Handbook for Monitoring Administrative Justice

FOLKE BERNADOTTE ACADEMY
SWEDISH AGENCY FOR PEACE, SECURITY AND DEVELOPMENT

OSCE ODIHR

HANDBOOK FOR MONITORING ADMINISTRATIVE JUSTICE

Folke Bernadotte Academy and
Office for Democratic Institutions and Human Rights

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FOLKE BERNADOTTE ACADEMY

SWEDISH AGENCY FOR PEACE, SECURITY AND DEVELOPMENT

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List of Acronyms

ACHR	American Convention on Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FBA	Folke Bernadotte Academy
HRC	United Nations Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
UNBPIJ	UN Basic Principles on the Independence of the Judiciary

FOREWORD

A comprehensive approach to supporting democratic institutions and processes increasingly puts the spotlight on public administration and its adherence to the rule of law. Transparency and accountability in public administration are commonly regarded as part and parcel of democratic governance.

Promoting these standards and their practical implementation is not possible without a functioning system of administrative justice, which allows private persons to effectively challenge administrative acts and decisions and holds public authorities accountable for breaches of law and infringements of human rights. Conversely, the absence of such systems results in increased legal insecurity and potential social tensions and conflict, especially when public authorities are not perceived as accountable or law-abiding.

OSCE participating States have committed to ensuring effective means of redress against administrative decisions. During the 1990 Copenhagen Meeting, participating States listed numerous elements of justice, including that "[E]veryone will have an effective means of redress against administrative decisions to guarantee respect for fundamental rights and ensure legal integrity". Moreover, they declared that "administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available".[1] Subsequently, at the 1991 Moscow Meeting, participating States agreed that "there will be effective means of redress against administrative regulations for individuals affected thereby" and, furthermore, that [t]he participating States will endeavour to provide for judicial review of such regulations and decisions".[2]

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1 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 5 to 29 June 1990, para 5.10 and 5.11, <http://www.osce.org/odihr/elections/14304>.

2 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 10 September to 4 October 1991, para 18.3 and 18.4, <http://www.osce.org/odihr/elections/14310>.

In general terms, challenges remain in several OSCE participating States, for instance, in relation to an appropriate or clear legal framework to provide effective administrative and judicial remedies to affected private persons, the scope of judicial review, or the enforcement of administrative court judgments. These challenges undermine the effectiveness of administrative justice systems, irrespective of their legal traditions, constitutional provisions and current procedural frameworks.

Trial monitoring is widely regarded as a useful and powerful tool to support a process of judicial reform consistent with domestic and international guarantees of a fair trial. In order to give effect to their commitments relating to fair trials, OSCE participating States have agreed "to accept as a confidence building measure the presence of observers […] at proceedings before the courts".[3] Today, trial monitoring is used across the OSCE area and beyond by a host of organizations and field operations staffed by professionally trained monitors, both local and international. By systematically gathering reliable information about how trials are conducted, these programmes aim to assist OSCE participating States in developing functioning justice systems that adjudicate cases consistent with the rule of law and international and regional fair trial standards.

The Folke Bernadotte Academy (FBA) and the OSCE Office for Democratic Institutions and Human Rights (ODIHR) have jointly developed this *Handbook for Monitoring Administrative Justice* with the common objective of promoting the rule of law in public administration. A practical tool was requested by OSCE field operations and other ODIHR partners in order to enhance on-going trial monitoring and administrative justice reform programmes. The handbook attempts to fill a gap by providing an overview of core standards that apply to administrative justice, in order to increase national and international capacities to support reform efforts in this field and to enhance adherence to international and European fair trial standards and OSCE commitments. It is primarily intended to be used by practitioners, within the OSCE area and beyond, who wish to set up monitoring activities in the field of administrative justice, and is meant to be read as a complement to ODIHR's *Trial Monitoring: A Reference Manual for Practitioners*.

The handbook has been elaborated following a consultative process with legal experts, practitioners, academics and representatives of regional and international organizations. The idea of the handbook was first discussed in May 2011 at a roundtable meeting in Stockholm with a select group of experts. In November 2011, the FBA and ODIHR arranged an international conference bringing together 30 experts from a wide range of OSCE participating States in Vilnius to discuss an initial draft of the handbook. Finally, in November 2012, an expert

3 Copenhagen Document, *op. cit.*, note 1, para 12.

meeting was held in Warsaw to validate and collect comments before finalizing the contents. The project teams at FBA and ODIHR are thankful to everyone who has taken part in this consultative process.

By providing this handbook to all interested institutions, organizations and persons, we encourage further engagement of practitioners and authorities in improving the existing framework and operation of their administrative justice systems.

Ambassador Janez Lenarčič,
ODIHR Director

Mr. Sven-Eric Söder,
Director General FBA

CHAPTER 1
Introduction

1.1 Why monitor administrative justice?

Administrative law covers a very wide range of issues, including expropriations, urban planning, civil registration, issuance of business licenses, protection of the environment, operation of public utilities and access to information. Administrative authorities are the main interfaces between private persons (natural or legal) and the state and, as such, they effectively determine rights, entitlements, duties and responsibilities. For example, the processes of civil registration (issuing of birth, death and marriage certificates) create legal documents that authorize access to entitlements connected to the full exercise of civil, political, economic and social rights (such as health care coverage, social security and tax benefits, and the ability to vote). Thus, administrative acts have a pervasive impact on daily life and, as such, it is important that private persons have the right to appeal administrative decisions that affect their rights, liberties or interests.

The existence of administrative justice is a fundamental requirement of a society based on the rule of law. It signifies a commitment to the principle that the government, and its administration, must act within the scope of legal authority.

It also signifies the right of private persons to seek legal redress whenever their rights, liberties or interests are negatively affected when the public administration exercises its duties in an unlawful or inappropriate manner.[4] In such cases, meaningful redress should be obtainable through the initiation of an administrative proceeding in a court or tribunal. The court or tribunal should have the power to exercise judicial review to determine the lawfulness or appropriateness of an administrative act, or both, and to adopt suitable measures that can be executed within a reasonable time.[5] A balance should be struck between the legitimate

4 "Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration", Council of Europe, 20 June 2007, <https://wcd.coe.int/ViewDoc.jsp?id=1155877&Site=CM>.

5 See "Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts", Council of Europe, 15 December 2004, <https://wcd.coe.int/ViewDoc.jsp?id=802925&Site=COE>; "Recommendation 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", Council of Europe, 9 September 2003, <https://wcd.coe.int/ViewDoc.jsp?id=65519&Site=CM>.

interests of all parties, with a view to reviewing the complaint without delay, and efficient and effective public administration.

Guaranteeing judicial review of administrative acts by a competent and independent court or tribunal that adheres to international and regional fair trial standards is fundamental to the protection of human rights and the rule of law.

1.2 The right to a fair trial in administrative justice

The right to a fair trial in administrative justice derives directly from international and regional conventions on human rights, including:

- the International Covenant for Civil and Political Rights (ICCPR), Article 14 (1);
- the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 6 (1);
- the American Convention on Human Rights (ACHR), Article 8 (1); and
- the African Charter on Human and Peoples Rights (African Charter), Article 7 (1).

The rights and obligations referred to in these international treaties include those that are at stake in administrative proceedings before the courts.

The right to a fair trial in administrative justice has also been acknowledged by the OSCE participating States. The core of the OSCE's commitments related to administrative justice are enshrined in the 1990 Copenhagen Document, where the States declared that "effective means of redress against administrative decisions" are "among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings".[6] The Copenhagen Document further states that administrative decisions should be reasoned and justified, and should indicate the remedies available.[7] The 1991 Moscow Document added that participating States should endeavour to provide for judicial review of those regulations and decisions.[8] In this regard, Helsinki Ministerial Council Decision No. 7/08 on "Further strengthening the rule of law in the OSCE area" encourages the participating States to strengthen rule of law in the following areas: independence of the judiciary, effective administration of justice, the right to a fair trial, access to a court, accountability of state institutions and officials, the respect for the rule of law in

6 Copenhagen Document, *op. cit.,* note 1, paras 5 and 5.10.

7 *Ibid.,* paras 5.10 and 5.11. See also Moscow Document, *op. cit.,* note 2, paras 18.2 and 18.3.

8 *Ibid.,* para 18.4.

public administration, the right to legal assistance, and the provision of and access to effective legal remedies.[9]

Moreover, the OSCE participating States have undertaken several commitments to comply with a set of rules and principles in the administration of justice under international and regional fair trial standards. In order to ensure adherence to these standards, States have further agreed to accept as a confidence building measure "the presence of observers [...] at proceedings before the courts."[10]

OSCE Commitments

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990.

"(5) [The participating States] solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.10) Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;

(5.11) Administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;

(5.16) In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;"

Concluding Document of the Vienna Meeting, Vienna 1989.

"(13.9) [The participating States] will ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, inter alia, effectively apply the following remedies:

- the right of the individual to appeal to executive, legislative, judicial or administrative organs;"
- the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;

the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

9 OSCE Ministerial Council, Decision No. 7/08, "Further Strengthening the Rule of Law in the OSCE Area", Helsinki, 5 December 2008, para 4, <http://www.osce.org/mc/35494>.

10 "Copenhagen Document", *op. cit.,* note 1, para 12.

OSCE Commitments (cont.)

Concluding Document of the Moscow Meeting of the Third Conference on the Human Dimension (1991)

(18.2) Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.
(18.3) To the same end, there will be effective means of redress against administrative regulations for individuals affected thereby.
(18.4) The participating States will endeavour to provide for judicial review of such regulations and decisions.

Ministerial Council Decision 7/08, Sixteenth Meeting of the Ministerial Council, Helsinki (2008)

4. Encourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law, inter alia in the following areas:

- Independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention;…
- The provision of effective legal remedies, where appropriate, and the access thereto; …

1.3 Key objectives of monitoring administrative justice

In the criminal justice field, trial monitoring has become a regular component of technical assistance and capacity-building within rule of law and human rights programmes. It has proven to be an important tool to support judicial reform and to assist states to effectively address outstanding problematic aspects of their justice systems. Likewise, trial monitoring in administrative disputes may also be employed as a multidimensional tool serving to improve administrative justice by ensuring that state legislation and judicial proceedings are in compliance with international and regional fair trial standards.[11]

Three key objectives of trial monitoring of administrative justice proceedings are of particular importance and are explained in more detail below:

- improving the quality of justice delivery;
- supporting new courts and tribunals; and
- raising awareness and understanding among the public and administrative authorities.

11 Throughout this handbook the term "standards" will be used as a collective term for obligations, principles, standards and case law on fair trial rights in administrative justice.

1.3.1 Improving the quality of justice delivery

A core function of a justice system is to ensure that persons enjoy protection of their individual rights. Monitoring can assist in assessing the degree to which actual administrative procedures and practices adhere to national legal frameworks and international and regional fair trial standards. It also provides an opportunity to identify system strengths and weaknesses, to offer guidance on how administrative agencies may employ discretion in line with general standards of administrative law, to advocate for reform through targeted recommendations, and to facilitate the exchange of good practices between national systems or courts. In this manner, monitoring assists all stakeholders to find ways to improve and ensure more efficient and effective judicial practices where they fall short of fair trial standards, thus increasing the quality of justice delivery. In relation to individual cases, trial monitoring serves to enhance the fair administration of justice through the presence of an impartial observer in court.

Quality of justice in administrative cases can be particularly relevant when parties to proceedings are members of vulnerable groups, such as ethnic or religious minorities, who may be more dependent on the protection of courts and tribunals. These groups also tend to be most seriously affected by rule of law challenges and deficiencies in administrative justice.[12]

1.3.2 Supporting new courts and tribunals

This handbook responds to the challenges associated with the growing trend in many countries of establishing specialized courts, tribunals or chambers within regular courts to deal with judicial review of administrative acts. This trend, for example, is particularly strong in Central and Eastern Europe and the South Caucasus, where a number of countries have set up specialized courts or are undertaking comprehensive reforms in the administrative justice sector. Reports from around the OSCE on the establishment of new courts and on the introduction of new administrative procedure laws describe how these initiatives often face difficulties with the interpretation and application of new legislation, with adverse effects for private persons seeking justice.[13]

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12 See Per Bergling, Lars Bejstam, Jenny Ederlöv, Erik Wennerström, and Richard Zajac Sannerholm, "Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development", Folke Bernadotte Academy, 2008, pp. 16-18, <http://folkebernadotteacademy.se/Documents/Kunskapsomr%C3%A5den/RuleofLaw/Rule_of_Law_in_Public_Administration.pdf>.

13 See "Opinion on the Draft Law of the Republic of Kazakhstan on Administrative Procedures", OSCE Office for Democratic Institutions and Human Rights, 29 December 2010, <http://www.legislationline.org/documents/id/16203>; "Report on the Administrative Justice System in Kosovo", OSCE Mission in Kosovo, April 2007, <http://www.osce.org/kosovo/24637>.

Monitoring administrative proceedings offers quality checks for the relevant authorities in charge of new judicial administrations, as well as interested groups and the general public, on adherence to national legislation and international and regional standards. The reports produced by trial-monitoring operations in the OSCE area generally include the identification of areas in need of further support in national contexts and recommendations for the improvement of justice systems. They also highlight conflicting or overlapping legislation, and obstacles in the implementation of legislation (i.e., resources, organizational matters, etc.).

1.3.3 Raising awareness and understanding

In many countries there is a gap between the high number of administrative acts issued by public authorities and the number of administrative reviews handled by courts and tribunals. One reason for this might be that many issues are resolved cost-efficiently and successfully at the stage of internal administrative review. However, it could also be due to cases not reaching the courts because of the limited scope of judicial review, discrimination and a lack of access for specific groups, or the costs and length of administrative justice proceedings. Another reason could be the lack of information and understanding of individuals on how to access administrative justice. Arguably, private persons might also be reluctant to confront the public administration in a judicial proceeding due to a lack of trust in the fairness of the system, or even fear of retaliation from the authorities.

Generally, there seems to be less public awareness and understanding of fair trial standards in administrative proceedings than in criminal or civil law proceedings.[14] The problem is enhanced by the fact that administrative justice places most of the responsibility on the private person to initiate administrative proceedings against the state in a judicial system that can be difficult to understand and navigate, and often without access to free legal aid. In many administrative cases the "burden of proof" is placed on the private person, for example, when applying for a particular entitlement, thereby further requiring a certain level of understanding and capacity to seek a remedy.

For private persons dealing with public administration and administrative justice, trial-monitoring reports can increase awareness and understanding of individual rights and state obligations stemming from domestic and international law, as well as OSCE commitments. This information can assist an individual in challenging administrative acts and, therefore, effectively accessing administrative justice.

14 See "Towards Basic Justice Care for Everyone: Challenges and Promising Approaches, Trend Report, Part 1", Hague Institute for the Internationalisation of Law, 2012, <http://ssrn.com/abstract=2229686>.

1.4 Scope and limitations of the handbook

The handbook is based on international, European and other regional standards, including OSCE commitments, as well as international and regional case law. While the geographical focus is the OSCE area, reference to these international standards allows for the worldwide use of the standards and monitoring guidance provided.

The handbook focuses on hearings adjudicating administrative disputes before courts or tribunals. It serves as a resource for policymakers and practitioners, and is intended for international and regional organizations, international professional associations, and national non-governmental and civil society organizations working in the fields of trial monitoring, rule of law, judicial and legal reform, good governance, public administration and human rights. The primary target audience for use of the handbook, in terms of professional categories, are trial-monitoring staff, including managers of monitoring operations, court monitors, legal staff and reporting officers.

This publication builds upon established practices and methodologies in trial monitoring in the fields of civil and criminal justice in the OSCE area. It complements existing tools by filling gaps on issues where monitoring of administrative proceedings requires specific adjustments or a different approach to established practices in monitoring criminal proceedings, and should be read in conjunction with the ODIHR publication *Trial Monitoring: A Reference Manual for Practitioners*.

1.4.1 Overview of the handbook

The handbook provides normative and practical guidance on trial monitoring and consists of two parts. The first part (Chapters 1 and 2) puts forward practical considerations on how to set up an administrative justice monitoring operation. This part draws upon established good practices and experience in past criminal trial-monitoring programmes and activities, focusing on practical considerations specific to administrative proceedings.[15] The second part (Chapters 3 to 6) describes key fair trial standards applicable in administrative proceedings for the purpose of trial monitoring, based on relevant international and regional norms, standards and case law. This part also includes practical guidance on monitoring compliance with those standards during administrative proceedings. The

15 For a complete overview of the methodological aspects of setting up and conducting trial-monitoring operations, see *Trial Monitoring: A Reference Manual for Practitioners,* revised edition 2012, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2012), < http://www.osce.org/odihr/94216>.

annexes provide practical tools for monitoring the application of the standards outlined throughout the handbook in a given legal system.

1.4.2 Focus on judicial proceedings

As stated above, this publication focuses on judicial proceedings before administrative courts and tribunals (as well as other quasi-judicial bodies exercising judicial review) concerning administrative law disputes between private persons and administrative authorities. It does not provide an overview of all substantive rights covered by administrative law that fall within the competence of administrative justice.[16] It merely covers fair trial aspects in administrative judicial proceedings that can be considered under international and European standards.

Thus, the handbook does not cover procedures conducted by administrative authorities regulating administrative law matters. Nor does it cover internal review procedures conducted by administrative authorities on the legality of administrative acts issued by subordinate administrative authorities.

The different forms of alternative dispute resolution (such as arbitration, mediation, negotiated settlements or conciliation efforts) similarly fall outside the scope of this book. Note, however, that the Council of Europe in its "Recommendation on alternatives to litigation between administrative authorities and private parties" emphasizes that when alternatives are used they should not preclude the possibility of proceedings before a court or tribunal.[17]

1.4.3 Administrative offences that are criminal in nature

Administrative offences that are criminal in nature fall outside the scope of the handbook. The domestic classification of an offence as either "administrative" or "criminal" is not determinative and has only a relative value.[18] Thus, an offence may still be regarded as criminal even if it belongs to the category of administrative offences under national law.

For the purposes of the ECHR, when determining whether a particular offence is criminal in nature, each of the following "Engel criteria" may be considered separately or cumulatively:[19]

16 This would be the task of an administrative law commentary.

17 "Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties", Council of Europe, 5 September 2001, section II, para iii, < https://wcd.coe.int/ViewDoc.jsp?id=220409&Back>.

18 *Ziliberberg v Moldova,* ECtHR, 1 February 2005, para 30.

19 *Ibid.*, para 31.

(1) the classification of the offence under national law;
(2) the nature of the offence; and
(3) the nature and degree of severity of the penalty that the person concerned risks incurring.[20]

Categorization of the offence upon consideration of the above criteria will determine whether proceedings should be regarded as either criminal or administrative. Those deemed criminal in nature may still be monitored, but they would be subject to fair trial standards in criminal justice, which are more extensive than those standards applicable to administrative cases. Therefore, reference should be made to ODIHR's *Trial Monitoring: A Reference Manual for Practitioners*[21] and the ODIHR *Legal Digest of International Fair Trial Rights*.[22]

It is important to remain cognizant of whether an administrative offence may be criminal in nature. For instance, in many countries in transition in the OSCE area, criminal law has been subject to processes of de-criminalization. This means that legislation regulating certain offences shifts from being criminal to administrative. This shift in substantive law usually entails a corresponding shift in the procedural law as well. Thus, when criminal offences become administrative as a result of decriminalization, the charges are determined through administrative proceedings. This process often evades the full effect and implementation of international fair trial standards applicable in criminal proceedings.

1.5 Practical limitations in monitoring administrative justice

1.5.1 Appellate proceedings

While the right to appeal to a court in criminal cases is universal, in administrative cases it is not always an inherent right. However, where the right to appeal an administrative decision to an administrative court or tribunal in a given legal system exists, fair trial rights should apply.[23]

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20 *Engel and others v the Netherlands,* ECtHR, 8 June 1976, para 82. For more recent case law, see, *Benham v the United Kingdom,* ECtHR, 10 June 1996, para 56; *Garyfallou AEBE v Greece,* ECtHR, 24 September 1997, paras 32-33; *Lauko v Slovakia,* ECtHR, 2 September 1998, para 56. For further elaboration on the criteria, see, "Key Case-Law Issues, Compatibility Ratione Materiae, Article 6 (Notion of "Criminal Charge)", Council of Europe, 31 December 2006.

21 ODIHR *Trial-Monitoring Manual, op. cit.,* note 15.

22 *Legal Digest of International Fair Trial Rights,* (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2012), <http://www.osce.org/odihr/94214>.

23 While the term "appeal" in the context of administrative justice is not limited to judicial review, as this handbook focuses on monitoring of court hearings, the term here is specifically used to signify an appeal before an administrative court or tribunal.

Still, not all fair trial standards applicable in a trial at first instance will be applicable during appellate proceedings. For example, if the applicant had the opportunity to present his or her case orally at a public hearing at first instance, the requirement of a public hearing does not necessarily apply to appellate proceedings, which may be conducted exclusively on the basis of written presentations.[24]

The Council of Europe's "Recommendation on judicial review of administrative acts" suggests that the decisions of courts or tribunals that review an administrative act should, at least in important cases (for instance, those involving heavy administrative sanctions), be subject to appeal to a higher court or tribunal, unless the case is directly referred to a higher court or tribunal in accordance with national legislation.[25]

1.5.2 Commitment from national stakeholders

A successful trial-monitoring operation is highly dependent on the co-operation and commitment of national stakeholders. Co-operation may include national stakeholders providing information about scheduled trials, facilitating free access to hearings and providing access to official documents, such as case files and court decisions. However, since administrative justice is an area that has usually been overlooked by rule of law or human rights reform initiatives,[26] national stakeholders such as judges or administrative authorities might not be familiar with, or not see the rationale for, trial monitoring.

