instead of sophisticated models that cannot be implemented in Kosovo would be better.

Rules of procedures as well as other related normative acts do not regulate the preparation and approval of secondary legislation approved by ministers. There are no criteria or standards as to which issues should fall within the jurisdiction of the respective ministry and which issues are to be dealt with by the government. This gives ministries the opportunity to decide on important issues without prior consultation with interested or related institutions and without any obligation to publish normative acts in the *Official Gazette*. As a result, many sub-legal acts are in conflict with primary laws or mutually inconsistent. Thus there is a need to draw a line of competences within the government to issue secondary legislation. In 2008 the government established an ad hoc commission to work on the analysis and elimination of the collision of laws. Apart from a few meetings that were held, no outputs have been produced so far by this commission.

There is also a concern about the access of the general public to regulations, laws and other sub-legal acts, although there have been improvements in this area since the creation in April 2006 of the Office for Management and Administration of the *Official Gazette*. However, due to a lack of capacity this office is currently publishing only primary legislation and selected secondary legislation. It is expected that with the approval of the draft Law on Government the situation will be redressed.

**The overall quality of legislation must be improved. The various steps in the drafting process (including impact assessments) should be understood as opportunities for improvement, not as bureaucratic obligations. Without improving the quality of the legal system (including secondary legislation) and without ensuring the enlarged public awareness of the legislation in place, it is not possible to say that Kosovo is fully ruled by law.**

## Administrative Procedures

The general administrative decision-making process is regulated by the Law on Administrative Procedures (LAP), while a number of laws or subsidiary legislation regulate special administrative procedures. The LAP was promulgated by the SRSG (Regulation no. 2006/33 of 13 May 2006), but the SRSG did not sign the Law on Administrative Disputes. The LAP is a general law that regulates the way in which administrative decisions are to be made and the legal relationships between administrative bodies and individuals or legal persons to produce individual administrative acts. In general, the law is a modern instrument and encompasses most of the core administrative law principles (legality, balance between public and private interests, equality before the law, proportionality, objectivity and impartiality, sustainability, predictability and openness).

With regard to specific issues, such as standing rights, all interested persons are entitled to start an administrative procedure or to participate in it either personally or through representation. The right to a hearing in the administrative procedure remains at the discretion of the administrative body conducting the administrative procedure (article 67). However, the hearing may be organised at the request of the interested party (article 68).

The law provides that in the course of exercising its legal competences with the view to fulfilling a public interest, public administrative bodies are to have recourse to means and remedies that are proportional to the goals to be fulfilled (article 6.1).

Interested parties may file an appeal against the administrative act within 30 days of the date on which they were notified of the act. The administration is obliged to examine the appeal and issue a decision within 30 days (article 130).

The philosophy behind the LAP is not understood by administrative bodies or the general public. Its dispositions are therefore sometimes disregarded and in some cases the legal mechanisms are not used.

In the meantime, a draft amending the LAP has been prepared by the government. According to some officials, the main objective of the draft amendment is to align the LAP with the new constitutional situation of Kosovo.

**The LAP is generally recognised as being in line with international standards, even if some improvements could be made. The problem is its weak implementation. The absence of a modern law on administrative disputes and the inefficiency of administrative justice (only the Administrative Chamber of the Supreme Court is dealing with these cases) are additional problems.**

### **Freedom of Access to Information**

Every person enjoys the right of access to public documents. Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification (Constitution, article 41). Citizens' access to official documents is regulated by Law no. 2003/12 on Access to Official Documents. The Ministry of Public Services issued Administrative Instruction no. 2006/03 to implement this important law that guarantees the possibility of access to public documents. The law establishes the rule according to which all official documents are accessible and introduces exceptions. The law defines the processing of applications, the time frame within which institutions are bound to reply to the applicant's request, and the ways in which official documents can be assessed. Furthermore, the law defines the beneficiaries of the right of access to official documents and enumerates the public interests that could constitute exceptions to the rule of accessibility of official documents. The law also contains provisions on the use of language, the establishment of the Inter-Institutional Committee for the examination of best practices on access to official documents, and the obligation of institutions and the government to issue annual reports.

