TRANSPARENCY OF LEGISLATIVE DRAFTING IN KOSOVO

An analytical view on transparency practices followed by the Government and Assembly of Kosovo in legislative drafting
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## CONTENTS

Summary........................................................................................................................................3
Methodology of work...................................................................................................................4
The right of access to public information..................................................................................5
The right of the public to participate in preparing the legislation.........................................6
Comparing practices of Republic of Kosovo with European practices.......................................9
Transparency in institutions of Republic of Kosovo in developing legislative policies and transparency towards interest groups.................................................................9
General information on legal practices in Republic of Kosovo.............................................9
Rules of Procedures of the Government of Kosovo and other legal acts of the executive branch.................................................................10
Legislative drafting practice in Kosovo vs transparency........................................................11
Institutional responsibilities of units responsible to develop and process the legislation in the government.........................................................................................13
Office for Services of Legal Assistance in the Office of Prime Minister of Kosovo............13
Departments/Legal Offices at ministerial level........................................................................14
Legislative desk of the Coordination Secretariat in the OPM..................................................14
What standard has been achieved in the executive branch?...................................................15
Rules of procedure of the Assembly of Kosovo......................................................................16
How could the procedure for public participation in legislative drafting look like?..............17
Making administration include public interventions in legislative drafting..........................18
Why more transparency in legislative drafting?......................................................................18
A view on legislative practices in the region............................................................................20
The case of Republic of Albania...............................................................................................20
The case of Republic of Croatia...............................................................................................20
The case of Republic of Slovenia.............................................................................................21
The case of Republic of Bosnia and Herzegovina.................................................................21
Advocating for participation in legislative drafting.................................................................22
Conclusions and recommendations.........................................................................................23
Conclusions..................................................................................................................................23
Recommendations to the Government of Republic of Kosovo................................................24
Recommendations to the Assembly of Republic of Kosovo.....................................................24
Recommendation to interests groups and other organisations:.............................................24
References....................................................................................................................................26
Summary

Since the establishment of international administration of the United Nations in Kosovo legislative drafting was and continues to be a continuous challenge as regards to the quality, quantity and, in particular, lack of transparency of the decision making in legislative drafting. As far as the form and content is concerned, the legal acts of either local or international institutions, have faced the lack of strategies, knowledge and techniques of legal writing, work experience and recognition of targets on where should be reached with the new and/or amended legislation. In sum, ever since the establishment of international administration in Kosovo, legislative drafting and participation of interest groups in the process leave much to be desired.

This study will, inter alia, address the legislative drafting in the executive and legislative branches of the Republic of Kosovo and particularly legislative drafting vis-a-vis transparency in legislative drafting, and inclusion of interest groups in the process. In this regard, this publication will address the legal basis that ensures (or does not ensure) transparency, as well as forms and phases in which the consultation takes place, practices that are followed by other countries, fundamental principles of transparency in legislative drafting not provided by national institutions and so on.

This research will not address drafting of legal acts adopted at the level of local government.

It is already clear that this research will particularly address the issue of transparency in preparing draft laws and exceptionally bylaws, in determining legislative agenda vis-a-vis participation of interest groups in the process, discussions with the public and so-called “groups of interest” in different phases and so on. It will also briefly address the lack of “experts’” discussions within institutions when drafting legal acts.

This research includes analyses of legal acts regulating legislative drafting, like Constitution of Republic Kosovo and Assembly, administrative instructions adopted by the government on legislative drafting, opinions of interviewees involved in legislative drafting, regulation of the form and methodology of legislative drafting and processing, as well as persons that have direct interests in knowing and applying the legislation in practice.
Methodology of work

The research for this publication was conducted between February 2010 and July 2010. Researchers updated the information of this publication in April – July 2011. During this period, our institute met and conducted interviews with different interest groups in Kosovo that are included in legislative drafting, business groups and legal experts. Major information inputs for the paper were received from government officials, business organisations and businesses, workers’ organisations and so on.

Drafters have also collected and consulted data and materials, such as

(1) Rules of the Procedure of the Government and Assembly,

(2) Administrative instructions and other legislation,

(3) Literature, reports and relevant statistics on legislative drafting in Kosovo; and

(4) Other information provided in interviews
The right of access to public information

Access to public information is the first step to ensure an open public administration. This right is extremely important since access to public information is a prerequisite for public participation in the work of state administration. This access, inter alia, provides the citizens the opportunity to know the content of legal acts prepared by the state administration and this, in turn, facilitates the opening of the administration to public participation in decision making process. In fact, participation is not secured only by providing access to information, but provision of access to public information entails in itself the democratic function of this right.

The other important dimension of the function of access to public information relates to the right that this principle provides for supervising the work of public administration.

Third dimension has to do with how important the access to information is for businesses and public since they enable them to know which decisions are planned to be and which affect their interests.

Fourth dimension of the right of access to public information has to do with the reform of governance and inclusion of e-governance and the interconnection this may create with the administration, public, media and citizens in general.

Comparative aspects of the right of access to public information: according to the author David Banisar, more than 50 countries have already regulated the right of access to public information and more than 30 other countries are in the process of created norms to regulate this right. Among the first countries to have regulated access to public information is Sweden (1766), Finland (1951), US (1966). This early legislation includes at least the right of access to official documents, right to public hearing of court sessions, right of access to parliamentary sessions and freedom of expression of civil servants. Different from these states, Germany and Switzerland are the only western countries not to have adopted such legislation.

