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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

KOSOVO

DRAFT OPINION ON THE DRAFT LAW ON LEGAL ACTS

on the basis of comments by

Mr Murray HUNT (substitute member, United Kingdom)
Ms Janine OTALORA MALASSIS (member, Mexico)
Mr András VARGA (member, Hungary)

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I. Introduction

1. By letter of 12 March 2019 Mr Ramush Haradinaj, Prime Minister of the Republic of Kosovo, decided to request an opinion of the Venice Commission on the draft law on legal acts ("the draft law"), which is part or the legislative agenda of the year 2019, to ensure that it "adheres to best international practices, standards and norms", prior to the draft law being forwarded to the Government for adoption.

2. This draft law is the result of a process which involved private and public consultations. A previous version was already submitted to the Assembly of Kosovo and the Government, respectively the Office of the Prime Minister, revised it on the basis of the recommendations of the Assembly.

3. The English translation of the draft law was provided by the authorities of Kosovo. Inaccuracies may occur in this opinion as a result of incorrect translation.

4. For the present opinion, the Venice Commission invited Mr Murray Hunt, Ms Janine Otálora Malassis and Mr András Varga to act as rapporteurs.

5. The present opinion was adopted by the Venice Commission at its XXX Plenary Session (Venice, …).

II. International standards applicable to law-making

A. The diversity of legal systems and its limits

6. If we look around Europe, we will find a wide spectrum of rules on law-making, regarding the types, hierarchy and mandatory forms of legal acts, including those governing the law-making process itself. There is no (mandatory) international standard specific to this field, although there are a number of important international standards which are directly relevant to it. The particular solutions of the different states are influenced by legal traditions – by the history-based constitutional identity of the different nations. The various national solutions often originate in long constitutional customs; during the centuries, these traditions were partly, or in some cases fully regulated by formal laws, and often by the Constitution. In the absence of specific standards, this diversity in traditions and practices is admissible as long as it does not go against more general standards, deriving, for example, from the three main principles expressed in the Preamble to the Statute of the Council of Europe – democracy, human rights and the rule of law.

7. The content of such principles is expressed more in detail in hard law as well in soft law. Since the Rule of Law standards are crucial when dealing with formal aspects of legislation, reference has to be made to the *Rule of Law Checklist* drafted by the Venice Commission and endorsed by the Committee of Ministers, the Congress of Local and Regional Authorities and the Parliamentary Assembly of the Council of Europe.[1] The most essential features of the Rule of Law for the analysis of the draft law under consideration will be addressed below.

8. Apart from the Rule of Law Checklist, standards on law-making can be found in the CSCE 1990 Copenhagen Document, which provides that "legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability. Those texts will be accessible to everyone".[2] The 1991 Moscow Document similarly requires that States formulate and adopt legislation as the result of an open process reflecting the will of the people".[3]

[1] CDL-AD(2016)007.
[2] § 5.8.
[3] § 18.1. Cf. Article ICCPR on the right of every citizen to take part in the conduct of public affairs, including by having meaningful opportunities to contribute to the law-making process.

The reports of the OSCE/ODIHR on the legislative process in a number of countries, particularly in Eastern Europe, the Western Balkans, the South Caucasus and Central Asia put the emphasis on the need for thorough impact assessment, including human rights impact assessment; the need for broad and inclusive public consultations; the need for transparency in the legislative process, and for consistency in the laws.

B. The principle of legality – constitutionality and hierarchy of norms

9. The principle of legality first includes the *supremacy of the law*, law being understood as the whole legal order[4]. This also implies the supremacy of the Constitution, as the basis of the legal system - in almost every legal system a formal (written) Constitution (the United Kingdom being an exception). The Constitution is adopted in principle by the nation, in practice by a specially composed (mostly elected) body or the parliament as the supreme legislative body itself. In a number of countries the Constitution has to be ratified by a referendum.[5] Supremacy of the law implies that conformity of legislation with the Constitution must be ensured, and the action of the executive branch must conform with the Constitution and other laws.[6]

10. A Constitution usually covers three main topics:
- the fundamental relations between the state (its institutions) and the people (including human rights and freedoms),
- the structure of the state institutions (including clauses on the form of the state and of the government, the self-definition of the state) that implement the will of the state,
- the way of expression of the will of state: the laws, the source of laws and the main rules of the law-making process (legislation). In short: the main three strata of a Constitution cover rules on the state, on rights and on legislation. This opinion will focus on the latter, the rules on legislation. The Constitution should contain the most important rules on legislation.

11. The duty to implement the law is one of the cornerstones of the principle of legality.[7] An ambiguous and complex system of laws impenetrable for outsiders could be an obstacle to such implementation. The conformity to this duty cannot however be evaluated *in abstracto*. If the authorities are able to navigate through the legal system, and if these laws are clear for individuals, it is difficult to say that the system is not appropriate or it should be changed.

