

---

Warsaw, 16 March 2021

Opinion-Nr.: JUD-KAZ/397/2020

---

# **OPINION ON CONCEPT NOTE ON THE IMPLEMENTATION OF THE CODE OF ADMINISTRATIVE PROCEDURE AND PROCESS**

---

## **KAZAKHSTAN**

---

This Opinion was prepared based on comments received by Ms. Slavica Banic, former Justice of the Constitutional Court of the Republic of Croatia and peer-reviewed by Mr. Francisco Cardona-Peretó, *Magister Artis* in Public Administration and Ms. Alice Thomas, International Human Rights and Legal Expert

Based on an unofficial English translation of the Concept Note on the Implementation of the Code of Administrative Procedure and Process.

---



---

OSCE Office for Democratic Institutions and Human Rights

---

Ul. Miodowa 10, PL-00-251 Warsaw

Office: +48 22 520 06 00, Fax: +48 22 520 0605

[www.legislationline.org](http://www.legislationline.org)

---

*This Opinion is also available in Russian.  
However, the English version remains the only official version of the document*

## EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The Concept Note on the Implementation of the Code of Administrative Procedure and Process (hereinafter “the Concept Note” and “the CAPP” respectively) was prepared by the Ministry of Justice of Kazakhstan in co-operation with the World Bank and international experts following the adoption of the CAPP in June 2020.

OSCE/ODIHR welcomes Kazakhstan’s willingness to seek international expertise on the Concept Note and the CAPP respectively. The Concept Note covers a wide range of relevant issues in administrative law and views that OSCE/ODIHR share, such as removing internal administrative procedures from the scope of the CAPP, or excluding the public prosecutor from administrative proceedings. Other aspects should, on the other hand, be reconsidered. This includes the vaguely described allocation of competencies, and the discretion of administrative bodies.

More specifically, and in addition to what was stated above, OSCE/ODIHR makes the following recommendations to further enhance relevant parts of the Concept Note and the CAPP:

- A.** The CAPP should also apply with regard to procedures in sector-specific laws, in order for all administrative cases to be treated according to the same standards; exceptions should be clearly identified. Moreover, a special commission could be formed to examine sector-specific laws and harmonize them with the CAPP and with each other; [par. 33]
- B.** As outlined in the Concept Note, the allocation of competence between administrative bodies and other internal matters should be regulated outside of the CAPP, by a separate law or by-laws; [par. 39]
- C.** As indicated in the Concept Note, the time of entry into force of administrative decisions should be clarified in the CAPP; [par. 45]
- D.** To increase the understanding of administrative discretion, it should be more clearly explained in the Concept Note, and framed within the principles of administrative law. It should also be explained more how

administrative discretion can be scrutinized and how to avoid abuse and cases where authorities exceed the limits of administrative law; [par. 49]

- E.** The requirement for a proper reasoning of the administrative decision should be clearly defined in the CAPP, to allow for proper redress; [par. 52]
- F.** As regards the recommendation in the Concept Note on re-interpreting Article 9 par. 2 of the CAPP, consideration may be given to developing standards and regulations which may allow for so-called class actions, rather than barring them; [par. 58 ]
- G.** As recommended in the Concept Note, the public prosecutor should be excluded from administrative proceedings; [par. 64]
- H.** OSCE/ODIHR concurs with the proposal of the Concept Note, and recommends that rules on the execution of administrative decisions be elaborated on in the CAPP or in related legislation; [par.69 ] and
- I.** Mechanisms should be established to ensure a consistent application of the law, but rules ensuring a consistent application of the law may not infringe the independence of individual judges and courts. [par. 73]

Further recommendations below are marked in **bold**.

***As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation, as well as related documents to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.***

## TABLE OF CONTENT

### Contents

I.	<b>INTRODUCTION</b>	<b>5</b>
II.	<b>SCOPE OF REVIEW</b>	<b>5</b>
III.	<b>ANALYSIS</b>	<b>6</b>
	<b>1. INTERNATIONAL STANDARDS AND OSCE COMMITMENTS ON ADMINISTRATIVE PROCEDURE AND PROCESS</b>	<b>6</b>
	<b>2. THE CONCEPT NOTE AND ADMINISTRATIVE REFORM IN KAZAKHSTAN</b>	<b>9</b>
	<b>3. THE RELATIONSHIP OF THE CAPP WITH OTHER LEGISLATION</b>	<b>9</b>
	<b>4. PROSPECTS FOR THE DEVELOPMENT OF ADMINISTRATIVE JUSTICE LAWS</b>	<b>12</b>
	<i>4.1 Administrative Procedure</i>	<i>12</i>
	<i>4.2 Administrative Execution Proceedings</i>	<i>19</i>
	<i>4.3. By-laws and Internal Regulations</i>	<i>20</i>
	<b>5. IMPLEMENTATION OF THE CAPP</b>	<b>22</b>
	<i>5.1 Organization of Activities of Courts and Administrative Authorities</i>	<i>23</i>
	<b>6. FINAL COMMENTS</b>	<b>26</b>
	<i>6.1 Impact Assessment and Participatory Approach</i>	<i>26</i>
	<i>6.2 Gender-neutral Legal Drafting</i>	<i>27</i>

Annex: Concept Note on the Implementation of the Code of Administration Procedure and Justice

## I. INTRODUCTION

---

1. On 4 December 2020, the Ministry of Justice of Kazakhstan sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a request for legal review of the Note on the Concept of Implementation of the Code of Administrative Procedure and Process and the Development of the Institute of Administrative Justice and Administrative Procedure (hereinafter “the Concept Note”). The Concept Note was developed by the Ministry of Justice of Kazakhstan in cooperation with the World Bank and international experts.
2. On 15 December 2020, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Concept Note with international human rights standards and OSCE human dimension commitments.
3. In 2010, OSCE/ODIHR had prepared an Opinion on a Draft Code of Administrative Procedure.<sup>1</sup>
4. This Opinion was prepared in response to the above request. The OSCE/ODIHR conducted this assessment within its mandate as established by a number of Ministerial Council decisions and other commitments.

## II. SCOPE OF REVIEW

---

5. The scope of this Opinion covers only the Concept Note submitted for review and relevant parts of the Code of Administrative Procedure and Process (hereinafter CAPP). Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating administrative procedure and process in Kazakhstan.
6. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas of concern mentioned in the Concept Note than on the positive aspects. The ensuing recommendations are based on international standards, norms, and practices as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation or models, the OSCE/ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader

---

<sup>1</sup> [OSCE/ODIHR Opinion on the Draft Law of Administrative Procedure](#), 29 December 2010.

national institutional and legal framework, as well as country context and political culture.

7. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Opinion's analysis takes into account the potentially different impact of the Concept Note and relevant provisions of the CAPP on women and men (this Opinion, section 6.2 *infra*).<sup>2</sup>
8. This Opinion is based on an unofficial English translation of the Concept Note commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail.
9. In view of the above, the OSCE/ODIHR would like to mention that this Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation pertaining to the legal and institutional framework regulating administrative procedure and process in Kazakhstan in the future.

### III. ANALYSIS

---

#### 1. INTERNATIONAL STANDARDS AND OSCE - COMMITMENTS ON ADMINISTRATIVE PROCEDURE AND PROCESS

10. Legislation on administrative procedure and process differs greatly from one jurisdiction to another and is often a result of national legal traditions. Even if direct international legal sources are fairly limited, there are still relevant basic standards established by international organizations such as the United Nations and regional organizations like the Council of Europe (CoE), which national systems should abide by or that may serve as valuable guidance for other regions respectively.
11. Administrative laws should enable effective administration and promote respect for the rights of individuals towards the government.<sup>3</sup> As with other legislation, such laws will also need to be clear and foreseeable, promote the principles of legality and non-discrimination, and must follow basic rule of law standards.<sup>4</sup> They must also follow the principle of proportionality.
12. Moreover, international human rights law requires transparency when it comes to rule-making and administrative decisions. This principle derives, at least in part, from Article 19 (2) of the International Covenant on Civil and Political Rights,<sup>5</sup> which

---

<sup>2</sup> See par. 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

<sup>3</sup> See Galligan, Denis: Administrative Procedures and the Supervision of Administration in Hungary, Poland, Bulgaria, Estonia and Albania, SIGMA Papers No. 17, OCDE/GD (97)167, OECD Publishing, 1997, at Item 1.1.

<sup>4</sup> See Gerard Marcou: The Legal and Regulatory Framework of Public Administration, Department of Development Support and Management Services, UN Secretariat, UN Document ST/SG/AC.6/1995/L.4, par. 23.

