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**Mission in Kosovo**

**Department of Human Rights, Decentralization and Communities**

**Legal System Monitoring Section**

**REPORT ON THE ADMINISTRATIVE JUSTICE  
SYSTEM IN KOSOVO**

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## GLOSSARY

CSW	Centre for Social Work
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IOB	Independent Oversight Board
KFOR	Kosovo Force
LAD	Law on Administrative Disputes
LAP	Law on Administrative Procedure
OSCE	Organization for Security and Co-operation in Europe
SFRY	Socialist Federative Republic of Yugoslavia
UNMIK	United Nations Mission in Kosovo

## EXECUTIVE SUMMARY

After monitoring the criminal justice system in Kosovo since 1999 and the civil justice system since 2004, the Organization for Security and Co-operation in Europe (OSCE) began to monitor the administrative justice system in Kosovo in August 2006. Administrative law is an important area as it covers the legality of government action that affects the lives of ordinary Kosovo inhabitants. Without an effective administrative law system, Kosovo inhabitants can suffer from arbitrary and illegal government action without legal redress.

This report provides a description of the administrative law applicable in Kosovo. As there are many legal instruments regulating administrative issues, the report focuses on the general administrative framework, including the new Law on Administrative Procedure, which regulates the procedure before the administrative authorities, and the Law on Administrative Disputes, which governs the procedure before the courts. Next, the report addresses the weaknesses of the Law on Administrative Procedure and the Law on Administrative Disputes.

The OSCE also analyses concerns identified in relation to administrative proceedings before administrative authorities. Here, the OSCE has observed cases where the authorities have failed to justify their decisions in an appropriate manner, exceeded their powers, or breached applicable procedural rules.

The OSCE also focuses on general and substantive concerns observed in the judicial review of administrative acts. Of note, there are only two Supreme Court judges handling administrative law cases in Kosovo. As a result, judicial review of administrative acts is slow and the backlog of administrative cases pending at the Supreme Court has increased to over 2000 cases. On substantive issues, the report addresses concerns regarding the Supreme Court's assessment of its jurisdiction in custody cases involving children born out of wedlock and labour disputes involving civil servants. Furthermore, the OSCE addresses the Supreme Court's failure to assess the exhaustion of administrative legal remedies prior to deciding the merits of a case.

Finally, the OSCE concludes with an analysis of the lack of judicial review of UNMIK and KFOR administrative decisions.

## I. INTRODUCTION

Administrative law plays an important role in the protection of individual rights and the rule of law. As public authorities issue administrative acts<sup>1</sup> on a wide range of areas which may adversely affect the rights and freedoms of individuals, it is necessary to control the exercise of these powers.

However, individual rights and freedoms may be restricted (e.g. through expropriations) by the administrative authorities. In this context, the existence of clear rules and principles regulating the public administration's exercise of its discretionary powers is important to avoid arbitrary action by the government.

Countries have developed different control systems over government action. While countries influenced by the civil law legal tradition have established courts with specialized jurisdiction over administrative law cases which often may not be appealed to the general courts, countries influenced by the common law legal tradition have courts of ordinary jurisdiction (and often the Supreme Court) which also review the legality of administrative acts. The Kosovan system has been inherited from the former Yugoslavia and is hybrid because while there are no courts specialized in administrative matters, the Supreme Court of Kosovo has a Special Chamber responsible for administrative law disputes.<sup>2</sup>

This report provides a general overview of the administrative justice system in Kosovo and the main problems identified by the OSCE through analysis of the applicable law and monitoring of administrative court proceedings.<sup>3</sup> The concluding recommendations address the main concerns and shortcomings identified in the administrative justice system.

## II. THE ADMINISTRATIVE LAW FRAMEWORK IN KOSOVO

According to the Constitutional Framework for Provisional Self-Government in Kosovo (the Constitutional Framework)<sup>4</sup>, anyone "claiming to have been directly and adversely affected by a decision of the Government or an executive agency under the

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<sup>1</sup> For the purpose of this report, an administrative act shall be any decision issued by an administrative authority which produces legal effects on identifiable parties.

<sup>2</sup> See *The Civil Law Legal Tradition*, by John Henry Merryman (2<sup>nd</sup> ed. 1985), pp 85-89. Apart from judicial review of administrative law decisions in the Supreme Court, another form of external review of administrative decisions available in Kosovo is the Ombudsperson. See UNMIK Regulations 2000/38 and 2006/6.

<sup>3</sup> In July 2004, the Deputy Special Representative of the Secretary-General for Police and Justice and the Deputy Special Representative of the Secretary-General for Institution Building signed a Letter of Agreement entrusting the Legal System Monitoring Section of the OSCE Mission in Kosovo Department of Human Rights, Decentralization and Communities (former Department of Human Rights and Rule of Law) with the necessary powers to monitor all court proceedings in civil and administrative courts. This is the first OSCE report on the administrative justice system.

<sup>4</sup> UNMIK Regulation No. 2001/9, 15 May 2001, On a Constitutional Framework for Provisional Self-Government in Kosovo (the Constitutional Framework), amended by UNMIK Regulation No. 2002/9, 3 May 2002.

responsibility of the Government shall have the right to judicial review of the legality of that decision after exhausting all avenues for administrative review.”<sup>5</sup>

Under the Constitutional Framework, there are two major procedural mechanisms of control over the legality for administrative decisions: 1) administrative review, and 2) judicial review, which can only be sought after all stages of the administrative review have been exhausted.<sup>6</sup>

### **A. Administrative review**

Administrative review of administrative decisions is regulated by the Law on Administrative Procedure (LAP).<sup>7</sup> Pursuant to this law, any natural or legal person who has been adversely affected by an individual or collective administrative decision<sup>8</sup> may file a request for the administrative review of the decision before the body that issued it or an administrative appeal before the higher administrative body.<sup>9</sup>

The administrative body reviewing the request for review or the administrative appeal may either confirm, abolish or modify the administrative act, or instruct the administrative body to issue an act (if the administrative appeal was submitted on the grounds that the administrative authority refused to issue the act).<sup>10</sup>

### **B. Judicial review**

If the aggrieved party is dissatisfied with the final decision of the administrative authority, a judicial appeal may be filed with the Supreme Court under the Law on

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<sup>5</sup> Chapter 9.4.2, Constitutional Framework.

<sup>6</sup> As administrative proceedings may not always involve the “determination of a civil right” as provided for in Article 6.1 of the European Convention on Human Rights (ECHR), only under limited circumstances will this provision apply to administrative law cases. According to the European Court of Human Rights (ECtHR), “[w]hether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the state concerned.” (See *Konig v. Germany*, ECtHR, paragraphs 89-90). Thus, administrative proceedings may also fall within the scope of Article 6.1 if decisive of a private right. The ECtHR has found that the following rights encompass “civil rights,” as mentioned in Article 6.1: the right to a disability allowance; the right to practice a profession; a civil claim for compensation against the State.

<sup>7</sup> Kosovo Assembly Law No. 02/L-28 on the Administrative Procedure (LAP), promulgated by UNMIK Regulation No. 2006/33 on 13 May 2006, and entered into force on 13 November 2006.