12. The principle of legality also requires that State action must be authorised by the law.[8] The Rule of Law requires that public officials have authorisation to act, and their powers must be defined by law. In particular, the power of public authorities to act or make decisions which affect fundamental rights must have a legal basis. The ECHR requires that acts or decisions which affect certain ECHR rights must be prescribed by law, or in accordance with the law. This includes (but is not confined to) the requirement that there be a legal basis for such acts and decisions – public authorities cannot interfere with those rights without a legal basis.

13. A law on law-making (such as the draft law) should therefore provide for legislation to be simple and clear, but also to respect the principle of the *hierarchy of legal norms* – if it is not enshrined in the Constitution, which would be suitable[9]. It should define over which norms a specific kind of legal act has primacy. This implies, in turn, defining the various types of legal acts.

[4] CDL-AD(2016)007, § 46.
[5] Cf. the report on constitutional amendment, CDL-AD(2010)001.
[6] CDL-AD(2016)007, II.A.1.ii and iv.
[7] CDL-AD(2016)007, II.A.7.
[8] CDL-AD(2016)007, II.A.2.i and iv.
[9] CDL(1995)073rev, Opinion on the Regulatory Concept of the Constitution of the Hungarian Republic, p. 4.

C. Legality, separation of powers and democracy

14. As the 1789 French Declaration of Human and Civic Rights proclaims, "[a]ny society in which no provision is made… for the separation of powers, has no Constitution".[10] Traditionally, powers are separated into legislative, executive and judicial branches. From this principle emerges a main line between law-making (legislation) and implementation of laws. Both law-making and implementation of laws are expressions of sovereignty, of the will of the state (if it sounds better: of the nation): the difference depends on their addressees. Laws – in the material sense – or normative acts - are addressed to everybody (or at least to a large and indefinite group of addressees): they are general and abstract; decisions implementing laws always have one or more, but definite, specific, or named addressees: they are individual and concrete.

15. In a democratic state respecting the principle of separation of powers, the power to adopt laws in the material sense belongs primarily to the legislator (directly elected in a democratic way). In almost every state this power is not reserved in its entirety to parliaments, more or less topics are delegated to the executive. In theory, delegation could be unconditional (the executive may make laws concerning every issue not regulated by the legislation) or conditional (the executive needs a formal and case-by-case authorisation to create primary regulation and/or to complete regulation of an issue by secondary laws, coherent with the primary legislation). However, unconditional delegation would go against the principles of legality and separation of powers: those imply not only the supremacy of the legislature over the executive, but that general and abstract rules should be included in an Act of Parliament or a regulation based on that Act, save for limited exceptions provided for in the Constitution; when legislative power is delegated by Parliament to the executive, the objectives, contents, and scope of the delegation of powers have to be explicitly defined in a legislative act. General and abstract acts can in exceptional cases be included in an act of the executive power not based on an Act of Parliament (but directly on the Constitution).[11]

16. The Rule of Law Checklist also contains standards and benchmarks concerning the quality of the procedures by which laws are made. The process for making law must be "*transparent, accountable, inclusive and democratic*".[12] To satisfy this requirement, the public should have access to draft legislation, and should have a meaningful opportunity to provide input.[13] Where appropriate, impact assessments should be made, including human rights impact assessments, before legislation is adopted.[14]

17. Implementation of laws is the task of the executive and judicial branches of government. The power of the executive to adopt normative acts is limited to legislative delegation as defined above and implementation of (formal) laws. It is more generally competent for adopting decisions (legal acts of an individual and concrete nature). Usually the executive (through its administrative institutions and bodies) acts for the future (*pro futuro, ex nunc*), while the judiciary decides on the legality of the previous behaviour of the state and of individuals, it implements laws with retrospective effect (*ex tunc*).

18. Since the executive has usually the largest structure of institutions and bodies, its internal administration also needs rules. These internal rules look formally like normative acts (of a general and abstract character), but their addressees are only the state institutions: they have no direct effect on individuals.

[10] Article 16.
[11] CDL-AD(2016)007, II.A.4.
[12] CDL-AD(2016)007, II.A.5.
[13] CDL-AD(2016)007, II.A.5.iv.
[14] CDL-AD(2016)007, II.A.5.v.

D. The principle of legal certainty

19. Like legality, legal certainty is one of the main pillars of the Rule of Law. It includes in particular accessibility and foreseeability of the laws.[15] In order to exclude confusions regarding the applicable law (both for implementing institutions and individuals) rules on law-making should be as clear as possible. Specific and clear rules should apply to the drafting of the various types of legislation (on these types of legislation, see chapter IV.C below).