For example, many countries in the OSCE area have only just begun the process of establishing a more specialized administrative justice system. Monitoring operations in such countries must take care that the authorities involved in reforms perceive trial monitoring as a complementary, capacity-building and facilitating tool.

1.6 Key concepts

Many of the concepts presented in this handbook are difficult to conceptualize in a comprehensive and straightforward manner and there are differences among national jurisdictions on how concepts such as "administrative justice" or "administrative acts" are described and employed. For the purpose of facilitating the use of this handbook, the following working definitions related to the field of administrative law and justice were developed:[27]

24 *R.M. v Finland,* HRC Communication 301/1988, UN Doc CCPR/C/35/D/301/1988 (1989), para 6.4.

25 Recommendation Rec(2004)20, Council of Europe, *op. cit.,* note 5, para B.4.i.

26 For further information on this aspect, see: Rule of Law in Public Administration, *op. cit.,* note 12.

27 For general definitions of trial-monitoring terminology, the handbook refers to the ODIHR *Trial-Monitoring Manual*, *op. cit.,* note 15.

Public administration

Public administration is used to describe institutions, agencies and activities of the executive branch of government - for example, municipal executives or tax authorities. This also includes private entities exercising public authority, for example, through delegated or contracted powers. The concept also includes legislation and other normative acts regulating the function of the aforementioned institutions and entities.

Administrative justice

Administrative justice refers to the system of courts and tribunals exercising jurisdiction in cases involving public administration.

Administrative proceedings

Administrative proceedings refer to the process of launching, processing and deciding administrative law cases by administrative courts and tribunals.

Administrative courts and tribunals

Administrative courts and tribunals refer to state bodies established and authorized by law to adjudicate administrative law disputes between administrative authorities and private persons. These bodies may exercise judicial review to determine either the lawfulness of an administrative act, the appropriateness of the act, or both.

Administrative procedure

Administrative procedure is the course of action, established in legislation, that administrative authorities must follow to issue administrative acts.

Administrative authority

Administrative authority refers to institutions that form part of the central (e.g., Ministry), regional or state entities of a federal state (e.g., German *Länder*) or local executive government (e.g., city council), and to any entity or individual otherwise vested with public law powers and that is authorized by law to adopt administrative acts. The administrative authority consists of the actors within the public administration.

Administrative acts

Administrative acts refer to legal and physical acts taken in the exercise of public authority that may affect the rights, liberties or interests of natural or legal persons. This includes the refusal to act, an omission to act (in cases where the administrative authority is under an obligation to act), and regulatory acts. Administrative acts can be directed towards an individual as well as towards groups of people.

Monitoring operation

Monitoring operation refers to any operation, programme, project or any other structure set up to conduct trial monitoring in the field of administrative justice.

Monitoring staff

Monitoring staff refers to all staff members of a monitoring operation: manager, co-ordinator, legal analysts, court monitors, etc. The handbook will refer to specific categories of staff when necessary.

Judicial review

Judicial review refers to the examination and determination by a court or tribunal, other than constitutional courts, of the lawfulness and/or appropriateness of an administrative act and the provision of effective remedy.

Administrative discretion

Administrative discretion refers to the legitimate possession of discretionary powers by administrative authorities, with clear legal boundaries, subjected to a number of constitutional and administrative law principles.

Discretionary powers

Discretionary power is power that grants an administrative authority some degree of latitude in taking decisions, thereby enabling it to choose from among several legally admissible decisions the one it finds to be the most appropriate.[28]

28 "Recommendation No. R(80)2 of the Committee of Ministers Concerning the Exercise of Discretionary Powers by Administrative Authorities", Council of Europe, 11 March 1980, appendix, section I, <https://wcd.coe.int/ViewDoc.jsp?id=678043&Site=COE>.

CHAPTER 2

Monitoring Preparations – Getting Started

A wealth of methodological and practical tools on trial monitoring can be found in handbooks and manuals developed by international, regional, and non-governmental organizations. However, these materials focus primarily on trial monitoring of criminal proceedings.[29] This publication is designed as a specialized tool in support of monitoring activities in the field of administrative justice. It is inspired by existing monitoring tools and incorporates many of their features.

In order to avoid overlap and duplication of efforts, the handbook refers to good practices in trial monitoring on a wide range of matters, which are explained in more detail in *Trial Monitoring: A Reference Manual for Practitioners*. In addition, information on organizational issues and resources, operational matters, reporting and information-management systems from that manual can also be applied by analogy to monitoring of administrative proceedings.

2.1 Key principles

Three basic principles underlie trial-monitoring programmes conducted by OSCE field operations and institutions: non-intervention, objectivity and agreement.

The principle of non-intervention, or non-interference, ensures that judicial independence is not improperly encroached upon in practice or in perception. Non-intervention may be applied absolutely, with monitoring staff avoiding all

29 See ODIHR *Trial-Monitoring Manual, op. cit.,* note 15; *Trial Observation Manual for Criminal Proceedings: Practitioners Guide No 5* (Geneva: International Commission of Jurists, 22 July 2009), <http://www.icj.org/criminal-trials-and-human-rights-a-manual-on-trial-observation/>; *Rule of Law Tools for Post-Conflict States: Monitoring Legal Systems,* (New York and Geneva: Office of the High Commissioner for Human Rights, 2006), <http://www.ohchr.org/Documents/Publications/RuleoflawMonitoringen.pdf>; *Training Manual on Human Rights Monitoring,* (New York and Geneva: Office of the High Commissioner for Human Rights, 2001), <http://www.ohchr.org/Documents/Publications/training7Introen.pdf>; *What is a Fair Trial? A Basic Guide to Legal Standards and Practice,* (New York: Lawyers Committee for Human Rights, March 2000), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf>; "In Practice: A Manual for Non-lawyers Working in the Criminal Justice System", Paralegal Advisory Service; "Trial Monitoring Manual", United Nations Assistance Mission in Afghanistan.

direct contact with members of the judiciary, or in varying degrees of strictness (for example, stipulating that monitoring staff may communicate with judicial staff with regard to administrative or general legal matters, but may not engage in discussing the merits of the cases being monitored). When determining the application of the principle of non-intervention, managers of administrative justice monitoring operations should take into consideration the prevalence of written proceedings in administrative justice and to what extent this may require limited communications between court monitors and judicial staff (see section 2.3.4 on written proceedings, below).

The principle of objectivity ensures a balanced approach to a monitoring programme's case selection, observation of proceedings, analysis and reporting by requiring impartial application of clearly defined and accepted fair trial standards. This minimizes the risk of any unintentional or perceived bias, and encourages wide acceptance of the monitoring programme's findings, conclusions and recommendations.

The principle of agreement means that the national authorities have agreed to the trial-monitoring programme and have reached a common understanding with the monitoring organization regarding the purposes and benefits of monitoring. Such agreement can prevent or alleviate tensions, secure better access to courts and written documentation, and increase the effectiveness of trial monitoring.

Further guidance on each of these principles can be found in the *Trial Monitoring: A Reference Manual for Practitioners*.[30]

2.2 Overarching considerations

Two important considerations that should be threaded throughout the trial-monitoring operation are a gender perspective and the special needs of children. In addition, trial monitors and analysts should remain cognizant of the degree of discretion administrative authorities may enjoy when making determinations and administrative acts.

2.2.1 Gender equality

The use of a gender perspective has been recognized as a key feature to improving project quality and effectiveness. It is crucial for a monitoring programme to understand how men, women, boys and girls are affected in different ways by administrative justice, and how a gender perspective can contribute to more responsive and equitable public services. Moreover, there may be differences between men and women with regard to vulnerability in administrative proceedings,

30 ODIHR *Trial-Monitoring Manual, op. cit.,* note 15, chapter 1.2.

representation in a court or tribunal, or effects of administrative decisions. Thus, a thorough examination of gender equality in accessing administrative justice should be mainstreamed into the monitoring process.

Monitoring administrative justice can be an especially effective tool for assessing the effectiveness of the judicial system in cases that encompass a gender dimension (for example, court-issued protective orders in domestic-violence cases, decisions on the distribution of property or alimony, and child custody determinations in divorce proceedings). Gender mainstreaming can also be used as a tool to share information with judicial personnel so that established gender equality norms achieve greater exposure and become fully grounded in national practice.

2.2.2 Child-friendly justice

Children interact with administrative proceedings in many different ways before, during and after judicial hearings. An administrative justice system should ensure that the specific rights and needs of children are understood and respected, and that all authorities involved with children's rights during judicial proceedings are properly informed.[31]

The best interest of the child should be the paramount concern of the administrative authority in all proceedings involving decision-making on issues central to a child's well-being, such as those dealing with adoption, custody or visitation. The doctrine of the best interest requires taking into account (among other factors) the ascertainable wishes of the child, with due consideration for the child's age and maturity.

Thus, a child's right to be heard must be respected, and children must be provided the opportunity to be heard in any judicial and administrative proceeding affecting them, either directly or through a representative, in a manner consistent with the procedural rules of national law.[32] Furthermore, in situations within administrative law where children are most vulnerable (for instance, adoption procedures or complaints against social services), administrative decisions should be subject to judicial review.

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31 The "Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice" were adopted on 17 November 2010 and are designed to guarantee children's effective access to and adequate treatment in justice. The guidelines build on and cover five fundamental standards of child-friendly justice: participation, best interest of the child, dignity, protection from discrimination and rule of law. Available at <https://wcd.coe.int/ViewDoc.jsp?id=1705197&Site=CM>.

32 United Nations Convention on the Rights of the Child, 1989, Article 12.

2.2.3 Administrative discretion

Most administrative acts involve the exercise of discretionary powers by administrative authorities. The possession of discretionary powers by administrative authorities is a legitimate feature of administrative law, as legislatures cannot foresee all possible situations that public authorities will face in the everyday regulation of administration and, hence, cannot prescribe fixed solutions in the law for each of these situations. At the same time, the existence of discretionary powers may run the risk of their being used in illegal or abusive infringements on human rights.

Therefore, discretionary powers of administrative authorities must have clear legal boundaries and be subject to a number of constitutional and administrative law standards, such as objectivity and consistency in application.[33] Furthermore, authorities should use administrative discretion in a transparent manner, following a pre-established administrative procedure.

Judicial review of administrative acts can act as a safeguard against abuse and should, as a minimum, determine whether these boundaries and standards have been violated, in contravention of national legislation.[34] Courts and tribunals should have the power to examine the legal boundaries of the decision-making authority in light of the standards of administrative law. The judicial review should also be "adequate", i.e., it should not only review the exercise of discretionary powers, but also be able to provide effective remedies where a violation of human rights has resulted from the exercise of discretionary powers.

In practice, many administrative jurisdictions will not grant full judicial review of discretionary acts of administrative authorities, in deference to the principle of separation of powers. It is argued that if the legislator decided that it lies within the discretion of the administrative authority to freely choose between various courses of action, the judiciary may not thereafter compel the authority to decide otherwise.

If the reviewing court finds that the administrative authority's exercise of discretionary power breached the legal boundaries of those powers, the court's decision should be executed and the public administration should alter the administrative decision accordingly. In some legal systems, the court may have the authority to substitute the initial administrative act with its own decision, even if the original act was adopted through the exercise of discretionary power.

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33 Recommendation No. R(80)2, *op. cit.*, note 28.

34 See "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", United National Economic and Social Council, UN Doc E/CN.4/1985/4, 28 September 1984, para 18, <http://www.refworld.org/docid/4672bc122.html >.

Administrative discretion

In ***Meltex LTD and Mesrop Movsesyan v Armenia,***[35] the Armenian National Commission on Television and Radio (NCTR) enjoyed discretionary powers under the Broadcasting Law to grant and refuse broadcasting licenses. This discretion was restricted to the consideration of four selection criteria: the predominance of programmes produced in-house, the predominance of programmes produced in Armenia, the technical and financial capacity of the applicant, and the professional level of the staff.

The applicant company submitted seven applications for a broadcasting license, all of which the NCTR refused without explanation, while granting licenses to other companies. The applicant argued that the right to freedom of expression under Article 10 of the ECHR had been infringed because the NCTR did not provide any reasoning for the decisions made while exercising its discretionary powers.

The ECtHR held that "in matters affecting fundamental rights it would be contrary to the rule of law … for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."[36] Thus, the actions of the NCTR amounted to a violation of Article 10.[37]

2.3 Initial assessment

Before starting any trial-monitoring activities in the field of administrative justice, an assessment of the actual situation, the current legal framework, and any existing or anticipated development policies and strategies in the administrative justice sector must be conducted. The assessment should supply conclusions regarding the suitability of a potential trial-monitoring operation and its main objectives. Such an assessment may require analysis of statistical data (including with a gender perspective), where obtainable, and of available information and reports on the administrative justice system.

Already existing assessment reports by national or international actors working in the field of public administration and local governance are useful for identifying the issues that trigger recourse to administrative courts by private persons, as well as the main challenges in public administration. Assessments and evaluations of public administration reforms and similar programmes can also serve as valuable sources of information to further determine the objectives, scope and focus of trial-monitoring operations in a specific national context.

35 *Meltex LTD and Mesrop Movsesyan v Armenia,* ECtHR, 17 June 2008.

36 *Ibid.,* para 81.

37 *Ibid.,* paras 83-85.

Other methods, such as interviews with relevant national actors, can help gather views, experiences and opinions on the current situation, as well as on the prospects for change within the realm of administrative justice. Both the judiciary (as adjudicators) and the executive (as party to administrative proceedings) should be included among those national actors, since they are the authorities applying the law on a daily basis and, therefore, would be directly affected by the findings of the monitoring operation and the recommendations included in the reports. Interviews may take on higher importance where there is limited political will to co-operate with a trial-monitoring operation.

Trial-monitoring operations can complement and support on-going reforms of an administrative justice system, or they can serve to highlight the remaining challenges faced by the system and, thus, trigger supplementary reforms. In either case, it is important to assess the existence and level of political will behind the reform process and the probability that the trial-monitoring findings would be implemented.

2.3.1 Access and privacy

Because trial monitoring in administrative proceedings is relatively new, administrative courts may not be familiar with facing the same level of public scrutiny as criminal courts. Establishing positive working relationships with members of the administrative justice sections of the judiciary and their governing organs can help ease any tensions and further open up access to documents, hearings and other information. This is particularly important in countries and places where administrative court structures are relatively new, or where internal court procedures and lines of communication have yet to be consolidated.

Access to public information and to court hearings should be considered from the outset of the monitoring operation. The ability to obtain documents will be determined by domestic law and practice, and national legislation must be examined in light of rights to and restrictions on access to documents in the administrative procedure and court proceedings.

In many countries in the OSCE area, case documentation is only accessible to the parties to the dispute, and not to the public. Monitoring staff would thus require specific arrangements to gain access to case files and hearings, through the signing of a memorandum of understanding (MoU) with relevant state and administrative authorities or through direct contact with parties and their legal representatives.[38]

38 See ODIHR *Trial-Monitoring Manual, op. cit.,* note 15, chapter 4.

In special cases within administrative procedures, the law may provide for hearings *in camera*, such as when children or social benefits are involved. Careful consideration should be given to the right to privacy in these cases. Similarly, the requirement to keep certain personal information or facts confidential should be respected in all monitoring activities. An outreach activity may be advisable to inform communities about the administrative justice monitoring operation and its objectives and to allay any privacy concerns.[39]

2.3.2 Legal framework

Identification and analysis of the relevant national and international legal framework is of crucial importance before starting a trial-monitoring operation, and might require substantial efforts by the monitoring staff during the inception phase.

A compilation of applicable laws and case law that regulate the exercise of administrative justice, including the law on administrative procedure and law on administrative disputes[40], would be an essential resource for monitoring staff. If such materials are not available online or directly from the courts, legal compilations and reviews should be sought from other sources, such as universities, civil society organizations and judicial training academies. Legal or justice-related journals focused on the administrative legal system can also offer insight and analysis of relevant case law.

General knowledge of national civil procedures is also important, since reference can be made to civil legislation, as a subsidiary source, when handling administrative cases. Moreover, procedural laws may exist for specific administrative matters – for example, social security, commercial licensing or environmental matters. There may also be cases where judicial review of administrative acts is legally subject to restrictions, typically in relation to foreign policy, national security and certain decisions by the government.[41]

Finally, from the perspective of international law, the national legal framework and relevant case law should be reviewed and evaluated against the international legal obligations and standards applicable in the country. For guidance, Chapters

39 For more information on outreach activities, generally, see ODIHR *Trial-Monitoring Manual, op. cit.,* note 15, chapters 12.1 and 12.4.1.

40 As titles of statutes regulating the exercise of administrative justice differ from state to state, those mentioned under this section are for guidance only. In several European systems, the law on administrative procedure regulates administrative review and subsequent appeal, while the law on administrative disputes and the law on administrative courts regulate the structure and conduct of the administrative proceedings.

41 See S. Galera, ed., "Judicial Review: A Comparative Analysis inside the European Legal System", Council of Europe, 2010, pp. 198-201.

3 to 6 of this handbook contain an outline of the most common international and European fair trial standards applicable in administrative justice.

2.3.3 Institutional framework

The handbook recognises that there are different forms of institutional frameworks (including in relation to structure, composition and authority) among courts and tribunals, depending on national political and legal traditions. Regardless of the format of the framework created by the state, it should comply with international and regional fair trial standards. Sound knowledge and understanding of the administrative justice system will enable the monitoring staff to better understand how fair trial standards apply to the proceedings.

It is possible to distinguish administrative justice traditions worldwide from the way in which administrative cases are handled, although countries may also use a mix of these institutional arrangements. Predominantly in countries with common law traditions, administrative acts are challenged in specialized administrative tribunals and/or ordinary courts (e.g., in the United Kingdom and the United States). Alternatively, in some countries administrative proceedings are dealt with through specialized chambers or sections within ordinary courts (e.g., in the Netherlands and Spain). Many countries created separate parallel administrative court structures to deal with general administrative law (e.g., in Germany, France, Greece and Sweden). In countries with a parallel administrative court structure separate from ordinary courts, there may still be specialized courts on specific subject matters such as environment, social security or asylum.

A practical entry point to a trial-monitoring operation is to map the different courts and tribunals and their jurisdictional relationships. In order to understand which courts or tribunals are exercising administrative justice, monitoring staff should look at the different jurisdictions of the courts. Depending on the case-identification method, monitoring staff might need to cover different courts employing different laws on administrative procedures (environmental, civil service, social security or others).

There are systems where quasi-judicial bodies and tribunals other than courts, such as independent commissions or councils, may exercise administrative justice on certain thematic issues – for example, social welfare or the environment. The proceedings of such bodies should comply with international fair trial standards if these bodies can be regarded as a court or tribunal for the purposes of the right to a fair trial under international law (see Chapter 3)[42]. Monitoring staff

42 "General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial", United Nations Human Rights Committee, U.N. Doc. CCPR/C/GC/32, 9 to 27 July 2007, <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>.

should also consider whether these quasi-judicial bodies are the only ones exercising administrative justice on the matter. In general, limited judicial review may be available against the decisions of such quasi-judicial bodies.

A single case may contain both civil and administrative law matters, making the determination of which jurisdiction is competent to try the case more complex. Some systems provide mechanisms to address conflicts of competences, such as specific chambers within the highest courts or ad hoc commissions, where the specific conflict can be resolved and an effective remedy ensured. If the monitoring staff becomes aware of such cases, they should be monitored to assess whether national law ensures access to justice and an effective remedy.

2.3.4 Written proceedings

In many jurisdictions, administrative proceedings are largely conducted only in writing, either because oral proceedings are not foreseen in the law or not conducted in practice. This, in and of itself, may be problematic with regard to adherence to fair trial standards, especially in relation to equality of arms and the right to an oral hearing.[43]

Trial-monitoring staff should always be prepared to use multiple methods of data collection, tailored to the specific situation and the nature of proceedings. This is of particular importance where trial observation is not possible due to a heavy reliance on written materials. Alternative methods of information-gathering may include collecting decisions, motions and other case documentation, reviewing correspondence between the court and the parties, and interviewing parties to the proceedings.

Interviews may be based on standardized questionnaires, reflecting the objectives, scope and methodology of the monitoring operation. Interviewers should receive basic training in interviewing skills, in addition to general training on trial-observation skills and ethical conduct. Following the general principle of non-intervention of trial-monitoring operations in the judicial process, and to preserve independence of the judiciary, interviews should concentrate on the proceedings of administrative cases and their adherence to fair trial standards, and not engage on the merits of a case.[44]

2.4 Selection and prioritization of cases

The selection and prioritization of cases to monitor depends upon the mandate of the responsible organization and the objectives of the monitoring operation.

43 See Chapter 5.

44 For further reference, see ODIHR *Trial-Monitoring Manual, op. cit.,* note 15, chapter 1.2.

One approach is to select cases through random sampling, so as to cover a diverse caseload, representative of the administrative justice system as a whole. A random selection can provide comprehensive data and information regarding the overall system's strengths and weaknesses.

Another approach is to focus selectively on contested and controversial issues that have a particular impact on the rights, interests and liberties of private persons. The selection criteria may be based on an interest to monitor the judicial outcome of specific events that have taken place that have strong human rights implications (e.g., freedom of assembly or association), or impacted public interest (e.g., large expropriations for public works). The selection criteria may also be thematically focused on certain areas of administrative law (e.g., the right to property), on examining gender equality in the application of the law (e.g., gender-based violence or family law), or on assessing vulnerable groups' access to justice (e.g., minority rights).