<sup>5</sup> Kazakhstan ratified the ICCPR in 2006 (<https://indicators.ohchr.org/>)

provides that everyone shall have the right to freedom of expression and that this right shall include the freedom to seek, receive, and impart information of all kinds.<sup>6</sup>

13. Further United Nations treaties regulate specific aspects of administrative law. In the area of environmental law, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter “Aarhus Convention”),<sup>7</sup> requires public authorities to provide environmental information to the public on request, and certain types of information on a routine and proactive basis; it also obliges states to ensure public participation at various stages of environmental decision-making. Article 9 of the Aarhus Convention also awards standing rights in administrative disputes to any citizen or civil society organization because any individual is considered an interested party in environmental matters and is entitled to seek judicial protection.
14. At the European level, the Council of Europe (hereinafter “CoE”) has produced a wealth of relevant documents in relation to administrative law. While Kazakhstan is not a member of the CoE, legal and human rights standards developed by this organization may provide some useful guidance. Moreover, CoE documents, as well as documents of the European Union (hereinafter “EU”) have formed the basis for OSCE/ODIHR’s work in administrative law reform in the OSCE region, specifically in states belonging to the Commonwealth of Independent States (hereinafter “CIS”).<sup>8</sup>
15. Except for Article 6 of the European Convention on Human Rights (civil limb),<sup>9</sup> it is difficult to point to one or more provisions in the CoE’s conventions that refer directly to the administrative justice system. However, certain CoE documents address key principles relating to the administrative sector. Thus, the CoE Treaty on Access to Official Documents establishes a general right to access official documents as these are a) a source of information for the public, b) help the public form an opinion of authorities, and c) increase the accountability and affirm their legitimacy.<sup>10</sup> The principle of non-discrimination and the duty to ensure that domestic remedies respect the right to access documents are also included here.<sup>11</sup>
16. Furthermore, CoE Council of Ministers’ Resolution (77)31<sup>12</sup> stipulates that where an administrative act is of such a nature as to adversely affect a person’s rights, liberties or

---

<sup>6</sup> See General Comment No. 34 on ICCPR Article 19, adopted at the 102nd Session of the Human Rights Committee, 11-29 July 2011, pars. 3, 8 and 34.

<sup>7</sup> See in particular [Article 1, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998](#), developed under the auspices of the United Nations Economic Commission for Europe and now ratified by some 45 States, (Kazakhstan ratified the Aarhus Convention on 11.1.2001: <https://unece.org/environment-policy/public-participation/aarhus-convention/map-parties>)

<sup>8</sup> See Eva Grina and Scott Carlson: The Consolidated Response No. 09-005 of the International Network to Promote the Rule of Law (INPROL) “Assessing the Status of Administrative Law” of July 2009, p. 1.

<sup>9</sup> [European Court of Human Rights Guide on Article 6 of the European Convention on Human Rights Right to a fair trial \(civil limb\)](#) Note that the Court differentiates between different kinds of administrative procedures, not all of which fall under the scope of Article 6, see [Georgiadis v. Greece](#) (Application no. 21522/93), judgment 29 May 1997, par. 34, [Bochan v. Ukraine \(No 2\) \(GC\)](#) (Application no. 22251/08) judgment 5 February 2015, par. 43, and [Nait-Liman v. Switzerland \(GC\)](#) (Application no. 51357/07) judgment 15 March 2018, par. 106. See also [Guide on Article 6 \(Civil Limb\) . Chapter 1.A.](#)

<sup>10</sup> [Council of Europe Convention on Access to Official Documents](#), (CETS No. 205), 18 June 2009, Preamble.

<sup>11</sup> *Ibid.* Article 2 pars. 1 and 2.

<sup>12</sup> Council of Europe Council of Ministers: Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities, 1977, appendix to resolution pars. IV and V, available here: <https://rm.coe.int/16804dec56>. See also: [Recommendation CM/Rec \(2012\)11 and explanatory memorandum on the role of public prosecutors outside the criminal justice system](#); [CM/Rec \(2007\)7 the Committee of Ministers to Member States on Good Administration](#), adopted on 20 June 2007; [Recommendation CM/Rec \(2004\)20 of the Committee of Ministers to Member States on the Judicial Review of Administrative Acts](#), adopted on 15 December, 2004; [Recommendation CM/Rec \(2003\) 16 of the Committee of Ministers to Member States on the Execution of Administrative and Judicial Decisions in the Field of Administrative Law](#), adopted on 9 September 2003; [Recommendation CM/Rec R \(87\) 16 of the Committee of Ministers to Member States on](#)

interests, the person concerned shall be informed of the reasons on which the act is based. This is done either by stating the reasons in the act, or by communicating them, at the respective individual's request, to the person concerned in writing within a reasonable time. Further, "where an administrative act which is given in written form adversely affects the rights, liberties or interests of the person concerned", it is essential that this act "indicates the normal remedies against it, as well as the time-limits for their utilisation".

17. Other CoE documents aimed at synergizing administrative procedures are also relevant in this context; particularly as concerns administrative discretion, administrative sanctions the execution of administrative and court decisions, judicial review, and good administration.<sup>13</sup>
18. The Concept Note also cites the European Code of Good Administrative Behaviour of the EU (pp. 8 and 9)<sup>14</sup> as a reference point relating to the exercise of the right to good administration (not "good governance" as it is said in the Concept Note) deriving from Article 41 of the Charter of Fundamental Rights of the EU. This Code stipulates, among others, that the persons affected by administrative decisions should have a right to express their opinion in relation to decisions that affect them negatively, should have access to their files, and that in such cases; the decision-makers need to provide reasons for their decisions.<sup>15</sup> Additionally, the EU has issued rules on administrative simplification.<sup>16</sup>
19. While Kazakhstan is not a member of the Organization for Economic Cooperation and Development (hereinafter "OECD"), it has cooperated with this organization through the Eurasia Platform since 2008.<sup>17</sup> Thus, OECD sources may also be of relevance for this Opinion, including the OECD Council's Recommendation on Public Integrity, which underscores the importance of having a public administration with integrity and low corruption. The OECD's Policy Framework on Sound Public Governance also stipulate sound values for good governance, such as a) integrity and the accountability of the public bodies, b) openness and transparency, which include an solid regulatory framework and sufficient resources, c) inclusiveness, participation, gender equality and diversity across the public sector, and d) respect for the rule of law.<sup>18</sup> Other OECD sources include documents issued as part of the Support for Improvement in Governance and Management (hereinafter "SIGMA") joint initiative of the OECD and the EU on the aiming to strengthen public governance systems and public

---

[Administrative Procedures Affecting a Large Number of Persons, adopted on 17 September 1987; Council of Europe Recommendations CM/Rec R \(80\)2 Concerning the Exercise of Discretionary Powers by Administrative Authorities, adopted by the Committee of Ministers on 11 March 1980.](#)

<sup>13</sup> See *Ibid.* (Recommendation No. R (80)2 on the exercise of discretionary powers by administrative authorities, 1980),

*Ibid.* (Recommendation No. R (87)16 on administrative procedures affecting a large number of persons, 1987),

Recommendation CM/Rec R (91)1 of the Committee of Ministers to Member States on Administrative Sanctions, adopted on 13 February 1991, *Ibid.* (Recommendation CM/Rec (2003) 16), *Ibid.* (Recommendation CM/Rec (2004)20 on judicial review of administrative acts), and *Ibid.* (Recommendation CM/Rec (2007)7 on Good Administration)

<sup>14</sup> References to pages sections below refer to the Concept Note unless otherwise specified.

<sup>15</sup> [Charter of Fundamental Rights of the European Union](#), Article 41

<sup>16</sup> See EU Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Official Journal L 376, 27/12/2006 P. 36 – 68), - Chapter II on "Administrative Simplification".