The right of access to public information is also regulated with Article 255 of the EU Treaty of Amsterdam on the establishment of European Communities which defines the right of access to public information. This right stemming from the EU Treaty includes EU institutions, such as European Parliament, the Commission and Council of the EU. It is important to emphasize that the Case law of the European Court of Justice has developed a broad interpretation of the right of access to public information by setting only a few limitations to this principle. Although the principle of transparency is yet to be recognized by this court as a basic principle of the EU law, the right of access to information, as one of the forms of transparency, is becoming more and more important.

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1 See Amaryllis Verhoeven, The right to information: A functional Right? Published in May 2000.
2 Considering the nature of this publication, authors will not enter into further analysis of principle of access to public information. Also, for the sake of further analysis of transparency in decision making and in proclaiming legal acts, authors will provide some comparative aspects of the right of access to public information.
4 Ibid.
5 See, EU Law, Texts, Cases, and Materials (Paul Craig & Grainne de Burca, 4th Edition)
Taking into account that only a well informed society can be part of debates and discussions and thus, give its opinion, Republic of Slovenia in Article 39 of its Constitution has determined that everybody has the right to obtain information of public nature.⁶

The right of the public to participate in legislative drafting

The right of participation in drafting legal acts includes the right of citizens to express their opinions, views, comments and proposals.⁷

Being aware that consultation with the public improves the quality of work and guarantees the democratic nature of decision making,⁸ the procedure to ensure participation in decision making should be ensured within a certain period of time during which the administration should come up with a response regarding the expression of opinions, views, comments and proposals of citizens/groups of interest.⁹

Involvement of public participation in legislative drafting enables the legislator to include a broader scope of information and opportunities.

In case the institution acts without participation of interests groups, as it currently happens in Kosovo, it risks ending up with less information and options. It happens very rarely, or casually that Kosovo institutions are open to groups of interests during legislative drafting. A rare example of this is the Draft Law on Freedom of Association in Kosovo, for which some nongovernmental organizations were invited to contribute in the drafting process.

It should be underlined that there is a collision between transparency in legislative drafting, as a democratic principle and effectiveness of public administration in general, and particularly in Kosovo.

It is thought that public inclusion in legislative drafting within the executive makes administration less effective, since citizens' participation increases the level of procedural requirements that need to be addressed in order to ensure such participation in the legislative process.

These views present thoughts that are based on the old way of functioning of state administration. Modern ways of administration functioning are not divided from citizens demands and their work is based on the cooperation with citizens.¹⁰ Public participation in this process increases the quality of legal acts and in this way inclusion of the public in legislative process does not only create a hierarchical structure of organisation.¹¹

In general, democratic principle of public participation in legislative drafting is less present in practice than the right of access to public information.¹² The core of democratic right to participate in drafted legal acts differs from one country to another – below we will give some examples and analyses.

Participation in drafting legal acts has been invention of new legislatures in western countries. These standards are guaranteed in a significant of democratic countries.
This right is ensured either through petitions, referendums, and presentations of public opinions and adoption of constitutional standards of the country.

The right of participation in drafting legal acts within the executive branch is a new phenomenon that is found in Central European countries which provide for the participation of interest groups in the early stages of legislative drafting. In the past, this democratic principle of participation in legislative drafting was not considered necessary, which in a sense creates a high level of democratic deficit of state (the same may be said for Kosovo where such a thing is considered unnecessary).

European Union has undertaken persistent steps to enhance public participation in decision making processes and and drafting legal acts by these institutions and by the national level of member state institutions that exercise such responsibilities. The main document that addresses public participation in the lawmaking of EU institutions is “the European governance policy instrument” which defines that the EU legal order should respect the minimum standards of public participation in decision making procedures of public authorities.13

Mandelkern’s report as one of the key documents for the reform of decision making and inclusion of citizens in this process has established the framework for promoting public participation and decision making process related to the legislation.14

This document as early as in 2001 determined that all EU member states as of 2003 should promote appropriate procedures for public participation in decision making within executive institutions.15 Until now most of the EU countries have regulated procedures for public participation in legislative drafting, a very small number of them are still preparing mechanisms that ensure this democratic standard.16 Case law of the European Court of Justice has also contributed in strengthening these standards by referring to Article 253 of the Treaty on European Communities.17

Different from Central European countries, Anglo-Saxon countries have known this principle for over 60 years now.18 In addition to these countries, Nordic countries like Denmark, Finland, Iceland, Norway and Sweden have efficiently ensured these democratic principles through administrative codes.19

In European practice20 and in most countries,21 public participation in consultations for legislative drafting includes the environmental and spatial planning law.

European Union recommendations are also similar to standards already ensured by the EU member states. EU member states should at least ensure public consultation in the legislative fields like:

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14 See report of Mandelkern Group on best legislative practices (the original name of the report in English: GROUP ON BETTER REGULATION, FINAL REPORT) at: http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf
15 Ibid.
16 Including Germany.
19 See Citizens as partners, supra, footnote 17.
20 Similarly United Kingdom has regulated public participation in developing legislation through its Code of Consultation Practice in writing, for further information see the Code: www.berr.gov.uk/files/file47158.pdf
22 Including Germany, Netherlands, Finland, Slovenia, Norway, etc.
a) Construction and standards of construction,
b) Environment,
c) The right of consumers (as much as it is possible)\(^{23}\)

Based on what is said above, practices of EU member states should be carefully studied and Republic of Kosovo needs to adopt the best EU practices and standards as suggested in the recommendations of the European Commission for minimum practices of public inclusion in the lawmaking.

The procedural aspect of public inclusion in preparing the legislation is key element of ensuring this democratic standard after the existence of political will to develop the legal basis to include the public in this process. Procedure to ensure this participation should be simple, transparent and possible. Contents of what the administration puts for consultation, method for providing public views on this content and the form in which public makes comments on the content should be defined beforehand.

