

THE TRAJECTORY OF GEORGIAN ADMINISTRATIVE LAW - IMPRESSIONS OF AN ADVISOR¹

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1 Tasks in Transition

According to the socialist concept of identity, state and society are not separated. Rather the state apparatus is identical with the people, and even in its relative separation, it still is only its organ.² The state is at the same time an economic actor, a planning and regulatory body and a supplier of services and facilities.³ In this conception, administrative law is not a law covering the legal relationships between the state as a legal body and natural or legal personalities, but organizational law that determines the state apparatus' decision-making structures, powers and regulatory means, which establish obligations and responsibilities for citizens and economic actors alike.⁴

However, the real conditions in 'socialist' societies developed differently. The state apparatus, steered by the party, became detached from society, even more than its competitor, the state of bourgeois society, which formally rests in the separation of state and society. Without legitimacy the extensive administrative penetration of society paralyzed social creativity. In the late phase of 'real life socialism', this paralysis could

¹ My knowledge of the Georgian development rests in many consultancies concerned with the reform of administrative law, especially the work on the Administrative Codex and the Rules of the Administrative Courts.

² See for a particularly clear notion of the identity theory and particularly influential in the GDR, Karl Polak, *Zur Dialektik in der Staatslehre*, Berlin 1963 and id., *Reden und Aufsätze*, Berlin 1968. Cf. Uwe-Jens Heuer, *Marxismus und Demokratie*, Baden-Baden 1989, pp. 290 ff., pp. 359 ff.

³ Heuer, op. cit., pp. 374 f. mentions a similar spectrum of state functions, i.e. the development of productive forces, the control of the national income, distribution and the appropriation of nature.

⁴ For the example of the environmental law of the GDR mentioned in the regional cultural law, Autorenkollektiv, *Landeskulturrecht*, Berlin 1986, pp. 47 ff., pp. 58 ff.

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be cushioned somewhat, because economic law allowed economic actors relative autonomy and granted them a kind of individual rights⁵, and because administrative law introduced some forms of a quasi rule of law, such as the intra-administrative right to lodge complaints.⁶ Overall, however, the notion of a people's democracy prevailed; the proponents of a more direct responsibility for businesses and local authorities, of political pluralism and a socialist rule of law met no response for a long time⁷, and when they were listened to the regime was already discredited.

With the fall of the Iron Curtain, these structures were modeled after a totally different conception – the Western conception of representative democracy and the rule of law. This endeavor required to establish legal relationships between the state and its citizens aimed at framing societal freedom, providing infrastructure and ensuring redistribution of wealth.

Legal development was faced with two fundamental tasks: the construction of the new legal edifice and the creation of instruments enabling and directing the move from the old into the new dwelling. How this has been accomplished shall be illustrated with reference to the Georgian legal system. Among the transition countries Georgia is a suitable example, due to two reasons: the country consistently cast its transition in legal forms, and in this respect it has been the fastest and for a long time most advanced among other Eastern European and Central Asian states of the Community of Independent States (CIS). This, however, does not imply that today Georgia is a *de facto* social market society and a constitutional state. But to the extent that law can support their accomplishment, legal structures are readily available.⁸

⁵ For the GDR, Autorenkollektiv, *Marxistisch-leninistische Staats- und Rechtstheorie: Lehrbuch*, Berlin 1975, pp. 480 ff.; Autorenkollektiv unter Leitung von U.-J. Heuer, *Wirtschaftsrecht*, Berlin 1985, pp. 65 ff. Subjective rights are understood as organizational means of the state and show no resemblances with fundamental rights.

⁶ For the GDR, W. Bernet, 'Verwirklichung der sozialistischen Gesetzlichkeit in der staatlichen Leitung durch Rechtsmittel', *Staat und Recht* 1980/81, pp. 13 ff.

⁷ In the GDR, e.g. Heuer, op. cit. and U.-J. Heuer, G. Klinger, W. Panzer, G. Pflücke, *Sozialistisches Wirtschaftsrecht-Instrument der Wirtschaftsführung*, Berlin 1971.

⁸ In comparison to Georgia and the mainstream of transition countries, the German Democratic Republic is an untypical case, as the self-initiated *Wende* was rather quickly taken out of the hands of the citizens. Rapidly, a new system was introduced with the result of economic wealth but socio-psychological degradation. In all other transition countries matters were reverse: transformation in poverty but in proud self-determination.

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The reasons why Georgia chose law as the frame for its transition are partly contingent, as they are rooted in the involved actors⁹, but they are also of a more structural nature. Traditionally, Georgia is a self-confident civil society. During the Soviet regime it was considered a region difficult to govern. This renders understandable the country's quick try to establish legal forms that would enable societal intercourse without state intervention, i.e. especially civil law. A further factor was the relationship with Russia. Apart from two years in the early phase of the Soviet era, Georgia had been occupied by foreign powers since the 13th century, i.e. by Persians and Turks, and since about 1800 by the Russians. In order to capitalize on and secure the opportunity for independence after the break-down of the Soviet Union, a political system with constitutional authority had to be established quickly. Democratic and constitutional institutions could provide Western recognition, e.g. membership within the European Council, and hence safeguard against potential Russian ambitions.

2 The Instruments of Transition

The most important engine of transition is a proactive and democratically legitimate government. After the civil war had established the territory and the fundamental political orientation of Georgia, the layout of its political system had to be considered. As in most transition countries, a presidential system was adopted.¹⁰ In the first one and a half decades of transition it was rather the parliament and its staff that fostered the process of legal reform. Since the so-called Rose Revolution in late 2003 the president and his apparatus has become dominant in law reform and enforcement. However, the revolutionary potential of moving society ahead was gambled away by precipitate actions towards economic growth that often disrespected the rule of law and threw the regime into a legitimacy crisis.