20. The principle of legal certainty implies that laws must be *accessible*: they should be published before entering into force, and easily available, *e.g.* in an official bulletin.[16] The effects of laws must be *foreseeable*: they should be written in an intelligible manner and formulated with sufficient precision and clarity to enable people and legal entities to regulate their conduct in conformity with the law's requirements.[17]

21. Foreseeability also requires that new legislation should clearly state whether, and which, previous legislation is repealed or amended, and amendments should be incorporated in a consolidated, publicly accessible version of the law.[18]

22. Clarity and foreseeability of legal acts are important not only to enable individuals to regulate their conduct, but for separation of powers reasons: as the Memorandum summarising the conference on "The European legal standards of the rule of law and the scope of discretion of powers in the member States of the Council of Europe" states: "legislative provisions should be clear and understandable to enable the executive power to exert discretion only in areas where this is intended and not simply because the law is uncertain or ambiguous."[19]

III. A typology of legal acts: general remarks

23. In summary, and in conformity with the principles developed above, the various legal acts can be defined as follows.

24. Legal acts can be normative (general and abstract) or special (individual and concrete).

25. Normative (general) acts can be external (binding individuals) or internal (binding only state institutions).

26. The top-level external normative act is the Constitution, that should regulate the types of other external normative acts, including primary and secondary legislation.

27. The highest level primary external normative acts are statutes, products of legislation by the highest democratically elected body, the parliament. Statutes may not contradict the Constitution.

28. The Constitution generally provides for the possibility of the executive power to adopt normative acts under certain conditions:

- The Constitution may (under strict limits) delegate power to create primary external normative acts without need of delegation through statutes to the executive. Primary

[15] CDL-AD(2016)007, II.B.1. and 3.
[16] CDL-AD(2016)007, II.B.1.i and ii.
[17] CDL-AD(2016)007, II.B.3.i and § 58. See in particular ECtHR *The Sunday Times v. The United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 49.
[18] CDL-AD(2016)007, II.B.3.ii.
[19] CDL-JU(2013)020, p. 3.

legislation by the executive should not be called “statute”, to distinguish it from statutes adopted by Parliament, but, for example “decree”. Primary decrees may not contradict the Constitution and statutes.

- In conformity with the Constitution, the statutes may delegate to the executive the power to create secondary external normative acts if the objectives, contents, and scope of the delegation of powers are explicitly defined in a legislative act. The addressee of this delegation is usually (but not necessarily) the highest institution of the executive (cabinet or council of ministers, often called ‘Government’ and/or head of state). Primary legislation by the executive should not be called “statute”, to distinguish it from statutes adopted by Parliament, but, for example “decree”. Primary decrees may not contradict the Constitution and statutes.
- The executive may also adopt normative acts (which are also secondary decrees) to implement the statutes. [20]

29. Legislation by the executive should be clearly differentiated from the statutes of parliament. Secondary decrees may not contradict the Constitution and statutes in general, and the statute (possibly the primary decree) that delegates the power, in particular.

30. The denomination of the different types of external normative acts should only depend on their legal nature and not on their content (material, procedural, or institutional norms, etc.) or on whether they are new pieces of legislation or amendments to existing law.

31. In the case of *internal normative acts* there are less clear rules, since they are addressed only to state bodies. They may not contradict external normative acts, and they may not have a direct effect on individuals. Moreover, usually internal normative acts may not be referred directly to a court. However, they may have an indirect effect on individuals, when used by the administration to interpret external normative acts (*e.g.* in the fields of taxes and social security), and then be also indirectly challenged before the courts.

IV. Analysis of the draft law

A. Introduction - the constitutional context

32. The concept of “legal acts” is central to the idea of a State governed by the Rule of Law. A clear legal framework with a clear definition of legal acts and of the means by which they are made and can be changed is essential in order to give effect to important Rule of Law principles such as accessibility, foreseeability, predictability and consistency of the law. A clear law on legal acts therefore has the potential to be a significant Rule of Law enhancing measure.

33. The draft law contains many provisions which give effect to important Rule of Law principles which are engaged by the making of legal acts, as explained in detail in the Venice Commission’s Rule of Law Checklist.

34. The following comments focus on those parts of the draft law which raise questions about whether or how well they give effect to the internationally recognised Rule of Law standards, or which might be capable of improvement in order to secure better fulfilment of those standards.

35. The draft law is made pursuant to Article 65.1 of the Constitution of the Republic of Kosovo. Article 65 is within Chapter IV of the Constitution, which deals with the Assembly of the Republic of Kosovo, its legislative organ. Article 65 sets out the competencies of the Assembly, which include, in Article 65.1, that the Assembly “adopts laws, resolutions, and other general acts.” The

[20] On the limits to the law-making powers of the executive, see below IV.E.2.

term “resolution” does not appear in the draft, nor do “other legal acts” adopted by the Assembly. This should be clarified.