Whereas the main part of this process is how administration responds to the public regarding the content in which they have intervened.

Public participation cannot include every field of regulation of social life. Some legal acts in some areas of responsibility should not be included under the democratic standard of participation in legislative drafting within the executive. These fields in particular include matters related to state security, fields related to confidentiality of information and classified and confidential documents, official secrets, national defence and security, since inclusion of public in these areas of responsibility will be an obstacle for the performance of important tasks by the state administration.

\(^{23}\) See supra, footnote 20
Comparing practices of Republic of Kosovo with European practices

Transparency of institutions of Republic of Kosovo in legislative drafting policies and transparency towards interest groups

Different from the provision of legal ground to ensure a transparent process (that will be analyzed below), on the other hand, each and every official should be familiar with the “audience” that the draft law is addressed to.\textsuperscript{24}

In Kosovo and elsewhere, understanding the needs and demands of the society is a process that requires deep knowledge of processes that the country and society have gone through and particularly economic development of the country, which also requires a professional qualification in order to achieve objectives that the public truly needs and would embrace.

In order to further understand the needs and level of legislative drafting, the drafter should share it with other colleagues, as it will be seen below; such a thing cannot happen due to the lack of efficient mechanisms on the side of the government and assembly to control the quality of draft laws. As result, there is no public debate on majority of draft laws; furthermore, they are not even discussed within institutions, except for discussions in working groups as it will be explained later (for this, see the section that addresses how the legislation is drafted in the executive branch).

General information on legislative practices in Republic of Kosovo

Access to public documents and decision making in Kosovo is generally difficult. For a long time, Kosovo society has not been able to apply this European and international standard since it faced a lack of political will on the side of Kosovo institutions and legal infrastructure does not provide for transparency in decision making in fields that are of utmost importance for citizens. All this because access to official documents and decisions in Kosovo until now was considered as a type of post festum information for citizens, since the information is only shared after decisions are already taken by institutions (or other information mainly related to budget spending and allocations). They are made public only after they are issued and directly affect interests of citizens at the moment they are promulgated, while citizens are not able to know them before the adoption and before they feel the consequences (legal acts have mostly negative consequences).

Information regarding the legislation and creation of mechanism for prior information and consultation does not a priori have to do with access to information, but rather with the inclusion of interest groups in decision making and their practical and professional contribution in this process. Interest groups are those that can best identify their needs for amending/ supplementing/ promulgating a draft law.

\textsuperscript{24} See the Chapter 3 of “Legal, Legislative, and Rule Drafting in Plain English” by Robert J. Martineu and Michael B. Salerno.
Rules of Procedure of the Government are a legal infrastructure that ensures legislative methodology in Kosovo within the executive branch. In addition to these rules, the Government has issued an Administrative Instruction on Drafting Laws and Bylaws which will be explained more in details in the next chapter of this paper.

In addition to the executive branch, the Assembly of Republic of Kosovo has also regulated the legislation process. Rules of Procedures of the Assembly are the fundamental act for this process, based on the Assembly Authority stemming from the Constitution of the Republic of Kosovo (before that, it was based on the Constitutional Framework of Kosovo). See the next chapter of this paper for more details on this.

Next sections of this paper will address and analyze these legal documents inasmuch as they help in addressing the issue of transparency in legislative drafting.

Rules of Procedures of the Government of Kosovo and other legal acts of the executive branch

Rules of Procedure of Government of Kosovo (applicable version published in the Official Gazette of Republic of Kosovo), hereinafter 'RPGK' is an internal legal act of the Government of Kosovo, which, inter alia, regulates aspects of legislative drafting in the executive branch. After the declaration of independence, Republic of Kosovo should have had its law on the Government which should have replace not only this Rules of Procedure but also UNMIK Regulation 2001/19 establishing the Executive Brach. This, however, has not yet happened.

In the “epoch” of Provisional Institutions of Self Government (hereinafter ‘PISG’), drafting of Rules of Procedure for the Government and application of provisions regulating legislative drafting has continuously gone through many challenges, among which were lack of political will as the most evident obstacle, lack of state building experience, lack of human capacities to meet the requirements stemming from this document, etc, and ultimately all these obstacles were reflected in an erratic practice of legislative drafting in the executive branch in Kosovo, the consequences of which are felt not only by the law enforcement institutions but by the entire society, social relations of which are regulated by these legal acts.

Background: It is widely known that Rules of Procedure of the Government in its early stages of application (during 2004) did not include at all provisions regulating legislative drafting in the executive branch.

25 See: http://www.kryeministri-ks.net/repository/docs/Rregullorja_e_Punes123.pdf
26 See: http://www.kryeministri-ks.net/repository/docs/Udhezim_Administrativ_Nr_14_per_Draftim_dhe_Shtojcat.pdf
27 It should be said that Assembly mostly comments on the draft laws submitted by the Government. The Assembly is not considered a powerful actor for new initiatives in lawmaking. There are only a few cases since the establishment of the Assembly of Kosovo where it drafted legislation in line with its legislative authority.
28 See: http://www.kuvendikosoves.org/common/docs/Z-Rregulllore%20e%20punes-shqip-20%20maj%202005-me%20hdrayshime.pdf
29 Such a paper is not available electronically. It may be found in the archives of the Office of the Prime Minister.
It was considered back then that it would be sufficient if the legislative drafting is regulated only with an Administrative Instruction, which pursuant to the principle of hierarchy of legal norms would have less legal force than the Rules of Procedure of the Assembly. In that case institutions were obviously unwilling to regulate the aspect of legislative drafting in the executive branch. This has to do with the then practice of drafting legislation in the most uncoordinated way (which does not mean that the process is better coordinated today, but at least today there is a mechanism established in the Office of Prime Minister which back then did not exist) where legislation was processed in government meetings without any prior elaboration.