Public administration reform initiatives and similar programmes in the country, conducted either by national authorities or international organizations, may be useful sources of information for case selection because they usually address issues of concern that have given rise to claims before the administration and can result in appeals before the administrative courts. Their evaluations and assessments can guide the search for procedural obstacles in administrative law and practice.

2.5 Staffing issues

All monitoring staff should have a solid understanding of administrative law and justice standards, as well as of international and regional fair trial standards. The legal staff of the monitoring operation should, ideally, be experts in administrative law and procedure. In general, international organizations conducting trial monitoring can consider teaming national staff with international staff, thereby combining knowledge, expertise and legal traditions.

The complexity, technicality and length of administrative proceedings must be factored in when establishing a ratio of cases per court monitor. Sometimes, complex administrative cases are tried over long periods of time, and monitoring activities should be planned to remain in place long enough in order to follow cases up to the final judgment.

CHAPTER 3
Fair Trial Standards in Administrative Justice

3.1 Introduction

This chapter will provide an overview of some of the most fundamental fair trial standards applicable at all stages of administrative proceedings. The following chapters will provide an overview of fair trial standards that have been divided into three stages of administrative proceedings before a court or tribunal:

(1) initiating the case (Chapter 4);
(2) processing the case (Chapter 5); and
(3) deciding the case (Chapter 6).

This division may not correspond exactly to national circumstances and can be adjusted accordingly. The division provides the opportunity to monitor either the entire administrative justice system or particular stages of a proceeding.

A comprehensive explanation of fair trial standards is provided in each of the three chapters, together with monitoring guidance in relation to each standard. Additionally, Annex A: a Tool kit for monitoring administrative justice, includes: a checklist for monitoring administrative justice that outlines the main issues a monitoring operation should review in accordance with the standards listed in this handbook; a model questionnaire for legal analysis that can be used as a guideline for developing a local questionnaire for trial monitoring of administrative proceedings, adapted to the specific legal system in which the monitoring programme is operating; and a model questionnaire for courtroom observation, also to be adapted to the local environment, that provides guidance on specific aspects of courtroom procedure and of the behaviour of judges to be carefully monitored for their possible effect on compliance with international and regional standards.

The standards compiled in this handbook are minimum fair trial standards applicable in administrative proceedings that have been identified for the purposes of trial monitoring. Under the various stages of administrative proceedings, the main standards that should be observed include:

1. **Initiating the case:**
   - Reasonable time to initiate administrative proceedings;
   - Effective access to a court or tribunal; and
   - Availability and scope of legal assistance and legal aid.
2. **Processing the case:**
   - Right to an oral hearing;
   - Equality of arms and an adversarial trial; and
   - Availability of preventive or interim measures.
3. **Deciding the case:**
   - Right to a trial within a reasonable time;
   - Public and reasoned judgment; and
   - Effective execution of judgments.

It should be noted that these fair trial standards do not offer an exhaustive inventory and that there are regional and national variations on their implementation. Thus, this handbook uses the international body of treaties, recommendations and other policy documents to provide national monitors with a composite body of standards against which to evaluate administrative proceedings in a particular jurisdiction. The handbook does not distinguish which of these is binding or applicable to a particular jurisdiction by virtue of the state's international commitments, and it is up to the monitors to identify the state's particular international commitments in relation to the administrative system when setting up their monitoring framework.

The fair trial standards applicable to administrative proceedings outlined here stem from international law, standards established by regional and international organizations, and case law from regional and international courts, tribunals and human rights bodies. These include:

- the ICCPR and case law of the Human Rights Committee (HRC);
- the ECHR and case law of the European Court of Human Rights (ECtHR);
- the African Charter and case law of the African Commission on Human and Peoples' Rights (African Commission) and the African Court of Human and People's Rights (African Court); and
- the American Convention on Human Rights (ACHR) and case law of the Inter-American Commission on Human Rights (IACHR), and the Inter-American Court of Human Rights.

The right to a fair trial in international and regional law:

ICCPR, Article 14 (1)

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

ECHR, Article 6 (1)

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

African Charter, Article 7 (1)

"Every individual shall have the right to have his cause heard. This comprises:

a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
c) the right to defence, including the right to be defended by counsel of his choice;
d) the right to be tried within a reasonable time by an impartial court or tribunal."

ACHR, Article 8 (1)

"Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

3.2 The right to a fair hearing

The right to a fair hearing in administrative proceedings derives from international and regional fair trial standards, both as an inherent human right and as a key feature of rule of law in public administration.

As a fundamental right, Article 14(1) of the ICCPR stipulates that all persons shall be equal before the courts and tribunals and that in the determination of "rights and obligations in a suit at law", everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. According to the UN Human Rights Committee, the definition of "determination of rights and obligations in a suit at law" is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by the domestic legal system for the determination of a particular right.[45] This means that administrative law matters are, in principle, also covered by the scope of Article 14(1). Examples of administrative law matters that are covered include termination of employment of civil servants for other than disciplinary reasons,[46] determination of social security benefits[47] and procedures regarding the use of public land.[48] Other examples may be assessed on a case-by-case basis, taking into account the nature of the right in question.

Article 6(1) of the ECHR applies to administrative proceedings, provided the outcome is decisive for the individual's private rights and obligations.[49] Such has been the case, for example, in matters involving administrative discretion regarding the sale of land,[50] denial of enrolment in state education,[51] and issuance and revocation of licenses to sell alcohol.[52] Some disputes will, nonetheless, fall outside Article 6(1) when the state is exercising its core public authority prerogatives (such as tax matters[53]), where the state has clearly intimated its intention to exclude proceedings from its scope (such as expulsion of an alien, which is explicitly covered by Protocol 7[54]), and where political, not civil, rights are

45 General Comment No. 32, *op. cit.*, note 42, section III; *Perterer v Austria,* HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001, 20 July 2004, para 9.2.

46 *Casanovas v France,* HRC Communication 441/1990, UN Doc CCPR/C/51/D/441/1990, 26 July 1994.

47 *Garcia Pons v Spain,* HRC Communication 454/1991, UN Doc CCPR/C/55/D/454/1991, 1995.

48 *Äärelä and Näkkäläjärvi v Finland,* HRC Communication 779/1997, UN Doc CCPR/C/73/D/779/1997, 24 October 2001.

49 *Ringeisen v Austria,* ECtHR, 16 July 1971, para 94; *Ferrazzini v Italy,* ECtHR, 12 July 2001, para 27.

50 *Ringeisen v Austria,* ECtHR, para 94.

51 *Emine Arac v Turkey*, ECtHR, 23 September 2008, paras 16-25.

52 *Tre Traktorer Aktiebolag v. Sweden,* ECtHR, 07 July 1989, paras 35-44.

53 *Ferrazzini v Italy,* ECtHR, 12 July 2001, para 29.

54 *Maaouia v France,* ECtHR, 5 October 2000, paras 38-40.

concerned.[55] However, even when an administrative case does not fall under the purview of the civil rights and obligations covered by Article 6 (1) of the ECHR,[56] it could still trigger the Article if the dispute is found to be criminal in nature.[57]

With regard to disputes over civil service employment – specifically relating to recruitment, careers and termination of service – the ECtHR initially deemed them to be, as a general rule, outside the scope of Article 6.[58] However, in *Pellegrin v France*[59], the Court began to step away from this rule by adopting criteria to be applied on a case-by-case basis that focused on the nature of the employee's duties and responsibilities. Unsatisfied with the anomalous results in cases following *Pellegrin*, the Court clarified the assessment criteria in *Eskelinen and Others v Finland*. In order for a civil service employment dispute to be excluded from Article 6 of the ECHR, (1) the state must have explicitly excluded access to a court in its national law, and (2) the exclusion must be justified on objective grounds in the state's interest, meaning that (i) there exists a special bond of trust and loyalty between the civil servant and the state, and (ii) the subject matter of the dispute at issue is related to the exercise of state power or has called into question the special bond.[60] The state has the burden to overcome the presumption that Article 6 is applicable.

The IACHR and the Inter-American Court of Human Rights have determined that fair trial rights must be observed in all proceedings for the determination of obligations and rights, and that fair trial guarantees are also applicable to administrative proceedings.[61] Similarly, the African Commission has determined that the right to a fair and public hearing is a general principle applicable to all legal proceedings, including administrative.[62]

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55 *Pierre-Bloch v France,* ECtHR, 21 October 1997, paras 50-52.

56 See "The Scope of Article 6 § 1 of the Convention Under its Civil Head, According to the Case-Law of the European Court of Human Rights", Bureau of the European Committee on Legal Co-Operation, 8 September 2011, <http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ_Documents_2011_en.asp>.

57 See ODIHR *Legal Digest, op. cit.,* note 22, chapter 1.

58 For some exceptions to the general rule, see *Francesco Lombardo v. Italy*, ECtHR, 26 November 1992; *Massa v. Italy*, ECtHR, 23 June 1993; *Benkessiouer v. France*, ECtHR, 24 August 1998.

59 *Pellegrin v France,* ECtHR, 8 December 1999.

60 *Vilho Eskelinen and Others v. Finland,* ECtHR, 19 April 2007, para 62.

61 *Baena-Ricardo et al. v Panama*, Inter-American Court of Human Rights, 2 February 2001, para 124.

62 See "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa", African Commission, DOC/OS(XXX)247, section A – General Principles Applicable to All Legal Proceedings, <http://www1.umn.edu/humanrts/research/ZIM%20Principles_And_G.pdf>.

3.3 Courts and tribunals

Administrative law cases may be decided in specialized administrative courts or in courts of general jurisdiction possessing competence to try administrative cases. Regardless of how the judicial system is structured, certain fair trial requirements under universal and regional standards must be fulfilled. For example, the ECtHR has established that, for the purposes of Article 6(1) of the ECHR, a tribunal does not need to be a court of law integrated within the standard judicial machinery. What is important to ensure compliance with Article 6(1) is that the substantive and procedural guarantees be in place.[63]

The independence and impartiality of a tribunal is a central pillar of the right to a fair hearing.[64] In the context of administrative proceedings, whenever civil rights and obligations are determined, these must be adjudicated, in at least one stage of the proceedings, by an impartial and independent administrative court or tribunal.[65]

3.3.1 Independence of courts and tribunals

A tribunal is a body established by law that is independent from the executive and legislative branches of government. Independence of the judiciary is a pre-requisite for ensuring a fair judicial process, free from undue influence. Judicial independence, especially in the field of administrative justice, is also a pre-requisite for holding the government accountable for the acts and decisions taken against private persons that might affect their enjoyment of fundamental rights and freedoms. For example, if an administrative jurisdiction is not fully independent from the executive and other public agencies it can hardly be expected to effectively invalidate an unlawful administrative act of the government.

In addition to freedom from actual political interference by the executive branch and legislature, the requirements of independence also refer to the procedure and qualifications for appointment of judges, their security of tenure and the duration of their terms, as well as the appearance of judicial independence.[66]

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63 *Rolf Gustafson v Sweden,* ECtHR, 1 July 1997, para 45; *Boulois v Luxembourg,* ECtHR, 14 December 2010, para 73.

64 For a thorough discussion of independence and impartiality of a tribunal as fair trial rights, see the ODIHR *Legal Digest*, *op. cit.,* note 22, chapter 3.3.

65 General Comment No. 32, *op. cit.,* note 42, para 18.

66 See "Basic Principles on the Independence of the Judiciary", adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, <http://www.unrol.org/doc.aspx?d=2248>; "Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency, and responsibilities", Council of Europe, 17 November 2010, < https://wcd.coe.int/ViewDoc.jsp?id=1707137&Site=CM>.

Furthermore, states should take specific measures guaranteeing the independence of the judiciary and protecting judges from any form of political influence in their decision-making.[67]

A specialized administrative court, or a court of general jurisdiction possessing competence to try administrative cases, will typically form part of the regular judiciary in a given legal system. In both types of courts, judges should normally enjoy guarantees related to their independence, such as security of tenure, non-removability and non-transferability.[68] In contrast, other administrative tribunals that may specialize in specific types of administrative matters (social security, environment, etc.) do not generally form part of the regular judiciary. In many legal systems these tribunals may be composed of both ordinary judges and other official persons, whose appointment and tenure should also comply with international and European standards on independence and impartiality.

Within Europe, the Council of Europe's "Recommendation on judges: independence, efficiency, responsibility" explicitly refers to the applicability of judicial independence to all judges in all jurisdictions.[69] Similarly, in 2010, ODIHR published the "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia",[70] which deal specifically with judicial administration, with a focus on judicial councils, judicial self-governing bodies and the role of court chairs; judicial selection criteria and procedures; accountability of judges; and judicial independence in adjudication.

3.3.2 Impartiality of courts and tribunals

Impartiality refers to the objectivity of a judge when evaluating the merits of arguments and evidence in a case and when rendering a judgement. This matter can be particularly crucial in relation to a judge dealing with administrative law matters. A judge, who is a public employee him or herself, is required to settle disputes involving public bodies. An insufficiently independent judge (due to

67 See *Media Rights Agenda and Others v Nigeria*, African Commission, 2000, para 66: "States parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

68 See "Basic Principles on the Independence of the Judiciary", adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>; Recommendation CM/Rec(2010)12, *op. cit.,* note 65; *African Commission Principles and Guidelines, op. cit.,* note 61, section A, para 4.

69 Recommendation CM/Rec(2010)12, *op. cit.,* note 65, in particular the appendix to the recommendation.

70 "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia", OSCE ODIHR, Kyiv, 23-25 June 2010, <http://www.osce.org/odihr/71178>.

the appointment system, tenure, disciplinary system, financial dependence, etc.) is, therefore, less likely to be impartial when the state is involved as a party to proceedings.

The requirement of impartiality has two features: first, that judges do not allow their judgment to be influenced by personal bias or prejudice, referred to as "subjective impartiality"; and, second, that the tribunal must also appear to the reasonable observer to be impartial, referred to as "objective impartiality".[71] Subjective impartiality must be presumed until there is proof to the contrary.[72]

Independence and impartiality of courts and tribunals

In ***McGonnell v the United Kingdom***,[73] the same bailiff who had presided over the adoption of a Detailed Development Plan (DDP) regarding residential use of land acted as the sole judge of the law in the determination of the applicant's planning appeal. The ECtHR held that the direct involvement of the bailiff involved when the DDP was adopted was enough to cast doubt on his objective impartiality to determine a dispute over whether to permit a variation from the wording of the DDP.

In ***Campbell and Fell v the United Kingdom***,[75] the Albany Prison Board of Visitors, which had both adjudicatory and supervisory functions, was challenged in relation to its disciplinary proceedings.

With regard to "independence", the ECtHR examined the manner of appointment of the Board members, the duration of their term, and the existence of guarantees against outside pressures, as well as whether there was an appearance of independence. None of these criteria established that the Board was not independent. While the Court acknowledged that the impression the prisoners may have had — that the Board is closely associated with the executive and the prison administration due to frequent contact within its supervisory role — was a factor of greater weight, it nevertheless found that the existence of such sentiments was not sufficient to establish a lack of independence.[76] Interestingly, the European Commission of Human Rights had opined that the Board did not possess the necessary institutional independency, due to the limited periods of appointment, the apparent removability of the members, and the daily contact with prison officials in such a way as to identify it with the management of the prison.

With regard to "impartiality", the personal impartiality of members of a body covered by Article 6 is presumed until proven to the contrary. This is not a purely subjective test, as appearances may be of certain importance, and, therefore, account must be taken of questions of internal organization.[77] The Board had previously played no role in the disciplinary proceedings against the applicant and nothing in the actual organization of the adjudication impugned the Board's objective impartiality.

71 ODIHR *Legal Digest, op. cit.,* note 22.

72 *Hauschild v Denmark* ECtHR, 24 May 1989, paras 48-58.

73 *McGonnell v UK,* ECtHR, 8 February 2000, para 55

74 *Wettstein v Switzerland,* ECtHR, 21 December 2000, paras 44-50.

75 *Campbell and Fell v the United Kingdom,* ECtHR, 28 June 1984.

76 *Ibid.,* para 81.

In ***Wettstein v Switzerland***,[74] the judge on the bench at the applicant's proceedings before the Administrative Court was also acting as legal representative for the municipality against the applicant in proceedings pending before the Federal Court. The ECtHR found that this situation raised legitimate objective concerns of the applicant regarding the impartiality of the judge.

In ***Sramek v Austria***,[78] the applicant claimed that the Regional Real Property Transactions Authority that upheld an appeal against the Hopfgarten District Authority's decision to permit the purchase of property in a village in the Austrian Tyrol by the applicant, a foreign national, was not an independent and impartial tribunal.

The ECtHR held that the Office of the Land Government had acquired the status of a party when one of its Transactions Officers filed an appeal against the District Authority, and the inclusion in the Regional Authority of a civil servant from the Office of the Land Government whose hierarchical superior was that same Transactions Officer prevented the Regional Authority from being regarded as sufficiently independent. This was held despite the existence of regulations prohibiting the government from instructing civil servants on carrying out their judicial functions and despite the lack of any evidence that any actual (subjective) influence had been exerted. Where a "tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society."[79]

3.4. Public hearing

The ICCPR and the ECtHR guarantee the right to a public hearing in the determination of a person's civil rights and obligations. The public character of hearings ensures the transparency of proceedings and provides an important safeguard for the interest of the individual and of society at large. It protects parties from the administration of justice behind closed doors without public scrutiny.

As a general rule, procedures should be public and any member of the general public should be able to find out about proceedings and their course of conduct. However, this rule is subject to limitations, as discussed below.

Within written administrative proceedings, a hearing can be "public" when persons other than the parties have the opportunity to access the case file or when the case is tried in a courtroom accessible to the public, but the hearing consists mainly of an exchange of documents between parties and brief questions from the bench. According to Council of Europe instruments, when court proceedings are conducted entirely in writing, documents and information about the

77 *Ibid.,* paras 84-85.

78 *Sramek v Austria,* ECtHR, 22 October 1984, paras 37-42.

79 *Ibid.,* para 42.

case should be made publicly accessible, while maintaining due respect for the personal integrity and privacy of the private persons involved.[80]

➲ Exceptions to public proceedings

In accordance with universal and regional instruments, the press and public may only be excluded from all or part of court proceedings for reasons of morality, public order or national security in a democratic society. Public access may also be limited where the interest of juveniles or of the private lives of the parties so require, or to the extent strictly required in special circumstances where publicity would prejudice the interests of justice.[81] Any exclusion of the press and the public or restrictions of their access to hearings should be reasoned by the court or tribunal.

In cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of private persons and the sensitivity of the subject matter at hand requires otherwise (e.g., proceedings involving juveniles, matrimonial disputes or the guardianship or adoption of children).[82]

3.5 Effective remedy

ICCPR, Article 2

"3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

ECHR, Article 13

"Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

80 "Council of Europe Convention on Access to Official Documents", Council of Europe Committee of Ministers, 27 November 2008, <https://wcd.coe.int/ViewDoc.jsp?id=1377737>.

81 *B. and P. v the United Kingdom,* ECtHR, 24 April 2001, para 39.

82 International Covenant on Civil and Political Rights, Article 14, para 1, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; General Comment No. 32, *op. cit.,* note 42, para 29. See also *B. and P. v the United Kingdom, ibid.,* para 47.

ACHR, Article 25

"Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
   a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
   b. to develop the possibilities of judicial remedy; and
   c. to ensure that the competent authorities shall enforce such remedies when granted."

International and regional instruments guarantee the right to an effective remedy. The African Commission has also proclaimed the right to effective remedy and positive state obligations in relation to this right in its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.[83]

"Effective remedy" means an appropriate and functioning judicial and administrative mechanism for addressing and deciding upon claims of violations under domestic law. This applies equally when the violation has been committed by persons acting in an official capacity.

The OSCE participating States have committed themselves to ensure that everyone will enjoy recourse to effective remedies against any violation of their rights, as well as to ensure the right of the individual to appeal to executive, legislative, judicial or administrative organs.[84] In order to guarantee respect for fundamental rights and ensure legal integrity, participating States have also specifically agreed that the right to "an effective means of redress shall apply to administrative decisions and regulations for individuals affected thereby".[85]

Remedies cannot be considered effective when they prove illusory because of the general conditions prevailing in the country, when they are excessively onerous for the affected individual, or when the state does not ensure their proper enforcement by the judicial authorities.[86] Furthermore, if a court refuses to review

83 See African Commission Principles and Guidelines, *op. cit.,* note 61, section C – Right to an Effective Remedy.

84 "Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe", Vienna, 1989, para 13.9, <http://www.osce.org/mc/40881>.

85 "Moscow Document", *op. cit.,* note 2, paras (18.2)-(18.4).

86 *Baruch Ivcher Bronstein v Peru,* Inter-American Court of Human Rights, 6 February 2001, para 139.

the substantive issues related to an administrative action by an executive body that it deems to be a permissible exercise of its full discretion, the appeal cannot be considered an effective remedy.[87] Likewise, if the administrative agency fails to comply with a judgment in favor of a claimant, an appeal to the court becomes an ineffective remedy.[88] The burden of proof lies on the state to demonstrate that the specific remedy is effective.[89]

The right to an effective remedy also requires the cessation of the violation and implementation of provisional or interim measures to avoid continuing violations, and the provision of adequate compensation (see section 5.3).

While remedies granted to applicants in administrative proceedings vary from country to country, some of the most common are:

- full or partial invalidation of an unlawful administrative act;
- obligation of the administrative authority to adopt the administrative act requested by the applicant;
- obligation of the administrative authority to decide certain acts in favor of the applicant or prohibiting the administrative authority to decide certain acts against the applicant; and
- recognition (or declaration) that a legal relationship exists or that the challenged administrative act was null and void *ab initio*.