<sup>8</sup> For the purpose of the LAP, an individual administrative decision is “any decision of public administration bodies which produce legal consequences per individual cases” whereas a collective administrative decision is defined as “any decision of public administration bodies which produce legal consequences for two or more natural or legal persons.” Article 2, LAP.

<sup>9</sup> Articles 129.1 and 129.2, LAP. The deadline for submitting the administrative review and appeal is 30 days from the day the notice on the decision (or on the refusal to issue it) was received or, in case of failure to undertake any action by the administration, 60 days from the day of the request for the initiation of the administrative proceedings (Article 130, LAP).

<sup>10</sup> Article 136, LAP.

Administrative Disputes (LAD).<sup>11</sup> The procedure may be initiated within 30 days from the day when the administrative decision was served to the party.<sup>12</sup>

The administrative decision may be challenged on the following grounds:<sup>13</sup>

- violation of the law;
- lack of jurisdiction of the administrative authority who issued it; or
- the factual situation was wrongfully established.

Following the submission of an administrative lawsuit, the Supreme Court shall determine whether the admissibility requirements have been met.<sup>14</sup> If the lawsuit is accepted, the Supreme Court may annul the administrative act without offering the appellee the opportunity to respond, if it finds that the act contains crucial shortcomings that prevent the assessment on its lawfulness.<sup>15</sup> When such shortcomings are not identified, the appellee may submit a response within the deadline determined by the Court.<sup>16</sup>

When accepting the lawsuit, the Supreme Court may either decide to annul the challenged administrative act and instruct the administrative authorities on how to decide or, if the act has already been annulled and the administrative body failed to comply with the Court's instructions, issue a judgment of a substitutive character, thereby replacing the original administrative act.<sup>17</sup>

In practice, the Supreme Court decides *in camera*, although the law allows for a hearing if the Court deems it necessary due to the complexity of the case or if one of the parties requests it.<sup>18</sup>

The LAD foresees the possibility for an extraordinary review of a Supreme Court decision when it has allegedly violated substantive or procedural law. The requests for extraordinary review are decided by a panel of five Supreme Court judges.<sup>19</sup> Finally, under certain circumstances, the "repetition of the court proceedings" (or rehearing) is also possible.<sup>20</sup>

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<sup>11</sup> Law on Administrative Disputes (LAD), Official Gazette of the Socialist Federal Republic of Yugoslavia (SFRY) No. 4, 14 January 1977. A final administrative decision shall be considered one issued pursuant to an administrative appeal or a first instance administrative decision against which no administrative appeal is allowed. See Article 7, LAD.

<sup>12</sup> Article 24, LAD.

<sup>13</sup> Article 10, LAD.

<sup>14</sup> Article 30, LAD.

<sup>15</sup> Article 31, LAD.

<sup>16</sup> Article 33.2, LAD. The deadline shall not be shorter than eight days and longer than 30 days.

<sup>17</sup> Article 39.2 and 39.3, LAD.

<sup>18</sup> Article 34, LAD.

<sup>19</sup> Articles 19.2 and 20.4, LAD.

<sup>20</sup> Article 52, LAD enumerates the circumstances under which a concluded case may be reheard.

### **III. SHORTCOMINGS IN THE APPLICABLE LAW**

Although there are different legal instruments applicable in Kosovo dealing with administrative law issues,<sup>21</sup> the two main laws regulating the administrative procedure are the recently promulgated LAP and the LAD. The present section notes some of the shortcomings in these laws.

#### **A. Law on Administrative Procedure**

The new LAP is an important reform of the administrative law system in Kosovo. In general, the law is a modern instrument and encompasses most of the core administrative law principles.<sup>22</sup> There are, however, some shortcomings.

##### **1) Determination of the applicable law in administrative procedure**

One of the concerns regarding the new LAP is that rather than completely replacing the previously applicable Law on Administrative Procedure from the Socialist Federal Republic of Yugoslavia (SFRY Law on Administrative Procedure),<sup>23</sup> it “shall supersede all the provisions of the applicable law with which it is in contradiction.”<sup>24</sup>

Since these two laws have the same scope of application and the development of an entirely new administrative procedure is the intent of the new law, logically the new law should entirely replace the SFRY Law on Administrative Procedure. By failing to state that it supersedes the old law, the new law creates confusion as both instruments remain applicable and for each administrative issue, the administrative authorities or court dealing with an administrative matter must determine what provisions of the old law (a document with 300 articles) still apply.

Consequently, the OSCE believes the new law should be amended to clarify that it supersedes the SFRY Law on Administrative Procedure.

##### **2) Legal remedies**

Another area where the LAP requires further clarification is legal remedies. The law provides for two different forms of administrative appeals: the review (to be submitted to the body who issued the act), and the appeal (submitted to higher bodies).<sup>25</sup>

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<sup>21</sup> E.g. UNMIK Regulation No. 2000/45 On Self-Government of Municipalities in Kosovo, 11 August 2000, and Law on Expropriation, Official Gazette of the Socialist Autonomous Province of Kosovo of Kosovo (SAPK), No. 21/78.

<sup>22</sup> According to the LAP, the essential administrative law principles to be observed by the administrative authorities when exercising jurisdiction are the principles of legality, balancing the public and private interests, equality before the law, proportionality, objectivity and impartiality, sustainability and predictability, openness, and subsidiarity. Although the principle of access to justice appears in Chapter 9.4.2 of the Constitutional Framework, it was not included in the law.

<sup>23</sup> SFRY Law on Administrative Procedure, 15 August 1986, SFRY Official Gazette, No. 47.

<sup>24</sup> Article 142, LAP.

<sup>25</sup> Articles 126 and 127, LAP.



However, the law failed to clarify whether the request for review and the administrative appeal are cumulative or alternative administrative legal remedies.

In addition, the LAP is not clear as to which administrative legal remedies shall be exhausted before seeking the judicial review of an administrative act. The law establishes that “[t]he interested parties may address the court only after they have exhausted all the administrative remedies of appeal.”<sup>26</sup> Since the law uses the expression “administrative appeal” for both the request for review and the appeal before the higher body, the provision could be interpreted as an obligation for the exhaustion of both administrative legal remedies prior to the submission of a judicial appeal. However, the lack of clarity in other provisions, could lead to a different conclusion.

For example, Article 132 of the LAP regulates cases in which the administrative authority either accepts or refuses to review the administrative decision, but does not regulate cases in which the administrative authority is silent upon a request for review. These cases seem to fall under Article 131 of the LAP which states that “[i]f [within 30 days] no decision on the appeal has been issued by the competent administrative body, the interested party shall be given the right to address the court [...]” This suggests the possibility of a judicial appeal 30 days after the request for administrative review, i.e., without exhausting all administrative legal remedies.

Considering that the terminology in the LAP is vague and arguably contradictory, the OSCE believes that it should be amended to clarify whether the request for review shall precede the administrative appeal.