Furthermore, legislative drafting in the executive branch in Kosovo at that time was completely inconsistent with the European practice.\(^3\)

Institutional infrastructure: Office of the Prime Minister currently has under its auspices the Office for Services of Legal Assistance (OSLA),\(^3\) which plays a major role in coordinating and defining legislative policies in the Government of Kosovo. It serves as consultative body for the Government, if necessary. In addition to that, each ministry has a legal department or legal office that is responsible to draft legislation in their area of competence and to process it further. After promulgation of a law, ministries or offices for legal assistance and services are competent to fully implement that legislation.

Legislative drafting practice in Kosovo vs transparency

Rules of Procedure of the Government define the way how to prepare the legislative agenda.\(^3\) This agenda (often called legislative strategy) by its nature and the possibility of implementation within defined deadlines seems like a wish list of the Kosovo executive that is sent to the Assembly of Kosovo. Assembly of Kosovo reviews the deadlines defined in this agenda and makes its work plan for legislative drafting.

It should be mentioned that in the period from 2005 onwards, the PISG have faced difficult challenges, such as, adoption of a large number of laws to respond to policies in order to implement “standards before the status of Kosovo” which later turned into “standards for the status of Kosovo” and all these policies affected by later processes forced Kosovo institutions to increase the demand for legislative drafting, thus not ensuring quality and transparency and “they were not even able to develop more than 50% of all recommendations from the legislative agenda.”\(^3\)

In 2006, with a Government Decision a working group was established to revise the entire methodology of legislative drafting in the executive branch. Among other things that would be addressed at that time was lack of transparency and non-inclusion of interest groups in the legislative drafting process. This initiative failed after it was presented to the Government, due to the lack of political interest and because of the desire to close institutions for interest groups.\(^3\)
Despite some interventions on RPGK in 2007, laws were and continue to be drafted without any preliminary studies and with no inter-institutional coordination. Furthermore, it seems that there was an unwritten practice that at least one law had to be adopted and sent to the assembly every weekly meeting of the government. Thus, the ambition to reach a standard in the number of laws disregarded and continues to disregard the standard of increased transparency in the work of institutions and in the quality of lawmaking.

Legal initiative: Line ministries and OSLA have the right of initiative to propose draft laws including those that are in the legislative strategy of the next year’s work plan of the government. Identification of needs for drafting legislation in line ministries/executive agencies or similar is not done based on any study or broader institutional and social consultations. In most cases, programs of external consultations direct and “sponsor” the drafted legislation, some of which are requirements stemming from regular reports on Kosovo’s progress towards EU integration. In most cases, such technical assistance programs in drafting legislation for Kosovo do not take into consideration any need of the society or existing legal culture in Kosovo and in most cases are not able to harmonize the new legislation with the one that has already been promulgated or that is being drafted.

Regarding the initiative of technical work for legislative drafting and for establishing an inter-ministerial working group (the functioning of other working groups will be analyzed further), Rules of Procedure of the Government defines:

The working group is consisted of at least five (5) persons but not more than seven (7) members. One of the members shall be from the Legal Office.

Among responsibilities for the working group defined under the RPGK is to conduct consultations with the public.

The RPGK does not set in any way how the “public” shall be involved in consultations, when does it happen and how the views/opinions/proposals of the “public” are incorporated. It is also unclear what “public” actually means and how this institution is defined by the legal officer who chairs the working group. Since most of the Rules of Procedure is initially drafted in English by foreign consultants, unfortunately not even the English definition is much of help since it refers to the same undefined concept of the “public”.

OSLA as the highest authority within the executive for quality control exercises its competence as set in Articles 32 to 36 of the Rules of Procedure, which do not specify any requirement or obligation for this office or working groups to ensure consultations of the government with interest groups. As seen in this provision, even if the inter-ministerial working group does not consult the “public”, there is no control of this criterion by any other higher instance, which could have been OSLA or any other government working group.

In addition, Article 35 authorizes the Government not to approve any draft laws that are not prepared in compliance with the RPGK.

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36 See Article 25.1 of RPGoK.
37 From its establishment, the Government has received technical assistance in legislative drafting mainly from donors like: USAID, BE, GTZ, DFID etc.
38 It implies the legal office of a ministry, since if it refers to the Prime Minister’s Office for Services of Legal Assistance, than the acronym OSLA would have been used.
39 Article 27.1.3 of RPGK.
Nevertheless, study conducted by our institute of official documents from government meetings has not found any law to have been rejected by the government for not being drafted in consultation with the public.

In addition to RPGK, the Government of Kosovo has adopted Administrative Instruction No. 14/2008 on Composing Draft Laws and Sub-legislative Acts. According to this instruction, government conducts internal and external consultations (see Article 6). The government has also defined that after conducting consultations the text is readjusted and prepared for further processing (see Article 6.1.4 of this Administrative Instruction).

However, despite the fact that this instruction strives to address the consultation with interest groups, as indeed happens in practice with implementation of RPGK, such acts remain unimplementable since they are generalized regarding the involvement of interest groups in legislative drafting in the executive branch. According to the content of Article 6 of above mentioned administrative instruction, it is not at all sure that the consultation occurs and it is not at all clear how the given suggestions are incorporated, how others are invited to participate in the process and how they are informed with the content of the act and eventually, whether their suggestions are taken into consideration and finally how it is determined on who will be part of interest groups in government working groups?  

Institutional responsibilities of units in the government responsible to draft and process the legislation

Office for Services of Legal Assistance in the Office of Prime Minister of Kosovo

Office for Services of Legal Assistance (OSLA) is established with UNMIK Regulation No. 2001/19, on 13 September 2001\(^4\)(Article 2 of the Regulation).