36. Article 16 of the Constitution provides that the Constitution is the highest legal act of the Republic of Kosovo and that laws and other legal acts shall be in accordance with the Constitution.

B. Scope of the draft law

37. The draft law has two main purposes:[21]

(1) to further define the types of legal acts, in accordance with the Constitution of the Republic of Kosovo, and

(2) to determine the principles and standards for the drafting, issuance, approval, consolidation, correction and publication of legal acts.

38. The draft law will apply to all public institutions, central and local, which have power, under the Constitution or other laws in force, to draft, issue, approve, consolidate, correct, publish and implement legal acts,[22] but does not apply to “administrative acts” which are governed by the Law on Administrative Procedure.[23]

39. “Correction” and “consolidation” are both defined in the draft law. Correction is the correction of linguistic and technical errors in the legal act which does not affect its substance.[24] Consolidation is the incorporation into the text of the legal act of subsequent amendments and corrections, to make the legal act more accessible.[25]

40. “Legal act” is the generic term used in the draft law for mandatory general rules of general application.[26] The draft law goes on to define ten specific types of legal act.[27]

41. The draft law also sets out seven “Principles” that apply to the drafting of legal acts: constitutionality, legality, transparency, proportionality, necessity, compliance and standardisation.[28]

42. The draft law prescribes the interrelation (hierarchy) between different legal acts.[29]

43. Chapter III of the draft law lists the different types of legal acts. Chapter IV deals with consolidation and correction of legal acts.

44. The drafting of legal acts is to be conducted in accordance with drafting standards which already exist and those to be established by an Administrative Instruction to be proposed by the Office of the Prime Minister.

[21] Draft law, Article 1.
[22] Draft law, Article 2.1.
[23] Draft law, Article 2.2.
[24] Draft law, Article 3.1.13.
[25] Draft law, Article 3.1.12.
[26] Draft law, Article 3.1.1.
[27] Draft law, Article 3.1.2-3.1.11.
[28] Draft law, Article 4.
[29] Draft law, Article 5.

45. The draft law makes provision for when legal opinions about legal acts may be sought;[30] for the repeal, amendment and supplementation of legal acts;[31] and for the signing of legal acts.[32] It also makes provision for their publication[33] and their entry into force.[34]

46. To implement the draft law, the Government is required to issue Administrative Instructions on Drafting Standards, and on Standards and Procedures for the consolidation and correction of legal acts, within one year.

47. The draft law does not refer to the case law of the European Court of Human Rights, other international courts, or the Courts of Kosovo, including the Constitutional Court. This is in conformity with international standards. Case law (or rather: precedents) are important sources of law, but not as legal acts (products of legislation), and, at least in the continental system, may not contain new legal rules (unless provided for by the Constitution or a statute in exceptional cases). Separation of powers means that the power of adoption of new rules belongs to the legislative branch of government, except in case of delegation to the executive.[35] The role of courts is to implement legal acts. It is fulfilled by interpretation, and this interpretation is binding for the parties, but only under the limits of (primary or delegated) legislation, under the force of legal acts that were interpreted by the courts. Once a law is changed, the former interpretation – and the precedent – loses its binding force.

C. Terminology

48. The legal acts as dealt with in the draft law should be understood in the formal meaning, that is as sources of law. However, the distinction between legal acts, governed by this draft law, and administrative acts (see Article 2.2), governed by the separate Law on General Administrative Procedure (Law No. 05/L-031), provides a reasonably clear delineation of the scope of the draft law. However, given the definition of legal acts in Article 3.1.1 in terms of general rules, the inclusion of "decisions" (Article 3.1.3) and "orders" (Article 3.1.7) in the definition may require further explanation, as these sound more individual rather than general. Moreover, the difference between "decisions" and "orders" is not self-evident: orders are defined as "internal", but at the same time as "addressed to a number of certain subjects" (rather: "a certain number of subjects"), which gives the impression that they have direct external effect on individuals.

49. This conceptual concern is particularly important when it is noted that in the section regarding definitions, reference is made to administrative instructions, which resemble administrative acts and are considered as legal acts regulated by the draft law.

50. There may therefore be scope to clarify the definition of legal acts in Article 2 of the draft law to make it clearer, whether by omitting decisions and orders or defining them in a way which more clearly satisfies the general definition of legal acts in Article 3.1.1.