### **3) Incorrect reference to the “law on civil procedure”**

Although a new law on courts is currently in the draft stage, at present the Law on Regular Courts<sup>27</sup> regulates the jurisdiction of the courts in Kosovo. Concerning administrative law cases, the Law on Regular Courts states that “[t]he Supreme Court decides on legality of final administrative enactment in an administrative contest.”<sup>28</sup>

Although most of the provisions in the LAP do not specify which courts shall deal with the judicial review of administrative decisions,<sup>29</sup> Article 131.2, establishes that if the administrative authorities fail to decide upon an administrative appeal within 30 days from its submission, the party “[...] shall be given the right to access the court in conformity with the applicable law on civil procedure.” By referring to “the applicable law on civil procedure”<sup>30</sup>, the LAP suggests that the judicial appeal should be submitted to the municipal or district courts, instead of the Supreme Court, whose jurisdiction regarding administrative cases is established through the Law on Regular Courts.

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<sup>26</sup> Article 127.4, LAP.

<sup>27</sup> Law on Regular Courts, SFRY Official Gazette, No. 21, 28 April 1978.

<sup>28</sup> Article 31.5, Law on Regular Courts.

<sup>29</sup> See, e.g., Article 127.4, LAP which states that “[t]he interested parties may address the court [...]”

<sup>30</sup> The applicable law on civil procedure is the Law on Contested Procedure (LCP), SFRY Official Gazette 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 35/91.

The rationale behind this provision in the LAP might have been linked to the current discussion towards the establishment of a new court, which would have primary jurisdiction over administrative cases.<sup>31</sup> Nevertheless, until such courts are established, the provision in the Law on Regular Courts applies. Thus, the OSCE believes that Article 131 of the LAP should be amended so that it does not refer to the “applicable law on civil procedure,” but only to “the applicable law.”

## **B. Shortcomings in the Law on Administrative Disputes (judicial review of administrative decisions)**

While there is a new law regulating administrative procedure, the law regulating the judicial review of administrative acts is still the 1977 LAD. As this law is outdated, the adoption of a new law on administrative disputes should be a matter of priority.<sup>32</sup>

### **1) Inconsistencies between the Law on Administrative Procedure and the Law on Administrative Disputes**

There are inconsistencies between the new LAP and the LAD. These conflicts must be corrected to implement the LAP.

The definition of an administrative act is one issue that must be addressed by a new law on administrative disputes. While the LAP defines individual and collective administrative acts as “any decisions of public administration bodies which produce legal consequences in individual cases” or “for two or more legal persons,”<sup>33</sup> the LAD contains a more restrictive approach by referring to an act by which the public authorities decide upon a “particular right or obligation of an individual or organization regarding an administrative matter.”<sup>34</sup> The latter definition does not cover cases where a person may sue the public administration for an administrative decision which violates the interests of the public welfare. This is expressly covered by the LAP.<sup>35</sup>

Thus, in conflict with the LAP, the LAD does not allow for a judicial complaint unless there has been a direct violation of an individual’s right or legal interest.

### **2) Lack of an oral hearing**

Although the function of an administrative court is different from that of a civil or criminal court,<sup>36</sup> in some jurisdictions administrative tribunals also decide questions of fact. This is the case in Kosovo since the Supreme Court, apart from reviewing the

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<sup>31</sup> The Supreme Court would function as an appellate court for administrative cases.

<sup>32</sup> The LAD contains references to institutions that no longer have jurisdiction in Kosovo (e.g. Article 3 LAD refers to the Supreme Military Courts and the Federal Court).

<sup>33</sup> Article 2, LAP.

<sup>34</sup> Article 6, LAD.

<sup>35</sup> Article 35.3, LAP.

<sup>36</sup> In contrast to civil and criminal courts, administrative courts usually decide the lawfulness of an administrative act, which has already been reviewed at the administrative level, without a need to determine issues of fact.

lawfulness of the act, can make factual inquiries and may issue a new ruling based on its new factual determinations during the administrative dispute.<sup>37</sup>

According to the LAD, administrative disputes may be decided *in camera* and an oral hearing is not mandatory. Typically, the Supreme Court only holds hearings in complex cases or upon request of the parties. In practice, the Supreme Court decides the vast majority of administrative cases without an oral hearing, even when determining questions of fact.

While a court hearing may not be essential when the administrative court decides questions of law, the situation is different when the court also determines facts. This is the position of the European Court of Human Rights (ECtHR), which held that “[...] in proceedings before a court of first and only instance the right to a ‘public hearing’ in the sense of Article 6.1 of the ECHR entails an entitlement to an oral hearing unless there are exceptional circumstances that justify dispensing with such a hearing [...]”<sup>38</sup> Therefore, since it is the only judicial court presiding over administrative cases, the Supreme Court should hold a hearing when it determines questions of fact in administrative law cases.

In light of ECtHR case law, and since the Supreme Court of Kosovo is the only court reviewing administrative decisions, the OSCE believes that the LAD should be amended to require the Supreme Court to hold oral hearings when determining facts.

### **3) Lack of an effective and impartial appeal from Supreme Court decisions**

Another shortcoming in the LAD arises since the Supreme Court is the only court deciding administrative law disputes, there is a limited possibility of appeal.

According to applicable law, it is possible to file a request for extraordinary review of Supreme Court decisions in administrative cases. The request may only be based on a violation of the law and is decided by a panel of five judges.<sup>39</sup> That these appeals are decided upon by the same court which issued the original decision (even if with a different panel) raises questions as to whether the appeal is effective or impartial.

Furthermore, due to a lack of judges on the Supreme Court, civil and criminal judges, who are less specialized than administrative judges who issue the original decision, also decide appeals to the Supreme Court.

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<sup>37</sup> See Article 39.3, LAD, which states that “[...] the court can find out what is the real state of facts and on the base of that declare a judgment or decision.”

<sup>38</sup> *Valova, Slezak and Slezak v. Slovakia*, App. No. 44925/98 (1 June 2004), paragraph 63. However, “where a tribunal is only called upon to decide on questions of no particular complexity” an oral hearing may not be required under Article 6.1, ECHR. *Id.* at, paragraph 64. In another case involving an administrative dispute, the ECtHR stated “[...] the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained.” *Bakova v. Slovakia*, App. No. 47227/99 (12 November 2002), paragraphs 30 to 32. There, the ECtHR held that a non-public hearing before a judicial court to which the plaintiff appealed an administrative decision regarding a property registration claim violated Article 6.1, ECHR. *Id.* at paragraphs 32 to 36.

<sup>39</sup> Articles 18 and 45, LAD. See also Article 20.5, LAD.

#### **4) Lack of interim measures**

Interim measures are important legal mechanisms to prevent irreparable damage while a case is pending a final court decision. In the administrative field, such measures can be even more important due to the discretionary powers of the administrative authorities.

Unfortunately, the LAD contains no provision allowing for the issuing of an interim measure while an administrative case is pending before the Administrative Chamber of the Supreme Court. This gap is particularly troubling because the law expressly states that an administrative lawsuit shall not suspend the execution of the administrative act against which it has been lodged.<sup>40</sup>

Furthermore, although the LAD allows for suspension of the execution of an administrative act until a final court decision, the decision on the suspension is made by the administrative authority and there is no possibility to challenge such decision through a judicial appeal.<sup>41</sup> Thus, there is a risk that the execution of administrative acts pending judicial review cause irreparable damage to the individuals affected.