Duties and mandate of the office are defined with Annex 1 of this Regulation, where OSLA, inter alia, provides:

a) legal guidance, advisory services and expertise to the Executive Branch and other Provisional Institutions of Self-Government; and

b) Review all draft legislation to be submitted by the Executive Branch to the Assembly to ensure consistency with the applicable law in consultation with the Advisory Office on Good Governance, Human Rights, Equal Opportunity and Gender, and the Advisory Office on Communities, as appropriate.\(^4\)

In addition to this document, Rules of Procedure of the Government of Kosovo, determines a more detailed mandate and responsibilities for OSLA, including inter alia: coordination of legislative agenda, chairing working groups on drafting legislation on the initiative of OPM, chairing the second working group for drafting legislation, on the initiative of line ministries, drafting and sending draft laws and other cover letters to the Government Secretariat for further

\(^4\) http://www.kryeministri-ks.net/repository/docs/Pages_from_Udhezim_Administrativ_Nr_14_per_Draftim_dhe_Shtojcat.pdf
\(^5\) See Appendix 1 of this paper. Table of participation of interest groups and organisations in legislative drafting in executive branch of Kosovo.
\(^7\) Annex 1 of UNMIK Regulation No. 2001/19. All of the above mentioned offices under item (B) are integral part of the Office of Prime Minister of Kosovo.
processing, including comments made by the Donor Coordination and European Integration Agency, etc (this agency has already been merged within the Ministry of European Integration).

The way the office operates is that each legal officer coordinates a number of ministries, while the office is coordinated by the Office Coordinator and is lead by the OSLA Director.

Pursuant to the defined mandate, OSLA does not play a role in involving the public in legislative drafting, and subsequently does not ensure any public participation in developing draft laws, or comments thereof.

**Departments/Legal offices at ministerial level**

In absence of a Law on Government, Regulation No. 2001/19 and amendments made to this Regulation for years have, inter alia, defined the responsibilities of established ministries. Regulation provides the legal basis for developing the legislation for and by the line ministries.  

Every ministry has established a unit, either office or department. In the organisational aspect, departments have a more complex structure and have also a larger number of staff, i.e., legal officers.

Pursuant to Rules of Procedure of the Government of Kosovo, Ministries are responsible to draft legislation in accordance with their competences. Therefore, this responsibility falls mainly on offices/ departments established within respective ministries.

Every executive agency or line ministry harmonizes the content of legislation with budget requirements, thus harmonizing budget implications that a draft law may have on the budget of the agency of ministry that sponsors the draft law. Statement on budget implication is provided by the Ministry of Economy and Finance.

**Legislative desk of the Coordination Secretariat in the OPM**

Legislative desk of Coordination Secretariat is responsible for technical control of draft laws that are submitted for discussion at the government meeting, and it is responsible for submitting draft laws to the Assembly of Kosovo. This desk is administered by the Coordination Secretary, who is part of Office of the General Secretary in the Office of the Prime Minister of Kosovo. This desk has no mandate to contribute in drafting legislation and in particular, in addressing the transparency, therefore we will not analyze its functioning any further.

Regarding the submission of a law adopted by the government to the Assembly, it should be said that RPGK does not contain any timeframe that this office should uphold. There are different practices, ranging from the law on budget that is forwarded within the same day to Law on Prishtina which has not been forwarded for six months.

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44 Although the legislation drafted by each ministry should be in compliance with the responsibilities transferred from UNMIK, adopted by the Assembly and promulgated by the SRSG as the only authority vested with all three functions in Kosovo until the declaration of independence.

45 E.g. Ministry of Health, Ministry of Energy and Mining, Ministry of Environment, etc.

46 E.g., Ministry of Justice.

47 E.g., Ministry of Justice develops legislation in its area of responsibility, see UNMIK Regulation No. 2005/53.
**What standard has been achieved in the executive branch?**

According to the conducted interviews and careful review of public documents of Kosovo Government, transparency in issuing legislation should be viewed from several aspects:

a) Is there a legal infrastructure at the executive branch that provides for transparency in drafting legislation?

b) What are the impressions of interest groups?

c) What is the outcome of this situation?

Analyzing everything that is said above, we consider that there is no sufficient legislation in the Republic of Kosovo to facilitate substantial participation of interests groups in legislative drafting. On the contrary, even when there is participation, it is without any transparency and just 'for the sake of appearance'.

In the interviews conducted by our Institute, it was mainly found that in some cases business organisations addressed issues that were of interest for business to institutions that draft and implement legislation. Mostly, their requests were not incorporated so that they remain in the drawers of central institutions. Whereas, lately civil society organisations have participated in several working groups on drafting legislation, but apart from their presence they are not sure that their contributions will be incorporated in the legislation that will be promulgated in the future.

It is also unclear in what phase the government decides to consult civil society groups by inviting some of them and not opening the process for all citizens, but only for some civil society groups. This situation resulted in the complete lack of transparency in legislative drafting in Kosovo, and above all, lack of consultation with interest groups and incorporation of their views in the drafted legislation. Most importantly, the legislation that is meant for interest groups remains far from addressing the needs and requirements that exist in our country.
Rules of procedure of the Assembly of Kosovo

Rules of Procedure of Assembly of Kosovo, Article 45, paragraph 1 defines:

For the purpose of obtaining information on a subject under debate, a committee may hold public hearings of experts, public organizations, representatives of interests groups and other persons who can furnish information.

Paragraph 2 of the same Article defines:

The committee may enter into the general discussion with the persons furnishing information insofar as this is necessary to clarify the facts.