One of the most important legal means of transition was a legal framework for the privatization of state property, especially companies, dwellings and land. In many transition countries, privatization was implemented *ad hoc* by dint of executive acts and contracts, with the effect that assets were concentrated in the hands of very few – people who were often neither the technically, economically nor socially most capable.

⁹ In Georgia, a group of young lawyers emerged quite early, which established a reform network in the legally relevant institutions and made use of foreign, especially German, aid.

¹⁰ Constitution of the Republic of Georgia of 17 October 1995.

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In Georgia the Act on the Privatization of State Property of 1997 provided the framework for calls for tenders, auctions and private lease/sale (yet, it came too late as many assets had already been privatized in a rather opaque manner). Additionally, the Act on the Privatization of Agriculturally Used Estates was established in 2005.

The reduction of state regulation further fostered the transition from a state to a market economy. Almost any economic activity had been subject to often manifold authorization in the past. Now the principle of freedom of trade had to be introduced. This was meant to be achieved by reforming the Licensing Act, which freed many trades from the requirement to get a license to set up a business – excluded were only a small number of socially problematic industries¹¹.

A further tool of transition is the fundamental reorientation of administrative infringement codes. Such codes used to be the core of administrative law in the states of the Soviet Union. They contain a plethora (sometimes up to 400) of prohibitions covering almost all sectors of economic, social and cultural life, they provide sanctions ranging from fines to forced labour and arrest, they establish general requirements of prosecuting violations (such as causality, error in fact and law, intent and negligence, the liability of enterprises, etc.), and they open up procedures of complaint in the courts. This somewhat authoritarian approach of administrative law had to be cut back to the minimum necessary in a liberal society in order to make way for the new administrative law which shall facilitate rather than control societal freedom.

3 The New Legal Structure

The essential forms of economic transactions had to be established, such as different types of contracts, rules for liability, property rights, security interests, intellectual property, types of companies, competition rules and so forth, and they are all available now. However, many of these forms of intercourse have remained underused, as many transactions still follow the pattern of the bazaar, i.e. they are *ad hoc* and cash-based. Nonetheless, large investments, which require a variety of legal forms of intercourse, have increased over time.

¹¹ Insurance companies, banks, weapons production and sale, aviation and water transport, stock markets, lotteries, pharmaceutical industry and sale, technical test of motor vehicles, building industry, audit firms, private educational establishments.

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The market with its forms of intercourse under private law does, as is generally known, not work without a degree of administrative intervention. Even if the latter is reduced as much as possible, the necessity remains to implement political goals, provide for infrastructure and redistribute wealth through law making and law enforcement. For such functions organizational structures, financial resources and staff is needed, which also have to be established by legal norms. This is primarily the task of administrative law.

In the following, I will outline the genesis of modern administrative law in Georgia. In doing so, I will focus on general administrative law and the law of administrative courts. Organizational and sectoral administrative laws shall only be mentioned in passing, such as:

- concerning organizational law: the Act on Local Self-Administration of 2005, whose autonomy model is qualified by the fact that local communities depend upon the state allocation of funds; the Act on the Structure of the Executive Power, which determines the authorities of the state administration and their competences, and the Act on the Types and Generation of Normative Acts;
- concerning sectoral laws: the Police Law; the already mentioned Administrative Infringement Code, the Law on Licensing; the Public Procurement Law with a Code of Practice adapted to EU law; the Act on the Certification of Products and Services, the general Environmental Act entailing the instruments of environmental protection and establishing fundamental obligations for the handling of environmental media, yet without already creating concrete legal relationships; the Act on Environmental Permits, which is heavily influenced by the German Federal Immission Control Act; the Water Act and the Act on the Safety and Quality of Foodstuffs.

4 The Main Problems of a New Administrative Law

The issues administrative law has to address are various, as are the resulting legislative aims. Many problems are not limited to transition countries, as they emerge in other states as well, but of course they also have to be solved in transition countries. Among these general problems are:

- The tendency to concentrate power within the bureaucracy: the subjective legal position of the individual and the introduction of liability serve as correctives in cases of harm inflicted by public authorities;
- The inaction of the administration: action can, for instance, be triggered by setting terms and establishing obligations to act;

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- The lacking competence of staff: competence can, among others, be achieved by qualification requirements in the law of the public services and the right to a hearing in administrative proceedings;
- Schematic and monocratic decision-making: Decision-making can be made more responsive by the duty of administrative bodies to carefully investigate the circumstances of the case, the duty to give reasons for the decision, and the possibility of cooperative forms, such as the contract under administrative law;
- The insistence on already established solutions: more flexibility can be reached by the possibility of attaching subsequent conditions to an administrative act as well as to withdraw it if a new situation so requires;
- The keeping secret of administrative information and autocratic decision-making: more openness can be introduced by the right of access to information and the introduction of rights to hearing and participation serve as correctives.

Beside these widely known problems and their solutions, corruption poses a particular problem for Georgia and other transition countries. Corruption had already been rampant in the Soviet system, but only in postsocialism it turned into a ubiquitous phenomenon strangulating economic development. Doubtlessly, corruption is also widespread in 'the West', and even seems to increase with the recent tendency to informalization in administrative law, yet it has not reached the level prevalent in 'the East'.

The reasons for corruption and the means to fight it in the public sector are numerous and cannot be discussed here. Suffice it to name the socio-cultural core of corruption: the perception that a public office is a good like any other good on the market. Accordingly, the office has a value that can be 'sold'. It is the task of the rule of law to constitute public office as a *res extra commercium*, to institute state functions independent of those of the market.