87 *Hasan and Chaush v Bulgaria,* ECtHR, 26 October 2000, para 100.

88 *Ibid,* para 101.

89 *Ibid,* para 102.

CHAPTER 4

Initiating the Case – Standards and Monitoring Guidance

During the initial phase of proceedings, the main standards that should be observed are whether reasonable time has been allowed to initiate administrative proceedings, whether effective access to a court or tribunal has been provided, and those related to the availability and scope of legal assistance and legal aid.

4.1 Reasonable time to initiate administrative proceedings

Reasonable time to initiate administrative proceedings: private persons should be allowed reasonable time, provided for by law, in which to initiate administrative proceedings.

The right to initiate administrative proceedings is inherent to the right to an effective remedy laid down in universal and regional instruments. The initiation of administrative action may be subject to limitation periods, which vary in length from one system to another.

Many countries have clearly regulated time limits determining when a person must appeal an administrative act, ranging in general terms from 30 days to six months. Within a national legal system, different limitation periods may be applicable to different administrative proceedings, for example in tax disputes, license disputes or freedom-of-information cases. Where time limits apply, by-laws or regulations should be made publicly accessible and time limits should be clear. Unreasonably short time limits may infringe upon the right to an effective remedy.

In many legal systems where private persons must first appeal or object against an administrative act before the administrative authority, the time period for instituting court proceedings will run from when a decision is taken in the internal appeal procedure.[90] From this perspective, periods for preliminary administrative

90 Recommendation Rec(2004)20, *op. cit.*, note 5, para (B)(2)(c).

review become relevant when measuring access to court, as well as the reasonable time period. (See section 6.1.)

➲ Monitoring guidance

Consideration must be given to any existing requirements for preliminary administrative review and the impact, if any, these requirements may have on the calculation of limitation periods. For instance, some countries require applicants to exhaust all available administrative remedies before resorting to court proceedings, while in other countries applicants have the option to apply to the administrative authority or the court – provided they do so within the timeframe for bringing legal proceedings.

A monitoring operation should pay special attention to issues such as:

- The general limitation periods applicable to administrative proceedings;
- The requirements for preliminary administrative review and the peculiarities surrounding the calculation of limitation periods;
- Exceptions to the limitation periods; and
- Consequences of non-compliance with the time limitation.

4.2 Access to court or tribunal

Access to court or tribunal: access to a court or tribunal must be effectively guaranteed to ensure that no private person is deprived, in procedural terms, of his or her right to seek justice.

The right to a fair trial concerns not only the conduct of proceedings in court, but also includes the right to initiate proceedings.[91] Under international law, access to a court or tribunal must effectively be guaranteed to ensure that no individual is deprived, in procedural terms, of his or her right to claim justice, including in administrative cases. The concept of "access to a court" to challenge administrative acts is, for example, included in OSCE commitments, which call on participating States to provide for judicial review.[92]

This right includes access to court in both fact and in law. A situation in which an individual's attempts to access the competent administrative courts or tribunals are systematically frustrated constitutes a violation of this right.[93]

91 *Golder v the United Kingdom,* ECtHR, 21 February 1975, para 36.

92 Moscow Document, *op. cit.,* note 5, para (18.4).

93 *Oló Bahamonde v Equatorial Guinea,* HRC Communication No. 468/1991, UN Doc CCPR/C/49/D/468/1991, 10 November 1993, para 9.4.

The right of access to a court or tribunal also requires a coherent system governing recourse to them that is sufficiently certain in its requirements, so that applicants have a clear, practical and effective opportunity to exercise the right.[94] Where a state has established an administrative jurisdiction, it must also ensure effective access to such jurisdiction.

The right of access to a court or tribunal is not absolute and may be subject to legitimate restrictions. In cases where a private person's access is limited, either by law or in fact, the restriction will not be incompatible with international fair trial standards, provided that the limitation does not impair the very essence of the right, that it pursues a legitimate aim, and that there is a reasonable relationship of proportionality between the means employed and the aim to be achieved.[95] In this respect, states may enjoy a margin of appreciation. Nevertheless, the decision as to whether a limitation results in a violation of the right of access will lie with a court.

4.2.1 Exhausting administrative remedies before judicial review

In some jurisdictions, there are legal requirements to exhaust all administrative remedies prior to initiating proceedings before a court (e.g., filing an administrative complaint to initiate an internal review by the administrative authority). In other jurisdictions, however, an internal administrative review may be stayed by the initiation of court proceedings.[96]

The requirement to exhaust all administrative remedies should not essentially frustrate the right to administrative justice. For example, if pursuing an administrative remedy prior to seeking judicial review would result in irreparable harm to the private person's interests, access to justice will effectively be denied.

4.2.2 Standing

The right of access to a court or tribunal is often limited by the necessity to prove "standing". *Locus standi*, or standing, is the legal term indicating that an individual is entitled to initiate or participate in legal proceedings. It generally requires the individual to have sufficient interest in the subject of the proceeding, though the scope of this requirement can vary depending on the jurisdiction and the

94 *De Geouffre de la Pradelle v France,* ECtHR, 16 December 1992, paras 34-35.

95 *Waite and Kennedy v Germany,* ECtHR, 18 February 1999, para 59; *Kart v Turkey,* ECtHR, 3 December 2009, para 79.

96 *Administration and You: Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons - A Handbook,* (Strasbourg: Council of Europe, April 1996), para 77.2.

type of action being brought.[97] 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.

4.2.3 Parties to the proceedings

A common characteristic of administrative proceedings is that they are usually initiated by a private person. In some countries, the office of the prosecutor or of another public body can initiate proceedings to test the legality of an administrative act.[98] From the perspective of ensuring access, it is important that the law clearly defines who may be an applicant and who may become a respondent party in administrative proceedings.

The Council of Europe 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.[99] In some countries, civil society organizations and other entities, such as unions or associations, can also be parties to an administrative dispute and may, as such, also have the right to access administrative proceedings, directly or as third parties.

4.2.4 Physical access

According to international and regional instruments, the right to access includes physical access to the facilities of the court or tribunal, as well as access to information concerning the time and place of hearings. Administrative courts and tribunals must make information regarding the date, time and venue of hearings available to concerned parties and the public. The notification should occur within a reasonable time, taking into account the potential interest in the case and the expected duration of the hearing.[100]

The ECtHR has held that unjustified restrictions on private persons' access to court premises violate the requirements of Article 6(1).[101] Moreover, the lack of

97 See "Standing up for your Right(s) in Europe, A comparative Study of Legal Standing (locus standi) before the EU and Member States' Courts", European Parliament, 2012, p. 15, <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=75651>.

98 "Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system", Council of Europe, 19 September 2012, <https://wcd.coe.int/ViewDoc.jsp?id=1979395&Site=CM>.

99 Recommendation Rec(2004)20, *op. cit.*, note 5.

100 *Van Meurs v The Netherlands,* HRC Communication 215/1986, UN Doc CCPR/C/39/D/215/1986, 13 July 1990, para 6.2.

101 *Zagorodnikov v Russia,* ECtHR, 7 June 2007, paras 26-27.

publicity of hearings,[102] an inaccessible venue,[103] insufficient courtroom space or unreasonable conditions of entry into the courtroom[104] have also been said to hinder physical access to the court and violate the right to access.

4.2.5 Costs

Costs relating to the procedure (e.g., court fees, state duties for filing procedural documents, copies of certain materials, services of experts, travel costs of witnesses, and legal representation) should not exclude or discourage access to administrative courts and tribunals.[105] Similarly, a rigid duty under law to award costs to a winning party without consideration of the implications thereof, or without providing legal aid, may have a deterrent effect on the ability of persons to pursue the vindication of their rights.[106]

Court fees may be determined by law. For example, the law may fix a percentage of the value of the claim as a court fee. In general, the fee is paid prior to lodging the claim.

Access to court or tribunal

In ***Äärela & Näkkäläjärvi v Finland***,[107] the applicants claimed that state authorization for logging and road building activities in areas used for reindeer herding violated their minority rights, and that the imposition of a substantial award of costs against them at the appellate level violated their right to equal access to the courts.

The UN Human Rights Committee found a violation of Article 14(1), in conjunction with Article 2, because national law required that the losing party in a court proceeding pay the costs of the winner without allowing the judge any discretion to lower the amount awarded. The rigid duty to award costs to a winning party may have a deterrent effect on the ability of persons who allege that their rights under the ICCPR have been violated to pursue a remedy before the courts.

102 *Riepan v Austria,* ECtHR, 14 November 2000, para 29; *Hummatov v Azerbaijan,* ECtHR, 29 November 2007, para 144.

103 *Hummatov v Azerbaijan, ibid.,* paras 140-152.

104 *Marinich v Belarus,* HRC Communication 1502/2006, UN Doc CCPR/C/99/D/1502/2006, 19 August 2010, paras 2.16 & 10.5.

105 *Kreuz v Poland,* ECtHR, 19 June 2001, para 67.

106 General Comment No. 32, *op. cit.,* note 42.

107 *Äärelä and Näkkäläjärvi v Finland, op. cit.,* note 49, para 7.2.

In ***Obermeier v Austria,***[108] the applicant had been dismissed from his position in a private company. The dismissal was approved by the Disabled Persons Board, which, in accordance with the law, had discretion to determine whether termination of employment was based on a legitimate interest of the employer, rather than on the disablement of the employee. The Board did not seek submissions from the applicant before issuing its decision. The applicant appealed the Board's decision to the Provincial Governor, who rejected the appeal.

The applicant then appealed the Board's decision to the Administrative Court, which took the view that it was precluded from examining the validity of a dismissal that had the Board's authorization. Because the Board did not exceed its discretionary power in authorizing the dismissal, the applicant's appeal was rejected.[109]

The ECtHR held that the protections of Article 6(1) could only be satisfied if the decisions of the administrative authorities binding the courts met the requirements of the provision. In this case, however, neither the Board nor the Provincial Governor could be regarded as independent tribunals within the meaning of Article 6(1). The Court's lack of jurisdiction to fully examine the Board's decision resulted in no effective review of the administrative decision. Therefore, the applicant's right of access to a court was violated.[110]

Monitoring guidance

Assessing the right of access to a court or tribunal will require collection of information on cases that have been rejected, returned or left without consideration by administrative courts or tribunals.

Restrictions based on formalities, grounds not explicitly specified in law or grounds that, despite being defined by law, undermine the very essence of the right of access to a court, may amount to restrictions of fair trial rights under international law. Further, restrictions based on a failure to exhaust administrative remedies or lack of standing, if overly strict or lacking justification, may lead to denial of access to court. Procedures for fulfilling the prerequisite of exhaustion of administrative remedies and costs to access a court should not be excessive.

- Monitoring staff should collect cases where access to a court or tribunal was restricted and analyse the grounds and reasoning for the restriction in light of international and regional standards.
- Careful attention should be paid to whether rules regarding standing or exhaustion of all administrative remedies are applied in a manner that leads to the denial of access to court by effected individuals.

108 *Obermeier v Austria,* ECtHR, 28 June 1990.

109 *Ibid.,* paras 17 & 69.

110 *Ibid.,* para 70.

Where different types of administrative actions are not clearly defined in legislation, an applicant might initiate one particular action, only to have the administrative jurisdiction consider another type of action to be the correct one.

A law following good practice would clearly define all possible consequences of filing an incorrect administrative action and define how to gain access, as well as communicate all existing time limits. These collected practices should be analysed in light of international and regional standards on the right of access to a court or tribunal and to an effective remedy.

- If trial monitoring reveals issues related to the filing of "incorrect" actions with the administrative jurisdiction, the monitoring staff should collect data about the consequences of such filings.

If monitoring reveals that administrative courts express different positions and act inconsistently on the same matter related to admissibility of administrative actions, these instances should be followed by a proper assessment and recommendations for improvement. The assessment and recommendations should be based on both national legislation and international and regional standards. Note that if the difference of treatment can be attributed to discriminatory characteristics, the right to equal access may be violated (see section 4.3 below).

- Monitoring staff must pay attention to the uniform and consistent application of norms pertaining to admissibility, which is a crucial safeguard for ensuring non-discriminatory access to a court or tribunal.

In case the applicant lacks sufficient financial means, exemptions from payment of court fees may apply under conditions foreseen in national law. Monitoring staff should assess whether these exemptions are applied consistently.

- While assessing the fairness of litigation costs in the administrative jurisdiction, the monitoring staff should also assess whether free legal aid and assistance are available to litigants without sufficient means to initiate proceedings, as the two issues are usually interconnected (see section 3.4).

4.3 Equal access

Equal access to a court or tribunal: private persons should have equal access to seek recourse or redress through administrative justice, and public authorities shall not act in a discriminatory manner.

Equality before the law requires that all private persons have equal access to a court or tribunal, regardless of the nature of the proceedings, and that they are treated in a non-discriminatory manner throughout the entire proceeding.[111]

➲ Forms of discrimination

Discrimination is any distinction, exclusion, restriction or preference that is based on any ground such as "race", colour, gender, sexual orientation or gender identity, language, religion, political or other opinion, national or social origin, property, birth or other status, and that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[112] Discrimination may take place not only on the basis of one aspect of an individual's identity, or perceived identity, but on several grounds, as is in the case in multiple or intersectional discrimination. For example, women with minority backgrounds may be more vulnerable to discrimination.[113]

According to international law, any distinctions regarding access to a court or tribunal that are not based on law and cannot be justified on objective and reasonable grounds are prohibited. For example, different burdens of proof may not be applied for male and female social security applicants.[114]

The ECtHR has provided guidance on assessing and challenging discriminatory practices by authorities. While procedures or policies may not be directly discriminatory, they can be indirectly discriminatory where a difference in treatment occurs through disproportionately prejudicial effects of a general policy or

111 "General Comment No. 18 on non-discrimination", Office of the High Commissioner for Human Rights, 10 November 1989, <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e>. With regard to access to justice from a gender perspective see, "Gender Equality and Justice Programming: Equitable Access to Justice for Women", United Nations Development Programme, 2007, <http://www.genderlinks.org.za/article/gender-equality-and-justice-programming-equitable-access-to-justice-for-women-2012-04-20>.

112 *Ibid.*, para 1. See also *Toonen v Australia,* HRC Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), holding that the references to "sex" in Article 2, paragraph 1, (non-discrimination) and Article 26 (equality before the law) of the ICCPR includes "sexual orientation".

113 "The Ljubljana Guidelines on Integration of Diverse Societies", OSCE High Commissioner on National Minorities, November 2012, p. 39, <http://www.osce.org/hcnm/96883?download=true>.

114 *Broeks v The Netherlands,* HRC Communication No. 172/1984, UN Doc CCPR/C/OP/2 at 196 (1990), para 14.

measure against one gender, or "racial" or ethnic group.[115] Claimants may rely on statistical evidence to demonstrate the discriminatory effect of a practice by state officials, in which case the burden shifts to the respondent government to show that this is the result of objective factors unrelated to discrimination.[116]

The right of equal access to administrative courts and tribunals must be applicable to all private persons. This applies regardless of nationality or statelessness, of status, and of whether a person is an asylum seeker, refugee, migrant worker, unaccompanied child or other person in the territory or subject to the jurisdiction of a state.[117] The prohibition against discrimination also applies when dealing with children on any of the enumerated grounds, and special attention should be paid to possible discrimination or discriminatory effects based on the socio-economic background or status of parent(s). Migrant children, unaccompanied children, refugees and asylum seekers, children with disabilities, homeless and street children, ethnic minorities, including Roma, and children in residential institutions may comprise especially vulnerable groups.

➲ Monitoring guidance

Information collected to assess access issues should allow for an analysis of any distinctions on the basis of "race", colour, gender, sexual orientation or gender identity, language, religion, national or social origin, political or other opinion, property, birth or other status.

- Attention during monitoring should be paid to possible barriers in accessing justice, including those particularly affecting members of minorities, be they of a financial, linguistic or social nature. For example, the use of minority languages in accessing free legal aid and judicial proceedings may promote equality of treatment while, conversely, the lack of such opportunities may adversely affect equal access to a court or tribunal for minorities.[118]

Insofar as access to justice is vital to the enjoyment of human rights, the degree to which one may participate directly and easily in available procedures is an

115 *D.H. and Others v Czech Republic,* ECtHR, 13 November 2007, para 184.

116 *Hoogendijk v the Netherlands,* Decision as to the Admissibility of Application No. 58641/00, 06 January 2005; *D.H. and Others v Czech Republic,* ECtHR, 13 November 2007, para 187.

117 See *Andrejeva v Latvia,* ECtHR, 18 February 2009, paras 87-89; *Case of the Girls Yean and Bosico v Dominican Republic,* Inter-American Court of Human Rights, 8 September 2005, para 166.

118 "The Oslo Recommendations Regarding the Linguistic Rights of Minorities & Explanatory Note", OSCE High Commissioner on National Minorities, February 1998, recommendations 18-19, <http://www.osce.org/hcnm/67531>; Ljubljana Guidelines, *op. cit.,* note 114, guideline 47; "The Language Rights of Persons Belonging to National Minorities under the Framework Convention", Advisory Committee on the Framework Convention for the Protection of National Minorities, ACFC/44DOC(2012)001 rev, 5 July (2012), para 59, <http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_CommentaryLanguage_en.pdf>.

important measure of such access. The availability of judicial procedures functioning in the language(s) of persons belonging to national minorities, therefore, renders access to justice more effective for such people.[119]

At a minimum, the state should provide language services to people who do not speak the language of the judicial proceedings. This standard of due process of law is universal, and its application relates to the linguistic rights of national minorities, as well as expressing the underlying principles of equality and non-discrimination before the law.[120]

- Any patterns of unequal access to court should be carefully analysed and, where possible, additional data may be sought to verify these patterns.

Analysis of relevant administrative justice legislation, interviews with vulnerable or marginalized groups and gender analysis can provide valuable information on possible discriminatory practices as regards effective access to justice in administrative proceedings.

When analyzing gender-based discrimination, specific tools and practices are available within international and local organizations to assess whether gender plays a determining factor in accessing justice.[121] These tools and practices can be adjusted and applied to administrative justice monitoring.

- Data on cases disaggregated to identify the gender of complainants, the type of administrative justice violation recorded, and how such cases are adjudicated and resolved can be used to identify gender-based trends in access to justice.

As stressed before (in section 2.2.1), monitoring can be used to identify the existence of gender-based discrimination or gender-specific barriers to accessing justice. It can also confirm whether equal access is guaranteed for children, who may require special assistance in order to be provided the opportunity to be heard, such as the obligatory presence of a public prosecutor or an ombudsperson specializing in children's rights.

119 *Ibid.,* explanatory note to Recommendation 19.

120 *Ibid.,* explanatory note to Recommendation 17.

121 An effective gender-analysis process should identify entry points for improving access to administrative justice for both women and men, at institutional, policy and procedural levels. See, e.g., "Gender Mainstreaming in Practice: A Toolkit", United Nations Development Programme, November 2011, <http://www.undp.kg/en/resources/e-library/article/%2028-e-library/1801-gm-toolkit->; "Report of the Special Rapporteur on the independence of judges and lawyers", Human Rights Council, seventeenth session, 29 April 2011, <http://www.refworld.org/docid/50f036122.html>.

- When monitoring, special consideration should be given to the equal access to justice for children. This includes proper accessibility, courtroom design, availability of appropriately trained staff and proceedings that are child-friendly. Where the law provides for special measures to protect children's rights, monitoring staff should confirm whether all appropriate special procedures were applied.

4.4 Legal assistance and legal aid

Legal assistance and legal aid: the right to access justice requires the right to legal assistance and legal aid when the private person lacks the necessary means. The costs relating to the procedure (e.g., court and legal representation fees) should not prevent or discourage the filing of appeals.

Legal assistance and aid refers to the provision of free legal advice or representation by legal counsel before administrative courts and tribunals, as well as partial or full coverage of the costs of litigation. The Human Rights Committee has acknowledged that "the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way."[122]

There is no absolute obligation under international or regional standards for states to provide legal aid for all legal disputes.[123] With regard to non-criminal proceedings, a case-by-case examination is necessary to determine whether legal aid or assistance is necessary to ensure a fair trial and whether, therefore, it must be provided under the state's legal aid scheme to ensure a fair hearing. The specific circumstances of the case, its legal character, the importance of what is at stake for the applicant, and the complexity of the relevant law and procedure are among the factors that have a bearing on an applicant's capacity to represent him or herself effectively and the need to provide legal assistance or aid.[124]

The Council of Europe recommends that legal aid be made available to persons lacking financial means to initiate administrative proceedings, in order to ensure that no one is prevented by economic obstacles from pursuing or defending his

122 General Comment No. 32, *op. cit.,* note 42, para 10.

123 *Bertuzzi v. France,* ECtHR, 13 February 2003, para 23; *Aerts v Belgium*, ECtHR, 30 July 1998, para 58.

124 See *Exceptions to the Exhaustion of Domestic Remedies,* Advisory Opinion OC-11/90, Inter-American Court of Human Rights, 10 August 1990, para 28; *Steel and Morris v. United Kingdom,* ECtHR, 15 February 2005, para 59-72.

or her rights before a court or tribunal determining civil, commercial, administrative, social or fiscal matters.[125]

Where the right of access requires legal assistance, it is up to the state to decide the manner in which to provide such means to guarantee effective access to court.[126] States may provide limited legal assistance — two hours of free legal advice, for example — or conditional fee arrangements. Where a private person qualifies for legal aid or assistance under the state's legal aid scheme, the assistance itself — such as the appointment of counsel — must be actualized and adequate. It is the state's responsibility to ensure that legal representation rendered under the legal aid scheme provides effective representation.[127] Ultimately, the need for and extent of legal aid or assistance must be determined with regard to the nature of the rights and interests in question, and whether assistance is indispensable to effective access to court.