51. Chapter III refers to the types of legal acts and makes a classification depending on the authority that issues them, without defining whether this catalogue is illustrative or limitative. Also, this chapter does not talk about the "sub-legal acts" a concept referred to in the Regulation of Rules and Procedure of The Government of The Republic of Kosovo No. 09/2011, so it would be necessary to add or determine why these are not included. It should also be noted that the Deputy Prime Ministers are not among the listed authorities despite being part of the Government.

[30] Draft law, Article 10.
[31] Draft law, Article 11.
[32] Draft law, Article 12.
[33] Draft law, Article 13.
[34] Draft law, Article 14.
[35] On the law-making powers of the executive, see below IV.D.2.

52. More precisely, Article 65 of the Constitution states that the Assembly can adopt laws, resolutions and other legal acts, while Article 3 of the draft law does not provide for the same categories. The term "laws", while absent from Article 3, appears in Article 6.1.3. This should be made consistent. (It could however be a translation problem). At any rate, the law on legal acts should be in conformity with the Constitution. Another question is what the term 'laws' in the Constitution exactly means: a normative legal act (law in the material sense), or a statute adopted by the Assembly as an external normative act (law in the formal sense)?

53. According to the Rules of Procedure of the Assembly (Appendix I), resolutions are written motions by which the Assembly , by voting, expresses its will in a particular matter. They are not legal acts and its is therefore normal that they are not addressed in the draft law.

54. In the same line, the term "statute" as used at least in the English translation of the draft law (Articles 3.1.11, 6.1.7, 6.3.4, 6.8.1.1) diverges from the standard meaning given to this term in English (law in the formal sense, normative act adopted by Parliament) and seems to apply rather to internal acts.

55. "Regulations" (Article 3.1.5) appear to be internal legal acts, while "directives" (Article 3.1.8) would have an external effect. In English at least, this would be the other way round.

56. More generally, there is an ambiguity with the terminology in the draft, because it defines the various types of legal acts not only on the basis of the authority which adopts them (*fons essendi*) and/or the way they are adopted, but also of their content.

57. It would therefore be suitable to ensure a better convergence between Article 3 (definitions) and Article 6 (types of legal acts). In particular, Article 3 could make clear, for which type of legal act which it enumerates, by which authority or authorities it may be adopted. In particular, Article 6 should provide only for legal acts which are defined in Article 3 (and not for "rules" mentioned in Article 7.3). For example, a contradiction appears between Article 3.1.8, according to which directives are adopted by a collegial body, and Article 6.8.2.2, which makes their adoption by mayors possible.

D. The draft law in the legal order

58. The principles stated above, and in particular the principles of the supremacy of the law and of the hierarchy of legal norms, apply to every piece of legislation, including those addressing the drafting of legislation, like the draft law on legal acts.

59. While it is clear that the executive branch of government (including the public administration) has to abide by parliamentary legislation, it is less certain that supremacy of the law implies that parliament is bound by the (ordinary) legislation it adopts. The application of the principle *patere legem quem ipse fecisti* to the Assembly might however be imposed by the national legal order. Since the law on legal acts would be ordinary legislation, the question is therefore whether the Assembly has to abide by it. At any rate, the Assembly will always have the possibility to modify the law on legal acts if it does not wish to abide by its rules.

60. The draft law does not address the issue of sanctions in the case of its violation, and in particular of violation of "principles of drafting legal acts" in Article 4. In conformity with the principle of hierarchy of norms, laws passed by the Assembly that fail to comply with the law on normative acts remain valid, but infra-legislative acts may be annulled if they are adopted in violation of its provisions. In order to avoid any ambiguity, the law should state this explicitly[36].

[36] CDL-AD(2009)053, Opinion on the draft law on normative acts of Bulgaria, §§ 10-11.

61. The question of the consequences of the violation of the law on legal acts in the process of drafting ordinary legislation arises in particular concerning the principles of drafting legal acts defined in Article 4. Most of them (*e.g.* constitutionality, legality, proportionality) are of a constitutional nature and it could be envisaged to enshrine them clearly in the Constitution – legislation adopting against these principles would then become unconstitutional.

62. The delegation of the adoption of rules on the elaboration of legislation to the government or the administration is more problematic. It is doubtful that the legislator should be bound by such rules, especially if they appear in administrative instructions addressed to the administration. It would be preferable to make it clear that such instructions, as well as normative acts drafted by the executive, apply only to the stages of the legislative process under the responsibility of the bodies which have adopted them or of their subordinate bodies.

63. More concretely, the draft law refers to the processes of consolidation, correction, and standardisation in the drafting of legal acts through an administrative instruction proposed by the Office of the Prime Minister and approved by the Government (Article 9). This could collide with the provisions of the Law on Legislative Initiatives, whose purpose is to establish the rules and procedures for all legislative initiatives. Although Article 8.7 refers to such legislation, Articles 8.8 and 9.2 of the draft law refer to procedures and standards that may already be regulated and even contradict what is provided by the Prime Minister's office.