Many legal areas are called to ensure this, among them administrative law. Every candidate norm of administrative law should hence be checked not only in terms of its substantial expediency but also as to whether it provides a potential source for hidden, extra income. If, for instance, the introduction of a recurring safety inspection for motorcars is discussed, it has not only to be asked whether this is suitable to ensure road safety, but also whether this new obligation can be 'traded' for bribes. Until a few years ago, in Georgia the badge which certified that a vehicle was safe was available

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without check for about 100 US\$, depending on the type of motorcar. The driving license was available without any lesson and test for a slightly amount.¹²

The drafting of new legal norms therefore requires the consideration of how a provision can best be immunized against bribery. This aim can, among others, be achieved by limiting those activities which need administrative authorization, by fettering administrative discretion, by more precisely phrased provisions that bind the administration, by setting deadlines for decisions, by the right of access to information and by establishing the opportunity to sue for particular administrative acts.

Such legal framing of administrative functions must be flanked by economic means, like the increase of wages of public officials to a sufficient standard; for after the end of the Soviet Union public servants have increasingly lost direct gratifications (such as free holidays in public facilities, public housing, etc.) and their income suffered by inflation and increasing prices.

One measure of course depends upon the other: an administration strongly bound by administrative law would cost less to the individual client; this raises the willingness to pay taxes and thus increases the state revenue which then allows the state to better remunerate its civil servants.

After the Rose Revolution of 2003, the new government fought corruption decidedly. Thousands of civil servants, e.g. policemen, were urged to ask for their dismissal in exchange for the promise to be able to reapply. These positions were now better salaried. In this way, small corruption could be eradicated to a large extent. The entire approach, however, had been immensely harsh and unfair, and it was problematic under constitutional law. Although the Georgian constitution does not protect 'the rights acquired in the public service' like the German Basic Law¹³, still the freedom of occupational choice¹⁴ was infringed by unfounded dismissals and layoffs based on extorted consent.

Corruption was also battled at the level of politicians and high officials. In order to tackle the issue of sufficient evidence in regular prosecution under criminal law, two ways of procedural simplification were adopted: the 'life style' approach and plea-bargaining.

¹² Evidence from an interview with a Georgian attorney.

¹³ Article 33(3) German Basic Law.

¹⁴ Article 30(1)(4) Georgian Constitution.

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'Life style' approach means: if the prosecutor has sufficient suspicion that a person has acquired her wealth (e.g., real estate) in an illegal manner, he can ask the administrative chambers of Rayon courts to confiscate these assets; by dint of shifting the burden of proof, the defendant has then to prove that the property in question has been acquired legally (e.g., by heritage). This procedure has been successfully applied several times, but it met judges in the administrative courts who objected to it as unconstitutional or who applied it only reluctantly, rendering it insignificant in the fight against corruption; so much so that it will probably be abolished altogether in the near future.

Plea-bargaining means that an indictment under criminal law can be refrained from or withdrawn, if the defendant admits to the charge and commits to pay a fine. Such proceedings have turned out to be the core instrument in the fight against corruption. They have generated enormous resources for the state budget and for secret or private cash funds as well. The main reason for this development is that plea-bargaining mainly takes place between the prosecutor and the defendant, allowing the prosecutor to push through state interests in raising funds and save prosecution costs. Although the deal requires approval by the court this is no corrective because judges are often pressed by public prosecutors to provide agreement.¹⁵ This lack of independent supervision has fostered the perversion of the instrument. The prosecution is hardly forced to specify its indictment; some indications often suffice to bring a defendant to the heel.

In consequence, the cancer – the assumption of an office as a tradable commodity - is in a way doubled by plea-bargaining rather than being abated. Not only the office of the accused but also the office of the prosecutor is turned into a commodity. Through plea-bargaining, the office of the prosecutor - objective prosecution according to the standards of criminal law alone - becomes an object of barter, if the prosecutor trades guilt and justice for expediency and state revenue. In addition, other inappropriate factors can influence prosecution practice. This might explain why members of the previous but hardly those of the current regime have been prosecuted because of corruption, and why those who were charged were often picked out arbitrarily.

The judiciary had also been affected by bribery and hence became an object of the fight against corruption. The informal rules of such affairs had previously looked like

¹⁵ This is different in the country of origin of plea bargaining, the USA, where the judge is independent and influential. That this fact was ignored in Georgia is an example for how problematic the transfer of a legal concept can be.

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this: a prosecutor offers the reporting judge an amount of money or is encouraged by the latter to do so. The judge discusses the offer with his or her colleagues, in larger cases also with the court president, and agrees to share the offered sum. If the offer is insufficient, the judge can approach the defendant. If the latter agrees to a sum, and this leads to a ruling in his favor, the sum accepted by the judge has to be paid back. Communication in this matter avoids the direct pattern of money for verdict, as bribery is illegal; it rather takes a roundabout way; judges then point to the high workload of the court and hence the potential time span of the proceedings, or more directly to a car in need of repair or to the high study costs of their children.¹⁶

Fatal to the development of a modern economy, this system was battled with political actions permanently on the brink of collapse. Already during the transition period after 1988 it was decided that all judges should be dismissed at the end of 1999. This meant that in 1999 all re- or newly employed judges had to pass an exam in the newly introduced law. The exam questions were guarded like a state secret. About the best 40 percent of those passing the examination were employed. At the same time, wages were raised to a level guaranteeing a sufficient standard of living for the judges. Although the success cannot be evaluated systematically, according to both the impression of many experts and my own view, based on a variety of intensive contacts with new judges, highly qualified lawyers who in their majority do not accept bribery and fulfill their function with the necessary objectivity have been chosen for the higher courts.

In the dynamic of the Rose Revolution of 2003/2004, the incremental success of the first years after 1999 was seen as deficient. New activities were undertaken. Still perceived as corrupt, many judges were urged to 'voluntarily' apply for their dismissal in return for safe retirement. Some judges, who refused this procedure as they objected to its implicit accusation, were sacked by dint of disciplinary proceedings. One case has gained particular notoriety. Five judges of the Supreme and Appellate Court were blamed for failures, which were either of a technical nature or belonged to the usual discretion in interpreting legal norms. These accusations disregarded the fact that disciplinary proceedings have to respect judicial independence and can only be applied in cases of severe organizational misconduct or significant violations in applying the law. In this vein, the accusations would have justified an amiable or adhortative conversation with the Court President at best. To the contrary the insistence on taking drastic measures for (if at all) negligible misbehaviour caused the impression that the

¹⁶ Evidence from interviews with Georgian attorneys and judges.