The actual providers of legal aid may also vary depending on the system in question. Legal aid may be offered by state agencies, such as legal aid bureaus, bar associations, NGOs or private attorneys' providing pro-bono services. Independence of bar associations, especially when lawyers represent applicants against state institutions, becomes a crucial aspect to ensure adequate legal assistance and legal aid.[128] If the provision of legal aid is performed by non-state actors, the state still carries the primary responsibility for ensuring adequate and effective legal service within the legal aid scheme.[129] Children should also have the right to access free legal aid and to have their own legal counsel and representation in their own name in cases of conflict of interest with their parents or guardians.

125 "Resolution 78(8) on legal aid and advice", Council of Europe, 2 March 1978, para 1, <http://euromed-justice.eu/document/coe-1978-council-europe-committee-ministers-resolution-78-8-legal-aid-and-advice>.

126 *A. v United Kingdom,* ECtHR, 17 December 2002, paras 96-97.

127 *Bertuzzi v. France, op. cit.,* note 124, paras 27-30.

128 See "IBA Standards for the Independence of the Legal Profession", International Bar Association, 1990, <http://www.ibanet.org/About_the_IBA/IBA_resolutions.aspx>.

129 *Van der Mussele v Belgium,* ECtHR, 23 November 1983, paras 29-30.

Legal assistance and legal aid

In ***Aerts v Belgium,***[130] the applicant was placed in detention pending trial, first in a two-person cell and then transferred to a ward of the psychiatric wing of the prison by order of the Mental Health Board. The court of first instance ruled that the applicant's continued detention in the psychiatric ward was unlawful and should be terminated immediately. The Court of Appeal set aside the decision, ruling that the implementation of the Mental Health Board's decisions was an administrative act that fell outside the court's jurisdiction.

The applicant's request for legal aid in order to file an appeal to the Court of Cassation against the Court of Appeal judgment was refused by the Legal Aid Board, which reasoned that the appeal did not appear to be "well-founded".[131] In Belgium, representation by legal counsel is required before the Court of Cassation.

The case did not involve the determination of a criminal charge, but the outcome of the proceedings was decisive for the applicant's civil rights within the meaning of Article 6(1) ECHR, since the dispute concerned the lawfulness of the right to liberty.[132]

The ECtHR held that the refusal to grant legal aid to the applicant, who did not have sufficient means to pay for legal counsel, impaired the very essence of the applicant's right to a tribunal as stipulated in ECHR.[133] It was not the place of the Legal Aid Board to assess the proposed appeal's prospects of success.

In ***Purohit and Moore v The Gambia,***[134] an application was filed on behalf of patients committed in the Psychiatric Unit of the Royal Victorian Hospital under the Lunatic Detention Act (LDA).

While avenues of legal redress for patients to challenge the medical certificates that formed the legal basis of their detention existed, there was no legal aid or assistance available for such challenges. Only persons charged with capital offences were entitled to legal aid under the Poor Persons Defence (Capital Charge) Act.[135]

The African Commission found that the category of persons that would be committed as voluntary or involuntary patients under the LDA were likely to be people picked up from the streets or from poor backgrounds. The legal remedies provided for in the law were only accessible for the wealthy or those who could afford the services of private counsel, and were, therefore, unrealistic and not effective in this situation.

Monitoring guidance

Legal aid schemes may include legal representation or only legal advice, payment, or waiver of fees in administrative matters. In some systems, all costs incurred by

130 *Aerts v Belgium,* ECtHR, 30 July 1998.

131 *Ibid.,* para 20.

132 *Ibid.,* para 59.

133 *Ibid.,* para 60.

134 *Purohit and Moore v The Gambia,* African Commission, May 2003, paras 52-54.

135 *Ibid.,* para 52.

the assisted persons are covered, while some states may cover only specific costs, such as lawyer's fees, filing fees, costs of experts or expenses associated with witnesses, translations, etc.

- The monitoring staff will have to get a clear understanding of the grounds, conditions and criteria for the provision of legal aid or assistance in the national system.

Some systems may prescribe compulsory representation for a particular group of persons (children, for instance) or for engaging a particular court. Some countries may offer specific treatment, including preliminary advice, only to the most vulnerable groups, such as victims of gender-based violence, children, older persons, migrants and people with disabilities.

In some legal systems, free legal aid may be conditioned on the financial situation of a person seeking legal aid, the anticipated costs of proceedings, (which are normally higher than in criminal matters), and the nature and complexity of proceedings. In other systems, free legal aid may depend on the social status or age of the person – for example, a minor or pensioner, or a person with a disability.

- The monitoring staff should assess the categories of persons that are eligible to apply for legal aid in administrative cases (e.g., foreigners or any other group) and which restrictions apply. They should also assess the grounds for refusing legal aid, the possibility for judicial review of a decision to refuse legal aid, and the complexity and duration of the procedure for granting legal aid.

It is also important to gather information on whether legal aid can be obtained at any stage of proceedings, for example, when there is a change in the financial resources or obligations of the applicant after proceedings have commenced.

Where a state has established a legal aid scheme and an applicant has been approved to receive legal assistance, the state must ensure that the legal assistance is received and is adequate.

- Monitoring staff should also pay attention to whether information on the provision of legal aid is accessible and widely disseminated. The state should bring the criteria for the provision of the legal aid system to the attention of the public and other interested parties, particularly those agencies to which potential legal aid applicants might turn for help.
- Monitoring staff should pay special attention to the effectiveness of free legal aid providers and to the overall quality of such services by interviewing users and providers of the legal aid services.

CHAPTER 5

Processing the Case – Standards and Monitoring Guidance

The phase of processing administrative cases requires the observation of several standards: the right to an oral hearing, equality of arms and an adversarial trial, and the availability of preventive or interim measures.

5.1 Oral hearing

Oral hearing: the right to an oral hearing is not an absolute right in administrative proceedings, but the refusal to allow an oral hearing must be reasoned by the court or tribunal.

The right to an oral hearing means, in essence, that a person is provided an opportunity to present his or her case orally before the court. The right to an oral hearing constitutes a fundamental right under international law, but it is not an absolute right. The choice between written proceedings or oral hearings should be determined by national law, in compliance with international and regional standards. One of the distinctive features of administrative justice is the common use of written proceedings by administrative courts or tribunals.

The right to an oral hearing may be particularly important in cases where the administrative court or tribunal deals not only with matters of law, but with the assessment of facts. In some administrative cases, oral submissions become decisive for the fair resolution of the case, while in others, oral presentations might not be necessary and written proceedings may still ensure a fair trial within a reasonable time. The proportion of oral and written proceedings conducted by administrative courts differs from country to country, and oral hearings with the participation of the parties are rare in certain legal systems.

It should be noted that the ECtHR does not always distinguish between the requirements of a public hearing (see section 3.4) and an oral hearing. The Human Rights Committee generally treats the two rights jointly, and they might

appear as interchangeable concepts. For the purpose of administrative proceedings, it can at times be easier to treat them separately (as has been done in this handbook).

5.1.1 Translation and interpretation

Any person, whether an immigrant, member of a national minority or alien should be able to understand the proceedings he or she is involved in and all the procedural rights he or she is entitled to, regardless of legal status or language barrier. The right to translation (written rendering of one language to another) and interpretation (oral rendering of one language into another) means that a party that does not fully understand the language of the court or tribunal should be entitled to an authorized interpreter and authorized written translations of relevant documentation.

The right to translation and interpretation is explicitly provided for in criminal proceedings by both the ICCPR and ECHR.[136] With regard to non-criminal proceedings, the Human Rights Committee has found that interpretation may also be required, where necessary, in order for a party to participate on equal terms under the principle of equality of arms (see section 5.2 below).[137]

International and regional instruments have set special standards providing for linguistic rights of members of national minorities, in order to allow such persons to exercise and defend their rights, regardless of any language barrier.[138] Such persons should be provided interpretation and translation services, at no individual cost, whether engaged in criminal, civil or administrative proceedings.[139] OSCE Participating States and European states have further pledged to ensure that, wherever possible and necessary, persons belonging to national minorities may use their mother tongue in any communications with administrative

136 ECHR, Article 6(3); ICCPR, Art 14 (3).

137 General Comment No. 32, *op. cit.,* note 42, para 13.

138 See "UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", United Nations, 1992, <http://www.un.org/documents/ga/res/47/a47r135.htm>; "European Charter for Regional or Minority Languages", Council of Europe, 1992, <http://conventions.coe.int/Treaty/en/Treaties/Html/148.htm>; "European Framework Convention for the Protection of National Minorities", Council of Europe, 1995, <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>.

139 European Charter, *ibid.,* Article 9; European Framework Convention, *ibid.*, Articles 4.2, 10.1, 10.2 & 15.

authorities.[140] Some states have bilateral agreements creating linguistic rights that trigger obligations to provide for interpretation of administrative proceedings and translation of documents.[141]

5.1.2 Exceptions to oral hearings

Under the ECHR, the right to an oral hearing is not an absolute right, but the refusal to allow an oral hearing must be reasoned by the court or tribunal. If the court or tribunal is acting as a first and only instance, and deals not only with issues of law but also with merits and facts, then the threshold for denying an oral hearing is higher.[142] The right to a hearing may be expressly or tacitly waived.[143]

In exceptional circumstances where the case is better dealt with in written rather than oral submissions, the court may dispense with the oral hearings. Examples include cases of a highly technical nature, such as those dealing with social security proceedings, or where the national authorities could have regard to the demands of efficiency and economy.[144] However, in such cases, the party must have had the opportunity at some point of the proceedings to request an oral hearing.[145]

The requirement of an oral hearing does not generally apply to appellate proceedings, which may take place solely on the basis of written presentations.[146]

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140 Copenhagen Document, *op. cit.,* note 1, para 32; European Framework Convention, *ibid.*, Art. 10.2. See also, "Recommendation 1201(1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights", Council of Europe Parliamentary Assembly, 1 February 1993, Art. 7, <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta93/EREC1201.htm>; Oslo Recommendations, *op. cit.,* note 119. Note that while national minorities should have the right to bring a case in administrative proceedings in their own language, this right is not absolute, as a government might not be able to accommodate every person's language in every situation, and financial constraints and limitations on human resources may come into play.

141 For example, the "Treaty on Good Neighbourliness and Friendly Cooperation" between Hungary and Slovakia provides that the Hungarian minority in the Slovak Republic and the Slovak minority in Hungary have the right to use their own language when dealing with administrative authorities and court proceedings. "Treaty on Good Neighbourliness and Friendly Cooperation", 19 March 1995, Article 5(2)(g).

142 Recommendation Rec(2004)20, Council of Europe, *op. cit.,* note 5, p. 12. See also *Håkansson and Sturesson v Sweden,* ECtHR, 21 February 1990.

143 *Håkansson and Sturesson v Sweden, ibid.,* para 67; *Schuler-Zgraggen v Switzerland*, ECtHR, 24 June 1993, para 58.

144 *Schuler-Zgraggen v Switzerland, ibid.,* para 58; *Martinie v France,* ECtHR, 12 April 2006, para 41; *Eisenstecken v Austria*, ECtHR, 3 October 2000, paras 34-35.

145 *Martinie v France, ibid.,* para 42.

146 *R.M. v Finland, op. cit.,* note 24, para 6.4.

Furthermore, if there has been an oral hearing at first instance, there is no absolute right to an oral hearing in any subsequent appeal proceedings.[147]

➲ Monitoring guidance

Ideally, monitoring operations should try to obtain permission to observe any oral hearing, even if it is not open to the general public. Alternatively, if direct observation is not possible, in some administrative justice systems the recording of oral hearings may be required by law. The monitoring operation should ensure access to such recordings, being careful to respect the privacy of the parties involved.

Administrative proceedings that are conducted in writing present a challenge to trial-monitoring staff, as there is no courtroom hearing to observe. However, it should be possible to monitor the overall proceedings by collecting sufficient and reliable data, provided that access to the court files is guaranteed, and by interviewing the parties and main actors.[148]

- ➲ Monitoring staff should examine national legislation to determine the instances where administrative courts or tribunals conduct a case through written proceedings. Some typical situations include:
  - cases when parties have expressed their consent to written proceedings;
  - judicial review of normative acts;
  - cases when the administrative dispute is of a highly technical nature or it is of purely legal nature, and oral contributions are not necessary;
  - appellate proceedings in the higher administrative jurisdiction; and
  - certain types of administrative disputes specifically provided for in the national systems.
- ➲ It is advisable that monitoring staff identify the categories of cases or legal grounds for conducting administrative proceedings in writing in a given jurisdiction. This information will be useful to assess compliance with the right to an oral hearing.
- ➲ Monitoring staff should pay careful attention to whether there was an opportunity to request an oral hearing, and whether a party can be deemed to have tacitly waived the right to an oral hearing.

For monitoring purposes, it is important to assess whether the court provides a separate decision on conducting written proceedings, the reasons stated in this decision and the proper notification to the parties.

147 *Dory v Sweden,* ECtHR, 12 November 2002, paras 37-40.

148 This is, for example, the methodology used by the OSCE Mission in Kosovo when monitoring administrative justice cases, as the proceedings are written.

- The grounds as set out in the law, the circumstances of the case and the reasons stated by the judge in relation to holding written procedures, or denying a request for an oral hearing, should be examined.
- Whether the administrative jurisdiction notifies the parties about conducting the proceedings in writing, and whether the parties have effective remedies against such a decision should be established.

The reasons stated, along with the nature of the proceedings, may be analysed in light of international and regional fair trial standards applicable in such situations, in order to assess their appropriateness and make recommendations.

- Where there is no appeal guaranteed against decisions denying the right to an oral hearing, the monitoring staff should assess whether the national law provides for another effective remedy against such judicial decisions.

5.2 Equality of arms

Equality of arms: the standard of equality of arms requires a fair balance between the parties to a proceeding, where each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage against the opponent.

For a hearing to be fair, compliance with the principle of equality of arms is a necessary requirement under international law. The principle of equality of arms is of particular significance in administrative proceedings, where the parties are private persons and administrative authorities. The principle is meant to safeguard a private person's capacity to actively participate in the proceedings to ensure its fairness.

The principle of equality of arms means that the same procedural rights should be provided to all parties (the individual and administrative agency) unless distinctions are based on law, are justified on objective and reasonable grounds and do not entail actual disadvantages to either party. Equality of arms requires that parties to a proceeding must be allowed access to facilities on equal terms,[149] and that both parties may attend hearings. Court experts must always be neutral,[150] and rules regarding costs must not unduly favour one party.

The administrative court or tribunal should always strive to offset inequality between parties, for example, by inviting them to submit additional facts and

149 *Schuler-Zgraggen v Switzerland, op. cit.,* note 145, paras 50-52.

150 *Sara Lind Eggertsdottir v Iceland,* ECtHR, 5 July 2007, para 47.

evidence. In particular, a court or other independent body controlling the exercise of an administrative discretionary power should be able to obtain information necessary for the fair exercise of its function.[151] The right of a judge to request information from a public administration should be complemented by a duty to provide it. Unless national law provides for exceptions, the administrative authority should make documents and information relevant to the case available to the tribunal.[152]

The court or tribunal should also allow equal access to all documents and relevant information of the case to both parties (discussed further in section 5.2.2). The principle of equality between parties also demands that each party be given the opportunity to contest all the arguments and evidence presented by the other party.

5.2.1 Adversarial and inquisitorial trial

The requirement for an adversarial proceeding is interlinked with the requirement of equality of arms. The terms "adversarial" and "inquisitorial" derive from the two types of procedures used internationally to resolve legal issues to be determined by litigation. Modern administrative justice systems often manifest features of both adversarial and inquisitorial systems.

The right to an adversarial trial means, in principle, that proceedings are conducted by the two parties, who present their positions in court. The parties must be given the opportunity to obtain knowledge of and to comment on all evidence presented or observations filed, with a view to influencing the court's decision.[153]

In the inquisitorial model, the conduct of the trial is largely in the hands of the judge, who has powers to initiate motions, inquiries, expert opinions, etc. The proper exercise of legally established inquisitorial powers is important in administrative cases due to the public interest at stake and in order to ensure that balance is maintained between private parties and public administration.

5.2.2 Access to files, documents and evidence

The court should take the initiative to inform parties to a proceeding of the existence of evidence or observations, including new information added to the case after the commencement of proceedings or evidence obtained by the court on its

151 Recommendation No. R(80)2, *op. cit.,* note 28, para 11.

152 Recommendation Rec(2004)20, *op. cit.,* note 5, Section B, para 4(c).

153 *Lobo Machado v. Portugal,* ECtHR, 20 February 1996, para 31; *Feldbrugge v. The Netherlands,* ECtHR, 29 May 1986, paras 42-46.

own initiative from public authorities or other sources. It is not sufficient that the material is on file with the court.

The ECtHR has held that parties to proceedings must have the opportunity to become familiar with the evidence before the court, as well as the opportunity to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time. If need be, these comments can come in a written form and in advance, even if the evidence has been produced by national authorities at the request of the court.[154]

The right of access to evidence by the respective party is, however, not unlimited. The right may be restricted on a number of legitimate grounds, such as protecting national security[155] or preserving the fundamental rights of another private person, (e.g., the protection of witnesses at risk from reprisals).[156] However, limitations of access to relevant information must also be proportionate.

Equality of arms

In ***Fretté v France,***[157] the applicant appealed a rejected application for pre-authorization to adopt a child. The applicant, who was representing himself, was not notified of a hearing before the Conseil d'Etat despite regularly telephoning the Registry to inquire about the next hearing. He maintained that he was never given a clear answer about the date and never informed of the possibility to request notification of the hearing date in writing, and as a result was not able to attend the actual hearing.

The ECtHR held that the applicant could not legitimately be expected to regularly travel to court to check whether his case was posted on the notice boards, as was prescribed by law, and moreover, such a requirement was not compatible with the "diligence" states must exercise to ensure that rights guaranteed by Article 6 are enjoyed in an effective manner. As a result, the applicant was not able to acquaint himself with the Government Commissioner's submissions, nor had he been able to establish the general tenor of those submissions before the hearing. Thus, the applicant was denied the opportunity to submit a memorandum for the deliberations in reply and there had been a violation of his right to an adversarial proceeding.[158]

154 *Krcmar and Others v the Czech Republic,* ECtHR, 3 March 2000, paras 40-42; *Fretté v France,* ECtHR, 26 February 2002, para 47.

155 *Mirilashvili v Russia,* ECtHR, 11 December 2008, para 202.

156 *Doorson v the Netherlands,* ECtHR, 26 March 1996, para 70.

157 *Fretté v France, op. cit.,* note 155, paras 49-50.

158 *Ibid.,* paras 49-51.

In ***Jansen-Gielen v the Netherlands,***[159] the Central Appeals Tribunal refused to admit into evidence a psychological report that was submitted two days before the hearing in a pension case, citing that accepting new evidence at that time would unreasonably hinder the opposing party.

The HRC found that this failure resulted in an absence of equality of arms between the parties, in violation of Article 14(1) of the ICCPR. The HRC noted that the applicable procedural law did not provide for a time limit for the submission of documents, and, consequently, it was the duty of the court to ensure that each party could challenge the documentary evidence that the other filed or wished to file and, if need be, to adjourn proceedings to allow for such consideration.[160]

In ***Kress v France,***[161] the applicant had filed a suit against the Strasbourg Hospital in relation to injuries allegedly suffered after an operation. The applicant complained she did not receive a fair trial in the administrative courts because she had been unable to study or reply to the submissions of the Government Commissioner and the Commissioner participated in the court's deliberation although he did not have a vote.

The ECtHR held that there was a violation of Article 6 of the ECHR due to the presence of the Government Commissioner during the judges' deliberations. While the Commissioner's role was to act as an impartial and independent second reporting judge without a vote during deliberations, the doctrine of appearances must come into play; The applicant may have a feeling of inequality if, after hearing the Commissioner make submissions against her case during a public hearing, she sees him withdraw with the judges to attend private deliberations.[162] The benefit for the trial bench of the technical assistance of the Commissioner's presence during deliberations must be weighed against the higher interest of the litigant, who must have a guarantee that the Commissioner presence at the deliberations does not influence their outcome.[163]

➲ Monitoring guidance

The conduct of proceedings in writing has an impact not only on monitoring the right to an oral hearing, but also on monitoring other fair trial rights, such as the right to equality of arms and to an adversarial trial.

In many instances, the written materials of the administrative case file will contain useful information on whether the principle of equality of arms has been respected in a particular case.

159 *Gertruda Hubertina Jansen-Gielen v The Netherlands,* HRC Communication No. 846/1999, U.N. Doc. CCPR/C/71/D/846/1999 (2001)

160 *Ibid.,* para 8.2.

161 *Kress v France,* ECtHR, 7 June 2001, paras 73-81.

162 *Ibid.,* para 81.

163 *Ibid.,* para 85.

➲ To determine whether the principle of equality of arms has been respected, monitoring staff should focus on:

- The awareness of the parties of their procedural and substantive rights and obligations;
- The actual opportunity to exercise procedural rights, including submission of motions and evidence, notification to the respondent party and sufficient time allowed for comments;
- Availability of and access to documents and information relevant to the case;
- Neutrality of court experts;
- Fair distribution of costs;
- Legislative changes intended to influence the outcome of proceedings; and
- Availability of legal aid in law and in practice to facilitate effective participation of private persons in administrative proceedings.