#### **IV. PROBLEMS WITH ADMINISTRATIVE DECISIONS**

Although the OSCE did not directly monitor the decision-making process at the administrative level, through an analysis of cases pending at the Supreme Court, the OSCE has concerns related to these administrative proceedings.

##### **A. Insufficient reasoning of administrative decisions**

Despite the legal requirements for a reasoned administrative decision that contains a summary of factual findings based on evidence submitted during the administrative proceeding,<sup>42</sup> the OSCE has noted that many administrative decisions fail to comply with these requirements. Of note, the OSCE has observed cases in which the Supreme Court, in assessing the legality of administrative acts, annulled the act based on lack of reasoning and referred the case back to the administrative authorities.

For example, the Department of Pension Administration (within the Ministry of Labour and Social Welfare) issued a decision on 12 May 2005 denying the plaintiff's request for eligibility for a disability pension because he did not have the required disability. The plaintiff appealed this decision stating that the administrative body did not correctly examine the evidence, as he had submitted documents including medical reports supporting his contention that he is a first degree disabled person. On 28 October 2005, the Board of Appeals at the Department of Pension Administration denied the appeal with the questionable justification that the plaintiff did not provide enough evidence. Both the first and second instance administrative decisions did not contain a summary of the

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<sup>40</sup> Article 17, LAD.

<sup>41</sup> Article 17.2 and 17.3, LAD.

<sup>42</sup> Article 84.2 c), LAP; see also Article 209.2, SFRY Law on Administrative Procedure.

factual findings based on the evidence submitted, or explanation as to why the submitted documents did not establish a disability.

In addition, the Centre for Social Work (CSW) - first instance administrative body - and the Institute for Social Policies of Kosovo - second instance administrative body - also issued poorly reasoned decisions in a custody case reviewed by the OSCE:

Following a request filed by the mother, on 8 January 2004 the CSW in Deçan/Deçane entrusted her with the custody of a child born out of wedlock.<sup>43</sup> According to the decision, while the mother claimed that the father had never shown any interest in the child, the father alleged that the mother had never allowed him to see his son. After hearing the father and the child, the CSW decided that it would be in the best interest of the child to stay with his mother. The CSW further determined that the father should meet the child once a month at the CSW in Deçan/Deçane. On 3 March 2005, the father appealed the decision claiming that it would be in the child's best interest to stay with his father, that the mother had never allowed him to have regular contacts with his son, and that a monthly visit would not allow him to have a normal relationship with his son. On 31 March 2005, the Institute for Social Policies of Kosovo partially upheld the decision of the first instance administrative body, only increasing the number of times the father would be allowed to contact his son from once to twice a month at the CSW in Deçan/Deçane. As a justification, the Institute for Social Policies cited the best interest of the child.<sup>44</sup>

Regardless of the outcome of the case, the reasoning of the two decisions at the administrative level was extremely weak, particularly in relation to the father's access to the child. Without explanation, the administrative authorities gave the father very limited access to the child without investigating his allegations that the mother had prevented him from seeing the child.<sup>45</sup>

According to applicable international standards, "[e]veryone has the right to respect for his [...] family life [...]" and "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."<sup>46</sup> In this case, the absence of a proper justification for the limited contacts between father and son and monitoring by the CSW resulted in an arbitrary interference with the father's and child's right to a family life.<sup>47</sup>

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<sup>43</sup> By the time the initial claim was filed at the Deçan/Deçane CSW, the child was five years old.

<sup>44</sup> On 10 May 2005, the mother filed an appeal against this decision with the Supreme Court requesting that the court reduces the number of visits from two to one a month.

<sup>45</sup> All contact between father and son at the CSW in Deçan/Deçane occurred in the presence of the mother, grandmother and one official from the CSW.

<sup>46</sup> Articles 8.1 and 8.2, of the ECHR. See also Article 9.3, of the Convention on the Rights of the Child, which states that "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

<sup>47</sup> According to the ECtHR, "[a]n interference with the right to respect for family life entails a violation of Article 8 unless it was 'in accordance with the law', had an aim or aims that is or are legitimate under Article 8.2 and was 'necessary in a democratic society' for the aforesaid aims." The Court further

## **B. Administrative decisions outside jurisdiction of administrative authorities**

Both the new and the previous laws on administrative procedure establish that no administrative authority should decide a matter outside its jurisdiction.<sup>48</sup> The SFRY Law on Administrative Procedure also states that a ruling issued in a matter that falls outside the administrative authorities' jurisdiction should be declared null and void.<sup>49</sup> These provisions are also a natural consequence of the general principle of legality.<sup>50</sup>

Despite these legal requirements, administrative authorities have issued decisions outside their jurisdiction. The following case serves as example:

The case was held before the CSW in Prizren, where a couple filed a request, together with the uncle of the child, for the adoption of a 17 year old child by the uncle and his wife. The child in question had always lived together with his parents, sisters and brothers. On 15 September 2004, the CSW in Prizren ordered that the necessary documents to initiate the procedure be submitted by the requesting parties. On 27 December 2004, the CSW refused the request for adoption on the grounds that that the child had parental care. Following an appeal filed by the parents and uncle of the child, the Institute for Social Policy of Kosovo upheld the decision of the CSW in Prizren with the justification that in the meantime, the child had turned 18 years old and, according to the applicable law,<sup>51</sup> was no longer eligible for adoption.<sup>52</sup>

Given that the child had parental care, the administrative authorities should not have decided upon the request but rather declared that they had no competence to deal with the matter.<sup>53</sup> Although the administrative authorities denied the adoption request, by

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stated that "the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the aim pursued [...]" *W. v. the United Kingdom*, ECtHR, 8 July 1987, paragraph 60.

<sup>48</sup> Article 21.1, SFRY Law on Administrative Procedure. The new LAP states in Article 12 that once a request has been submitted, the administrative authority shall establish whether it has competence to deal with the case. Article 18.1, LAP further establishes that "[i]n cases when natural and legal persons, by mistake, submit requests to a public administration body, which has no competences over the subject of the request [...] the public administration body to which the request is wrongfully submitted shall in the course of two days upon receipt, reach a decision declaring its non-competence over the matter [...]."

<sup>49</sup> Article 267.1, SFRY Law on Administrative Procedure, and Article 92 b), LAP.

<sup>50</sup> Article 4, SFRY Law on Administrative Procedure; Article 3, LAP.

<sup>51</sup> Article 140.1, Law on Marriage and Family Relations, SAPK Official Gazette, No. 10, 28 March 1984.

<sup>52</sup> As of March 2007, the OSCE is not aware of any judgment of the Supreme Court concerning this case.

<sup>53</sup> According to applicable law, the CSW had the obligation to provide certain categories of children (e.g., children deprived of parental care, disrupted in their physical and psychological development, educationally neglected, and whose development is disrupted by family reasons) with protection (Article 14, Law on Social Protection, SAPK Official Gazette 18/76, 14 May 1976). Children who did not fall within the mentioned categories were therefore not covered by the jurisdiction of the CSW. The new Kosovo Assembly Law No. 02/L17 on Social and Family Services, promulgated by UNMIK Regulation No. 2005/46, 14 October 2005, describes in detail the competences of the CSW in regard to children (Articles 9 to 10).

issuing a decision in the case they gave the impression of having jurisdiction, in violation of the applicable law.