<sup>17</sup> <https://www.oecd.org/eurasia/countries/kazakhstan/>

<sup>18</sup> [Recommendation of the OECD Council on Public Integrity](#), adopted on 26/01/2017, see also OECD: [Policy Framework on Sound Public Governance: "Baseline Features of Governments that Work Well"](#), Chapter 1.

administration capacities in EU candidate/potential candidate countries and EU Neighbourhood countries respectively.<sup>19</sup>

20. OSCE participating States have addressed elements of the administrative justice system in states based on rule of law principles in a number of human dimension commitments. In the 1990 Copenhagen Document, OSCE participating States observed that “the activity of the government and the administrations” are among those “essential elements of justice”<sup>20</sup> that are “exercised in accordance with the system established by law”.<sup>21</sup> Also, in the same document, OSCE participating States committed to ensure that “everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity”<sup>22</sup> and stated that “administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available”.<sup>23</sup> These commitments were reiterated in the 1991 Moscow Document, in which participating States “envisage the continuation and enhancement of bilateral and multilateral legal and administrative co-operation”,<sup>24</sup> *inter alia* as regards the “development of an efficient administrative system, assistance in formulating law and regulations and training of administrative and legal staff”.<sup>25</sup>
21. OSCE commitments on good governance also extend to other OSCE dimensions, which shows that good governance is a cross-cutting factor for stability and security. One important strategy document in that regard is the Maastricht Strategy Document for the Economic and Environmental Dimension,<sup>26</sup> in which the OSCE Ministerial Council expresses the urge for full respect of the rule of law, increased transparency, and the development of effective legislation to tackle aspects of weak governance.

## 2. THE CONCEPT NOTE AND ADMINISTRATIVE REFORM IN KAZAKHSTAN

22. The Constitution of the Republic of Kazakhstan<sup>27</sup> (hereinafter “the Constitution”) contains numerous provisions that are relevant for administrative procedures and good governance in general. Article 12 contains a general guarantee of human rights and freedoms. Article 14 par. 1 outlines the principle of equality before the law and courts, while Article 14 par. 2 focuses on the principle of non-discrimination.
23. Furthermore, Article 18 par. 3 of the Constitution specifies that state bodies and officials, among others, must provide every citizen with the possibility to become familiar with the documents, decisions and other sources of information concerning

---

<sup>19</sup> SIGMA & OECD European Principles for Public Administration, SIGMA Papers, No. 27, CCNM/SIGMA/PUMA (99)44/REV1, of 22 November 1999.

See also Francisco Cardona: SIGMA & OECD Checklist for a General Law on Administrative Procedures (2005), and SIGMA & OECD, Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe, SIGMA Papers, No. 15 (1997).

<sup>20</sup> Document of the Copenhagen Meeting of the Second Conference on the Human Dimension of the CSCE, Conference on Security and Co-operation in Europe, 1990, par. 5.

<sup>21</sup> *Ibid.* par. 5.5

<sup>22</sup> *Ibid.* par. 5.10

<sup>23</sup> *Ibid.* par. 5.11

<sup>24</sup> Document of the Moscow Meeting of the Third Conference on the Human Dimension of the CSCE, Conference on Security and Co-operation in Europe, 1991, par. 27.2.

<sup>25</sup> *Ibid.*

<sup>26</sup> [OSCE Strategy Document for the Economic and Environmental Dimension](#), 2 December 2003 section 1.8

<sup>27</sup> [The Constitution of the Republic of Kazakhstan](#) was approved by referendum on 30 August 1995 and last amended in 2017.

- his/her rights and interests. Additionally, Article 33 contains a general right for citizens to participate in the governance of state affairs (par. 1).
24. The CAPP was adopted in 2020, following a lengthy process of revising the 2000 Law on Administrative Procedures, as also described in the Concept Note (p. 5). It regulates internal administrative proceedings of state bodies, administrative proceedings, and “administrative legal proceedings”, in other words proceedings before administrative courts (see Article 3 of the CAPP). As stated in the first section of the Concept Note on “Laws Governing Administrative Justice Procedures and Administrative Process”, the CAPP is a systemic law in the field of public law and a single codified act for both administrative procedure and for the judicial proceedings relating to administrative disputes. Article 4 of the CAPP defines administrative procedure as any activity of an administrative authority or official on the consideration of an administrative case and the adoption and execution of a decision on it.
  25. The OSCE/ODIHR is pleased to note that Kazakhstan has expressed the need to reform its administrative procedure in the Concept of Legal Policy of the Republic of Kazakhstan, prepared for the period of 2010-2020 by the Presidential Administration.<sup>28</sup> This strategy recognizes the necessity to reform key legislation and public institutions (including administrative bodies and the judiciary) in order to strengthen the protection of human rights and freedoms, as well as to enable the sustainable economic development of the country.<sup>29</sup>
  26. The Concept Note deals with different aspects of the CAPP, and provides recommendations on amending certain provisions of this law. It starts out by describing the notions of administrative procedure and “administrative process” (which presumably relates to procedures before administrative courts), and the different stages of administrative reform in Kazakhstan over the last two decades, while also outlining the expected outcome of the 2010-2020 Concept.
  27. The section on Administrative Justice (II) describes the laws and authorities implementing administrative procedure and procedures before administrative courts, as well as how different legal rules in this sector correlate with one another. Section III of the Concept Note outlines different prospects and proposals for revising the CAPP, while Section IV contains concrete recommendations for implementing the CAPP. Both of the latter parts of the Concept Note will be addressed in the ensuing sections of this Opinion.

### **3. THE RELATIONSHIP OF THE CAPP WITH OTHER LEGISLATION**

28. The Concept Note (p. 23) describes how the CAPP relates to other legislation, in this case sector specific laws (*lex specialis*). In this context, the Concept Note mentions a number of proceedings, including referring a citizen for compulsory treatment for tuberculosis, referral of minors to special educational institutions, and cases of expulsion of foreigners/stateless persons, that actually fall under public law, but are currently tried through special procedures set out in the Civil Procedure Code. The

---

<sup>28</sup> [Approved by Decree of the President of the Republic of Kazakhstan dated 24 August 2009 № 858](#)

<sup>29</sup> *Ibid.* See for instance: 1. Introduction: “Kazakhstan’s legal system shall be able to compete on equal terms in the issues of ease of using and reliability of protecting rights with the legislation of developed countries of the world.”

Concept Note recommends that these cases should be transferred from civil to administrative proceedings due to their public and, in essence, administrative nature.

29. This will contribute to a greater consistency in the application of administrative procedure and thus **OSCE/ODIHR agrees with this proposal, and recommends that the above cases should be removed from the purview of the Civil Procedure Code, and dealt with under the CAPP, so that all administrative cases will be treated according to the same standards.** This transfer could also be important for another reason, as in administrative proceedings, courts must play a more active role in guaranteeing the equality of arms. This is due to the special nature of administrative proceedings, where the state automatically holds an overwhelmingly stronger position than the individual. In civil law litigations, on the other hand, judges usually adopt a more passive stance and leave the parties to fix the contours of the litigation.
30. The Concept Note also stresses the need to unify sector-specific laws in Kazakhstan (p. 24), indicating that the CAPP sets up “the priority of special laws”, which suggests a subsidiary application of the CAPP (see also Article 1 of the CAPP). While noting that it is unrealistic to prohibit the inclusion of procedural aspects in sector-specific laws, the Concept Note states that there is too much different regulation in this field, and that oftentimes, there is no real justification for not using the general procedural framework of the CAPP. It therefore suggests a harmonization of sector-specific laws by including general references to the CAPP to link the sector-specific law with the principles and rules of the CAPP, and to remove provisions that are in direct conflict with the CAPP from existing legislation, and ensure that there are no such conflicting provisions in new laws (unless there are “justified exceptions”<sup>30</sup> from the general administrative rules of the CAPP).
31. In its 2010 Opinion on the Draft Law on Administrative Procedures (hereinafter “the 2010 Opinion”), OSCE/ODIHR devoted significant attention to the relationship of the draft Law to other relevant legislation. In particular, OSCE/ODIHR emphasized in this context that “a Law on Administrative Procedure will only fulfil its purpose properly if it is the primary piece of legislation in this field and as such takes precedence over aspects of administrative procedure found in other legislation. Exceptions to this rule of precedence must be named specifically in the draft Law (by name and provision of the respective law) and in the relevant legislation itself. **It is recommended to amend the relevant legal provisions accordingly**”.<sup>31</sup>
32. A similar approach was found in a 2018 Opinion issued by the Council of Europe’s Commission for Democracy through Law (hereinafter “the Venice Commission”) on the Administrative Procedure and Justice Code of Kazakhstan (hereinafter “the Venice Commission Opinion”), which alleged that “this Code, if adopted, will require harmonisation with other already existing pieces of legislation”.<sup>32</sup>
33. **Based on its previous recommendations, OSCE/ODIHR agrees with the Concept Note’s proposals and reiterates that the CAPP shall constitute an overarching standard when it comes to administrative procedure, also in sector-specific legislation. Exceptions from the CAPP must be clearly identified.** Moreover, although the manner in which the sector-specific laws will be harmonized with the

---

<sup>30</sup> E.g., more detailed procedures in the Environmental Code of Kazakhstan, in implementation of the Aarhus Convention.