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authorities misused disciplinary proceedings in order to avoid regular anti-corruption proceedings. In addition, there is indication that the accusation had a second and even more important goal: the expulsion or domestication of self-conscious and politically independent judges.

In that respect the outlined case is indeed a turning point for a new development in judicial policy. With such drastic measures, corruption among judges is probably largely contained. Instead, judges seem to become politically more careful and more adaptable, especially in cases in which state interests are at stake. Furthermore, the qualification of some judges, who succeeded their dismissed colleagues, can be doubted. It would be detrimental, if in such a manner the old dependency on bribery would be replaced with a new dependency on priorities of governmental policy.

5 The Project of Reforming Georgian Administrative Law

In Georgia a General Administrative Code and a Law on Administrative Court Procedure came into effect on 1 January 2000. The General Administrative Code (GAC) encompasses provisions on the organization of the administration, access to administrative information, administrative procedures, the shape and withdrawal of administrative acts, administrative enforcement, contracts under administrative law, state liability, complaint procedures and procedures of rule-making. The Law on Administrative Courts Procedure (LACP) refers fundamentally to the Code of Civil Procedure and adds only those provisions that are specific for disputes under administrative law.

The notion to comprehensively codify administrative law, instead of leaving it open to judicial casuistry, was initiated by the European Council, which demanded of Georgia to introduce means of controlling the administration before being granted accession to the Council of Europe. As Georgia anticipated that its accession would increase Western solidarity and foster stability in the region, the drafting took place under considerable time pressure from the very beginning; the strain even increased towards the autumn of 1999, as parliamentary elections were pending and the old parliamentary majority favored the envisaged reform of the administrative law. Thence, both laws came into existence after hardly more than two years of elaboration. This comparatively short preparatory phase has to be taken into account when assessing the text in detail; it has doubtlessly caused many gaps, redundancies, inaccuracies and some incomprehensiveness within both legal texts.

During the drafting phase of both laws, a number of Western countries offered advice from the perspective of their system of administrative law. The project took off with a seminar in The Hague in October 1997, organized by the European Council and

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bringing together the high representatives of Georgia and Armenia, who had similar plans at the time, and consultants from the Netherlands, France, Poland, the United States and Germany. The seminar addressed conceptual issues of an administrative law reform, such as how the new legislation was related to the traditional Administrative Infringement Codes, whether an inner-administrative complaint procedure should be mandatory before court review, etc. A second seminar took place in May 1998 in Strasbourg, yet this time without Armenia.

The actual drafting of the GAC was the subject of a project by the GTZ (Deutsche Gesellschaft für Technische Zusammenarbeit) in collaboration with the Center for International Legal Cooperation (CILC) in Leiden and the United States Agency for International Development (USAID).

The main work rested with two Georgian lawyers. One, about 40 years old, had already worked as a judge, the other, about 25 years old, served as an assistant to the parliamentary law committee. Both had studied law in Georgia and had only scarce knowledge of Western administrative law. One only spoke Georgian and Russian, the other also some passable English. They knew the Georgian social and political conditions very well and were experienced in the fight with real life socialism. Favored by an immense grasp, they were both able to comprehend Western administrative law codifications very quickly. They partly worked with Dutch consultants in Groningen and in The Hague and with me in Bremen.

Both Georgian lawyers studied and evaluated the English versions of legal texts of Dutch and German and less so of American and French administrative law, discussed the individual articles to be drafted with their consultants and then formulated them in the Georgian language. The outcome was translated into English and discussed at a number of seminars with about 20 Georgian lawyers and in changing composition with two Dutch, one American consultant and me, as German adviser. However, these seminars were primarily meant to increase the interest of the Georgian lawyers in the codification project. For deeper substantial suggestions, the project was all too new. In the following time, I more and more became the principal advisor. I went through the drafted texts in detail and discussed them again with both authors.

The drafting of the LACP went somewhat differently. Much time had been spent on advice given by Dutch consultants to draft a complete set of Rules for Administrative Courts, which entailed no reference to the Georgian Code of Civil Procedure and neglected the fact that separate administrative courts were not intended for Georgia. Following my advice, a simpler solution was then chosen; it left the project by amending the Code of Civil Procedure. As the parliamentary schedule left almost no time for further complex consultations the resulting relatively short text (with its 35 articles) was in large parts drafted by myself.

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After they had come into effect, both laws were intensely reviewed and applied in court practice. However, little is known as to what extent the administrative bodies have become aware that they must act within new forms and have to obey new requirements (e.g., the hearing and justification of administrative acts, the rule against bias, the protection of legitimate expectations in cases of the annulment and withdrawal of administrative acts, the suspensive effect of complaints, etc.).

The judicial practice and younger university lecturers have identified many deficiencies within the first version and demanded some amendments. From time to time, I was consulted. I also made suggestions of my own but tried to ensure that the overall systematics is not impaired by *ad hoc* ideas. Between 2000 and 2007, a total of eight amendments to the GAC and ten amendments to the LACP were adopted.

The provisional character of the first version and the number of amendments have now caused both laws to be fundamentally reworked.