### **C. Failure to comply with applicable procedural rules**

As administrative law covers a wide variety of topics, in making administrative decisions, the administrative authorities must apply not only the LAP but also any special legislation regulating the matter. In fact, the LAP establishes that “[i]f part or whole aspects of administrative activity [...] are subject to regulation by a separate legislation, then the said regulation of such legislation shall prevail.”<sup>54</sup> In practice, however, the administrative authorities often fail to comply with these rules, leaving the aggrieved parties with no solution but to file a judicial appeal against the decision.

In one case involving a tax issue, an NGO filed an appeal with the Independent Review Board requesting review of the decision of the Tax Administration that had ordered it to pay a specific amount of taxes. According to the appeal, the first instance decision failed to specify the origin of the debt, and therefore violated UNMIK Regulation 2000/20.<sup>55</sup> As the Board failed to decide on the appeal, the taxpayer appealed to the Supreme Court.

In this case, according to the relevant UNMIK Regulation, after the taxpayer filed an appeal in writing to the Board, a hearing should have been held within 60 days. During this hearing, the taxpayer should have been given the opportunity to submit oral and written evidence to the Board, which should have notified the parties of its decision “within 30 days of the date of the conclusion of the hearing.” The taxpayer or the Tax Administration could afterwards file a judicial appeal against this decision.<sup>56</sup> As this procedure was not followed, the taxpayer filed an appeal to the Supreme Court.

The administrative authorities’ failure to comply with applicable legislation is problematic. Even if the parties can file a judicial appeal for the review of administrative decisions in violation of procedural rules, this should be a last resort. In fact, the judicial review of administrative decisions results in avoidable costs not only for the aggrieved party whose rights have been violated, but also for the administration which will incur the expenses of a judicial proceeding that could have been avoided.

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<sup>54</sup> Article 10, LAP. The SFRY Law on Administrative Procedure had a similar provision in Article 3.

<sup>55</sup> UNMIK Regulation No. 2000/20 On Tax Administration in Kosovo, 12 April 2000.

<sup>56</sup> *Id.*, Sections 7.6, 7.7 and 7.8.

## V. CONCERNS IDENTIFIED IN THE JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

### A. General problems

The current administrative law system in Kosovo exhibits influences from both the civil and common law legal traditions. While no courts specialize in administrative law cases in Kosovo, the Supreme Court has one Chamber handling administrative cases. Unfortunately, due to a lack of resources and shortcomings in existing legislation, the present system for judicial review of administrative decisions does not function properly.

Currently, two Supreme Court judges, assisted by two legal officers, handle all administrative law cases in Kosovo.<sup>57</sup> As the Supreme Court is the only court reviewing administrative decisions, it must handle cases on a variety of topics and is overloaded with claims that should not be dealt with by a Supreme Court but rather by a lower court (such as claims filed by pensioners against decisions of their respective ministry determining the amount of their retirement pension). Furthermore, since the total number of judges on the Supreme Court of Kosovo is only 13, often the two administrative law judges must also hear criminal or civil law cases.

As of the end of 2006, the backlog of administrative law cases pending at the Supreme Court was 2164 cases, and the number of cases received by the Supreme Court between January and December 2006 was 4856.<sup>58</sup> The inability of the Supreme Court to deal with such a high number of cases, while understandable given the limited resources allocated to these cases, adversely affects the ability of parties to have their cases adjudicated within a reasonable time as required by applicable international human rights standards.<sup>59</sup>

Poor case management is another factor that contributes to case delays. According to the Supreme Court, once the court issues a decision, the case file (including evidence) is sent back to the administrative authorities. If at a later stage the parties file an appeal, the Court requests the administrative authorities to re-send the administrative case file. Apart from the risk of loss of important documents and evidence, such practice causes delays in administrative proceedings.

### B. Substantive concerns

In addition to these general issues, the OSCE has also identified substantive concerns through its monitoring of administrative cases.

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<sup>57</sup> According to the President of the Supreme Court, before 1989 five Supreme Court judges exclusively handled administrative cases.

<sup>58</sup> Information provided by the President of the Supreme Court on 13 February 2007.

<sup>59</sup> While the ECtHR has ruled that under exceptional circumstances severe caseloads and limited number of judges may justify a delay, if temporary, States shall take appropriate measures to address these problems (see *Zimmerman and Steiner v. Switzerland*, no. 8737/79, judgment, 13 July 1983, paragraph 29; see also *Rybakov v. Russia*, no. 14983/04, Judgment, 22 December 2005, paragraph 31; *Löffler v. Austria*, no. 72159/01, Judgment, 4 June 2004, paragraph 57 and *Duclos v. France*, no. 20940/92, 20941/92 and 20942/92, Judgment, 17 December 1996, paragraph 55).



## 1) Jurisdiction

Any court must first decide whether it has jurisdiction to hear a case before addressing the merits of the lawsuit. In administrative law, such assessment is even more important because it is done by the Supreme Court, the only and highest court reviewing administrative decisions in Kosovo. The concerns identified are described below.

### a) Custody cases

According to the Law on Regular Courts, the municipal courts have jurisdiction “to try disputes on taking care and bringing up of children who are born after the validity of the decision by which the marriage was dissolved, annulled or proclaimed as non-existing”<sup>60</sup> and the district courts are competent to make decisions regarding custody of a child in case of divorce, annulment or non-existence of marriage.<sup>61</sup>

However, when the child is born out of wedlock and the parents cannot agree on child custody, in the majority of cases<sup>62</sup> the decision is issued by an administrative authority, the CSW, which has the role of guardianship authority.<sup>63</sup> Since the CSW is an administrative authority, the LAP has been applied to child custody disputes arising from decisions of that institution. As a result, appeals against decisions of the CSW are filed with the Institute for Social Policies within the Ministry for Labour and Social Welfare (the second instance administrative authority), whose decisions are then appealed to the Supreme Court.

For example, on 25 November 2005 the CSW in the Municipality of Podujevë/Podujevo entrusted custody of a child born out of wedlock to the mother, while the father retained visitation rights. The father appealed, and the Institute for Social Policies in Pristine/Priština, the appellate administrative authority, on 28 December 2005 confirmed the first instance decision. The father appealed this appellate decision to the Supreme Court, which rejected the appeal on a legal technicality<sup>64</sup> on 20 December 2006.

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<sup>60</sup> Article 26.11, Law on Regular Courts.

<sup>61</sup> Article 29, Law on Regular Courts.

<sup>62</sup> In some cases, however, the municipal courts decide the question of custody of children born out of wedlock. For example, a mother filed a claim dated 03 February 2003 before the Municipal Court in Viti/Vitina requesting the custody for her three children who were born out of wedlock and then living with their father. Upon the request of the Municipal Court dated 28 January 2004, the CSW of Viti/Vitina provided a written opinion regarding the custody of the children on 12 March 2004, recommending that they should be entrusted to the father because he could offer them better living conditions. Based on this report, the Municipal Court of Viti/Vitina issued a decision dated 21 June 2006 denying the mother’s custody claim.