<sup>31</sup> *Op. cit.* footnote 1, Part 4.3 “Relationship of the Draft Law to Other Legislation” (par. 19)

<sup>32</sup> [Opinion on the Administrative Procedure and Justice Code of Kazakhstan](#), (CDL-AD (2018)020) adopted at the 116th Plenary session (Venice, 19 -20 October 2018), par. 19

CAPP and each other will be conducted is a matter of Kazakh legal policy, it may be helpful to form a commission or other type of consultative body, which would be tasked to examine the respective laws and prepare proposals to render them more compliant with one another.<sup>33</sup>

#### **RECOMMENDATION A**

**The CAPP should also apply with regard to procedures in sector-specific laws, in order for all administrative cases to be treated according to the same standards; exceptions should be clearly identified. Moreover, a special commission could be formed to examine sector-specific laws and harmonize them with the CAPP and with each other.**

## **4. PROSPECTS FOR THE DEVELOPMENT OF ADMINISTRATIVE JUSTICE LAWS**

### **4.1 Administrative Procedure**

34. The CAPP includes both external administrative procedures and internal operating procedures of public authorities (Article 3 of the CAPP), as pointed out in the Concept Note (p. 19). The internal operating procedures are further elaborated in Section 2 (Chapters 7 and 8) on the Internal Administrative Procedures of State Bodies of the CAPP, with Chapter 7 focusing on general aspects of the internal procedures of the administration and Chapter 8 dealing with the transfer or outsourcing of public functions to other bodies in order to increase the service to the public.<sup>34</sup>
35. The Concept Note justifiably raises the problems associated with including internal administrative procedures in the CAPP, by referring to the fundamental differences in the legal relationship of the “state vs. the citizen” on the one hand, and of that of the “state vs. the state” on the other. It proposes to extract the provisions on internal administrative proceedings from the CAPP, and to introduce them in a separate law or by-law.
36. In this context, it is recognized that there are fundamental differences in the balance and standing of the parties in such cases, given the powers and resources of the state *vis-à-vis* those of the individual. Moreover, adopting internal working procedures belongs to the remit of the executive branch, not the legislative branch, based on the principle of the separation of powers. It is the executive that must be accountable for the functioning of the public state administration. It is thus questionable whether the internal rules that the executive gives itself should be part of a law passed by the legislature.
37. The above combined approach of the Kazakh legislator was already commented on in the Venice Commission Opinion, which observed that the internal procedure of public authorities “by its content, structure and form, should not be part of the Code” and that due to its normative particularities, the internal procedure “breaks“ the structure of the Administrative Procedure Code, as it “refers to situations and relations that are not

<sup>33</sup> [Venice Commission Report “Legislative Drafting Process. Main Issues and some Examples](#)

<sup>34</sup> [The Administrative Procedural and Process Related Code of the Republic of Kazakhstan](#) (June 29, 2020)

directly connected to the concept of administrative procedure or court proceedings directly concerning individuals and other private parties.“ In that regard, the Venice Commission recommended considering the possibility of extracting this part of the draft Code and placing it into “a separate legislative act”.<sup>35</sup> Even not in a separate law passed by the legislature, the internal rules and procedures of administrative bodies could be the object of an internal administrative instruction, or of a similar by-law issued by the executive.

38. Furthermore, at an OECD/SIGMA 2009 Conference on Public Administration Reform and European Integration, the presentation of a paper explicitly emphasized that laws on administrative procedure should not allocate competence between public authorities. This should be dealt with in in separate legislation.<sup>36</sup>
39. **Based on the above considerations, OSCE/ODIHR agrees with the proposal of the Concept Note, and recommends that the regulation of the allocation of competence of administrative bodies and other internal matters be regulated outside of the CAPP by a separate law or by-laws.**

#### **RECOMMENDATION B**

**As outlined in the Concept Note, the allocation of competence between administrative bodies and other internal matters should be regulated outside of the CAPP, by a separate law or by-laws.**

#### *4.1.1 Legal certainty*

40. Clear and precise rules are a prerequisite of the principle of legal certainty and an inseparable element of the rule of law principle.<sup>37</sup>
41. Section 1.1. of the Concept Note proposes the introduction of “administrative contracts “into the CAPP as a means to procure legal certainty and reliability in matters such as public-private partnerships, concessions (licences), and public procurement (p. 20). Including such contracts in the CAPP would provide a clear legal framework for them. More specifically, the Concept Note proposes to better regulate public-private partnerships by using administrative contracts.
42. In other jurisdictions, administrative contracts are a manner of resolving a contentious matter through mutual agreement between the administrative authority and the individual. The cooperation of public authorities with private individuals to achieve public interest goals is usually channelled through concessions; at the same time, a competitive public procurement procedure must be followed.
43. The introduction of rules concerning administrative contracts in the CAPP falls within the field of Kazakhstan’s legal policy and is a matter of legal choice. **At the same time, OSCE/ODIHR considers that the CAPP should also specify related matters, such as the nature of judicial protection in such cases, and in particular whether issues arising out of such contracts should be reviewed under administrative dispute**

---

<sup>35</sup> *Op. cit.* footnote 32, par. 24

<sup>36</sup> Rusch, Wolfgang, Administrative Procedures in EU Members States, Conference on Public Administration Reform and European Integration Budva, Montenegro 26-27 March 2009 <http://www.sigmaxweb.org/publications/42754772.pdf>

<sup>37</sup> See for instance: Venice Commission Rule of Law Checklist, adopted at the 106<sup>th</sup> Plenary session of the Venice Commission, 11-12 March 2016, section III.b.B

**legislation or under civil procedure law, as is currently the case of these contracts.<sup>38</sup> This may well depend on whether the legal dispute concerns the contents of the contract, or whether it has to do with matters concerning administrative matters, such as concessions or public procurement matters.**

44. Moreover, the Concept Note (p. 20) advocates for introducing the automatic annulment of clearly unlawful administrative acts in Chapter 3 of the CAPP. It is noted that Article 84 of the CAPP foresees the invalidation of illegal administrative acts. In this context, **it is recommended to specify with more precision what the conceptual difference is between the annulment proposed in the Concept Note and the existing invalidation of illegal administrative acts already found in Article 84 of the CAPP. Moreover, it is unclear in which situations administrative acts would exceptionally be so clearly unlawful that they could be annulled without following the proper procedure. This matter should be further reviewed.**
45. Article 83 of the CAPP concerns the effectiveness and binding nature of the administrative act. It is noted that Article 83 contains two contradictory paragraphs, as it prescribes two possible points in time of the legal entry into force of an administrative decision, par. 1 (time of the actual adoption) and par. 2 (when the decision reaches the concerned party). The Concept Note (p. 20) proposes to only keep the latter as the point when an administrative decision enters into force, as the previous point of time (when the decision is taken by the administration) is an internal process that has no legal consequences for the recipient. **It is recommended to clarify these matters in the CAPP accordingly.**

#### **RECOMMENDATION C**

**As indicated in the Concept Note, the time of entry into force of administrative decisions should be clarified in the CAPP.**

#### *4.1.2 Administrative discretion and the justification of the administrative act*

46. In its 2010 Opinion, the OSCE/ODIHR noted that closer attention would need to be paid to the issue of administrative discretion.<sup>39</sup> The CoE Committee of Ministers Recommendation (80)2 on the exercise of the discretionary powers by administrative bodies explained the principles applicable to such authority,<sup>40</sup> and may provide some guidance on this matter. The need to pay more attention to the issue of administrative discretion was also raised in the Venice Commission Opinion. More specifically, the Venice Commission underscored the need to have administrative discretion scrutinized

<sup>38</sup> Civil Procedure Code of the Republic of Kazakhstan, July 13, 1999 No. 411, Article 2.3

<sup>39</sup> *Op. cit.* footnote 1

<sup>40</sup> *Op. cit.* footnote 12 (CoE Recommendation No. R (80)2). In the annex to the Recommendation, Basic Principles are set out (II), specifying that when exercising discretionary powers, administrative authorities shall not pursue any other purpose than that for which the power was conferred, observe principles of objectivity and impartiality, and equality, maintain a proper balance between the aims pursued and the possible adverse effects of its decisions on individuals, take decisions within a reasonable time, and apply administrative guidelines in a consistent manner. The Principles also highlight the need public and transparent procedures (III) and for effective control over the exercise of discretionary powers of authorities through courts or other independent bodies (IV).