64. The adoption of this draft law could open the opportunity to harmonise the legal provisions in the field. The draft law defines a legal act almost identically as a *normative act* according to the *Administrative instruction no. 03/2013 on standards for the drafting of normative acts*, [37] but a completely similar drafting would be preferable.

65. Likewise, it would be convenient to point out what is to be understood for each of the acts that emanate from the different authorities and clarify the differences and hierarchies between legal act, normative act, and administrative act.

66. In sum, it is suggested to harmonise other legal acts, such as the Law 04/L-025 on Legislative Initiatives, the Regulation on Rules and Procedures of the Government of Kosovo 09/2011 and the Administrative Instruction 03/2013 on Standards for the Drafting of Normative Acts with this draft law.

E. The principle of legality in the draft

1. *Supremacy of the law*

67. The draft law acknowledges the supremacy Constitution of Kosovo and the requirement that legislation must be in conformity with the Constitution in the drafting principle set out in Article 4.1.1 (“laws and all other legal acts shall be in accordance with the Constitution)”, thus implementing Article 16 of the Constitution which states that the Constitution is "the highest legal act".

68. Recognition of a principle of constitutionality as a drafting principle is not enough on its own to ensure the conformity of legal acts with the Constitution, but it is a welcome provision. It requires the legislature as well as the executive to have regard to constitutionality when drafting

[37] Article 3, 1.4: “Normative acts comprise general rules of conduct for a legal relationship or for a complex of relationships, which apply to an undefined and unlimited number of individuals, for specific certain fields and have multiple activities effects and are approved or issued by the competent authority. For the purpose of this administrative instruction, normative acts include: Laws and subordinate legal acts that are issued to implement laws or to regulate specific fields, according to constitutional and legal competences of the holders of state and public office. ”

legal acts, which makes it more likely that legal acts will conform to the Constitution, and the recognition of such a principle of drafting will help both to legitimise and to provide relevant material for both *ex ante* legislative review of the constitutionality of legal acts, *e.g.* by specialised parliamentary committees, and *ex post* judicial review of the constitutionality of legal acts, which are other important means of securing compliance with the principle of legality.

69. There is no reference in the draft law to constitutional values as enshrined in article 7 of the Constitution and, specifically, in 7.1 on the principles of the constitutional order of Kosovo, nor in 7.2 on gender equality. Nor does the draft law refer to articles 19 and 22, on the applicability of international law, 20, on the delegation of sovereignty and 21, on general principles relating to fundamental rights and freedoms. Similarly, it is not clear if these principles apply only to the drafting process or if they shall govern the final legal act.

70. Article 5 of the Law encompasses the principles of interrelation between acts (*lex specialis derogat legi generali, lex posterior derogat legi priori* and *lex superior derogat legi inferiori*) but it does not indicate whether the principle of *lex posterior generalis non derogat legi priori speciali* is applicable. It would be suitable to state this explicitly.

71. These are rules of interpretation of the law and not on law-making. It should be made clear that, even if the principles *lex posterior derogat legi priori* and *lex superior derogate legi inferiori* apply, a new piece of legislation should identify clearly any provisions it repeals[38].

72. Article 5.4 indicates that, if a non-competent authority issues a legal act, the legal act in question shall have no legal effect and shall be revoked by the authority competent for its issuance, or by a higher competent authority. It is not clear if this enables a specific administrative authority to cancel a legal act adopted by another – non-competent - authority, a task which is usually is the responsibility of judges. Similarly, it is recommended to clarify whether the act is void or voidable. At any rate, the act should not be applied as soon as the competent authorities have declared that it was not regularly adopted. It should be made clear whether the invalidity of the text has *ex nunc* or *ex tunc* effects. The principle should be *ex tunc* effects (retroactivity) but closed legal relations (fulfilled contracts or *res iudicata*) should not be affected. It would be suitable to address this issue in legislation, while the courts would deal with individual cases.

73. Subsequently, Article 5.5 indicates that the issuance of a legal act that is related to the scope and responsibilities of two or more institutions shall be approved by the one with a higher authority. This should be made more precise. Is the Assembly "higher" than the Government, or the Government than local authorities? Even if hierarchy is clearer inside the executive branch of government (the Government is higher than its members), this assumption does not take into consideration the possibility of specialised powers conferred to a hierarchically inferior authority. It is important to note that Law 05 / L-031 on General Administrative Procedure refers to cooperation between administrative authorities, which offers a more precise legal basis.

2. *Law-making powers of the executive*

74. The definitions of the types of legal acts in Article 3 of the draft law include some types of executive law-making. Those definitions appear to ensure the supremacy of the legislature over the executive in most cases by including in the definition of the legal act the requirement that the legal acts must be "within the authority/authorisations" granted by the law.