<sup>63</sup> According to the applicable law on Social and Family Services, guardianship authority “[i]s the function within the Centre for Social Work that is responsible for the protection of children” (Article 1.3 j). While the new Family Law of Kosovo (Law No. 2004/32, promulgated on 16 February 2006, UNMIK Regulation 2006/7), is silent on this matter, the old Law on Marriage and Family Relations (SAPK Official Gazette No. 10, 28 March 1984), expressly provided that “[i]f in case of separate life parents have no agreement on who shall the child be living with, such decision is taken by the institute of the guardianship [...]”

<sup>64</sup> The Supreme Court rejected the appeal on the grounds that the appellant did not provide a written authorization for his lawyer who acted on his behalf in the proceedings.

Consequently, at present there are three different courts hearing custody cases as first instance courts: municipal courts, district courts and the Supreme Court. This is of great concern because different procedures apply depending on the existence or non-existence of a marriage. While the applicable law does not specify which is the competent court to review custody decisions taken by the administrative authorities in cases involving children born out of wedlock, the OSCE believes that domestic law and international human rights standards require that in all cases regarding child custody the litigants should have the same procedural guarantees.

According to the applicable law, “children of parents who were not married at the time of birth, enjoy the same rights [...] as children born from parents who were married at the time of birth.”<sup>65</sup> The ECHR also states that “[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as [...] birth.”<sup>66</sup> The fact that there are different procedural guarantees<sup>67</sup> in custody cases depending on the marital status of the parents discriminates against the children.<sup>68</sup> Furthermore, the principle of equality before the law requires that similar cases should be treated equally.<sup>69</sup>

The OSCE believes that the Supreme Court should not accept jurisdiction of administrative cases for “children born out of wedlock.” Although the CSW are administrative authorities, their decisions on custody disputes affecting non-married couples should not be classified as administrative acts. In fact, rather than issuing an unilateral discretionary decision, in these cases the administrative authorities involved are acting as a quasi-judicial body and deciding upon a dispute between two individuals regarding a family law issue. By qualifying these decisions as administrative and accepting jurisdiction over these cases through administrative law, there is a violation of domestic law and international human rights standards since there are different procedures for custody cases depending on the existence or non-existence of a marriage. Of note, the custody cases involving children born out of wedlock in the Supreme Court are decided in a closed session, often without a hearing, which violates international human rights standards.<sup>70</sup>

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<sup>65</sup> Article 3.4, Family Law of Kosovo. The old Law on Marriage and Family Relations established the same in its Article 7.2.

<sup>66</sup> Article 14, ECHR. The ECtHR has never held as justified different treatment of a child born of wedlock (See, e.g. the ECtHR judgments in the cases of *Marckx v. Belgium*, 1979 and *Mazurek v. France*, 2000).

<sup>67</sup> Whereas the decisions of the municipal court may be appealed to two higher courts (the district court and the Supreme Court), the “children out of wedlock” cases, when decided by the SWC as first instance administrative authority, are only reviewed by one court (the Supreme Court).

<sup>68</sup> See also Article 2 a), Anti-Discrimination Law, which states that “[t]he principle of equal treatment shall mean that there shall be no direct or indirect discrimination against any person or persons based on [...] birth.” (Kosovo Assembly Law No. 2004/3 on Anti-Discrimination, promulgated by UNMIK Regulation No. 2004/32 on 20 August 2004).

<sup>69</sup> Pursuant to Article 26 of the International Covenant on Civil and Political Rights, “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [...] birth or other status.”

<sup>70</sup> Article 12.1 and 12.2, of the Convention on the Rights of the Child states that “State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child [...]. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child [...].”

In the absence of a clear provision regulating the jurisdiction over child custody cases involving children born out of wedlock, the Supreme Court should apply existing legislation regulating similar matters regarding child custody cases, and refer “children born out of wedlock” cases to the municipal courts.

### **b) Labour disputes involving civil servants**

Whether the Administrative Chamber of the Supreme Court has jurisdiction to hear labour disputes involving civil servants is an unresolved issue in the Supreme Court. The debate started with the promulgation of UNMIK Regulation No. 2001/36 On the Kosovo Civil Service.<sup>71</sup> The regulation provides for the establishment of an Independent Oversight Board (IOB) for Kosovo<sup>72</sup> and states that “[a] civil servant who is aggrieved by a decision of an employing authority [...] may appeal such decision to the Board [...]” after exhausting the internal remedies within the employing authority.<sup>73</sup>

The regulation does not explicitly state that decisions of the IOB may be directly appealed to the Supreme Court, but since a new administrative procedure has been established to regulate disputes involving civil servants, there apparently is a legislative intent for these disputes to follow an administrative procedure.<sup>74</sup> Indeed, Section 11.6 of the regulation states that “[n]othing in the present regulation shall affect a civil servant’s right to procedural review of a final administrative decision in accordance with the applicable law [...]”.

Furthermore, although municipal courts traditionally have presided over labour disputes (the relevant law states that municipal courts have jurisdiction over labour cases if they fall within the competence of the regular courts),<sup>75</sup> the Law on Regular Courts clearly established the subsidiary jurisdiction of the municipal courts in this regard. Therefore, the jurisdiction of other courts to try these disputes is not excluded by the Law on Regular Courts.

In light of the existing law, this issue should be resolved conclusively within the Supreme Court because there are labour disputes in the Supreme Court in which judges have improperly denied jurisdiction and unlawfully denied litigants access to justice.<sup>76</sup>

The following example illustrates problems caused by the conflicting positions of the Administrative Chamber of the Supreme Court regarding its jurisdiction to hear labour disputes involving civil servants.

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<sup>71</sup> UNMIK Regulation No. 2001/36, On the Kosovo Civil Service, 22 December 2001.

<sup>72</sup> Sections 7 and 11, UNMIK Regulation No. 2001/36.

<sup>73</sup> Sections 7 and 11, UNMIK Regulation No. 2001/36.

<sup>74</sup> Such an interpretation allows for a direct appeal to be filed with the Administrative Chamber of the Supreme Court.

<sup>75</sup> Article 26.9, Law on Regular Courts. The LCP regulates labour disputes in Articles 433 to 437.

<sup>76</sup> In the absence of clear regulatory guidance as to jurisdiction over labour disputes involving civil servants, the Supreme Court should resolve the existing uncertainty. The primary issue is what makes a case administrative. In this context, the nature of the body that issued the final administrative decision could be used as a criterion for a Supreme Court judgement on the matter. Analysing the nature of the IOB, how it was established, the lines of authority within the IOB, and the status of its members could help the Supreme Court decide the issue of its jurisdiction over labour disputes involving civil servants.

In a labour dispute involving five employees of the Vushtrri/Vučitrn Municipality,<sup>77</sup> the plaintiffs filed an administrative lawsuit in the Supreme Court requesting the annulment of the ruling of the Vushtrri/Vučitrn Municipal Assembly which upheld their dismissal, claiming that it had been unlawful. On 17 August 2004, the Administrative Chamber of the Supreme Court referred the claimants to the Vushtrri/Vučitrn Municipal Court, on the grounds that the dismissal ruling was not an administrative act and, therefore, the matter could not be treated as an administrative dispute. Following the judgment of the Supreme Court, the plaintiffs filed a civil claim regarding the same matter with the Vushtrri/Vučitrn Municipal Court. The first instance decision was appealed,<sup>78</sup> and eventually the case was again submitted (through an appeal) to the Supreme Court, which decided, on 29 December 2005, that the lawfulness of rulings of municipal assemblies dismissing its employees shall be decided by the Administrative Chamber of the Supreme Court. The Supreme Court further determined that the procedures and decisions by the regular courts should be overruled because they lacked jurisdiction to hear the case.