- by superior administrative bodies and courts due to the complexity of the matter and to ensure that administrative bodies do not exceed the limits of their discretion.<sup>41</sup>
47. The principle of administrative discretion is described in Article 4 par. 6 of the CAPP as the possibility of the competent administrative body to conclude the matter at hand in one or more possible ways, within the “purposes and limits established by legislation”.
48. Administrative discretion is not clearly explained in the Concept Note. However, the Note correctly points out that the proper use of discretion and consistent application of the law can deter corruption (p. 27). In order for discretion in administrative decision-making to be properly applied, it must be framed within constitutional values, administrative law principles, and international standards of good administration (see section 1 *supra*). Otherwise, the discretion becomes arbitrary. Discretionary decisions must be challengeable in court,<sup>42</sup> as foreseen in Article 9 par. 1 of the CAPP.
49. To conclude, it is noted that while the Concept Note describes situations when administrative discretion can be used, it contains no clear guidance on how authorities shall exercise their statutory discretion, nor does it address how to ensure proper scrutiny of the exercise of discretion, or how to avoid that administrative bodies exceed the limits of their discretion. **For this reason, OSCE/ODIHR recommends that the relevant decision-makers in Kazakhstan review the current provisions in the CAPP once more, and expand the Concept Note to include concrete recommendations on how to assure greater accountability of public administrative bodies in the exercise of such discretion, including, but not limited to, proper oversight.**

#### **RECOMMENDATION D**

**To increase the understanding of administrative discretion, it should be more clearly explained in the Concept Note, and framed within the principles of administrative law. It should also be explained more how administrative discretion can be scrutinized and how to avoid abuse and cases where authorities exceed the limits of administrative law.**

#### *4.1.3 Reasoning of administrative decisions*

50. Both the OSCE Copenhagen Document and the OSCE Moscow Document clearly require that “administrative decisions against a person must be fully justifiable” (i.e. must provide reasons for the decisions) in order to provide “an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.”<sup>43</sup>
51. The CAPP contains a reference to the justification of administrative acts in Article 80 (4). This is important and commendable as the reasoning of an administrative act ensures transparency and helps enable proper redress in appeals proceedings. However, while the Concept Note (p. 21) underscores the importance of good reasoning, it does

<sup>41</sup> *Op. cit.* footnote 32, (pars. 29, 30, and 31)

<sup>42</sup> European Court of Human Rights, *Obermeier v. Austria* (Application no. 11761/85), par. 53, See also for instance explanations in Osgoode Hall Law Journal, Volume 17 (1979) Article 3, Chapter III Discretion and Jurisdiction, p. 110.

<sup>43</sup> *Op. cit.* footnote 20 (pars. 5.10 and 5.11), and *op. cit.* footnote 24 par. (18.2), see also CoE sources in footnote 12).

not provide additional information on what that would entail and which key elements need to be included in a proper reasoning.

52. Several countries have rules that specify what the reasoning of an administrative act should contain. One example for this is the General Administrative Procedure Act of Croatia, which requires i) a short description of the citizen's rights, ii) the established facts and circumstances, iii) reasons which were decisive for the evaluation of proof, iv) reasons why certain arguments are not accepted, v) procedural matters, and vi) legal norms as the legal basis for the solution.<sup>44</sup> **OSCE/ODIHR recommends that the contents of the reasoning of an administrative decision be specified in the CAPP, to facilitate redress, among others.**

#### **RECOMMENDATION E**

**The requirement for a proper reasoning of the administrative decision should be clearly defined in the CAPP, to allow for proper redress.**

#### *4.1.4 Standards for Proceedings before Administrative Courts*

53. Article 9 par. 2 of the CAPP stipulates that state bodies (within their competence), individuals and legal entities may file a lawsuit to protect the violated or disputed legitimate interests of other persons or an "indefinite circle of persons". The Concept Note (p. 22) states that there is a need to re-interpret the principle of the protection of rights, freedoms, and legitimate interests found in Article 9, par. 2 of the CAPP, stating that "[a]s a general rule, administrative claims to defend violated or disputed legitimate interests of other persons or an indefinite number of persons should be inadmissible". The Concept Note justifies this need for change by stating that such a ban will prevent an unjustified burden on the judiciary, without going into detail.
54. The proposed changes would seem to apply to all situations where individuals or legal entities file lawsuits in the interests of others or an undefined group of persons. It is unclear, however, whether the re-interpretation of Article 9 par. 2 shall apply only in cases where private individuals or legal entities undertake such lawsuits, or also where such lawsuits are initiated by state bodies. This would need to be clarified.
55. The OSCE's overview of the core standards applicable to administrative justice presented in the Handbook on Monitoring Administrative Justice states that the right of access to court in European countries in administrative (judicial) proceedings varies, depending on the jurisdiction and the type of the action being brought. In that regard, it has been noted that the "system may also allow for "class actions", or claims that a large group of people collectively bring to court or in which a group or class of defendants is being sued."<sup>45</sup> Public bodies can also, in some cases, initiate judicial proceedings to test the legality of an administrative act (both regulatory and individual) and a refusal/omission to act.<sup>46</sup> **As Article 9 par. 2 of the CAPP allows for such**

<sup>44</sup> [General Administrative Procedure Act of Croatia](#) (2009), Article 98.

<sup>45</sup> [OSCE Handbook for Monitoring Administrative Justice](#), section. 4.2.2 (p. 47)

<sup>46</sup> *Ibid.* section 4.2.3 (p. 48), referring to Recommendation CM Rec (2004)20, 15 December 2004, Section A.1.

**lawsuits, the Concept Note should clarify whether it seeks to revoke this part of Article 9 par. 2 as well.**

56. However, the Handbook has been emphasized “that CoE encourages Member States to take into consideration the possibility of granting legal persons and bodies empowered to protect collective or community interests the capacity to bring proceedings before a court”.<sup>47</sup> Moreover, it is noted that some countries recognize the right of civil society organizations and other entities, such as unions or associations, to be parties to an administrative dispute and that such entities may, as such, also have the right to access administrative proceedings, directly or as third parties.<sup>48</sup> The above-mentioned 1998 Aarhus Convention (Article 9 par. 2 (b)) goes in the same direction concerning the protection of the environment.
57. Prior to the Recommendation on judicial review of administrative acts from which the previously mentioned CoE encouragement stems, the CoE Committee of Ministers adopted Recommendation No. R (87) 16 on administrative procedures affecting “a large number of persons”.<sup>49</sup> According to this Recommendation, an administrative act should be “subject to control by a court or other independent body.” In that regard, the CoE recommends that “the court or other control body may take various steps to rationalise the procedure, such as requiring participants with common interests to choose one or more common representatives, hearing and deciding test appeals and making notification by public announcement.”<sup>50</sup>
58. With this in mind, **consideration may be given to developing standards and regulations which would allow for so-called class actions, rather than barring them.**

#### **RECOMMENDATION F**

**To consider developing standards and regulations which would allow for so-called class actions, rather than barring them.**

59. The Concept Note (p. 22) also argues that prosecutors should be excluded from administrative proceedings, as their participation is inconsistent with the principle of judicial protection of exclusively subjective public rights. According to Article 31 of the CAPP, the General Prosecutor carries out “the highest supervision over the legality of judicial acts that have come into legal effect in administrative cases on behalf of the state”. Under Article 9 par. 2 in conjunction with Article 31 par. 3, prosecutors may initiate lawsuits before administrative courts to restore the rights and protect the interests of individuals who, for physical, mental or other reasons, are not able to do so themselves, or of individuals, society or the state, if this is necessary “to prevent irreversible consequences for the life, health of people or the safety of the Republic of Kazakhstan”.

---

<sup>47</sup> *Ibid.* p. 4.2.3 (p. 48), and *op. cit.* footnote 12 (CoE Recommendation (2004)20 on judicial review of the administrative acts (Part B2a))

<sup>48</sup> See for Instance the Civil Procedure Code of Norway (Tvisteloven), Article 15-7.