6 Experiences from Consultation

I would like to add some generalisable experiences from this and other consultations I have been involved in. Western legal consultants when offering advice are in a way pushed into an external perspective on the law they are familiar with. The consultancy situation is a challenge to develop a deeper understanding of what shall be transplanted. It is not sufficient to know the shape of the law from literature, jurisdiction and practice; one is compelled to comprehend its foundations anew, to re-evaluate it critically and to compare its particularities with other legal systems. Only after such considerations the task at hand can actually be approached, namely to grasp the problems of a country in its transition from old to new social circumstances and to relate law, which emerges in such conditions, to them. Old doctrines about state functions, back to Adam Smith and buried in positivist dogmatics, become significant again and face the question which functions an administration in a transition country should fulfill.

Decades of legal-dogmatic precision work, e.g. in the law of the administrative act, state liability and the access to legal protection, have to be judged against the ruthless yardstick of simplicity and transparency. A helpful experience was that, for some time,

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the often overly complicated German law had already been pressured by Community law into becoming simpler.¹⁷

Closer attention has to be paid to current Western developments in the 'philosophy' of public administration. Of foremost interest are approaches called New Public Management (NPM), which shift the thrust of administration from legality and legitimacy to effectiveness and efficiency.¹⁸ I believe it would be fatal in a situation of transition to propagate managerial approaches at the cost of democracy and the rule of law. NPM can only unfold on a stable political system based on democratic law-making and court supported law-application. Recent governmental practice in Georgia is a case in point: legal rules have often been set aside in order to facilitate major investment projects. This has cost the Georgian government general acceptance, as became manifest in the demonstrations in November 2007.

Finally, as law is mainly created for deficient situations, the main phenomena of administrative deficiencies have to be identified, which administrative law is then meant to battle. Which, it has to be asked, are the society-specific flaws of public administration? Are the particularities of a state characterized by the power of an old caste, which at least succeeds accidentally? Is it indolence and arbitrariness which burdens a society, or is it the systematic exploitation of powers as a corrupt source of income? Above, I have already tried to address these issues.¹⁹

Consultation is, however, not only characterized by the intellectual challenge it entails; it is also in many ways socially structured. The central condition for success is doubtlessly the fact that counterparts who know their own legal and social system and are open for innovation must be found. Such lawyers are generally scarce, but in transition countries they are even harder to find, as the low wages in the public service forces them to have multiple employments, leaving them with no time for thorough legal study. Often, the best turn to the legal consultation of Western investors or are appointed by international institutions.

¹⁷ An example is the cumbersome construct of norm-concretising administrative guidelines, see ECJ Case C-361/88 (Commission v. Germany), Rep. 1991, I-2567; R. Streinz, *Europarecht*, Heidelberg (C. F. Müller Verlag) 7th ed. 2005, p. 152:

¹⁸ K. Schedler, I. Proeller, *New Public Management*, Bern (Haupt Verlag) 3rd ed. 2006, p. 54 ff.

¹⁹ See for a more elaborate discussion of finding a way between the generalisability of many legal concepts and the need to adapt them to the recipient country's tradition R. Knieper, *Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht*, *Rabels Zeitschrift* 72 (2008) 88-113.

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Foreign donor organizations are then confronted with the question of whether they should pay domestic drafting, in order to secure some qualified cooperation. If they choose to do so the often-noted risk arises that the receiving country and the individual expert do not develop an authentic interest in the project. Economic empirical research has proven that money often demotivates real involvement.²⁰ According to the logic of exchange, the counterpart acts rational if he comes up with a draft without much investment of time and work and "sells" it perhaps a number of times. Thus, it seems to be more promising for a legislative project to work with extra-economic benefits or delayed gratifications, such as the reputation of being the 'mother'/'father' of a law, which can later be of benefit in the exercise of legal consultation or in access to higher qualified positions. In the case of younger lawyers, the interest in learning and new subject matters also creates motivation.

On the other side, it seems cynical if the foreign consultant receives his or her *per diem* and the needy counterpart is expected to more or less work *pro bono*.

Donor organizations solve this dilemma in different ways. While American organizations rather turn to paid work, the German GTZ tries to follow the rule that Western consultation is paid for by donor countries and the work of staff in the receiving countries is paid for by the latter itself. But also the second concept allows for some flexibility: some nonpersonnel costs (such as office facilities, travel, literature, etc.) can, for instance, be covered by the donor, and individual achievements, such as the successful completion of a draft or legal commentary, can be remunerated moderately. In the cases of the Georgian General Administrative Codex and the Law of Administrative Court Procedure, it has proven valuable to invite experts from Georgia to Germany for some weeks. Here they were able to work undisturbed by their everyday business. At the same time, they received some kind of compensation in form of a modest *per diem* and a cultural program.

A further condition for successful consultation is that experienced translators and interpreters accompany consultants unfamiliar with the language in the receiving country. Their task is particularly difficult, as legal terms are defined in their individual country of origin and have to be linked to each other. This issue is well known from legal comparison, yet it becomes even more severe during consultation as the draft of a law has to establish an altogether new legal context. It is almost inconceivable how many misunderstandings can arise, and it is often puzzling to notice the difference

²⁰ Cf. B. Frey, *Markt und Motivation: Wie ökonomische Anreize die (Arbeits-)Moral verdrängen*, München 1997.

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between one's understanding and the matters actually addressed.²¹ Some interpreters have the ability to come up with sentences of erudite hollowness. This is most often the fault of the consultant himself if he has not introduced the translator to the respective terminology. In general, however, it is indispensable that the consultant and his counterpart communicate directly in one language, even if the common language is not native for either of them.

A further condition is that law-making policy is in general open to innovation. The offices of ministries and parliamentary committees are swamped with well-meaning, yet unread reports of foreign experts, and too often it is virtually only the consultant's supervisor in the donor organization who has indeed read the paper. Ideal conditions exist if the counterpart belongs to a network with some influence on law making in the receiving country. It is also essential that the respective law is part of the legislative schedule for the election period. A minimum requirement should be that its preparation has been arranged in a written cooperation agreement between the receiving state and the donor organization.