The two conflicting judgments of the Supreme Court are clearly problematic. Not only did the parties and court waste time and resources in litigating a dispute since 2004, but there may have been a violation of the plaintiffs' right to have their case adjudicated within a reasonable time.

## **2) Failure to assess exhaustion of administrative legal remedies**

A litigant must exhaust all administrative legal remedies before the Supreme Court will hear an administrative dispute.<sup>79</sup> Thus, when the plaintiff has failed to exhaust available legal remedies, the Supreme Court should dismiss the lawsuit. However, there have been cases where the Supreme Court heard an administrative law dispute when the litigant failed to exhaust available administrative remedies. The following property registration dispute serves as an example:

On 6 June 2005, the plaintiff requested the Directorate for Geodesy, Cadastre, Housing and Property within the Gjilan/Gnjilane Municipality, to register immovable property under his name. On 15 July 2005, the Directorate notified the plaintiff of its refusal to proceed with the registration, and on 15 August 2005 the plaintiff filed an appeal with the Supreme Court against this decision. On 27 July 2006, the Supreme Court annulled the Directorate's decision although the claimant had not submitted the case to the second instance administrative authority.

The registration of property rights is regulated by the Law on Cadastre.<sup>80</sup> Under the law, if the Municipal Cadastral Office rejects the request to register a change in the Cadastre, the aggrieved party may either request it to reconsider its decision or file an

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<sup>77</sup> According to the definitions in Section 1 of UNMIK Regulation No. 2001/36, the employees of a municipality shall be classified as civil servants.

<sup>78</sup> The decision of the Municipal Court Vushtrri/Vučitrn was confirmed by the Mitrovicë/Mitrovica District Court.

<sup>79</sup> Article 7.1, LAD.

<sup>80</sup> Kosovo Assembly Law No. 2003/25 on Cadastre, promulgated by UNMIK Regulation No. 2004/4 on 18 February 2004.

appeal with the Kosovo Cadastral Agency.<sup>81</sup> Since in the example described above, the plaintiff filed a judicial appeal without first appealing to the Kosovo Cadastral Agency (the second instance administrative authority), the Supreme Court should have dismissed the case.

## VI. LACK OF JUDICIAL REVIEW OF UNMIK AND KFOR ADMINISTRATIVE DECISIONS

The lack of judicial review of administrative decisions by UNMIK and KFOR in Kosovo has been identified as a problem in the past.<sup>82</sup> UNMIK was entrusted with the function of providing an interim administration of Kosovo.<sup>83</sup> Since 1999, no court in Kosovo has had jurisdiction to review the legality of administrative decisions by UNMIK or KFOR. Arguably, this has violated the right of individuals allegedly aggrieved by such decisions to an effective legal remedy.

According to the Report of the Secretary-General on the United Nations Interim Administration in Kosovo to the Security Council, “[i]n exercising their functions, all persons undertaking public duties or holding public office in Kosovo [are] required to observe internationally recognized human rights standards [...]” and in assuming its responsibilities UNMIK should be guided by “internationally recognized standards of human rights as the basis for the exercise of its authority in Kosovo.”<sup>84</sup>

In 2000, a new UNMIK Regulation<sup>85</sup> established that UNMIK and KFOR personnel shall be immune from jurisdiction of the courts in Kosovo. As the regulation did not limit this blanket immunity for UNMIK and KFOR,<sup>86</sup> individuals who claim their

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<sup>81</sup> Articles 19 and 20, Law on Cadastre.

<sup>82</sup> See *Opinion on Human Rights in Kosovo*, adopted by the European Commission for Democracy through Law (Venice Commission) in October 2004 and *The Disempowerment of Human Rights – based Justice in the United Nations Mission in Kosovo*, published in the Harvard Human Rights Journal, Volume 16, pages 95 to 146, by David Marshall and Shelley Inglis (2003).

<sup>83</sup> Article 10 of the United Nations Security Council Resolution 1244 (hereinafter UNSCR 1244), adopted on 10 June 1999, states that UNMIK was established under UNSCR 1244 “as an international civil presence [...] in order to provide an interim administration for Kosovo.” From its outset the core responsibilities of UNMIK included: “[p]erforming basic civilian administrative functions where and as long as required; [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government; [t]ransferring, as these institutions are established, its administrative responsibilities [...]; [and] [p]rotecting and promoting human rights.”

<sup>84</sup> See paragraphs 38 and 42 of the Report, S/1999/779, 12 July 1999, available at <http://www.un.org/Docs/sc/reports/1999/sgrep99.htm>.

<sup>85</sup> UNMIK Regulation No. 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, 18 August 2000. The compatibility of the mentioned Regulation with recognized human rights standards has been assessed by the Ombudsperson Institution in Kosovo in a Special Report published on 18 August 2000, available at <http://www.ombudspersonkosovo.org/doc/spec%20reps/pdf/sr1.pdf>. The report states in paragraph 23: “the main purpose of granting immunity to international organizations is to protect them against the unilateral interference by the individual government of the state in which they are located, a legitimate objective to ensure the effective operation of such organizations [...]. The rationale for classical grants of immunity, however, does not apply to the circumstances prevailing in Kosovo, where the interim civilian administration [...] in fact acts as a surrogate state.”

<sup>86</sup> Section 2.4 of the Regulation establishes that “KFOR personnel other than those covered under section 2.3 above [meaning, locally recruited KFOR personnel] shall be immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the

rights have been violated through administrative decisions by UNMIK or KFOR cannot seek redress from the courts in Kosovo.<sup>87</sup> In recent years, the OSCE has provided several examples of cases in which individuals who claimed that their rights had been violated by administrative decisions of the interim administration did not have access to a judicial legal remedy.<sup>88</sup>

Another remedy against alleged violations of applicable human rights standards is the possibility to file a complaint with the Ombudsperson. Although its recommendations are not binding, under its original mandate the Ombudsperson could review complaints against UNMIK.<sup>89</sup> Under UNMIK Regulation 2006/6 On the Ombudsperson Institution dated 16 February 2006, the mandate of the Institution has changed. Currently, the Ombudsperson only has jurisdiction to handle complaints against Institutions in Kosovo. However, the Regulation establishes that “[t]he Ombudsperson Institution may enter into a bilateral agreement with the Special Representative of the Secretary-General on procedures for dealing with cases involving UNMIK.”

The establishment of the Human Rights Advisory Panel (the Panel)<sup>90</sup> is a positive development that has the potential to offset some of the shortcomings created by the diminished jurisdiction of the Ombudsperson. The Panel has jurisdiction to examine complaints by anyone claiming to be the victim of a human rights violation by UNMIK, as set forth in applicable human rights instruments, listed in Section 1 of the Regulation.<sup>91</sup>

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territory of Kosovo.” Section 3.2 of the same Regulation also determines that “[t]he Special Representative of the Secretary-General, the Principal Deputy and the four Deputy Special Representatives of the Secretary-General, the Police Commissioner, and other high-ranking officials as may be decided from time to time by the Special Representative of the Secretary-General, shall be immune from local jurisdiction in respect of any civil or criminal act committed by them in the territory of Kosovo.”