<sup>49</sup> *Op.cit.* footnote 12 (Recommendation No. R (87) 16 on administrative procedures affecting a large number of persons.) (Scope and definitions)

<sup>50</sup> *Ibid.* section I.VII

60. In its Opinion, the Venice Commission also focused on the role of prosecutors outside of the criminal procedure in Kazakhstan, claiming that their “powers to defend interests of individual persons resembled partly the role of an ombudsman.”<sup>51</sup> The Venice Commission was critical of such expanded competence for public prosecutors, as it considered this confusing and counterproductive in the sense of competence of these two bodies. The Venice Commission therefore recommended further reconsideration of whether prosecutors should play such a significant role on the side of citizens in administrative proceedings. Further, the Venice Commission has argued that while it is the sovereign right of a country to define the competencies, “the role of the prosecutor should be limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function.”<sup>52</sup>
61. At the same time, OSCE/ODIHR (in its Handbook on Monitoring Administrative Justice) has observed that “in some countries, the office of the prosecutor or another public body (as mentioned in section 4.1.4 *supra*) can initiate proceedings to test the legality of an administrative act”.<sup>53</sup>
62. The CoE Committee of Ministers Recommendation (2012)11 on the role of public prosecutors outside the criminal justice system<sup>54</sup> may provide further guidance in this matter. This Recommendation stated that the issue of inclusion of prosecutors was a subject which underscored that prosecutors’ responsibilities and powers should in all cases be established by law and clearly defined to avoid any ambiguity. In that regard, same as prosecutors in criminal proceedings, public prosecutors who exercise their responsibilities and powers outside the criminal justice system should do so in accordance with the principles of legality, objectivity, fairness, and impartiality.
63. As stated by the Venice Commission (see the already mentioned 2018 opinion and 2010 report), the role of the prosecutor under the CAPP is essentially that of protecting the rights of vulnerable persons and where this is necessary to prevent irreparable consequences for the life and health of people and the safety of Kazakhstan. This is quite an unclear definition of the role, as the CAPP does not specify when the latter case (irreversible consequences for life, health and safety) shall occur. As mentioned the Committee of Ministers Recommendation (2012)11, states that responsibilities and powers need to be clearly defined. Moreover, it remains doubtful whether this is the proper role for a prosecutor, and whether this does not pose a conflict of interest as stated in the 2010 Venice Commission report. Lastly, this is beyond the “testing of the legality of an administrative act” specified by the ODIHR Handbook,
64. **Consequently, ODIHR agrees with the Concept Note’s proposal to exclude public prosecutors from the administrative proceedings.**

#### **RECOMMENDATION G**

**As recommended in the Concept Note, the public prosecutor should be excluded from administrative proceedings.**

<sup>51</sup> *Op. cit.* footnote 32 (pars. 26, 27, 28.)

<sup>52</sup> Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service CDL-AD (2010)040, adopted by the Venice Commission - at its 85th plenary session (Venice, 17-18 December 2010), par. 82.

<sup>53</sup> *Op. cit.* footnote 45, par. 4.2.3 (p. 48)

<sup>54</sup> *Op. cit.* footnote 12 (Recommendation CM/Rec (2012)11)

65. The Concept Note (also on p. 22) advocates the need for judicial review of by-laws. **The inclusion of this legal possibility should be considered as one of the future steps in the development of the Kazakh administrative proceedings, under the condition that it is constitutionally possible.**<sup>55</sup> The scrutiny of the legality of by-laws ensures the development of the rule of law in a state and particularly contributes to legal certainty, since a vast number of by-laws are *de iure* the legal base for the issuance of the administrative acts and as such could be a potential cause for the illegality of an administrative act.

#### 4.2 Administrative Execution Proceedings

66. It is important for a law on administrative procedure to contain legal guarantees that allow for the execution of administrative decisions. The Concept Note (p. 25) states that the CAPP does not include rules on proceedings for the execution of administrative acts. Article 37 of the CAPP currently states that the organization of the execution of an administrative act shall consist in the development and adoption of measures for the timely and comprehensive implementation of the decision by an official of a “relevant authorized state body”.
67. The Concept Note’s proposal, seemingly, follows the German model of the execution of administrative acts, as examples of German legislation are mentioned, such as Article 80 of the Code of Administrative Court Procedure of Germany on the suspensive effect of appeals of administrative decisions. The Concept Note suggests introducing a separate general regulation for the execution of administrative acts, instead of the rather vague provision in Article 37.
68. The CoE Committee of Ministers recommendation (2003)<sup>16</sup> on the execution of administrative acts includes, based on good practices of CoE Member States, principles for the effective execution of administrative acts. Some important principles are a). enforcement is to be expressly provided for by law; b) private persons against whom the decision is to be enforced are to be given the possibility to comply with the administrative decision within reasonable time except in urgent duly justified cases; c) the use of and the justification for enforcement are to be brought to the attention of the private persons against whom the decision is to be enforced; the enforcement measures used including any accompanying monetary sanctions are to respect the principle of proportionality.<sup>56</sup> (see also par. 18 *supra*)
69. It is this important to introduce rules on execution of administrative decisions in line with the above principles. Consequently, **OSCE/ODIHR agrees with the proposal to have a separate set of fixed rules on execution to avoid ending up with different sets of regulation as could be possible according to Article 37 of the CAPP .**

---

<sup>55</sup> Article 78 of the Constitution of Kazakhstan stipulates that courts cannot apply laws or other regulatory acts, which the courts find will infringe upon the rights of a person and citizen. The reference to “other regulatory acts” seems to indicate that courts may review by-laws and other regulatory acts that are not laws, as well.

<sup>56</sup> *Op. cit.* footnote 12 Recommendation CM/Rec (2003) 16) Section I.2. a

## **RECOMMENDATION H**

**OSCE/ODIHR concurs with the proposal of the Concept Note, and recommends that rules on the execution of administrative decisions be elaborated on in the CAPP or in related legislation.**

### **4.3 By-laws and Internal Regulations**

70. The Concept Note (p. 27) contains some proposals on, among others, the conduct of administrative procedures and proceedings before administrative courts under the CAPP, and identifies deficiencies in relation to the right to appeal against an administrative act.
71. Regarding the former, the Concept Note proposes to develop internal regulations in order to achieve a consistent interpretation of rules. Regarding the judiciary, this can be analysed in light of the CCJE Opinion No. 20 (2017) on the role of courts with respect to the uniform application of law,<sup>57</sup> which may provide further guidance in this respect.
72. In the Opinion, the CCJE elaborated on formal, semi-formal, and informal mechanisms by which courts achieve consistent case law. Aside from formal proceedings, which have a direct impact on the uniform application of the law, semi-formal mechanisms include e.g. formal, informal or even institutionalized meetings of judges both within a court or between judges of different courts of similar or hierarchically different levels, or guidelines outlining applicable principles based on established case law. These may include, e.g., scales for damages regarding personal injury in civil cases, sentencing in criminal cases or reimbursable lawyers' fees.<sup>58</sup> Informal mechanisms are considered to be informal consultations among judges seeking to establish consensus on several points of procedural and material law when practice shows divergent case law. Under no conditions may conclusions drawn in the context of semi-formal or informal mechanisms infringe on the independence of individual judges; the sole purpose of such mechanisms is to promote the uniform application of the law.<sup>59</sup>
73. **In light of the above, OSCE/ODIHR recommends establishing various mechanisms to ensure a consistent application of the law without infringing the independence of individual judges and courts.**

## **RECOMMENDATION I**

**Mechanisms should be established to ensure a consistent application of the law, but rules ensuring a consistent application of the law may not infringe the independence of individual judges and courts.**

74. The Concept Note further proposes to introduce in the CAPP an obligation to include in administrative acts (decisions) information and specific instructions, with model templates, indicating on how individuals may appeal against them (p. 27). In this

<sup>57</sup> [CCJE Opinion No. 20 \(2017\) on role of courts with respect to the uniform application of law.](#)

<sup>58</sup> *Ibid.* pars. 17, 18.

<sup>59</sup> *Ibid.* par. 19.

context, it is recalled that the OSCE Copenhagen Document and subsequent OSCE commitments require that everyone shall have an effective means of redress against administrative decisions, to guarantee respect for fundamental rights and ensure legal integrity, and that “administrative decisions against a person must [...] as a rule indicate the usual remedies available”.<sup>60</sup>