If a consultant has access to networks relevant to law making, the temptation grows to follow the networks' tactical moves. The situation arose, for instance, that the adoption of the Georgian GAC offered the opportunity to deal with many individually contested issues, which would disappear in the plethora of problems of the overall legal work, e.g. the public procurement law. From the perspective of the legal system, it does not belong into the Codex but the opportunity to introduce it was tempting.

The professional answer is to uphold the quality of law as the ultimate yardstick. The political network has to take responsibility for cut backs, the consultant should not be involved. Often, it becomes quickly obvious that a tactical move has been unsuccessful. Then, responsibility rightly also rests with the foreign expert. In the mentioned example, the public procurement law had indeed been adopted with the overall legal package, but within months it was rendered obsolete by a separate political discourse and an according special law.

The necessity that donors coordinate themselves should also be mentioned. Often, a number of organizations contribute to a project without this being planned and coordinated from the beginning. For example, recently a meeting of all donor organizations, which offer consultation in administrative matters in Georgia, established that almost all of them focus on the training of administrative judges, although there are

²¹ For example, a translator stated that the president of a municipal council had to *sing* the decisions of the council. What was meant?

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only 30 to 50 of them in the entire country. No wonder that administrative judges do not or seldom react to seminar invitations. However, no organization had turned to the training of administrative officials, although the new administrative law was primarily addressed to them and implemented completely unfamiliar new standards in their interaction with the citizens.

To turn to another example of lacking donor coordination: an essential innovation of the new administrative law is the right of access to information. Following my advice, the draft contained a chapter that mainly took up and generalized EU standards for the access to environmental information. Only after the first reading in parliament, a totally new text was introduced, based on an US initiative. Due to the rush, the text was out of place, both stylistically and substantially. It introduced its very own terms in stark contrast to the rest of the Codex, it was partly very detailed, provided its own recourse to legal action and cases of liability, and it provided the Georgian administration too quickly with requirements that were too ambitious, e.g. by demanding that every incoming information had to be categorized as public or classified and had to be included in a public registry.

Some partners in the consulted countries use the lack of coordination among the donor organizations to their personal advantage; as said before, if collaboration is paid for, they sometimes 'sell' their work a number of times. Other partners feel pressured and clueless with regard to the often contradicting pieces of foreign advice, which pile up in their offices in the form of heavy reports. Thus, the coordination of consultation and a division of labor among donor organizations is essential. This is, however, hard to achieve as donor organizations compete with each other when it comes to certain projects, and as they pursue different political aims and often represent different politico-legal traditions. It is, hence, of large significance that decision-makers in the receiving country notice the problem on the spot, and supervise and coordinate the different forms of consultation on offer.

7 Homegrown and Foreign Elements in the New Administrative Law

Different legal traditions have found their way into the General Administrative Codex and the Rules of the Administrative Courts in Georgia. However, the adaptation to Georgian needs and the particularity of the legal amalgam has created a genuine Georgian solution.

7.1 THE GENERAL ADMINISTRATIVE CODE

The first chapter of the GAC begins with a *short statement of its core contents* (the making and implementation of administrative acts and contracts) and a general definition of its *purpose* (the protection of civil rights while pursuing public interests). The following provision contains definitions of the most important terms, including the administrative agency, the administrative act, the administrative contract, and the administrative procedure.

In the ensuing articles the *principles* of administrative law are set out, including equality, the lawfulness of administration, statutory reservation (i.e. that intrusions in individual rights must be based on a law), the precept to balance interests while exercising discretion, the principle of proportionality, impartiality, open access to the administration, the right to be heard, the official language. These principles follow a cross section of principles in force in many member states of the European Council. The presentation of the main principles serves the purpose to briefly and comprehensively introduce citizens to the spirit of the code. A disadvantage of such a legal approach is that many principles are not self-explanatory and directly applicable, but need some further elaboration in the following chapters. In the draft of an amendment of 2008, it is made clear which principles are applicable by themselves and which ones need additional, more specific provisions.

The second chapter addresses problems of *administrative organization*, among others *mutual assistance between administrative bodies*. They follow German law and are of particular relevance for Georgia, as the cooperation among authorities causes serious difficulties, not least due to the hitherto unsolved question of who carries the costs for additional work. Provisions concerning the geographical competence of authorities are lacking, but they will be introduced with the new draft.

The third chapter regulates the *access to administrative information* in detail. Model is the American Freedom of Information Act. As already mentioned above, this part of the law is stylistically a failure and does not integrate in the overall systematics, caused by a lack of coordination among consultants. In the new draft, the chapter is phrased in a simpler and clearer fashion but without diminishing the right of access to information itself.

The fourth chapter is dedicated to *administrative acts*. Following continental European tradition, it sets out the form, contents, publication, coming into effect, withdrawal and annulment of administrative acts. The current version of the code does not contain provisions about auxiliary conditions to administrative acts; they have been added to the new draft. The preconditions for the annulment of administrative acts are somewhat more simplified in comparison to the over-complicated model, Article 48(2) of the German Administrative Procedures Law. The fundamental idea was that under

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Georgian conditions an independent casuistry would develop. Nevertheless, in a first verdict which considered recourse to the protection of confidence, an approach inspired by the Soviet era was chosen pursuing a very strict state-favoring application. Meanwhile, amendments have corrected such tendencies.

Subject of the fifth chapter is the *administrative contract*. The code provides that such contracts are to be judged under civil law, but aspects of public law and especially constitutional provisions have also to be taken into account. As an administrative contract ranks every contract concluded under the participation of a public authority. This taxonomy abolishes the distinction between contracts under administrative private law and administrative law, which is characteristic for German law but causes much doctrinal complication.²² The largely unnecessary distinction between settlement contracts and exchange contracts in German law were also considered dispensable. Unfortunately, specific measures aimed at preventing the prevalence of the administration (or else of powerful private parties) in the contractual relationship were lacking. Resounding German law in this respect²³, provisions will be introduced into the code's new version, ensuring the equivalence of services exchanged in the contract, requiring that the money paid in exchange for the public service must be spent for public purposes, and excluding illegitimate linkages between services (such as the 'selling' of a license for money). These clauses could also play a significant role in the fight against corruption.