75. The one type of executive legal act where there may be a little uncertainty about whether the definition in the draft law sufficiently ensures the supremacy of the legislature is that of "administrative instruction", which refers to implementing measures "in accordance with the

[38] CDL-AD(2010)017, Opinion on the draft law on normative legal acts of Azerbaijan.

purpose of the relevant law",[39] as opposed to the clearer requirement that the legal act be within the legal authorisation granted by the law, or simply in accordance with the law.

76. Administrative instructions should be considered as internal normative acts according to the typology described above. Whether they are a form of executive law-making which is sufficiently controlled by the legislature requires clarification. This is particularly important given that an administrative instruction is the type of legal act which shall be used to establish the standards, procedures and forms for drafting legal acts.[40]

3. *Hierarchy of norms*

77. Clarity about the hierarchy of norms, or which legal acts prevail in the event of a conflict or inconsistency between them, is also an important aspect of the Rule of Law. It helps to ensure that the executive is not left with a discretion which has not been expressly conferred on it but is the result of legal ambiguity.

78. Article 5 of the draft law contains some important provisions in this respect regarding the interrelation (hierarchy) between legal acts. Apart from what was said before about the relationship between the Constitution and ordinary legislation as well as the legislative powers of the executive, Article 5.3 says that the interrelation between legal acts of different levels must be determined as per the hierarchy of state bodies as defined in Article 6. Article 6 lists the types of legal acts, but does not itself make clear that the list defines the hierarchy of authorities, presumably in descending order. Article 6, or the Explanatory Report accompanying the Bill, could make explicit that the Article does not merely list the types of legal acts, but also sets out the hierarchy of state bodies issuing legal acts.

79. It would be more than suitable to include in the law an article establishing the hierarchy of all legal acts, international and internal. While the Constitution refers to its own superiority (Article 16) and provides that "[r]atified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo" (Article 19.2), it is silent on the other aspects of the hierarchy of norms, including the status of acts of international organisations and jurisdictional decisions of international courts.

F. The drafting of legislation

4. *Principles of drafting legal acts (Article 4)*

80. The inclusion in the draft law of Principles to guide the drafting of legal acts is to be welcomed as a positive step in the implementation of legislative standards, which is being increasingly encouraged by both the Venice Commission and the OSCE. However, there may be room for improvement of this important part of the draft law.

81. First, the Principles could include compatibility with the human rights obligations of the Republic of Kosovo and compatibility with international law. This would help to embed respect for human rights law and international law into the process of making legal acts. Second, it should be made clear that these principles apply to the whole legislative process, from the initial drafting of legislation, through its review by the Assembly, to its correction and consolidation; they could be constitutionalised in order to prevent the legislature from adopting legislation going against them.[41]

[39] Draft law, Article 3.1.6.
[40] Draft law, Article 9.2.
[41] See above par. 59.

5. *Consolidation of legal acts (Article 7)*

82. The draft law makes provision for the consolidation of legal acts. The incorporation of subsequent amendments into the text of legal acts enhances the accessibility and intelligibility of the laws and therefore promotes *legal certainty*. It is therefore a positive measure from the perspective of the Rule of Law. This appears to be the purpose of the relevant provisions of the draft law, which defines consolidation as the incorporation of amendments and corrections into the text of legal acts "with a view to providing easier and more transparent access to the legal act."[42]

83. However, it is not clear whether the provisions of the draft law would actually have this desired effect, because of Article 7.3, which provides that "the legal act's consolidated text shall serve as an effective documenting tool for internal use and shall have no legal power". The consolidated version of the amended legal act must be publicly accessible in order to enhance foreseeability and legal certainty, as the benchmark in the Rule of Law checklist makes clear. It is clear from Article 7.2 that the intention is that the consolidated text should be published in the Official Gazette, which would achieve the desired effect, but this appears to be brought into question by the text of Article 7.3. It is however possible that Article 7.3 is intended to refer to the consolidated text of the legal act after it has been drawn up but before it is published in the Official Gazette. The intended meaning and effect of Article 7.3, and possibly its text, would benefit from clarification.

84. One further minor point is that the definition of consolidation in the draft law includes the incorporation of both subsequent amendments *and corrections*, but the procedure for consolidation in Article 7 appears to apply only to "amendments" and to "partial abolitions" by the constitutional Court. It does not mention corrections. It may be unnecessary to include corrections, because the edited version of corrected legal acts is published in the Official Gazette under Article 8, but in that case the reference to correction in the definition of consolidation in Article 3.1.13 could be removed.

6. *Correction of legal acts (Article 8)*

85. The draft law also provides for the correction of legal acts, in cases of discrepancies between official languages and for linguistic or technical mistakes.