75. In CoE Committee of Ministers Resolution (77)13, the question of providing sufficient information about remedies is also listed among the guiding principles for the protection of persons in administrative procedure. Namely, the resolution states that where a written administrative act adversely affects rights, liberties or interests of persons concerned, it shall indicate “the normal remedies against it, as well as the time-limits for their utilisation.”<sup>61</sup>
76. In relation to judicial review, in a number of its cases, the European Court of Human Rights’ approach to the right to appeal is that it is a part of the right of access to court (see par. 55 *supra*). In that regard, for this right to be effective, an individual must “have a clear, practical opportunity to challenge an act that is an interference with his rights”. Furthermore, the European Court of Human Rights has stated that the right to bring an action or to lodge an appeal must arise from the moment when the parties may effectively become aware of a legal decision imposing an obligation on them or potentially harming their legitimate rights or interests.<sup>62</sup>
77. OSCE/ODIHR notes that Article 80 of the CAPP does not require administrative acts to contain instructions on the right to appeal or judicial review, nor does it oblige authorities to provide an indication on the procedures to be followed, or the time-limits for appeals. This lack of instruction within an administrative act on the right to appeal against an administrative act or on the right to judicial review may seriously affect the rights of individuals in the administrative procedure and process, and beyond. To ensure that individuals can fully exercise their rights to a legal remedy under Articles 2 par. 3 of the ICCPR, it is necessary to require public authorities to provide additional supporting documentation that provides proper instructions on how to appeal, as proposed in the Concept Note. As Article 80 par. 3 already contains a provision on the content of an administrative act, and as par. 4 of this provision prescribes that supporting documents shall be an integral part of an administrative act, there should be no obstacle to the adoption of an additional provision to help enforce the right to appeal in administrative procedure. **The approach described in the Concept Note is hence welcome and needed to ensure legal certainty, as well as to ensure the proper protection of the human rights of individuals affected by the administrative act or decision.**
78. The Concept Note (p. 21) also criticizes Article 98 par. 6 of the CAPP (erroneously cited as Article 88 in the Concept Note), which states that if an individual complains, the appeals decision of the administrative body may not impact the complainant more negatively than the original decision did, even if the authority handling the complaint is not bound by the previous decisions and can verify the case in full (Article 98 par. 4). The Concept Note argues that following the principle of legality, the higher administrative body should use the complaint to the detriment of the complainant if this is the only legal decision possible. It is further argued that the citizen would not have

---

<sup>60</sup> *Op.cit.* footnote 20

<sup>61</sup> *Op.cit.* footnote 12 (Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities, 1977)

<sup>62</sup> European Court of Human Rights *Bellet v. France* (Application no. 23805/94), judgment 4 December 1995, par. 36 and *Zubac v. Croatia* (GC) (Application no. 40160/12), judgment 5 April 2018, pars. 76-79

“legal confidence” in the preservation of an original administrative act, since he/she, by filing a complaint, prevented the original administrative act from acquiring legal effect.

79. Currently, Article 98 par. 6 is a welcome means to protect individuals in administrative procedures, as it strengthens their role vis-à-vis the state and prevents them from being overly disadvantaged by administrative proceedings. Indeed, if there were no protection for applicants against further detriment following a complaint, it is doubtful whether any of them would complain against administrative acts at all. **Based on the above, it is recommended that Article 98 of the CAPP remain as is.**

## 5. IMPLEMENTATION OF THE CAPP

80. The Concept Note also includes a section (p. 28) that deals with how the CAPP can be implemented through various measures to ensure the impact of the CAPP. This includes:

1. The training of lawyers; 2. Ensuring that universities are involved at an early stage to instill knowledge of administrative law in students, even if they later follow a different specialization; 3. A larger number of textbooks and commentaries on administrative procedure; 4. The organization of activities of courts (e.g. via an application procedure for future judges<sup>63</sup>) and administrative authorities (including e.g. a provision stating that in cases where there is no appellate higher authority, first-instance administrative authorities may review their own decisions following complaints); 5. Enhancing judicial independence by making the bodies appointing judges independent from the Ministry of Justice, extending judges’ tenures, and ensuring that key legislation contains key provisions on irremovability, neutral criteria for promotions, and impartiality of judges. See further analysis in section 5.1 *infra.*; 6. Information to the public; 7. Translation of relevant foreign administrative and legal literature into Russian. As the legal context evidently varies from one country to another, it should be indicated what is relevant for the Kazakh context; 8. Exchanging experiences with other countries that have adopted relevant laws; 9. Internships, including training for judges in other countries with similar legal traditions to enhance practical experience in the application of administrative law.

81. To ensure a proper selection of judges with sufficient knowledge of administrative law, the Concept Note (p. 29) suggests implementing certain measures in the university curricula, which should focus more on training analytical skills. The measures are well-targeted and to a certain extent correspond with the OSCE/ODIHR Kyiv Recommendations related to the selection and training of judges, which also recommend OSCE participating States to focus on training the analytical skills and practical experience in university curricula.<sup>64</sup> Other elements, such as case studies, practical experience, law clinics, and moot courts should also be integrated into the curricula.<sup>65</sup> As for the training of lawyers, the provided proposals is also in the line with the Kyiv Recommendations on ensuring that training programmes will focus on what is

---

<sup>63</sup> The Concept Note (p. 32) recommends that in order to establish high quality administrative courts (or sections in ordinary courts); an application procedure for future judges should be established. Requirements for judges should include a) high qualifications in law and b) moral qualities and ethics.

<sup>64</sup> [Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia - Judicial Administration, Selection and Accountability](#), part II; par. 18

<sup>65</sup> *Ibid.*

needed in the judicial service, including aspects of ethics, communication skills, the ability to settle disputes, management skills, and legal drafting skills.

82. In the Kyiv Recommendations, it is reiterated that “where a Judicial Council exists, it may adopt recommendations for the legal education of judges. This includes the specification of relevant skills and advice on the continuing education of judges. Special training should also be provided for representatives of other legal professions joining the judiciary.”<sup>66</sup>
83. Generally, the proposals made in the Concept Note are welcome, though it is hard to comment on specific activities without knowing the details of how they will be implemented. While some of the proposals, such as the exchange with countries with relevant legal models, are well targeted to implement the CAPP, others may be a good starting point, but this will need to be further elaborated and clarified.

### **5.1 Organization of Activities of Courts and Administrative Authorities**

84. The Concept Note mentions the creation of “high-quality courts” (p. 32) and criteria for the appointment of judges, access to judicial posts, and the disclosure of assets. These aspects need to be looked at more closely.
85. The Concept Note’s specific proposal on “staffing”, involving individuals of all age groups, fully complies with the OSCE/ODIHR Kyiv Recommendations, which state that “access to the judicial profession should be given not only to young jurists with special training but also to jurists with significant experience working in the legal profession “.”<sup>67</sup>
86. OSCE/ODIHR also welcomes another position expressed in the Concept Note, noting that “access to the judicial profession should be limited to those candidates with a higher law degree”, which is also in line with the Kyiv Recommendations.<sup>68</sup>
87. Nevertheless, OSCE/ODIHR recalls that judicial independence is crucial to ensure respect for the principles of the rule of law, as only an independent judiciary can secure the administration of justice in light of its essential elements, such as fairness, lawfulness, legal certainty, and equality. In that regard, the selection and appointment of judges and consequently their accountability are of crucial importance, and are necessary preconditions for their independence. Based on several international documents, essential elements for the selection of judges are merit-based, objective, pre-established, and clearly defined criteria with regard to qualifications, integrity, ability and efficiency of candidates for judicial positions.<sup>69</sup>
88. The Concept Note takes note of the intention of the legislator to create specialized administrative courts (p. 17) with the reservation that public law disputes may be tried by courts of general jurisdiction. Judges specialised in administrative justice will then

---

<sup>66</sup> *Ibid.* pars. 19 and 20.

<sup>67</sup> *Ibid.* par. 17.

<sup>68</sup> *Ibid.* par. 18.

<sup>69</sup> See for instance: [UN Basic Principles on the Independence of the Judiciary](#), endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; and Council of Europe, [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities](#), adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies.

handle administrative cases in ordinary courts, possibly in separate sections of the court. Such structures of the ordinary courts can be found for instance in the Netherlands.<sup>70</sup>

89. For both matters, OSCE/ODIHR refers to its Comparative Note on International Standards for Selection, Competencies, and Skills for Judges in Administrative Justice, which offered a comprehensive approach to the concerns expressed in this section,<sup>71</sup> and may provide further guidance on this matter. Key findings of this Note include the following:
- The independence of the judiciary is linked to how judges are appointed and should be based on clear and pre-determined criteria established by law;
  - The bodies selecting (but not necessarily formally appointing judges) must be independent; and
  - All administrative acts must be subject to possible judicial review and courts' annulments of administrative decisions must be binding for the administration.
90. The Concept Note raises concerns with regard to the selection of judges by the Ministry of Justice, which could “cause the executive interest to prevail”. It thus proposes the establishment of a more inclusive body to decide on the appointment of judges, namely a commission composed representing the executive, legislative and judicial branches equally (p.33). OSCE/ODIHR has previously provided guidance on the appointment of judges in administrative justice to Kazakhstan in the previously cited Comparative Note on International Standards for Selection, Competencies and Skills for Judges in Administrative Justice<sup>72</sup>. Independent bodies for appointing judges judicial are crucial to support and guarantee the independence of the judiciary, and as such should themselves be independent and impartial,<sup>73</sup> i.e., free from interference from the executive and legislative branches.
91. While it is welcome that the Concept Note seeks to change the selection procedure for judges, the proposed approach could perhaps be modified somewhat to render the process even more independent and open. The OSCE/ODIHR Kyiv recommendations, for example, state that the body responsible for selecting judges should consist of a substantial number of members from the judiciary selected by their peers, and that the inclusion of other professional groups is desirable (law professors, advocates). Furthermore, it is important to ensure that high-ranking members of the executive, such as the Minister of Justice, and also the State President, cannot be presiding members.<sup>74</sup> **OSCE/ODIHR therefore supports the recommendation in the Concept Note on establishing an independent body for appointing judges in administrative justice, but recommends that further consideration should be given to ensuring the openness and transparency, and independence of the selection process.**
92. In the OSCE/ODIHR Kyiv Recommendations, it is stated that the composition of the judiciary should reflect the composition of the population as a whole. In order to