Chapters 6 to 11 concern *administrative procedures*. Not less than five different types of procedures have been introduced. They were heavily influenced by Dutch and German law, although the fifth is a genuine creature.

The *simple procedure* includes provisions about

- the participants of the procedure;
- the right to submit an application, which actually should be a matter of course but which is separately mentioned due to the still prevailing anxious attitude of citizens towards the administration;
- the documents applicants must submit, including the explicit exclusion of administrative powers to demand more documents than required by law – again this is another element against delaying tactics and hence against potential sources for extra income;

²² For the amendments to the new draft, see below.

²³ Article 56 of the German Administrative Procedure Act.

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- the right of proxy;
- the exclusion of administrative staff in the case of conflicts of interest;
- the maxim of investigation [Untersuchungsmaxime];
- the right to be heard;
- failure to observe a time-limit and *restitutio in integrum*;
- deadlines of the administration with respect to making decisions (usually one month after making an application).

For the *procedures of collegial bodies*, the law stipulates the decision-making process and the taking of minutes. This would also be the appropriate place for the principle of publicness of all committee meetings, which was introduced in the chapter about the access to information – a requirement which is, however, hardly practicable under current Georgian conditions.

The *formal procedure* with formalized hearing of evidence and contradictory structure represents a court-like administrative decision procedure. It could be made applicable in highly controversial, but individualisable cases like the decision-making about expropriation and compensation. However, it seems that as yet no sectorial law makes reference to this type of procedure.

The *procedure with public participation* is intended for the authorization of large industrial and infrastructural projects with impact on diffuse interests. Its major issue is the notice and comment procedure including details of the public display of documents, terms for comments and the procedure of public hearings. Here too, references to this procedural type are still missing in sectorial law.

The *procedure before an independent body* can be applied to decisions with significant political and economic consequences, e.g. in the privatization of large public enterprises or other public property like frequency ranges or conduction rights. This type of procedure follows the Anglo-American model of independent 'inspectors' or 'administrative law judges'. The provisions are especially meant to allow the appointment of neutral foreign individuals or consultants (e.g. an internationally renowned law firm) as head of the procedure.

Chapter 12 includes the provisions concerning the implementation of administrative acts. Two options were available: the model of Anglo-American law according to which an authority has to obtain a judicial enforcement order in the regular case, or the continental model according to which the administrative body is able to enforce the administrative act itself. In the end, the latter solution was adopted. Following German law, procedural safeguards for those affected were introduced, especially by stipulating that normally an authority has to announce the means of enforcement before actually applying them. The catalogue of sanctions – compulsory fine, execution by substitution,

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direct coercion, and in the case of monetary claims also the distraint of assets – also corresponds with German law.

Chapter 13 regulates the procedure of inner-administrative complaint. It mainly follows Dutch administrative law. It had to be decided in advance whether the lodging of an appeal should be optional, i.e. whether a party affected has the choice to either appeal to an administrative body or to go to court. The Georgian experts felt that the authorities would hardly change a decision they had made voluntarily and therefore chose the optional solution. This has led to the practice that almost always courts are appealed to. When the currently beginning training of administrative lawyers shows effect, it will be advisable to introduce the obligatory option due to reasons of institutional economy. The new draft already includes this.

Chapter 14 concerns the issue of state liability. The official liability of employing administrative bodies for their employees follows the German model established in the civil code, to which the GAC refers. In addition, a further claim to liability exists, which equals the German claim to compensation for damage caused by not unlawful burdensome administrative activities; yet, in the interest of protecting the state treasury, the preconditions of liability in Georgia have been phrased more carefully: on the part of the harmed there has to exist both a particular sacrifice for common welfare and a particularly serious damage. Finally, the chapter also contains liability provisions for unlawful state action.

The final chapter includes provisions concerning the procedure for the generation of sublegal norms. This chapter has to be seen in relation to the Law of Normative Acts. While the latter in particular defines the types of normative acts and clarifies questions of hierarchy, legality and the consequences of faults, the GAC specifies the procedure for the enactment of such norms. The model for this chapter is the American rule-making procedure under the Administrative Procedure Act. It is especially intended that the drafts of statutory instruments or administrative regulations have to be publicised and sent to the affected administrative bodies and associations. The public as well as the authorities and associations then have the right to submit their comments. Additionally, the formal procedure of the 8th chapter on public participation of the GAC is found applicable. This means that every time a potentially costly hearing has to take place. In this respect, the new draft introduces some simplifications.²⁴

²⁴ For the corresponding American experience with the so-called ossification of formal proceedings and notions of simplification, see Mashaw, Merrill and Shane, *Administrative Law*, 4th edition 1998, pp. 604-610.

7.2 THE LAW OF THE ADMINISTRATIVE COURT PROCEDURE

Georgia does not possess an independent administrative judiciary. Regular courts decide upon administrative matters. In inferior courts, i.e. the so-called rayon or city courts and (if implemented) magistrates' courts, administrative and civil matters are decided by the same judges, while district courts, courts of appeal and the Supreme Court have particular administrative panels.

The LACP included 35 articles in its first version of 2000. Since then it has been amended ten times. Most changes came as a reaction to legal practice, which revealed shortcomings of the first version but also indicated that LACP has indeed found its way into practice. Some amendments also originated in the political realm. This applies in particular to a number of special proceedings including proceedings of confiscation of illegitimate property (the 'life style approach' explained above), the admission for the control of economic activities, the fight against domestic violence, and the hospitalization in psychiatric institutions.