The treatment of sensitive documents is also defined by the law and by the "principles, procedures and classification signs of official documents" set out in Administrative Instruction no. 07/2007 issued by the PMO. The instruction foresees the creation of a commission in each institution to be responsible for drafting and adopting the list of sensitive documents. In a recent "discussion forum" with media representatives, this instruction was very much criticised because it enlarges without reason the scope of the documents considered as confidential. The Ministry of Public Services has foreseen in its work plan for 2009 to amend the Law on Access to Official Documents.

Article 7 of the law specifically states that the applicant can file a complaint to the Ombudsperson institution if his/her request for an official document has been rejected or if no information has been received concerning this request. However, despite the right of access to an official document, the law does not include penalties for the failure to comply; in practice, ministries rarely granted access during the year 2008. The remedy of proceeding to the court is not a suitable way of addressing this

issue. There is no law that provides public access to UNMIK official documents and no access to EULEX documents, and in practice the general public has been unable to obtain access to these documents.

The government has prepared a draft Law on Personal Data Protection, which is expected to be approved soon by the Assembly. This draft law foresees the establishment of an independent agency for data protection.

Generally, the practice shows that the large majority of municipal institutions and citizens is not aware of the legislation in this area and does not know how to implement it. In any case, the major concerns of citizens are related to the absence of a functional public administration, not to having access to public information.

**Once again, the problem regarding the right of access to public information is not the law but how it is implemented and the low degree of public awareness of citizens' rights and how to exercise them.**

### **Administrative Liability and Judicial Review of Administrative Acts**

According to the Constitution and the Law on Administrative Procedures (LAP), every person has the right to pursue legal remedies against judicial and administrative decisions that infringe on his/her rights or interests, in the manner provided by law. However, there is an inconsistency in the legal framework, because the legislation on administrative disputes, which dates back to the days of former Yugoslavia, does not reflect the current developments in Kosovo and the institutions that have been created. Also, a major obstacle is the lack of a law on the organisation of the courts that would better distribute the competences within the court system. Currently all final administrative acts can only be appealed to the Supreme Court. The administrative cases in the Supreme Court constitute 60% of all court cases<sup>11</sup>, and the number of available judges cannot deal with the backlog of cases that has accumulated.

The Supreme Court has the right to examine the procedure and the merit of cases but generally it reviews only cases related to procedural issues. The Ombudsperson has observed cases where the complaints of civil servants have been sent backwards and forwards for five years without a final decision being taken by the court. There have also been delays in the course of the review of cases by the Supreme Court. The largest number of cases in the Supreme Court concerns property and privatisation. After a court makes a decision regarding an administrative appeal, it has the power to compel the administrative bodies concerned to act where a legal duty exists. There are no provisions for interim remedies, such as temporary injunctions.

There is an urgent need to regulate the judicial system by reorganising the courts and redistributing their competences. A draft law in this regard has been circulating for a long time, but it has not yet been approved.

To date civil servants have not been liable to pay compensation for any damages they have caused, either by reimbursing the government for the cost of compensating an aggrieved party or by direct liability. The Auditor-General considers this absence of liability as a major drawback in the system. The draft Law on Civil Service recently adopted by the government includes an article on liability for damages.

**The weak capacity of administrative justice requires attention, and the organisation of administrative justice must be discussed when drafting a Law on Administrative Disputes.**

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<sup>11</sup> Data provided by the Statistical Department of the Kosovo Judicial Council.

**Recommendations for Assistance**

Even considering its very special situation, which is aggravated by the global financial and economic crisis that is diverting attention and resources, Kosovo is trying to complete its administrative legal framework, and some progress has been made.

However, the reform dynamic needs to be strengthened and supported. The Ministry of Public Services (MPS) lacks the power, capacity and resources to drive reforms forward, and it seems that public administration reform is not a political priority because it is not clearly understood as a cornerstone for other reforms. The MPS plays a very important role in completing and improving the administrative legal framework. This role relates not only to the preparation of legislation concerning the civil service but also to other relevant pieces of legislation, such as the Law on Administrative Procedures, the Law on the Organisation of Public Administration Institutions and the Law on Government, as well as to legislation related to various areas such as official statistics, protection of personal data, and organisation of cadastre institutions.

Some donors and international organisations (European Commission, World Bank, DFID, Sigma and others) are trying to support reformers in Kosovo, but it seems that, along with better co-ordination, a strong commitment from the European Commission is needed. For instance, in view of the fragile resources and capacities of the MPS, some twinning projects could be envisaged to support the central management unit in the MPS as well as the training school (KIPA).