86. A procedure for correcting linguistic and technical errors in legal acts, and for publishing the corrected version, enhances the intelligibility and accessibility of the law and so promotes legal certainty.

87. Correction is defined to mean changes "which shall not cause any change in the substance of the legal act."[43] The difference between a technical and a substantive change is not elaborated in the draft law. Standards and procedures for correcting legal acts are to be established by an administrative instruction proposed and adopted by the executive.

88. A power of technical correction of legal acts, while necessary, gives rise to the risk of executive amendment of legislation going beyond the technical and straying into the substantive. Safeguards against the risk of such executive legislation are desirable, for example by ensuring that there is an opportunity for independent scrutiny of the corrections to ensure that they are not substantive. There does not appear to be any such safeguards on the face of the draft law. In fact, Article 8.4 appears to rule out such scrutiny by providing that the competent body for the approval of legal acts "shall approve it formally without discussing the edited text of the legal act."

[42] Draft law, Article 3.1.12.
[43] Draft law, Article 3.1.13.

What safeguards exist to ensure independent scrutiny of corrections being technical not substantive would benefit from clarification.

7. *Legal advice (Article 10)*

89. The provisions about when legal opinions about legal acts might be sought are not very explicit. It is not clear on the face of the draft law what "legal units" is referring to, or who might seek legal advice from whom concerning what. The restriction on legal advice being sought "only in cases of ambiguities in legal norms" could potentially operate as a limit on scrutiny of legal acts during the process of their enactment or adoption. For example, in relation to legal acts adopted by the Assembly, the Assembly might want access to independent legal advice in order to assess the constitutionality or human rights compatibility of a legal act. Indeed, access to such independent legal advice by the human rights committees of legislatures is an important standard in the emerging guidance on how parliaments should scrutinise legislation for human rights compatibility: see the Draft UN Principles on Parliaments and Human Rights.[44] Moreover, since the legal opinion has no binding legal effect (Article 10.2), restricting its scope does not appear to be justified.

G. Publication and entry into force of legal acts (Chapter V)

90. Concerning Chapter V regarding the publication and entry into force of legal acts, it is suggested to offer more details on the use of official languages in legal acts and the obligations of the authorities in this regard, especially based on article 5 of the Constitution, if this is not addressed in another piece of legislation. For example, Article 71 of Law 05 /L-031 on General Administrative Procedure does establish clear parameters regarding language in administrative act.

V. Conclusions

91. The Venice Commission welcomes the initiative of the authorities of Kosovo to draft a law on legal acts intended in particular at clarifying the various types of legal acts and their interrelations.

92. The draft law on legal acts contains some important provisions which make it more likely that the legal order of Kosovo will in future conform more to the requirements of the Rule of Law as set out in the international standards identified in the present opinion. In particular, it defines the various types of legal acts and the authorities competent to adopt them, as well as their interrelation.

93. The Venice Commission makes the following main recommendations:

- To ensure a clear and consistent terminology on the various types of legal acts in the whole legal order of Kosovo - including the Constitution, the law on legal acts and any other law adopted by the Assembly, as well as acts adopted by the executive branch of power, including those with internal effect, such as administrative instructions;
- To harmonise with this draft law, also in their substance, all legal acts relating to the drafting of legislation, such as the Law 04/L-025 on Legislative Initiatives, the Regulation on Rules and Procedures of the Government of Kosovo 09/2011 and the Administrative Instruction 03/2013 on Standards for the Drafting of Normative Acts;
- To make clear, for each type of legal act, by which authority or authorities it may be adopted;

[44] See https://undocs.org/A/HRC/38/25; Annex I.

- To address the hierarchy of legal norms, by determining in detail on which norms a specific kind of legal act has primacy; in particular, to affirm the primacy of international law over internal laws;
- To make the consolidated version of amended legal acts publicly accessible.

94. The Venice Commission also makes the following recommendations:

- To provide for sanctions in case of violation of the law on legal acts; the main drafting principles could be enshrined in the Constitution in order to make it possible to annul statutory legislation going against them;
- To make it clear that every legal act should state explicitly which previous acts (or parts of them) it repeals;
- To address the effect of invalidity of legislation adopted by a non-competent authority (*ex tunc* or *ex nunc*);
- To set out the hierarchy of state bodies issuing legal acts;
- To provide safeguards against substantive changes to legislation by “corrections”;
- Not to restrict the scope of legal opinions to “ambiguities in legal norms”;

95. Some of the questions about the draft law raised in these comments could be addressed in the Explanatory Report when it is published. Others may require revision of the draft law.

96. The Venice Commission remains at the disposal of the authorities of Kosovo for further assistance in this matter.