The content of this Article makes it clear that the Assembly Committee on its discretion may invite interest groups and interested persons to discussions on a legal act. The Assembly of Kosovo has provided very little possibilities for participation of interest groups in developing draft laws because it leaves to the discretion of assembly committees to invite groups of interests in decision making on legislative drafting only if they have the will to do so.48

It is only through the support of some technical assistance programs that the Assembly of Kosovo managed to benefit from open discussions with interest groups and professional institutions in order to advance the legislation developed by the Government of Kosovo and submitted to the Assembly. Such a case is the one related to the Labour Law, but suggestions given by professional groups were in most cases not taken into consideration by the deputies of Kosovo Assembly.

We should mention the recent NDI Kosovo Assembly Strengthening Program has provided a great contribution in improving and advancing procedures for adoption of legislation in Kosovo, in order to increase the quality in adopting laws. In this regard, the NDI Programme for Assembly aims to achieve two main objectives: increase the quality of laws adopted by the Assembly and enhance transparency in the work of Assembly related to the procedure of discussing, drafting and adopting laws for Kosovo.49

Implementation of these programs is in its early stages and in a medium-term they should need, inter alia, be sustainable and independent from the support of international organizations. It is very difficult to believe that the Assembly of Kosovo would find room to include professional groups in the process after the end of the support of technical assistance programs.

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49 Interview with Mr. Bardhyl Hasanpapaj from NDI Kosovo Assembly Strengthening Programme
How could the procedure for public participation in legislative drafting look like?

Since Kosovo institutions have not yet established the legal basis, based on the Rules of Procedure of Government and Assembly, as well as administrative instructions issued until now, it should be emphasized that for the needs of our country procedure for participation of public in lawmaking process should begin with discussions with the public at the moment of publication of the first draft of the legal act.

Publication of the draft law could be done in different forms, from the official gazette to less formal forms such as publication of materials in websites of executive agencies.\(^5\)

Publication of a draft law (or bylaw) by the Government of Kosovo should contain the legal grounds for issuing such an act, the text of the draft law, institutions that sponsor the legislation, a legal commentary on the provisions of draft law\(^6\) and deadlines when comments of the public should be submitted to the responsible institution.

In other steps of communication between the institution and interest groups, institution gathers comments of the public, as stated above, in accordance with defined deadlines during which the public can make interventions to the draft law.

In existing practices, in some EU member states this deadline for communication between institutions and interest groups/citizens on the draft law is set between 30 and 60 days (or more) during which interested parties can provide comments on the draft law after its publication for consultation. Then, the state institution collects and studies all interventions (comments).

Currently, no EU member state obliges its institutions to include by all means such interventions to the legal act. However, state administration should take such comments in consideration and should study them very carefully.\(^7\) If that would be ensured in Kosovo, even if not all comments would be taken into consideration, then merely putting the draft law for public discussion/intervention presents a more advanced transparency in legislative drafting in Kosovo.

\(^5\) For more information see: Modern Legislative Management, by Donny Barstow and Dale Barstow. This material is available at: http://www.mccinnovations.com/about_us/documents/ModernLegislativeManagement-Final.pdf

\(^6\) Commentary should at least contain the following information for the public: (a) purpose and objectives of the draft law; (b) clear and accurate reasons for solutions that the draft law provides; (c) alternatives studied by the institutions that developed the draft law; (d) experts involved in developing the draft law and model of legislation on which the draft law that is proposed to be discussed with the public is based upon. These information should be as detailed as possible, since giving brief and insufficient information does not help to enhance transparency in legislative drafting.

\(^7\) See, inter alia, Martin Shapiro, The Giving Reasons Requirement, 1992 page. 179.
Making administration to include public interventions in legislative drafting

The consideration that administration should give to public comments on certain legal text that is sent for comments is one of the most important elements towards transparency in legislative drafting. However, it still remains an open question to what extent the institutions are obliged to incorporate comments in the legal text? This, of course, remains one of biggest challenges of this democratic process since it is feared that:

1) They cannot be harmonized with one another,
2) It would paralyze the work of administration,
3) There would be influence of certain groups of interest to create more favourable environment for them.

However, at least at the EU level, Article 253 of the Treaty Establishing European Communities defines that community institutions are required to state reasons for the content of all regulations, directives and decisions. This provides enough possibility for each intervention made on a legal text to be compared with the final text and with the reasons stated by institutions in that legal content.

Why more transparency in legislative drafting?

Enhancing transparency in legislative drafting in the Republic of Kosovo could have some advantages.

Firstly, enhancing and advancement of transparency in decision making in general and in legislative drafting in particular, contributes to the quality of legislative drafting, increases approximation of the content of legal act with demands of the society and in particular, increases the responsibility of relevant institutions towards citizens.

In addition to these aspects, transparency in particular strengthens public participation in decision making process and makes interests groups part of the process and enables them to have “ownership” over the process.

If we look into broader aspect, freedom of information is also guaranteed with the European Convention on Human Rights and its Protocols, so the participation in the process also facilitates democratization processes of our society. Since this Convention is directly applicable in the Republic of Kosovo, there are no reasons why Kosovo institutions should not make sure to respect the standards defined by this Convention. In addition to this Convention, participation in decision making processes is a requirement stemming also from the International Covenant on Civil and Political Rights (ICCPR).
In the European Union, the principle of transparency in the work of institutions is defined with the Treaty of Amsterdam, Article 1 of the Treaty. This Article defines that decisions taken by the EU institutions are taken “as openly as possible and as closely as possible to the citizen”.

Transparency in legislative drafting is one of the principles of good governance. This transparency is essential for establishing legal security, economic and institutional development of any country, particularly of a developing country, such as Republic of Kosovo. Some EU member states even before accession to the EU and before proclamation of the Treaty of Amsterdam had taken into account transparency when adopting their legal acts.