<sup>87</sup> Although Section 7 of UNMIK Regulation No. 2000/47 states that “[t]hird party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from "operational necessity" of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for,” only KFOR established such a Commission. While the Claims Office within KFOR is responsible for processing and adjudicating all claims against HQ KFOR, each Troop Contributing Nation (TNC) has jurisdiction to assess claims that arise from their activities, pursuant to their own rules, regulations and procedures. However, neither the decisions of KFOR’s Claim Office nor the decisions of TNCs may be appealed to a domestic court in Kosovo. Thus, if dissatisfied with a decision by KFOR’s Claim Office, the claimant may only appeal to NATO’s Claims Office, whereas TNC’s decisions may only be challenged through a lawsuit filed against the Ministry of Defence within the domestic courts of the country concerned.

<sup>88</sup> See OSCE *Review of the Criminal Justice System, September 2001-February 2002*, page 38, available at: [http://www.osce.org/documents/mik/2002/04/965\\_en.pdf](http://www.osce.org/documents/mik/2002/04/965_en.pdf); OSCE report on expropriations, titled *Expropriations in Kosovo* (December 2006), page 13, available at: [http://www.osce.org/documents/mik/2006/12/22676\\_en.pdf](http://www.osce.org/documents/mik/2006/12/22676_en.pdf).

<sup>89</sup> See Section 3, UNMIK Regulation 2000/38, On the Establishment of the Ombudsperson Institution in Kosovo, 30 June 2000.

<sup>90</sup> UNMIK Regulation No. 2006/12, On the Establishment of the Human Rights Advisory Panel, 23 March 2006.

<sup>91</sup> However, the Panel only has jurisdiction to investigate human rights violations that allegedly occurred after 23 April 2005, “[o]r arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights.” (Section 2, UNMIK Regulation No. 2006/12).

However, the Panel does not address the lack of a judicial remedy against administrative decisions by UNMIK. Furthermore, as an advisory panel, its findings and recommendations are not binding.<sup>92</sup> The Human Rights Committee expressed concern that the Panel lacks the necessary independence and authority required by Article 2.3 of the International Covenant on Civil and Political Rights (ICCPR). Consequently, the Committee recommended that UNMIK should reconsider arrangements for the human rights review of acts and omissions by UNMIK.<sup>93</sup>

Also of concern, while the Regulation establishing the Panel was promulgated on 23 March 2006, it was not appointed until January 2007. As of March 2007, the appointed members of the Panel had not taken their oath as required in the Regulation or started work.<sup>94</sup>

## VII. CONCLUSION

Inhabitants of Kosovo deserve and have the legal right to review of allegedly unlawful or arbitrary government action that affects their lives. The recent enactment of a new law on administrative procedure which follows international best principles is a positive development in Kosovo. However, monitoring by the OSCE of judicial review of decisions by administrative agencies has identified a number of areas of concern.

Regarding administrative decisions, in the majority of cases reviewed by the OSCE, administrative decisions exhibit poor or no reasoning. In fact, the Supreme Court referred many cases back to the administrative authorities due to poor or insufficient reasoning. This is positive in that the Supreme Court is proactive and refuses to uphold poorly reasoned decisions.

More generally, judicial review of administrative decisions in the Supreme Court suffers from inadequate legislative framework and insufficient number of Supreme Court judges available to preside over administrative law cases. While the number of administrative cases filed over the last six years has been increasing, the number of Supreme Court judges working in the Administrative Chamber of the Supreme Court has remained at two.

Regarding judicial review of administrative acts in particular areas, the OSCE is concerned by the discriminatory treatment of children born out of wedlock when there is a dispute regarding custody. More specifically, all children – whether born in or out of wedlock – should be treated similarly and custody disputes should be decided by the courts as a family law issue rather than by administrative agencies. In addition, the Supreme Court has been inconsistent in the assessment of its jurisdiction over labour disputes involving civil servants.

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<sup>92</sup> According to section 17.3 of UNMIK Regulation No. 2006/12, “the Special Representative of the Secretary General shall have exclusive authority and discretion to decide whether to act on the findings of the Advisory Panel.”

<sup>93</sup> See section 10, Concluding Observations of the Human Rights Committee, 87th session, UN Doc. CCPR/C/UNK/CO/1, 14 August 2006.

<sup>94</sup> Section 6, UNMIK Regulation No. 2006/12.

Finally, the absence of judicial review of UNMIK and KFOR administrative decisions is problematic. A plaintiff who claims that a governmental entity (either international or local) has violated the law through an administrative act should have the ability to submit a complaint to an impartial and independent court.<sup>95</sup>

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<sup>95</sup> See Article 2.3, of the International Covenant on Civil and Political Rights.



## **VIII. RECOMMENDATIONS**

### **To the Legislature:**

- Article 142 of the new Law on Administrative Procedure should be amended specifying that it supersedes the SFRY Law on Administrative Procedure.
- Section IX of the new Law on Administrative Procedure should be amended to clarify whether the request for review shall precede the administrative appeal and what administrative legal remedies should be exhausted prior to submission of a request for judicial review of an administrative act.
- The reference to the “applicable civil procedure law” in Article 131.2 of the Law on Administrative Procedure should be deleted.
- Within a future legal framework, the Supreme Court should function as an appellate court and only have jurisdiction for the review of the lawfulness of decisions taken by a first instance court with regard to administrative cases.
- A new law on administrative disputes should establish the possibility of interim measures pending a final court decision on an administrative law case.
- A new law on administrative disputes should make an oral hearing mandatory in cases where the courts decide questions of fact.

### **To the Ministry of Public Services and Administrative Authorities:**

- The Ministry of Public Services should launch a public campaign with the aim of informing Kosovo residents about their rights pursuant to the new Law on Administrative Procedure.
- The Ministry of Public Services should organize mandatory trainings for civil servants on the new Law on Administrative Procedure.
- The administrative authorities should ensure that administrative decisions are well reasoned.
- The administrative authorities should not decide cases outside their jurisdiction.
- When issuing decisions, the administrative authorities should comply with the applicable procedural rules.

**To the Supreme Court, the Kosovo Judicial Council, and the Kosovo Judicial Institute:**

- The Supreme Court should refer any custody case related to children born out of wedlock filed as an administrative dispute to the competent municipal court.
- The Administrative Chamber of the Supreme Court shall conclusively decide that it has jurisdiction to hear labour disputes involving civil servants.
- Before deciding the merits of a case, the Supreme Court should assess whether the plaintiff exhausted the available administrative legal remedies.
- The Kosovo Judicial Institute should organize trainings on the new Law on Administrative Procedure.
- The Kosovo Judicial Council should increase the number of Supreme Court judges handling administrative law cases.

**To UNMIK:**

- UNMIK should provide all necessary support to the Human Rights Advisory Panel to make it operational, and invite the appointed members to take their oaths so they can begin their work.