The principle of equality of arms might be compromised when the judge repeatedly interrupts one party; limits, modifies or restricts their questions; or grants motions or requests evidence in support of only one party. Conversely, the principle can also be endangered when the judge does not exercise any power conferred by legislation or remains so passive as to allow one party to monopolize court proceedings.

In certain administrative cases, a private applicant may be placed in an unfavourable situation compared to the respondent authority, due to lack of access to information or facts necessary for obtaining effective judicial protection from the administrative jurisdiction. In some situations, the administrative authority may intentionally hide or refuse to provide certain documents or other materials. In such a case, the exercise of *ex officio*, or inquisitorial powers, by the administrative judge may rectify this disadvantage and restore equality between the parties.

- Monitoring staff should examine the legislative provisions and their application in practice concerning the powers and duties of the administrative judge in obtaining information from administrative authorities.
- Monitoring staff should also pay particular attention to the impartiality of the judge when exercising or refusing to exercise *ex officio* powers in order to create balance between the parties.

5.3 Interim measures

Interim measures: the right to interim measures should be provided where the rights, interests or liberties of a private person can be irreparably affected by the execution of an administrative act.

The notion of an effective remedy under international law requires that the remedy prevent the execution of measures whose effects are potentially irreversible. In some jurisdictions, the law may provide that an appeal against an administrative act entails automatic suspension of its execution. Suspension of execution may also be possible upon a formal request to an administrative or judicial authority. Administrative courts or tribunals should have the authority to grant interim measures pending the outcome of a proceeding, including the full or partial suspension of execution of the disputed administrative act.[164]

In deciding whether provisional protection should be granted, courts should take into account all relevant factors and interests, in particular whether execution of the administrative act is likely to cause severe damage that can only be rectified with difficulty, and whether there is a prima facie case against the validity of the act.[165] The public interest and the rights and interests of third persons should also be taken into account. Decisions on interim measures should be dealt with speedily by the court or tribunal, within reasonable time limits.[166]

Monitoring guidance

Special attention should be paid to the procedure for requesting interim measures when monitoring administrative proceedings. In some systems, a separate application to suspend the execution of the administrative act must be filed, while in other systems the request for interim measures may be filed as an integral part of the main claim against the administrative act.

The court or tribunal should deal with requests for interim measures within a reasonable time (within hours or a few days), so as to not undermine the right to effective remedy. A decision to reject a request for interim measures should always be sufficiently reasoned and based on legally established criteria.

164 See *Jabari v Turkey,* ECtHR, 11 July 2000, para 50.

165 "Recommendation No. R (89)8 of the Committee of Ministers to member states on provisional court protection in administrative matters", Council of Europe, 13 September 1989, section II, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2011090&SecMode=1&DocId=702300&Usage=2>.

166 *Ibid.,* section I*V*

CHAPTER 6

Deciding the Case – Standards and Monitoring Guidance

When deciding a case, the main standards to be observed are the rights to a trial within a reasonable time, a public and reasoned judgement, and the effective execution of judgments.

6.1 Trial within a reasonable time

Trial within a reasonable time: the right to a trial within a reasonable time is an important guarantee to protect all parties against excessive procedural delays that might jeopardize both the effectiveness and the credibility of courts and tribunals.

Inherent in the right to a trial within a reasonable time is the right to initiate administrative proceedings within a reasonable time (see Chapter 4), as well as the right to a timely judgment. Where delays in administrative proceedings are caused by a lack of resources and chronic under-funding, supplementary budgetary resources, to the extent possible, should be allocated by the state for the administration of justice.

➲ Determining reasonable time

There is no absolute time limit in international law for the completion of judicial proceedings, and the reasonableness of the length of proceedings is dependent on the particular circumstances of the individual case.[167] There are several factors to consider when determining reasonable timeliness, such as the complexity of the case, the conduct of the applicant, and the conduct of the competent administrative and judicial authorities.

Also, the nature of the right at risk and the personal stakes involved for the applicant are of special relevance. For instance, depending on the individual circumstances, a child custody case or a decision on a severe disability allowance might

167 *König v Germany,* ECtHR, 28 June 1978, para 99.

need to be considered in a more expeditious manner than a long standing property-ownership dispute.

A delay in proceedings that cannot be objectively justified by the complexity of the case or the behaviour of the parties may constitute a violation of international fair trial rights.[168] The entire time period (i.e., from the initiation of the administrative procedure, through the proceedings before the court, and up until the judgment becomes final) should be taken into consideration when determining whether the time elapsed is reasonable.[169] This period might also be extended to include proceedings related to the enforcement of decisions.[170]

Trial within a reasonable time

In ***Salesi v Italy***,[171] the administrative proceedings for a private person seeking payment of a monthly disability allowance lasted more than six years. The ECtHR held that the case was not of a complex nature and the applicant's conduct did not substantially contribute to the length of the proceedings. The excessive length of the proceedings was due to the authorities' behaviour and, as such, was not reasonable and constituted a violation of ECHR.[172] With regard to the backlog of cases in the appellate court that led to the case lying dormant for two years, the ECtHR stressed that "Article 6(1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements."[173]

In ***Muñoz Hermoza v Peru,***[174] a private person was discharged, by an administrative act, after having served in the *Guardia Civil* (police) for more than 20 years, losing his livelihood and accrued retirement benefits. The applicant spent ten years attempting to appeal and reverse his dismissal through administrative and judicial channels. The HRC considered that the delays in the proceedings, which included an administrative review that was pending for seven years and repeated failures to implement judicial decisions calling for the applicant's reinstatement, constituted unreasonable delay and violated the principle of a fair hearing.[175]

168 See *Mũnoz Hermoza v Peru,* HRC Communication 203/1986, UN Doc CCPR/C/34/D/203/1986 (1998), para 11.3; *Fei v Colombia,* HRC Communication 514/1992, UN Doc CCPR/C/53/D/514/1992 (1995), para 8.4.

169 *Vilho Eskelinen and Others v Finland,* ECtHR, 19 April 2007, para 66.

170 *Jankovic v Croatia*, ECtHR, 5 March 2009, paras 68-69; *Scordino v Italy,* ECtHR, 29 March 2006, para 198.

171 *Salesi v Italy,* ECtHR, 26 February 1993.

172 *Ibid.*, paras 24-25.

173 *Ibid.*

174 *Ruben Toribio Munoz Hermoza v Peru,* HRC Communication 203/1986, UN Doc CCPR/C/34/D/203/1986 (1998), paras 11.1-12.

175 *Ibid.*, para 11.3.

Monitoring guidance

Attention should be paid to any general or specific time limits set in the legislation for various types of cases and stages of the proceedings. For example, the law may specify a specific time period for ruling on admissibility from the moment of registering a lawsuit in the court registry. Similarly, it may specify time periods for the determination and resolution of the dispute and for appeal proceedings.

The legal framework should be sufficiently clear and avoid inconsistencies in the calculation of time limits in an administrative proceeding.

- Monitoring staff should assess the clarity and reasonableness of the time limits defined by law, as well as compliance with set time periods.
- Monitoring staff should pay due attention to the mechanisms for calculating time limits – such as when the timeline starts (institution of proceedings, ruling on admissibility, etc.) and when it ceases to run (conclusion of proceedings, final determination of case, execution of the judgment, etc.).

Some countries incorporate the principle of "reasonableness" into their legislation, and monitoring staff will be required to assess the reasonableness of time within which a hearing is held in each case, paying due attention to issues such as:

- facts of the case;
- complexity of the legal issues;
- nature of the rights at stake;
- number of persons involved in the proceedings;
- behaviour of parties (delaying tactics, etc.);
- efforts of administrative or judicial authorities to expedite the proceedings;
- delayed transfer of cases between the courts; and
- delayed communication to the parties of judicial acts.

In some countries where an administrative court or tribunal hears a variety of claims, legislation or court regulations may dictate the prioritization of certain types of cases over others.

- The monitoring staff should ascertain whether a system for giving priority to certain types of cases exists.

Reasonable time can also be affected by organizational aspects, such as effective case management. In particular, the monitoring staff may want to inquire whether there is a clear and transparent mechanism for case allocation and the scheduling of hearings. When no such mechanism or rules on scheduling exists, the judicial system may be subject to undue influences that endanger fair trial

rights, for instance, when certain cases initiated by state authorities are arbitrarily prioritized.

- The monitoring staff are advised to find out whether domestic legislation provides adequate remedies against delayed justice.[176]

6.2 Public and reasoned judgment

Public and reasoned judgment: judgments shall be pronounced publicly. All interested parties should have access to a judgment in which they have a legitimate interest, and judgments of general scope should be accessible to the general public. The judgment must include adequate reasoning, justifying the decision reached and related to the court or tribunal's response to the parties' arguments.

Under international law, judgments should be publicly pronounced, except where considerations of privacy or other legitimate restrictions apply. The purpose of the public nature of judgments is to contribute to a fair trial through public scrutiny and judicial transparency.

Persons concerned should be notified of judgements, which should also be accessible to the press and the general public, while still respecting the principle of privacy. All parties should have access to a judgment in which they have a legitimate interest, and judgments of general scope should be accessible to the general public, taking into account language considerations and available facilities, such as publication in journals or electronic media.

Although Article 6(1) of the ECHR does not provide for any exceptions to the publicity requirements in its wording, case law has drawn up a series of limitations and exceptions. For example, the full text of the judgment does not have to be delivered at all levels of the proceedings; a summary may be enough.[177] Publication of orders or judgments concerning children's and parental rights may be restricted to directly interested or affected persons and not available to the public at large.[178] The purpose and benefits of public scrutiny of judicial decisions must be balanced against the factors compelling the conduct of a closed hearing. Judgments must be adequately reasoned[179] so that parties can be certain that their arguments have been examined properly, and the public can understand

176 *Kudla v Poland,* ECtHR, 26 October 2000, paras 157-158.

177 *Lamanna v Austria*, ECtHR, 10 July 2001, paras 32-34.

178 *B. and P. v the United Kingdom,* ECtHR, 24 April 2001, para 52.

179 *Case of Claude Reyes et. al. v Chile,* Inter-American Court of Human Rights, 19 September 2006, para 135.

how courts and tribunals reach their decisions.[180] A well-reasoned judgment also allows parties to effectively exercise any available right of appeal. The reasoning provided must be specific to the case and the matters at hand, and not confined to general references to legislation.

➲ Monitoring guidance

The requirement that the judgment must be "pronounced publicly" does not necessarily mean that the judgment must always be read out loud in court in its entirety. In each case, the form of publicity to be given to the "judgment" under domestic law must be assessed in light of the special features of the proceedings in question and by reference to the object and purpose of this requirement.

- Monitoring staff should ascertain whether the legal system prescribes a clear procedure for public pronouncement of judgments in administrative justice, and whether the procedure is satisfied in practice.
- For compliance with this principle, the effective availability of information on the date and venue of the pronouncement of judgments is important, and notification to the parties is crucial.

If there is no clear obligation on the part of the judge, and the judgment is not required to be read in full, other means of dissemination must be assessed. The principle of public pronouncement may be satisfied where full judgments are published in an official collection of case law or deposited in the court registry. However, any limitations, such as restricting access to decisions in the court registry to those persons who display "legitimate interest" in obtaining a copy, must be considered.

- In order to obtain knowledge of the system in place to provide access to decisions, monitoring staff may want to inquire whether existing collections of case law are regularly updated, whether they contain all judgments, and what is the actual period between the official date of pronouncement and posting of the judgment in the system, as well as about the technical support for the databases and the functionality of search engines.

Analyzing whether a judgment is effectively reasoned requires assessing compliance with specific instructions in national law on how judgments should be formulated. Many legal systems use the same structure of judgements for civil and administrative cases: in brief, these are a preamble stating the main facts of the case and the parties' claims, the legal and factual discussion on the merits of the case, the decision of the court, and instructions on the right to appeal.

180 *Tatishvili v Russia*, ECtHR, 22 February 2007, para 58; *Ryakib Biryukov v Russia*, ECtHR, 17 January 2008, para 45; *Hirvisaari v Finland*, ECtHR, 27 September 2001, para 30.

The findings of any trial-monitoring report addressing compliance with the principle of reasoned judgments should be carefully formulated. They should not amount to interference with the exercise of justice or to an evaluation of the merits of the judgment. What should be examined is whether the judgment addresses the main submissions of the parties, especially those submissions rejected by the Court that could have had a decisive bearing on the case.

- The analysis should include an examination of the terminology used in the judgment from the perspective of a private person's understanding. It should also consider whether the claim was totally or partially upheld or rejected and whether the reasoning for the decisions was clear.

6.3 Execution of judgments

Execution of judgments: the court or tribunal must be in a position to implement or ensure implementation of its decisions (by the relevant authority) within a reasonable period of time.

Fair trial rights would be illusory if the final judgment of any court or tribunal, including administrative ones, were allowed not to be executed.[181] Execution of a court judgment must be regarded as an integral part of a "trial" for the purposes of the right to a fair trial,[182] and judgments should be enforced within a reasonable period of time.

The obligation to enforce final judgments lies with the state, and is equally valid regardless of whether courts or other entities are responsible for execution. Inaction by the executing authorities or excessive delays in implementing court decisions are violations of the right to a fair trial and the right to an effective remedy.[183]

➲ Authority of administrative courts and tribunals

The administrative court or tribunal must be empowered to decide upon an effective remedy (see section 3.5), and to implement, or ensure implementation of, its decisions. An appropriate procedure should be provided to enforce execution

181 See *Czernin v Czech Republic*, HRC Communication 823/1998, UN Doc CCPR/C/83/D/823/1998 (2005), para 7.5.

182 *Hornsby v Greece*, ECtHR, 19 March 1997, para 40; *Plazonić v Croatia*, ECtHR, 6 March 2008, para 47; *Jankovic v Croatia, op. cit.,* note 171, para 68.

183 *Czernin v Czech Republic*, HRC Communication 823/1998, UN Doc CCPR/C/83/D/823/1998 (2005), para 7.5.

of a decision, and administrative authorities should be held liable where they refuse or neglect to implement judicial decisions.[184]

Execution of judgments

In ***Hornsby v Greece***,[185] two foreign nationals had applied to the Ministry of Education for authorization to establish a private school. The Ministry refused the application on the grounds that only Greek nationals can be granted such authorization. In two separate judgments, the Supreme Administrative Court held that the rejections of the applications were unlawful and must be set aside, and that the application under consideration must be approved. The administrative authorities refused to comply with the Court's judgments despite numerous requests by the applicants.

The ECtHR stated that the right to a fair trial "would be illusory if a State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party… Execution of a judgment given by any court must be regarded as an integral part of the 'trial' for the purposes of Article 6."[186]

A common cause of non-enforcement of the judgments by administrative justice is a lack of financial resources. However, the lack of state funds or other resources is not a sufficient reason for a state's failure to execute a judgment, and the burden is on the state to justify any delay.[187]

In some systems, enforcement of administrative court judgments is problematic due to a lack of independence on the part of the executing public body. For example, sometimes the executing body is located within the hierarchy of the government, creating a situation where the head of the service may be appointed or removed by the same authorities against which he or she must eventually execute a judgment.

➲ Monitoring guidance

In order to check whether the judgments of administrative jurisdictions are executed within reasonable time periods and in a fair manner, the monitoring operation should first examine the institutional aspects of the enforcement of judgments.

There are many different systems of enforcement. In some states, the enforcement of judicial acts is entrusted to the executive authorities, e.g., the Ministry of Justice. In others, the judiciary carries out execution of judgments and a specific

184 Recommendation Rec(2003)16, Council of Europe, *op. cit.,* note 5.

185 *Hornsby v Greece*, *op. cit.,* note 183, paras 40-41.

186 *Ibid.*, para 40.

187 See Recommendation Rec(2003)16, Council of Europe, *op. cit.,* note 5, section II 2.

court section or judge deals with the execution proceedings. There are also states where the enforcement of judgments has been privatized or outsourced.

- In order to monitor the execution of the judgements of administrative courts or tribunals, trial-monitoring staff may collect statistical information on the number of judgments issued or which have become final that have not been executed for specific periods of time (3 months, 6 months, 1 year, etc.).

If the power to execute judgements lies with the courts, information can be requested from the registry of the court in charge. If it is a separate administrative authority, specific contacts and requests will be required.

Information should also be sought on the reasons provided, if any, by the authorities for non-execution or delayed execution.

- Interviews with parties of the enforcement proceedings, the relevant authorities, experts and attorneys, as well as an examination of issues related to the structure of the execution service, may provide useful information about the functioning of the system.

Where the enforcement of judgments by administrative courts or tribunals has been privatized in accordance with national law, trial-monitoring staff should assess whether private persons in whose favour the judgement has been made have effective legal remedies available to contest the acts and omissions of these private enforcement agents.

ANNEXES

ANNEX A
Tool Kit for Monitoring Administrative Justice

The present tool kit includes the following:[188]

Checklist for monitoring administrative justice

The checklist for monitoring administrative justice is an outline of the main issues that a monitoring operation will need to review and compile in accordance with the recommendations and standards provided in the handbook. The checklist also provides an overview of the international and regional fair trial standards and monitoring guidance.

Model questionnaire for legal analysis

The questions included in the model questionnaire for legal analysis are based on the international and regional fair trial standards explained in the handbook. The model proposed should be treated as guidelines for developing a tailored questionnaire, adapted to the specific legal system where the administrative proceedings will be monitored. In addition to international and regional standards presented in this publication, the content of the adapted questionnaire should reflect local laws and practices, local monitoring needs, and the focus and type of trial monitoring.

Model questionnaire for courtroom observation

As an additional practical tool, the questionnaire for courtroom observation provides guidance on how trial monitoring can integrate international and regional standards. The proposed model questionnaire should be adapted to the specific legal system in which the monitoring programme is operating.

188 Note that the handbook, as explained above, is intended to support the establishment of specific monitoring activities in the field of administrative justice. It should be read in conjunction with ODIHR's *Trial Monitoring: A Reference Manual for Practitioners* for guidance on setting up trial-monitoring operations.

Checklist for monitoring administrative justice	
1. MONITORING PREPARATIONS – GETTING STARTED (Chapter 2)	
Initial assessment	• The initial assessment supplies conclusions on the suitability of a potential monitoring operation and its main objectives. • The assessment may require analysis of statistical data, including analyzing statistics from a gender perspective, from obtainable and available information and reports on the administrative justice system.
Gender equality	• It is crucial for a monitoring programme to understand how men, women, boys and girls are affected in different ways by administrative justice and the distinct barriers that each group may face in accessing justice. A gender perspective should be maintained from the initiation of proceedings and throughout the life of a case. Applying a gender perspective to monitoring can contribute to more gender-responsive and equitable public services.
Child friendly justice	• Children come into contact with judicial institutions in many different ways before, during and after judicial proceedings. Judicial systems should be adapted to protect the specific rights, interests and needs of children and ensure that all authorities responsible for or involved with children's rights during judicial proceedings are properly informed.

Access and privacy	• Access to public information and to court hearings should be considered from the outset of the monitoring operation. National legislation must be examined in light of restrictions on access to documents in administrative proceedings. • In many countries, case documentation is not publicly accessible, and is available only to the parties. Trial monitoring might require specific arrangements to gain access to the files, such as direct contact and information from legal representatives of the parties or an agreement (memorandum of understanding) with the courts that includes access to files via the court registry or archive. • The right to privacy of private persons and the requirement to keep certain personal information or facts in confidence should be respected. (Note: the right to privacy is especially important in cases that concern gender-based violence or minors.) • Outreach activities may be advisable to inform communities about the administrative justice monitoring operation and its objectives, ensuring that information reaches all community members, both women and men.
Legal framework	• There should be a compilation and examination of applicable laws at the national level (e.g., the constitution and law or code on administrative procedure, the law or code on administrative disputes, the law or code on administrative courts and/or similar legislation that regulates the judiciary and the review of administrative acts and administrative proceedings). • The compilation and review of relevant administrative laws should also be considered, depending on the selected priorities (e.g., a law on adoption, expropriation, labour relations, education, or construction). • A review of the legal framework should include an assessment of whether there is any overt gender-based discrimination enshrined in the laws (e.g., divorce, inheritance or parental leave provisions). Attention should also be paid to how the courts apply the provisions and the application by the public administration of such provisions. • Relevant case law and decisions from legal compilations, specific administrative law and justice journals, and court websites should be compiled and reviewed.

Institutional framework	• In order to understand which courts or tribunals exercise administrative justice, the different jurisdictions of the courts should be examined and their jurisdictional relationships mapped. Depending on the case-selection method, monitoring staff might need to cover different courts employing different laws on administrative procedures (e.g., environmental, civil service or social security). • The proceedings of quasi-judicial bodies and tribunals other than courts (independent commissions, councils, etc.) with administrative justice jurisdiction on certain thematic issues – for example, social welfare, family issues or the environment – should be considered. • To assess whether national law ensures access to justice and an effective remedy, cases containing both civil and administrative law matters should be closely monitored.
Written proceedings	• Due to the frequent reliance on written forms of trial in administrative proceedings, monitoring staff should be prepared to use multiple methods of data collection, depending on the situation and the nature of the proceedings (e.g., interviews, access to judicial documents).
Administrative discretion	• Monitoring staff should be aware of the exercise of discretionary powers by administrative authorities, a legitimate feature in administrative law that also creates the risk of infringing on human rights. Administrative discretion should have clear legal boundaries and follow a pre-established administrative procedure. In addition, it should be applied objectivity and consistency in a transparent manner. (Note: the exercise of discretionary powers may be influenced by gender stereotypes or norms, for example in cases concerning child custody, alimony, inheritance or gender-based violence).
Selection and prioritization of cases	• The management of a trial-monitoring operation should determine at the outset the method for selecting cases and the criteria for prioritizing some cases over others. • It should be ensured that the courts and tribunals chosen for monitoring provide a sample of the kinds of legal cases in which both women and men are typically involved.