In the US, principle of transparency in decision making is defined for the first time with the Administrative Procedure Act in 1946, which gives to citizens the right of consultation during the process of proclaiming legal acts by the state administration. Twenty years later, the US proclaimed the Freedom of Information Act of 1976 which defines that the government meetings shall be open to the public. Similar regulations may be found in legal culture of all Nordic countries. In the European system, it may be said that Nordic and Anglo-Saxon countries were the first to have regulated the right of access to public information.

Countries with a fragile democracy such as Moldavia and Bosnia and Herzegovina facing the lack of transparency in decision making processes, including the legislative drafting, have recommended special draft laws on transparency in legislative drafting; e.g., draft law on transparency in the decision making process.

Existence of such legislation in Kosovo would make sense only if that is viewed as

a) good opportunity for implementing the legislation for access to public information; and
b) demand to increase citizen participation in decision making process, particularly in the executive of Kosovo.

The way how institutions currently address the discussion on legislation makes one understand that inclusion in the legislative drafting process is viewed by the Kosovo institutions as:

a) a formal act
b) institutions are convinced that interest groups do not know their needs better than institutions, therefore, consultation is not necessary

these two views reflect the immaturity level of democracy in our country, the culture of institutional performance and lack of knowledge on how to better organize the lawmaking process in Republic of Kosovo and approximate the needs of the society with institutional policies.
A view on legislative practices in the region

Regional practices of participation of interest groups in legislative drafting also show a low level of transparency. However, some countries in the region show more advanced practices than Republic of Kosovo. This section of the paper will address in particular the implementation scale of one of the instruments ratified by countries of the region, the Aarhus Convention, which, inter alia, provides for public participation in decision making and access to public documents related to the legislation regulating environmental matters.

Some bodies have been institutionalized, such as, Business Advisory Body in the Ministry of Economy; National Labour Committee which represents employees, employers and institutions. This report identifies good space for continuing consultations that would include external actors. Although Republic of Albania has ratified the Aarhus Convention in 2001, it has not managed to extend the nature of requirements that this convention contains, not only in the field it applies, but also in other fields of functioning of central and local institutions of Republic of Albania.

The case of Republic of Albania

Rules of procedure of the Government of Albania for conducting consultations with entities outside the institutions are rather vague. In Republic of Albania there is no roadmap on how line ministries include external entities in consultation when drafting the legislation. In its absence, as is the case in the Republic of Kosovo, consultation is floppy both as regards to the quality and trust that interested entities may have that the institutions will reflect their interests in drafted legislation.

According to the same report, several fields were identified where there were ad hoc consultations, like in agriculture, health, business - particularly in regard to issuance of work permits to businesses, etc.

The case of Republic of Croatia

Although Republic of Croatia has not envisaged any particular form for participation of interests groups in consultation or legislative drafting process, Republic of Croatia being a signatory to the Aarhus Convention is obliged to adopt the requirements of this Convention. In this way, Republic of Croatia has provided for public participation in decision making in the field of environment by adopting a number of laws that provide for the application of standards of Aarhus Convention. For more information regarding the application of this Convention in the Republic of Croatia, see the prepared report.

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64 Draft Manual for drafting laws including an instruction for the legislative process in Albanian, 2003
65 In Kosovo such an institution is called Economic and Social Council, which covers the same responsibilities as the institution of Republic of Albania, it is as precondition for the existence of tripartite dialogue.
67 Aarhus Convention is a Convention proclaimed by UNICEF on access to information, public participation in decision making and access to justice on environmental matters, and was signed in Danish City of Aarhus in 1998. This Convention entered into force in 2001. The text of the Convention is available at: http://www.unece.org/env/pp/documents/cep43e.pdf
68 Report prepared on the application of Aarhus Convention in the Republic of Croatia: http://participator.zelenaistra.hr/pub/Participator/Novosti/Izvjestaj_o_primjeni_Aarhuske_konvencije_u_Hrvatskoj.pdf
The case of Republic of Slovenia


Law on access to public information in Republic of Slovenia defines the minimum standards of an open administration in Republic of Slovenia. However, this act does not include obligations of institutions for particular consultations regarding the legislative drafting in Republic of Slovenia. In fact, the right of consultation is usually included in specific areas of legislation, such as legislation on spatial planning, environment, etc. The right of participation of interest groups in consultations is still not regulated and remains dissipated.

The case of Republic of Bosnia and Herzegovina

Federation of Bosnia and Herzegovina, through its unique regulations for drafting legislation of institutions of Bosnia and Herzegovina (Official Gazette B&H, No. 11/05) has defined consultation procedures of institutions with the public and interested organisations regarding the legislative drafting.

These regulations oblige each and every institution individually to maintain a list of organisations and individuals interested in legislative drafting, which should be made available. This list is compiled based on requests that institutions receive from interested parties. In addition to this, institutions authorize a consultation coordinator.

Regulation also defines steps that institutions should follow in order to determine the minimum requirements for participating in consultations. Institutions also publish a list of acts planned to be drafted and for which the public shows interest.

Regulations define in what cases the public opinion does not have to participate, such as linguistic changes and grammatical aspects of legislation and legislation that codifies or unifies, reorganizes certain legislative provisions.

Regulations also include aspects of compensation of consultation, forms of consultation, aspects regarding who should be taken into consideration for consultation, such as media, lawyers’ professional community, prosecutors, judges and other professional associations.

Regulations also define deadlines when consultation may be conducted, which provide sufficient time for interested parties to contribute in the legislative drafting process.