---

<sup>70</sup> [Judiciary \(Organisation\) Act of the Netherland, 1 January 2020](#), section 43 see also:

<https://www.rechtspraak.nl/English/Judicial-system-and-legislation/Pages/District-courts.aspx>

<sup>71</sup> [Kazakhstan: Comparative Note on International Standards for Selection, Competencies and Skills for Judges in Administrative Justice](#)

<sup>72</sup> *Ibid.*

<sup>73</sup> Bangalore Principles of Judicial Conduct), Preamble: which states that the Bangalore Principles “presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards which are themselves independent and impartial”.

<sup>74</sup> *Op. cit.* footnote 64, Part I, par. 7

- increase the representation of minorities in the judiciary, underrepresented groups should be encouraged to acquire the necessary qualifications for being a judge.<sup>75</sup>
93. According to data set out in the 2017 OECD Gender Policy Delivery Review for Kazakhstan, women comprise 55% of all administrative civil servants, but only 8.4% of the political-level civil servants. In the judiciary, 55% of all judges are women, while only 36.4% of the judges in the Supreme Court are women.<sup>76</sup> Thus, men seem to be recruited to higher positions than women as women are the majority of judges overall.
94. OSCE/ODIHR recommends that the selection and appointment procedure should also reflect gender considerations and should promote a diverse body of decision makers in the judiciary. This statement derives from the OSCE Athens Ministerial Council Decision on Women’s Participation in Political and Public Life, which concluded that participating states should “consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies”.<sup>77</sup> Although publicly available data on the percentage of participation of women in public service and judiciary speak of a balanced state, nevertheless, this percentage decreases in higher positions. **OSCE/ODIHR recommends consulting the Comparative Note on International Standards for Selection, Competencies and Skills for Judges in Administrative Justice, which summarizes certain models for selecting judges for administrative courts.**<sup>78</sup>
95. The Concept Note also includes a proposal on the disclosure of assets (p. 32), which is one of several tools in the fight against corruption. Many countries face problems with public trust in the judiciary. In its Fourth Evaluation Round, GRECO recommended to several countries to implement or improve a system of asset declaration to comprehensively record in a regular – often annual – rhythm judges’ revenues and other assets.<sup>79</sup> In its Opinion No. 21 (2018), CCJE confirmed this recommendation, as this step can contribute to the identification and subsequent avoidance of conflicts of interests if relevant steps are taken and thereby lead to transparency inside the judiciary, and contribute to the fostering of a climate of judicial integrity.<sup>80</sup> However, CCJE considered that such a system should always be strictly in line with the principle of proportionality because it could have a deterrent effect for candidates who apply for a position as a judge, as they may see such a far-reaching obligation as an unjustified intrusion into their private lives.<sup>81</sup> **As shown above, judges’ declaration of assets can be a useful tool to fight corruption in the judiciary, but the measures must be proportionate. It is recommended to bear this in mind in future reform efforts relating to such matters.**

---

<sup>75</sup> *Ibid.* par. 24

<sup>76</sup> OECD Gender Policy Delivery Review, Kazakhstan, Highlights 2017 <https://www.oecd.org/gov/Gender-Highlights-Kazakhstan.pdf>

<sup>77</sup> OSCE Ministerial Council, [Decision 7/09 on Women’s Participation in Political and Public Life](#), 2009, par. 1.

<sup>78</sup> *Op.cit.* footnote 71, Section 4

<sup>79</sup> CCJE Opinion No. 21(2018) on prevention corruption among judges, par. 37: available here:

<https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta>

<sup>80</sup> *Ibid.* par. 38.

<sup>81</sup> *Ibid.* par. 39.

## 6. FINAL COMMENTS

### 6.1 Impact Assessment and Participatory Approach

96. Generally, where new legislation is to be introduced or existing legislation is to be revised, OSCE/ODIHR welcomes an approach in line with OSCE commitments, which requires legislation to be adopted “as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (Moscow Document of 1991, par 18.1).
97. In order to be effective, consultations on draft legislation and policies need to be inclusive and to provide sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.<sup>82</sup> To guarantee effective participation, consultation mechanisms must allow for input at an early stage and throughout the process,<sup>83</sup> meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public consultations constitute a means of open and democratic governance; they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.<sup>84</sup> Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders’ understanding of the various factors involved and enhance confidence in the adopted legislation.
98. Furthermore, given the potential impact of the CAPP or other relevant legislation on the rule of law in Kazakhstan, it is essential that such revised or new legislation be preceded by an in-depth regulatory impact assessment, complete with a proper problem analysis, using evidence-based techniques to identify the most efficient and effective regulatory option (including the “no regulation” option) and with a view to understanding, mitigating and eliminating any potentially negative and differentiated impact that the legislation may have on various groups.<sup>85</sup> Ultimately, this also improves the implementation of laws once adopted.
99. **In light of the above, the legislator is therefore encouraged to ensure that any new legislation is subject to further inclusive, extensive, and effective consultations, according to the principles stated above, at all stages of the law-making process.**

---

<sup>82</sup> See e.g., Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, <<http://www.osce.org/odihr/183991>>.

<sup>83</sup> See e.g., OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders (2014), Section II, Sub-Section G on the Right to participate in public affairs, <<http://www.osce.org/odihr/119633>>.

<sup>84</sup> *Ibid.*

<sup>85</sup> [OSCE/ODIHR Assessment of the Legislative Process in the Republic of Armenia](#), October 2014, pars. 47-48, and [Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain other Acts of Poland](#) (as of 20 December 2019), par. 103, See also: [OECD \(2009\), Regulatory Impact Analysis: A Tool for Policy Coherence](#), OECD Reviews of Regulatory Reform, OECD Publishing, Paris, the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, <<http://www.osce.org/odihr/183991>>.

~~<sup>85</sup> See e.g., OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders (2014), Section II, Sub-Section G on the Right to participate in public affairs, <<http://www.osce.org/odihr/119633>>.~~

~~<sup>85</sup> *Ibid.*~~

~~<sup>85</sup> [OSCE/ODIHR Assessment of the Legislative Process in the Republic of Armenia](#), October 2014, pars. 47-48, and [Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain other Acts of Poland](#) (as of 20 December 2019), par. 103, See also: [OECD \(2009\), Regulatory Impact Analysis: A Tool for Policy Coherence](#), OECD Reviews of Regulatory Reform, OECD Publishing, Paris.~~

## 6.2 Gender-neutral Legal Drafting

100. It is noted positively that overall, the Concept Note uses gender-neutral terminology. However, it is silent on gender issues, such as equal opportunities for men and women (even if non-discrimination in general is mentioned). Further administrative legislation and other documents providing guidance on the understanding of administrative law should avoid language and provisions referring to individuals occupying certain official positions or belonging to a certain category using only the male form of a term, which would imply that the position is occupied by a man only. Established international practice requires legislation to be drafted in a gender-neutral manner.<sup>86</sup> It is recommended that, whenever possible, the reference to post-holders or certain categories of individuals be adapted to use a gender-neutral word, whenever possible. Alternatively, the plural form of the respective noun could be used instead of the singular or it is recommended to use both male and female words, for instance.<sup>87</sup>

[END OF TEXT]

---

<sup>86</sup> See e.g., the UN Economic and Social Commission for Western Asia (ESCWA), Gender-Sensitive Language (2013), <[https://unswap.unwomen.org/UNEntity/ViewDocument?FileName=Annex16\\_\\_23201435437.pdf](https://unswap.unwomen.org/UNEntity/ViewDocument?FileName=Annex16__23201435437.pdf) [copy and paste weblink in the browser]>.

<sup>87</sup> See e.g., OSCE/ODIHR, Report on the Assessment of the Assessment of the Legislative Process in the Republic of Armenia (October 2014), pars. 47-48, <<http://www.legislationline.org/documents/id/19365>>.