Staffing issues	• All monitoring staff should have a solid understanding of administrative law and justice standards, as well as international and regional fair trial standards. International organizations conducting trial monitoring can consider teaming national staff with international staff, thereby combining knowledge, expertise and legal traditions. Gender balance among monitoring staff may also be taken into account. (Note: gender-sensitivity training could also be conducted with monitoring staff). • The complexity, technicality and length of administrative proceedings need to be factored in when establishing a ratio of cases per court monitor. Sometimes complex administrative cases are tried over long periods of time, and monitoring activities should be planned to remain in place for sufficiently long periods of time to follow cases until their final judgment.

FAIR TRIAL STANDARDS IN ADMINISTRATIVE JUSTICE (Chapter 3)	
Impartiality and independence of courts or tribunals A court or tribunal must be independent from the executive and legislative branches of government, and judges must remain objective when evaluating the merits of arguments and evidence, and when rendering a judgment.	• An analysis should be made as to whether the public bodies, especially quasi-judicial bodies, entrusted with the exercise of judicial functions in administrative cases, enjoy independence and impartiality as required by international human rights law. Factors to be considered include procedures for the appointment of judges, security of tenure and duration of judicial term, state guarantees protecting judges from political influence, and the appearance of judicial independence. • Note whether there exists any conflict of interest on the part of the judges and legal staff involved in the proceedings. The appearance of a conflict of interest should also be noted.
Public hearing As a general rule, hearings should be public, to ensure transparency.	• If the press and public are excluded from all or part of the proceedings, establish the reasons for restricting public access.
Effective remedy Effective remedy is an appropriate and functioning judicial and administrative mechanism for addressing administrative disputes.	• There should be an examination of the legal and institutional frameworks that provide for remedies in administrative disputes, to ensure that the process is clearly established and not excessively onerous. Note whether interim or provisional measures are available.

INITIATING THE CASE (Chapter 4)	
Principle	**Monitoring guidance**
Reasonable time to initiate administrative proceedings Private persons should be allowed a reasonable time, provided for by law, in which to initiate administrative proceedings.	• Special attention should be paid to issues such as the time limitations applicable to administrative appeals and the consequences of noncompliance with these limitations. • Due consideration should be given to the requirements for preliminary administrative review and the specifics of calculating time limits in these instances.
Access to court or tribunal Access to a court or tribunal must effectively be guaranteed to ensure that no private person is deprived, in procedural terms, of his or her right to seek justice.	• Information on rejected administrative actions should be collected and assessed, and the grounds for inadmissible and "returned" actions analysed. • There should be an examination of whether the parties have been informed about the dates of hearings and received relevant case documents. • Fees related to access should be assessed in combination with an analysis of the availability of free legal aid or assistance. The legal aid or assistance available should be sufficient to allow members of society to access justice regardless of their economic status.
Equal access to court or tribunal Private persons should have equal access to seek recourse or redress through administrative justice, and public authorities shall not in any way restrain access in a discriminatory manner.	• Information allowing for disaggregation and analysis on the basis of gender, "race", birth or other status should be collected. • Attention should be paid to the whether there is uniform and consistent application of norms on admissibility. • Patterns of unequal access should be carefully analysed and additional data sought to verify these patterns. Special attention should be paid to equal access to justice for children. Monitors should also focus on whether the proceedings are child-friendly and whether national law provides special measures to protect children's rights.

Legal assistance and legal aid The right of access to a court may require the right to legal assistance and legal aid when the private person lacks the necessary means, as costs relating to the procedure should not exclude or discourage the filing of appeals.	• There should be an assessment of which categories of persons are eligible to apply for legal aid in administrative cases and which restrictions apply (e.g., foreigners or any other group, or whether free legal aid is conditioned on the person's financial situation). There should also be consideration of whether eligibility requirements for legal aid may have a disparate impact on women or men, based on differences in economic status and the types of cases covered. • The grounds for refusing legal aid, the possibility for judicial review of a decision to grant legal aid, and the complexity and duration of the procedure for granting legal aid should be assessed • There should be an identification of cases or issues that require compulsory legal representation (e.g., involving children). • There should be an assessment of the degree to which information on free legal aid is accessible and widely disseminated, and especially whether this is consistent for women and men.

PROCESSING THE CASE (Chapter 5)	
Principle	**Monitoring guidance**
Oral hearing The right to an oral hearing is not an absolute right, but the refusal to allow an oral hearing must be substantiated by the court or tribunal.	• It should be determined whether the absence of oral hearings is in line with international and regional fair trial standards. This requires a case-by-case approach. • All instances where written proceedings are mandatory in the national legislation (e.g., certain types of disputes, consent or waiver by parties, judicial review of normative acts) should be considered. • There should be a determination of whether national law requires the tribunal to provide reasons for conducting written trials and, in such cases, if national law provides effective remedy. • If there are oral proceedings, monitoring staff should use direct observation in combination with reviewing any protocol or minutes from the hearing.
Equality of arms Equality of arms requires a fair balance between the parties, where each party must be afforded a reasonable opportunity to present its case under conditions that do not place one party at a substantial disadvantage against the other.	• Their should be a focus on the parties' awareness of their procedural and substantive rights and obligations; the actual opportunity to exercise procedural rights, including the submission of motions and evidence, and the notification to the respondent party; the availability of, and access to, documents and information relevant to the case; the neutrality of court experts and the distribution of costs; the role of the court or tribunal in assessing the factual issues and evidence brought to its attention; and any legislative changes intended to influence the outcome of the proceedings. • It should be determined whether all parties have access to documents and evidence filed by the other party or obtained by the court *ex officio*. Legislation and practice related to *ex officio* powers of administrative judges when establishing the facts of the case should also be examined.

Interim measures Interim measures should be provided where the rights, interests and liberties of a private person can be irreparably affected by the execution of an administrative act.	• Relevant legislation and practices on interim measures should be identified. • There should be an assessment of the time it takes for the court or tribunal to reach a decision on interim measures once an applicant has submitted a request.

DECIDING THE CASE (Chapter 6)	
Principle	**Monitoring guidance**
Trial within a reasonable time The right to a trial within a reasonable time is an important guarantee to protect all parties against excessive procedural delays that might jeopardize both the effectiveness and credibility of courts and tribunals.	• There should be an assessment of the various general and specific time limitations in national legislation and practice for different types of cases and stages of the proceedings. • The mechanisms should be identified for calculating time limits – that is, when the timeline starts (appeal, ruling on admissibility, initiation of proceedings, etc.) and when the timeline ceases to run (conclusion of proceedings, final determination of case, execution of the judgment, etc.). • There should be a focus on whether the duration of the proceedings is fair in relation to the complexity of the case, the nature of the facts, the number of persons involved in the proceedings, any delaying tactics used by the parties, any efforts of judicial authorities to expedite the case, etc. • It should be determined whether there is a system of giving priority to certain types of cases (e.g., involving children or emergency protection procedures in domestic violence cases). • An assessment of the organizational structure and case-management system in terms of general delays in proceedings should be carried out. • National legislation should be examined to determine whether it provides for adequate remedies against delayed justice.

Public and reasoned judgment Judgment shall be pronounced publicly. A judgment must include the reasoning behind the decision reached, and relate to the court or tribunal's response to the applicants' arguments. All interested parties should have access, and judgments of general scope should be accessible to the broader public.	• It should be noted whether the parties to the proceedings are notified of the date and venue of the pronouncement, as well as whether this information is made available to the general public and media. If restrictions are applied to public access to the pronouncement, it should be determined whether the reasons for these (such as protection of children) were legitimate. • Research should be conducted on legislation and court rules with regard to whether pronouncement of the full judgment is required, or whether a shortened summary may legally suffice. Monitors should confirm whether court practice adheres to the rules. • It should be determined whether judgments are accessible to the general public. • The judgment should be attained from the court registry and assessed in terms of motivation and reasoning. When assessing whether the judgment is properly reasoned, monitoring staff should avoid making comments on the merits of the judgment, e.g., whether the court has reached a correct or incorrect decision. The assessment should only be of whether the court has addressed the arguments and evidence from the parties that impacted the outcome of the case.
Execution of judgments The court or tribunal must be in a position to implement or ensure implementation of its decisions (by the relevant authority) within a reasonable period of time.	• The system for executing judgements should be identified, whether by private or public bodies. In particular, the focus should be on issues related to the timing and effectiveness of execution, and to the independence of executing agencies and officers. Statistical information on the execution of judgments, as well as the reasons for non-execution, may provide useful information for drawing conclusions in this area of the right to fair trial. • There should also be a focus on whether private persons have effective legal remedies available to contest the acts and omissions of agencies responsible for executing judgements.

Model questionnaire for legal analysis

1. GENERAL INFORMATION ON THE ADMINISTRATIVE JUSTICE SYSTEM

1.1 SCOPE OF JUDICIAL REVIEW

Are administrative acts adopted in the exercise of the discretionary powers of administrative authorities subject to judicial review? If so, is the scope of judicial review of discretionary acts different from the scope of judicial review of non-discretionary acts? Please describe.

Is any type of administrative act excluded from judicial review? If so, please describe.

1.2 THE RIGHT TO A FAIR HEARING

Does the legislation provide for a hearing? If so, is it public? Oral? Please describe.

1.3 COURTS AND TRIBUNALS

a. Bodies exercising jurisdiction in administrative justice

What is the nature of the body entrusted with exercising jurisdiction in cases involving public administaration? Are there specialized administrative court(s), courts specializing in specific public law matters (e.g., welfare or taxation), and/or courts of general jurisdiction? Are there any independent bodies (commissions, councils) outside the judicial system vested with powers to exercise administrative justice? Please describe.

Is the body exercising jurisdiction the only judicial instance? If not, what body reviews appeals?

Is the court only a trier of law or also a trier of fact?

Who is eligible to initiate judicial review of an administrative act?

b. Independence and impartiality of administrative courts and judges

What are the procedures of appointment, promotion, transfer of venue, tenure and removal from office of judges within administrative justice? Do they differ from those concerning judges for civil or criminal courts? Please describe.

1.4 PUBLIC HEARING

Does the law require the administrative court to try administrative cases publicly?

Does the law stipulate all grounds on which an administrative case may be tried *in camera*? What are those grounds?

If a separate ruling is issued to hold proceedings *in camera*, does the law require that such decisions be sufficiently reasoned? What reasons are provided for the decision, and are they legally prescribed?

Do parties have the right to appeal such decisions to a higher authority? Is the exercise of this right effective in practice?

1.5 REMEDIES

What are the remedies available to the applicant in the case of an unlawful administrative act? Cancellation of the act? Invalidation of the act? Compulsion to adopt an act by administrative authorities? Please describe.

2. INITIATING THE CASE

2.1 REASONABLE TIME TO INITIATE ADMINISTRATIVE PROCEEDINGS

What are the time limitations for initiating trial proceedings against administrative acts?

What is the procedure for calculating the time limitation period for initiating trial proceedings in the administrative court? Is it triggered by the adoption of the administrative act, its entry into force, notification of the administrative act to the applicant, or other? Please describe.

If administrative remedies have to be exhausted before turning to the administrative justice system, how does that affect the timelines and their calculation?

What are the consequences of non-compliance by the applicant with the time limitation? Is there the possibility of restoring a lapsed time limitation for filing an administrative action by providing a justification? Is there the possibility to extend the applicable time limitation for filing an administrative action by providing a justification? If the answer to any of the above questions is "yes", please answer the following questions:

- Are the justifications for restoring/extending time limitations prescribed by law? If so, are they clear and foreseeable?

- Is there a time period specified by law during which the justification raised by the applicant shall be determined?

- Is the applicant entitled to a hearing by a judge on the question of restoring or extending the time limitation?

- In case the court refuses to accept the justification to restore/extend the time limitation, is there a requirement to adopt a separate decision on the matter?

- Does the applicant have a right to appeal this decision in a higher jurisdiction?

2.2 ACCESS TO COURT OR TRIBUNAL

a. General aspects

- Who is responsible for providing information to the public about hearings?

- Are the requirements for the institution of administrative proceedings by applicants prescribed by law? Are these requirements publicly accessible and foreseeable?

- Describe any legal obstacles to the initiation of administrative proceedings. For instance, does the law provide for restrictions whereby a private person cannot directly institute administrative proceedings and is required to obtain an authorization from a public body or official or request another public body to institute the proceedings on his or her behalf?

- Do civil society groups and organizations have the right to institute administrative proceedings on behalf of a community, a private person or group of private persons?

- Do civil society groups and organizations have the right to participate in administrative proceedings on behalf of a community, private person or group of private persons (e.g., acting as non-legal advocates in support of domestic violence victims in court; submitting *amicus curiae* briefs in child protection cases)?

b. Physical access

- Is there a publicly available schedule of administrative cases, indicating the date, time and venue of each case to be tried by the administrative court?

  → If so, does it contain accurate and up-to-date information on the hearings?

- What are the requirements for members of the public and the media to gain entry into the courtroom? Describe the requirements as set out in the law.

c. Procedural aspects

- On what grounds can an application against an administrative action be ruled inadmissible in the administrative court?

- What are the consequences of submission of an "incorrect" action by the applicant?

- Does the applicant have the right to challenge a court ruling declaring an action inadmissible?

2.3 EQUAL ACCESS TO COURT OR TRIBUNAL
• Are there any specific provisions pertaining to vulnerable groups as parties to administrative proceedings? (Note: "vulnerable groups" may include, but are not limited to, children, minorities, people with disabilities, victims of gender-based violence, single parents and indigent persons, especially indigent women.)
• Are private persons who do not speak and/or understand the language of the proceedings entitled to free interpretation and translation?
• Are there special provisions in the law regarding linguistic rights for members of national minorities, such as the right to conduct administrative proceedings in their language?
2.4 LEGAL ASSISTANCE AND LEGAL AID
• Is there a free legal aid scheme applicable to administrative proceedings?
• If so, what types of legal aid or assistance are available in administrative matters under the scheme?
➜ Reduction or waiver of court fees?
➜ Free legal advice or assistance?
➜ Free legal representation in court by a state-funded or state-appointed lawyer?
➜ Other? (please describe):
• What are the eligibility criteria for free legal aid in administrative matters? Are the criteria sufficiently clear?
• What is the impact of eligibility on the ability of individuals to access free legal aid? Are men and women impacted differently?

- What is the procedure for determining whether or not a private person is eligible for free legal aid in administrative matters? Who makes the decision on granting or denying free legal aid to a private person?

- Is an effective remedy against such a decision available to the private person(s) concerned?

3. PROCESSING THE CASE

3.1 ORAL HEARING

- Does the law guarantee the right of private persons to an oral hearing before the administrative court?

- Does the law stipulate the grounds on which the administrative court may dispense with an oral hearing and try the case in written form? What are those grounds?

- Is there a legal obligation for the court to provide a separate decision to try the case in written form? Does the law require that such decisions be sufficiently reasoned?

- Does the law provide recourse against decisions not to hold an oral hearing?

3.2 EQUALITY OF ARMS

Does the law require that all motions by all parties to the proceedings be considered?

What are the *ex officio* powers of the court with regard to:

- ➜ Establishing facts of the administrative case?

- ➜ Requesting that the administrative authority disclose specified information?

- ➜ Requesting that the administrative authority disclose the information to all the parties?

- What are the legal consequences of non-compliance by the administrative authority on the merits of the case?

3.3 INTERIM MEASURES

- Does the law provide for interim measures in administrative proceedings? If so, what types of interim measures are available?
- Do private persons have the right to submit motions to the court requesting interim measures?
- What are the legal grounds for requesting interim measures?
- What are the stages and procedures for motions for requesting interim measures?
- What are the time limitations prescribed by law for deciding upon a motion for an interim measure?
- What are the grounds for the court to decide whether the motion for an interim measure is justified?
- Does the court rule separately on granting or rejecting the motion for an interim measure?
- Are such decisions subject to appeal to a higher jurisdiction?

4. DECIDING THE CASE

4.1 TRIAL WITHIN A REASONABLE TIME

- What event triggers the time period of a trial in administrative court?
  - ➜ Filing of the lawsuit with the administrative court?

➜ Start of the preliminary administrative review, if the final decision is later appealed in the administrative court?
➜ Other? (please specify):
• What event ends the time period of a trial in administrative court?
• Does the law establish any prioritization system for cases to be dealt with by administrative courts (social benefits, minors, emergency protection procedures in domestic violence cases, etc.)?
• Is there any prescribed length for a particular administrative proceeding?
4.2 PUBLIC AND REASONED JUDGMENT
a. Public pronouncement of judgments
• Does the law require that administrative court judgments be pronounced publicly?
• Is there any prescribed form in which judgments and files of the cases tried by the administrative court are made available to the parties and/or the public (court registry, web, any other)?
b. Reasoned judgments
• Does the law require that the administrative court provide a reasoned judgment? Is there any further requirement as to the reasoning, i.e., to address the main arguments raised by the parties during the proceedings, etc.?
4.3 EXECUTION OF JUDGMENTS
• Which public body is competent to enforce the judgments of the administrative court?
➜ Judiciary?

➜ Executive government (e.g., Ministry of Justice)?
➜ Independent public service for enforcement of judgments?
➜ Privatized professional service for enforcement of judgments?
• What are the time limitations for the enforcement of judgments of the administrative court? What are the consequences of exceeding the time limitations?
• Was the final decision of the court effectively enforced? If not, was there a suspension or termination of enforcement proceedings by the enforcement authority?
• What are the consequences of non-compliance by enforcement authorities with the final judgment of the administrative court?
➜ Criminal responsibility?
➜ Disciplinary measures (fines, demotion, pay cut, etc.)?
➜ Payment of compensation to the beneficiary private persons?
➜ Other? (please specify):

5. OTHER COMMENTS

Model questionnaire for courtroom observation

NOTE: The current model requires adaptation to the national legislation before commencement of monitoring operations in any given system and serves mainly for monitoring first-instance court proceedings.

Observer's identification card/number	
Observation date	(dd/mm/yyyy)
Start of observation (time)	
End of observation (time)	
1. GENERAL INFORMATION ON THE CASE	
Case file number and case title	
Summary of the case to be tried (subject of claim and statement of claim)	
Name and location of court	
Level of jurisdiction (preparatory hearing, first instance, second instance or appeal, complaint, interim measure or injunction)	
Number and gender of judges on the panel (if applicable). *(Note: used to establish whether there is gender balance.)*	
Name and rank of the presiding judge	
Name and rank of other judges on the panel (if applicable)	1. 2.

Name of the registrar of the court session:	
Name and gender of plaintiff (natural person): *(Note: used to map gender patterns in access to administrative justice).*	
Name and gender of respondent (legal person/ body): *(Note: used to map gender patterns in access to administrative justice).*	
Applicant's representative	Lawyer: Authorized representative:
Respondent's representative	Lawyer: Authorized representative:
Representative of legal body (Head of department, legal representative):	
Name and status of third parties involved in the proceedings (organizations, representatives, etc):	

Information on the history of judicial proceedings held within the case: *(Specify the date of all court proceedings related to the case, any lawsuits, if the case was stayed, and the court session where the final judgment was delivered)* Highlight/mark those proceedings that were observed, and reference previous reports related to observation of the same case.	(dd/mm/yyyy)
1.1 Impartiality and Independence	
Did the presiding judge explain the essence of the dispute in general?	
Was/were the judge(s) present in the courtroom throughout the trial? Did the judge(s) attentively follow the trial? Please specify in detail all instances where the judge may have been distracted from the trial, such as speaking on the phone or similar incidents.	
Was the judge able to preserve order and decorum in the courtroom? Did the judge express his/her attitude to the parties' demeanor that was in breach of the procedural norms? Please describe in detail any irregularities noticed.	
Were there instances in which the judge used sexist language or behaviours, or made decisions based on gender stereotypes or preconceived notions about gender roles and responsibilities? Please describe in detail any irregularities noticed.	

Did the court adjourn for deliberation? Please describe in detail any irregularities noticed.
Was there any factor that put the judge's impartiality in question (e.g., improper relations with one party prior to or after the court session, personal ties, invitation of the applicant or the respondent to judge's chambers, etc.). Please describe in detail.
1.2 Public Hearing
Courtroom capacity (number of people)
Were there any obstacles to entry into the courthouse and/or the courtroom? If so, describe in detail.
Was the hearing held in a regular courtroom? If not, where (e.g., judge's office, etc.)?
Was the trial open to the public? If not, what was the reason given for it to be closed (e.g., protecting personal or family privacy, public interest, national security, etc.)? Were the grounds provided for by law?
Was anyone denied entry to the courtroom? Did this restriction have a basis in law and was it reasoned accordingly?

2. INITIATING THE CASE
2.1 Reasonable Time to Initiate Proceedings
Did the judge provide information on the duration of the administrative procedure before public administration? If so, please specify the duration.
What time had elapsed before administrative proceedings were initiated before the court?
2.2 Access to Court or Tribunal
Was information on the case to be tried posted in advance in public? If the information was not available, how and where did you receive the list of cases (e.g., registrar of the court session, law firm, etc.)?
Was access provided for persons with disabilities to enter the courtroom?
Were any persons who failed to present themselves in court without a legitimate reason notified by court? Was any penalty imposed on them by the court? If so, specify in detail the participant on whom the notification or penalty was imposed; the amount of penalty; the date of notification or imposition of penalty.
If the applicant could not speak and/or understand the language of the court proceedings (e.g., a foreigner, member of an ethnic minority, hearing and/or speech-impaired person), was he/she provided with an interpreter? Please describe.
Was there any discussion regarding the admissibility of the case (time, subject, jurisdiction, etc.)? Please describe.