Submission of comments, verbal presentation of such comments and their inclusion in the drafted legislation are also covered by these regulations. However, despite provision of such opportunity for participation, Article 23, paragraph 3, provides for the discretion of institutions regarding the incorporation or
rejection of such comments. Institutions should, however, provide a written report with reasons that have made the institution take such a decision for including or not including the interventions in the legislation. Such a decision should also be made available and should be public.

Regulations have defined circumstances under which institutions may exclude the possibility to consult with the public when preparing draft laws, particularly when they are dealing with emergent procedures, un-negotiated international obligations, when a court devalues a section of the law. In such cases, institution should provide to BiH Council of Ministers detailed reasons of such exclusion of public consultation. In cases when the law is processed in the Parliament, Council of Ministers should enclose reasons for excluding public consultation. In cases when institution has not given reasons of excluding public consultation, the Council of Ministers may decide not to include a draft law in the Council’s decision making agenda.

Although BiH has applied but not yet signed the Aarhus Convention, as stated above, from all the countries of the region it has made the most advanced steps towards public participation and consultation in legislative drafting process, not only in a few but in most areas of responsibility, except those areas where the possibility of public participation in legislative drafting is excluded.

**Advocating for participation in legislative drafting**

In order to develop the advocacy for participation in legislative drafting in Kosovo, interests groups should focus on increasing public participation in decision making.

Initially, as stated above, every legislative drafting should be preceded by a decision making process which should be transparent.

Since this does not happen in Kosovo and since such a process is not possible to occur in current phase of institutional and political development and maturity, interest groups should insist on creating different practices and on developing legal basis that would provide for participation in the process.

There is an essential difference between co-decision making and participation in legislative drafting process. In case of legislative drafting, it is the institution itself (Government or Assembly) that defines the problem, defines deadlines and manner of participation. In the case of co-decision making, both parties in the process, institution and interest group determine together the content of legislation and cooperate in finding formulas required by the society as defined in the legislation.

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80 Ibid, Article 27.
Countries like Canada, Finland and the Netherlands have defined forms for participation of interest groups in institutional decision making. In the Netherlands, in 2001 was established the Expertise Bureau for Innovative Policymaking. The main tasks of this bureau have to do with collecting know-how and information in developing decision making policies, including the legislative requirements. The website of this bureau acts in such a way that it facilitates a virtual meeting between the central and local institutions and the public.\footnote{See website of this bureau at: http://web.mit.edu/dusp.$\ddagger$etpp.$\ddagger$content.$\ddagger$projects.$\ddagger$index.html}

**Conclusions and recommendations**

**Conclusions**

Ensuring access to public information, participation in legislative drafting and active participation in the decision making process are some of the best examples of transparency of public administration.

There has not been any change regarding transparency, participation in decision making and interest group consultation despite the amendment of Rules of Procedure of the Assembly and adoption of new legislation after the declaration of independence.

Quality of draft laws and their adaptation to social needs are two essential requirements that affect the functioning of public administration.

The right of access to information on the activities of public institutions is one of the main pillars for ensuring transparency of institutions of the Republic of Kosovo.

Access to information and participation in the legislative drafting process presents the most functional mechanism of democratic control that citizens may have over the institutions of Republic of Kosovo.

Legislative drafting without participation of interest groups and other stakeholders undermines transparency and causes legal insecurity, lowers the quality of the law, etc..
Recommendations to the Government of Republic of Kosovo:

1) Government should adopt a special legal act to ensure participation of interest groups in legislative drafting, particularly in areas where participation is necessary;

2) Government of Republic of Kosovo should amend Rules of Procedure of the Government to include the role of Ministry of European Integration in drafting and checking legislation to ensure approximation of national legislation with the EU legislation;

3) Within a short time, the Government should adopt the Law on Government so that legislative drafting, forms and methods are defined by law. In particular, it should define the participation of public/interest groups;

4) Rules of Procedure of the Government should provide for participation of the public/interest groups in the very early stages of legislative drafting process.

5) To make electronic publication of draft laws of 2001 in a number of ministries, such as Ministry of Environment, Transport, Energy, Economy, Finance;

   To receive comments from interest groups

6) within 60 days and to hold open discussions about the received comments on draft laws;

Recommendations to the Assembly of Republic of Kosovo:

1) To ensure a sustainable legal base that would oblige assembly committees to debate publicly about every legal act that is adopted by this institution and not leave it to their discretion;

2) assembly committees should provide possibility for participation of interest groups and public in legislative drafting in the Republic of Kosovo;

3) to improve the level of public information and make draft laws available to interest groups and public, who want to be informed beforehand about draft laws that are being drafted;

Recommendation to interests groups and other organisations:

1) to initiate and put sufficient pressure on Kosovo institutions to ensure amendment of legislation that provides for their participation in legislative drafting, both in the executive and legislative branches;

2) at the level of organisations they are part of, or as organisations they should request to participate in legislative drafting;

3) to make concrete proposals for amending legislation and about the need of drafting new legislation any time they deem it appropriate, and in particular, before the preparation of legislative agenda of the Government of Kosovo.
### Table of participation of interest groups and organisations in legislative drafting at the executive branch of Kosovo

<table>
<thead>
<tr>
<th>Ministry</th>
<th>Number of laws that are being drafted for 2011</th>
<th>Number and name of organisations that participate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ministry of Trade and Industry</td>
<td>3</td>
<td>2 (OEK/AmCham))</td>
</tr>
<tr>
<td>Ministry of Labour and Social Welfare</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Ministry of Economy and Finance</td>
<td>2</td>
<td>0</td>
</tr>
</tbody>
</table>

This table includes only ministries which by nature of their work and responsibilities should be open for all interested parties.
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