Did the judge announce the composition of the court, the registrar of the court session, expert, specialist and translator?
Did the judge explain to the parties their rights and duties? If so, specify the rights explained.
Did the judge obtain the administrative body's file? Did he/she request it?
Did the judge explain the *status quo* of the lawsuit in terms of previous hearings and gathering of evidence?
Did the judge discuss any preparatory proceedings (deadlines, expert evidence, gathering documents and/or witnesses)?
Was the registrar present throughout the court session? Did the registrar take minutes of the hearing? Please specify if the note-taking was consistent; if not, specify when the registrar took notes and for how long. Did the participants in the administrative process give instructions to the registrar to record any information in the minutes? Were there other factors that put the accuracy of the court minutes into question?
Did either party complain about the structure of the court, the registrar or the expert, the specialist or the translator (if there was any disagreement, please give a detailed description)?

2.3 Legal Aid and Legal Assistance
Were the parties represented by lawyers?
Did the judge explain to the parties their rights in relation to legal aid? Did either party request a state-funded or state-appointed lawyer? Did the judge appoint such a lawyer?
How do you evaluate the performance of the applicant's lawyer/representative? Was the lawyer/representative prepared for the case? Was the lawyer/representative closely familiar with the case materials? How many motions did the lawyer/representative file with the court? How many objections did the lawyer/representative present?

3. PROCESSING THE CASE
3.1 Oral Hearing
Was any part of the proceedings conducted in writing? Were the reasons for doing so stated? If so, specify the reasons. List the relevant documents submitted via written procedures that should be obtained by the court monitoring operation.
3.2 Equality of Arms
Were both parties present at the hearing? If not, specify the reasons given for absences.

Was the background or subject of the claim changed, or the scope reduced or expanded? Why? Please explain in detail.
Did the judge create equal opportunities for the parties to submit their facts and opinions? Did the judge favour either party? Was priority given to either party? Please describe in detail any irregularities noticed. (Note: an indication of gender bias in court proceedings could include the judge's use of sexist language or decisions based on gender stereotypes).
Did the judge investigate the facts of the case and explain to the parties the order of investigating the evidence in the court proceeding? What was the order of questioning of parties, witnesses, experts and professionals?
Did the judge give the floor to trial participants to file motions and/or justify them?
Did the participants have an opportunity to be acquainted with case materials, as well as with the documents submitted to the court with regard to the proceeding?

Did the judge request additional documents from the parties?
Did the judge inquire of the trial participants whether they had any new evidence, witnesses or motions for conducting additional examination? If motions were filed, how many were granted and how many rejected? If any motions were rejected, specify their content and the grounds for rejection.
Did the presiding judge require the trial participants to provide information on facts concerning certain events or evidence at their disposal? Please describe in detail. Did the judge fix any deadline to this end?
Were witnesses questioned in the court session? If so, were they questioned out of the hearing of subsequent witnesses?
3.3 Interim Measures
Was any interim measure/injunction requested? At what stage in the proceedings? Was it granted or rejected?

4. DECIDING THE CASE
4.1 Trial within a reasonable time
How long did the deliberations last? In case of an excessively lengthy trial, indicate the reasons for delay: Was the case complex? Did the acts of the administrative authority cause the delay? Did the acts of either party cause the delay? Did the acts of the court or judge cause the delay? What was the consequence of the delay on the private applicant? Other reasons for delay (specify)?
If the hearing did not result in a judgment, was a new date set for the next court hearing?
4.2 Public and Reasoned Judgment
Was the judgment pronounced publicly? If so, was it pronounced in full or in part? If the judgment was not publicly pronounced or pronounced in part, what were the reasons? If it was pronounced in part, then which parts were pronounced? If the judge only pronounced the outcome of the case, was the full judgment later made publicly available? How was it made available (e.g., database or website, other)?
Was a date set for the publication of the judgment?

Did the judgment provide the Court's reasoning? Did the decision address all the claims of the plaintiff or only some of them? Which claims were left out?
4.3 Execution of judgments
How did the trial conclude (final judgment accepted by the parties, new trial granted or judgment open for additional evidence, amicable agreement, withdrawal)?
Were the costs related to the court procedure discussed at the hearing? Were the court expenses discussed? Were they noted in the decision?
Were the procedural expenses and the rule and time for using remedies against the verdict indicated in the concluding part of the judgment?

Summary of the judgment:

5. OTHER COMMENTS

ANNEX B
Practical Examples of Administrative Justice Monitoring Operations

The practical guidance provided in this handbook is largely based on the experiences from four monitoring operations conducted by NGOs and the OSCE Office in Baku and OSCE Mission in Kosovo focused on administrative proceedings.

Project on Monitoring Administrative Court Proceedings in Armenia, Protection of Rights Without Borders (2009-2010)

The monitoring project was conducted over a period of 18 months by the NGO "Protection of Rights Without Borders" and comprised three phases: (a) preparatory phase, (b) monitoring phase, and (c) reporting and publishing phase.

During the preparatory phase, the core staff – consisting of a project co-ordinator, an administrative assistant and a legal expert – studied legislation, prepared questionnaires, and recruited and trained court monitors. During the monitoring phase, the monitoring staff directly observed trials and collected data. During the final phase, the legal expert and the project co-ordinator analysed the collected data and prepared a final report for publication.

The main responsibilities of the project co-ordinator were the daily supervision of the work of the court monitors and the compilation of data. Seventeen full-time court monitors were employed (through an open competition) to cover the entire country. All monitors were trained in the methodology of trial monitoring, legislation on administrative proceedings, relevant international fair trial standards, working with questionnaires, and the rules of ethics.

Information on scheduled cases was provided by the Administrative Court on a weekly basis, and each day the project co-ordinator prepared a list of the cases scheduled. Court monitors were notified of the details of the trial to be monitored. Each case was monitored by the same person throughout the process until pronouncement of the final decision. Information was also collected from additional sources, such as interviews, official documents obtained from trial participants, and copies of judicial acts. Separate questionnaires were prepared for

judges, state officials and private persons. Thirty interviews with stakeholders were conducted, the results of which were also used for the preparation of the final report. Private data contained in the cases monitored was dealt with in a careful manner to ensure privacy of the persons involved.

The final report was drafted by legal experts with specialization and expertise in the field of administrative law. Any private data obtained by the monitoring was redacted to ensure anonymity.

The Final Trial Monitoring Report[189] contained a number of detailed recommendations for improvements in the administrative legislation and practice. After the Final Report's release, a number of follow-up workshops were held involving the Chairman and the judges of the Administrative Court of Armenia, officials from the Ministry of Justice and other public officials and interested parties. In 2011, some of the key recommendations contained in the Final Report were incorporated in the draft law on amendments to the Code of Administrative Proceedings.

Monitoring Administrative Justice, OSCE Mission in Kosovo (on-going since 2006)

The Legal System Monitoring Section (LSMS) within the Human Rights and Communities Department of the OSCE Mission in Kosovo has monitored administrative proceedings since August 2006. Initially, the objective of the monitoring operation was to provide authorities and the public with an assessment of the administrative justice system.

The LSMS's initial assessment revealed concerns about the right to a fair trial and effective participation of the parties. In addition, lack of clarity regarding the various laws on administrative procedure created uncertainty as to competencies to deal with complaints at the municipal and district levels, before the dispute reached the Supreme Court.

From the initial stages, a team of six persons was engaged in the project: two court monitors (national and international), one co-ordinator, two legal analysts, and a Chief of Section. The Chief of Section clears the assessment reports drafted by an external expert consultant. The mission analysed material collected from

189 "Final Report Monitoring Administrative Courts in Armenia", Protection of Rights without Borders, available only in Armenian Language, with a summary of the main findings in English, pages 122-139. For more information about Protection of Rights without Borders trial-monitoring work see: <http://www.prwb.am/en>.

case files (a written procedure at the Supreme Court[190]) and internal update reports drafted for each case by the trial monitors.

The Report on the Administrative Justice System in Kosovo* was published in April 2007.[191] Since the publication of the 2007 Report, monitoring of administrative justice has become an integral part of the trial-monitoring activities of the OSCE Mission to Kosovo. The LSMS's regular trial-monitoring reports also include updates on various administrative justice matters, including labour, property and child-custody cases. In 2010, the Mission published a Report on Child Adoption Procedure in Kosovo, which identified shortcomings in administrative proceedings and noted that adjudication of adoption-related cases is not always performed by courts as the law prescribes.[192]

Monitoring Administrative Cases, Transparency International Georgia (on-going since May 2011)

The Transparency International (TI) Georgia project on monitoring administrative courts started in May 2011. In the preparatory phase, an international expert on trial monitoring, together with TI Georgia staff consisting of a senior lawyer, co-ordinator and a trial lawyer, conducted an assessment of the legislation regulating administrative justice and developed a trial-monitoring methodology and checklist.

An electronic database was also created that provided a simple way of compiling and processing information and retrieving relevant statistics. The online survey was identical to the paper version of the checklist, simplifying management and administration of the information gathered. Once the preparatory work was finalized, trial monitoring began in courts in Tbilisi and Batumi between October 2011 and February 2012 by seven volunteer monitors, all of them graduating law students. The "First Court Monitoring Report" was published in June 2012.

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190 In Kosovo, prior to 2013, one Chamber of the Supreme Court composed of two national judges reviewed appeals of administrative acts in administrative disputes. A new Law on Courts, which entered into force on 01 January 2013, instituted a major reform of the judicial system and, inter alia, introduced a two-tier system for adjudication of administrative cases. The Administrative Department of the Basic Court of Pristina will have jurisdiction over administrative matters for the entire territory of Kosovo*, and the Administrative Department of the Court of Appeals will hear all administrative cases at second instance.

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/99 and the ICJ Opinion on the Kosovo declaration of independence.

191 "Report on the Administrative Justice System in Kosovo", OSCE Mission in Kosovo, April 2007, <http://www.osce.org/kosovo/24637>.

192 "Child Adoption Procedure in Kosovo", OSCE Mission in Kosovo, August 2010, <http://www.osce.org/kosovo/71205>.

Trial monitoring started at the opening stage of the main hearing and continued until the final decision was rendered. Cases were selected from the official schedule published on the Tbilisi and Batumi City Courts' web-pages, official schedules, and through contact with judges' assistants, bailiffs and the administrative staff of the courts. TI Georgia focused its monitoring project on cases involving property rights. If no such hearings were scheduled, however, monitors attended cases randomly.

The second reporting period of the trial monitoring ran from June 2012 until October 2012. Experience gained during the first stage was taken into consideration, minor adjustments were made to the methodology and several questions were added to the checklist. The territorial scope of the trial-monitoring programme was broadened to include the Gori and Telavi city courts. "Court Monitoring Report #2" was published in April 2013.[193]

Monitoring Justice, OSCE Office in Baku (on-going since 2003)

The OSCE Office in Baku (the Office) has been monitoring court proceedings since 2003 and has issued five reports, focusing mainly on criminal justice.[194] The reports include an assessment of the courts' compliance with fair trial standards and recommendations on how to address shortcomings.

In 2010, the Office, in consultation with the Ministry of Justice, set up a trial-monitoring working group as a forum to discuss their findings and recommendations in the trial-monitoring reports. The working group includes representatives from the Ministry of Justice, the Judicial Legal Council, the Office of the Prosecutor General, the Bar Association and the OSCE, as well as a senior member of the judiciary.

The Office provided training for trial observers on monitoring methodology and how to effectively complete the questionnaires in order to gather relevant factual data while observing court proceedings.[195] Data collected from the questionnaires was analysed in line with domestic laws and international fair trial standards. Interim and final trial-monitoring reports were drafted in consultation with the trial-monitoring working group.

193 For more information about Transparancy International Georgia's trial-monitoring work see: <http://transparency.ge/en>.

194 The OSCE Office in Baku has published trial-monitoring reports covering 2003-2004, 2006-2007, 2009, 2010 and 2011, available at <http://www.osce.org/baku/43379>.

195 All questionnaires were developed by the OSCE Office in Baku, including a specially tailored questionnaire for monitoring administrative justice based on domestic legislation and international fair trial standards on administrative justice as identified in an earlier draft of this *Handbook for Monitoring Administrative Justice.*

In 2012, the Office launched a pilot project to monitor administrative justice in light of the establishment of new Administrative-Economic Courts, which became operational in January 2011.[196] From April to November 2012, the Office monitored 68 administrative cases at first instance courts[197] and the Baku Appeal Court. Additional specialized training for trial observers and the OSCE staff on monitoring administrative justice was organized by the Office in co-operation with ODIHR and the FBA. The Office plans to issue a separate thematic report on its administrative justice pilot program in 2013 that will identify shortcomings in the functioning of administrative courts and recommendations on how to address them.

196 Administrative Economic Courts were established in Ganja, Sumqayit, Sheki, Shirvan, Naxchivan Autonomous Republic and Baku.

197 Between April and November 2012, five observers monitored cases in Administrative-Economic Courts in Baku #1 and #2 as well as Sumgayit. From July to November 2012, three more observers monitored cases in courts in Ganja, Sheki and Shirvan.

ANNEX C
International and Regional Norms and Standards

International and regional human rights treaties

African Charter on Human and Peoples' Rights (African Charter), adopted 17 June 1981, entry into force 21 October 1986.

Charter of Fundamental Rights of the European Union, 2000.

Convention on the Rights of the Child, adopted by the United Nations General Assembly Resolution 44/25 on 20 November 1989, entry into force 2 September 1990.

European Charter for Regional or Minority Languages, 1992.

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted 4 July 1950, entry into force 3 September 1953.

European Framework Convention for the Protection of National Minorities, 1995.

Inter-American Convention of Human Rights, adopted 22 November 1969, entry into force 1978.

International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, entry into force 23 March 1976.

International standard-setting documents

United Nations

Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985

and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).

CCPR General Comment No. 18 on non-discrimination, United Nations Human Rights Committee, Thirty-Seventh Session, 10 November 1989.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations General Assembly, 1992.

Draft United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, United Nations General Assembly, 2012.

General Comment No. 31 [80] on 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', United Nations Human Rights Committee, CCPR/C/21/Rev.1/Add.13, 26 May 2004.

General Comment No. 32 on 'Article 14: Right to equality before the court and tribunals and the right to a fair trial', United Nations Human Rights Committee, CCPR/C/GC/32, 23 August 2007.

Guidelines on the role of prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

Universal Declaration of Human Rights, United Nations General Assembly, 10 December 1948.

OSCE

Concluding Document of the Vienna Meeting of the CSCE Conference, Conference on Security and Co-operation in Europe, 1989.

Document of the Copenhagen Meeting of the Second Conference on the Human Dimension of the CSCE, Conference on Security and Co-operation in Europe, 29 June 1990.

Document of the Moscow Meeting of the Third Conference on the Human Dimension of the CSCE, Conference on Security and Co-operation in Europe, 3 October 1991.

Ministerial Council Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area, MC.DEC/7/08, Organization for Security and Co-operation in Europe, 5 December 2008.

European Union

European Code of Good Administrative Behaviour, European Union, 2005.

ANNEX D
Case Law

European Court of Human Rights

A. v UK (Application no. 35373/97) Judgment, 17 March 2003.

Aerts v Belgium (Application no. 25357/94) Judgment, 30 July 1998.

Andrejeva v Latvia (Application no. 55707/00) Judgment, 18 February 2009.

B and P v UK (Application nos. 36337/97 and 35974/97) Judgment, 05 September 2001.

Benham v the UK (Application no. 19380/92) Judgment, 10 June 1996.

Benkessiouer v France (Application no. 95/1997/879/1091) Judgment, 24 August 1998.

Bertuzzi v France (Application no. 36378/97) Judgment, 13 February 2003.

Boulois v Luxembourg (Application no.37575/04) Judgment, 14 December 2010.

Campbell and Fell v the United Kingdom (Application no. 7819/77; 7878/77) Judgment, 28 June 1984.

D.H. and others v Czech Republic (Application no. 57325/00) Judgment, 13 November 2007.

De Geouffre de la Pradelle v France (Application no. 12964/87) Judgment, 16 December 1992.

Doorson v the Netherlands (Application no. 20524/92) Judgment, 26 March 1996.

Döry v Sweden (Application no. 28394/95) Judgment, 12 November 2002.

Eisenstecken v Austria (Application no. 29477/95) Judgment, 03 October 2000.

Emine Araç v Turkey (Application no. 9907/02) Judgment, 23 December 2008.

Engel and Others v the Netherlands (Application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72) Judgment, 8 June 1976.

Feldbrugge v The Netherlands (Application no. 8562/79) Judgment, 29 May 1986.

Ferrazzini v Italy (Application no. 44759/98) Judgment, 12 July 2001.

Francesco Lombardo v Italy (Application no. 115 19/85), Judgment, 26 November 1992.

Fretté v France (Application no. 36515/97) Judgment, 26 February 2002.

Garyfallou AEBE v Greece (Application no. 93/1996/712) Judgment, 24 September 1997.

Golder v United Kingdom (Application no. 4451/70) Judgment, 21 February 1975.

Hasan and Chaush v Bulgaria (Application no. 30985/96) Judgment, 26 October 2000.

Hauschildt v Denmark (Application no. 10486/83) Judgment, 24 May 1989.

Hirvisaari v Finland (Application no. 49684/99) Judgment, 27 September 2001.

Hoogendijk v The Netherlands (Application no. 56841/00), Judgment, 06 January 2005.

Hornsby v Greece (Application no. 18357/91) Judgment, 19 March 1997.

Hummatov v Azerbaijan (Applications nos. 9852/03 and 13413/04) Judgment, 29 February 2008.

Håkansson and Sturesson v Sweden (Application no. 11855/85) Judgment, 21 February 1990.

Jabari v Turkey (Application no. 40035/98) Judgment, 11 July 2000.

Jankovic v Croatia (Application no. 38478/05) Judgment, 14 September 2009.

Kart v Turkey (Application no. 8917/05), Judgment, 03 December 2009.

Krcmar and Others v the Czech Republic (Application no. 35376/97) Judgment, 3 March 2000.

Kress v France (Application no. 39594/98) Judgment, 07 June 2001.

Kreuz v Poland (No 1) (Application no. 28249/95) Judgment, 19 June 2001.

Kudla v Poland (Application no. 30210/96), Judgment, 26 October 2000.

König v Germany (Application no. 6232/73) Judgment, 28 June 1978.

Lamanna v Austria (Application no. 28923/95) Judgment, 10 July 2001.

Lauko v Slovakia (4/1998/907/1119) Judgment, 2 September 1998.

Lobo Machado v Portugal (Application no. 15764/89), Judgment, 20 February 1996.

Maaouia v France (Application no. 39652/98) Judgment 5 October 2000.

Martinie v France (Application no. 58675/00) Judgment, 12 April 2006.

Massa v Italy (Application no. 23/1992/368/442), Judgment, 24 August 1993.

McGonnell v UK (Application no. 28488/95) Judgment, 08 February 2000.

Meltex LTD and Mesrop Movsesyan v Armenia (Application no. 32283/04) Judgment, 17 July 2008.

Mirilashvili v Russia (Application no. 6293/04) Judgment, 05 June 2009.

Obermeier v Austria (Application no. 11761/85) Judgment, 28 June 1990.

Pellegrin v France (Application no. 28541/95), Judgment, 08 December 1999.

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ABOUT THE FOLKE BERNADOTTE ACADEMY

The Folke Bernadotte Academy (FBA) is a Swedish government agency dedicated to improving the quality and effectiveness of international conflict and crisis management, with a particular focus on peace operations, including peace building. Its overall objective is to contribute to lasting peace and development. The Academy functions as a platform for co-operation between Swedish agencies and organizations and their international partners. Its main areas of responsibility are recruitment of Swedish civilian personnel to international peace operations, multifunctional education, training and exercises, policy, research and development, national and international co-operation and coordination, and funding of civil society peace projects. In 2008, the FBA published its research report "Rule of Law in Public Administration",[198] which addressed the necessity of rule of law programmes targeting public administration in countries in transition.

ABOUT ODIHR

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) is the specialized institution of the OSCE dealing with elections, human rights, democratization and tolerance and non-discrimination (the "human dimension"), which are cornerstones of the Organization's comprehensive concept of peace and security. ODIHR assists OSCE participating States, and others, in the implementation of their human dimension commitments by observing elections, monitoring respect for fundamental human rights, promoting tolerance and non-discrimination, and providing expertise, capacity development and practical support in strengthening democratic institutions and the rule of law, civil society and democratic governance. More specifically, ODIHR's rule of law activities include monitoring of judicial proceedings, facilitating dialogue for judicial reforms between all justice chain actors and providing capacity development for members of the judiciary and legal professionals. Administrative justice has previously been addressed in the context of programmes on general judicial reform. ODIHR's 2010 "Expert Forum on Criminal Justice for Central Asia" included a working session on reforms of legislation on administrative offences,[199] while the 2012 Expert Forum addressed issues arising from the criminalization or decriminalization of administrative offences in on-going criminal law reform efforts.[200] In the area of judicial independence, ODIHR developed the "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia" in 2010, which are applicable to all judges and the judiciary in general, including judges dealing with administrative matters.[201]

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