The LACP originally followed an easy legislative strategy: the Code of Civil Procedure generally applies to proceedings before administrative panels, while the LACP includes only those provisions that differ from the Code of Civil Procedure.

Despite these conceptually clear distinctions, there were points of contention in judicial practice, especially concerning the issue of whether those rules of the Code of Civil Procedure that are not particularly regulated in the LACP have to be applied directly or only in analogy (i.e. by way of interpretative adaptation). In order to provide greater clarity, a parliamentary working group which should draft a more detailed LACP was established in 2007. This reversed the legislative strategy of the LACP in force: only those rules of the Code of Civil Procedure should find application in administrative proceedings, which were explicitly referred to in the LACP. Furthermore, the working group is instructed to clarify additional substantial issues that have arisen in judicial practice. In the meantime the completed draft encompasses almost 100 articles.

The central question remains which kind of disputes should be heard in administrative proceedings and which ones in civil proceedings. Such issues of distinction can be resolved more easily if both proceedings are dealt with by the same jurisdiction, as is the case in Georgia. Here competing courts are absent, which, in a system of separated civil and administrative jurisdiction, lead to turf wars and attempts to extend competences. Still, even in a unitary system there should be clear criteria for the separation of competences.

Therefore, it also had to be determined in Georgia, which criterion should underlie the term of a dispute under administrative law: the purpose of those legal norms deciding the dispute (the criterion of public interest), their subject matter (criterion of power

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relations) or their nature (criterion of law specially designed to control administrative bodies). As all of these criteria are not sufficiently selective and as a simple solution was considered necessary, the authors of the first version of the LACP opted for a formal criterion: accordingly, administrative law cases were to concern legal relationships involving an administrative body as one or even two or more parties. While this poses no issues for administrative acts, it leads to a significantly extended application of the LACP in the area of administrative contracts. This implies that, for instance, rental agreements for a flat between the state and individuals fall into the area of administrative law and therefore have to be decided upon by the administrative panels of courts (respectively, if particular panels do not exist, under application of the LACP).

This confronted the administrative panels of courts with a flood of cases in legal areas in which civil courts are usually far more experienced, as the example of tenancy law shows. *Vice versa*, the formal selection criterion also excluded those actors under civil law who fulfill public functions from administrative proceedings.

This is the reason why judges came to demand a substantial criterion for the distinction of civil and administrative law cases. The definition of contracts under administrative law was therefore narrowed down to contracts that were concluded to exercise sovereign authority.²⁵ At the same time, the definition of authorities was extended to private persons who exercise sovereign authority.²⁶

Characteristic for the administrative proceedings are the so-called procedural maxims [*Prozessmaximen*], especially the issue of whether the matter in dispute is at the disposal of the parties or the court (party disposition), and whether it is the parties' or the courts' task to feed facts and provide evidence in the proceedings (principle of contradiction vs principle of investigation).

The first chapter of the LACP explicitly confirms the principle of party disposition, which also applies to civil proceedings, for administrative proceedings, yet curbs it insofar as the administration is bound to legal provisions when making a composition, waiving or accepting a claim. This provision, also present in German law, reduces the opportunity for defendants and third parties to bribe the administration into making a composition, waiving or accepting a claim *contra legem*. Therefore, the court has to examine whether the termination of proceedings follow legal requirements.

²⁵ Article 2(1)(g) General Administrative Codex (version of 2005).

²⁶ Article 2(1)(a) General Administrative Codex (version of 2005).

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In German Law, a mixture of the contradiction and investigation principles determines the introduction of dispute matter and proofs. While the parties are primarily responsible the court is authorized to complement facts and proofs on its own account. For the Georgian LACP it was to be considered that Article 85(3) of the Georgian constitution prescribes legal protection according to the principles of both equality and the competition of the parties. This is why the contradiction maxim was adopted as a basis. It was however somewhat qualified, as the court is allowed to demand the submission of information (especially administrative files) and order certain proofs (especially expert opinions). I believe it could be argued that constitutional law allows for a more proactive role of the court as a compensation for the disparate starting positions of private individuals and the administrative bodies in a proceeding. Following this argument, the new draft tries to extend the court's room for maneuver.

The second chapter of the LACP contains some provisions concerning jurisdiction. The competence of the first instance was allocated to inferior and district courts. District courts are courts of first instance in more significant cases, i.e. administrative acts and decrees by the president and ministers as well as by the councils and mayors of the large cities.

Chapter 3 states that a judge is excluded if he has been party to an administrative proceeding which has dealt with the same matter before.

Chapter 4 deals with the matter of costs. After a prolonged discussion about the need to simplify access to administrative legal protection, the legislator nevertheless opted for a liability for court costs with the exception of disputes under social law. Following the Code of Civil Procedure, the losing party owes the resulting costs. It facilitates matters that a nonpaid advance on fines does not cause the proceedings to be suspended. In practice, however, parties sometimes take advantage of this fact, as cost payment is often refused and the court has to press its debtors.

Chapter 5 concerns the time allowed for appeal in cases of failure to provide instructions about possible legal remedy. This matter actually belongs into the Code of Civil Procedures, but is missing there.

Chapter 6 includes provisions concerning the parties. It determines that administrative bodies and not their founding entity (the state, local communities) act as parties. The rationale is that in this way administrative bodies learn better from their mistakes, as according to Georgian budgetary law not the state or local communities but the individual administrative agency carries the costs of court proceedings.

Chapter 7 includes particular provisions concerning the introduction of subject matters and the hearing of evidence; it thus concretizes the specific amalgam of proceedings and investigation maxims. Among other things, it is stressed that on the one hand both parties are required to contribute and that on the other hand the court can present

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matters, but only if the parties are allowed to comment. A stronger obligation to contribute exists for administrative authorities, in so far as they are obliged to submit the files concerning the case. With regard to the secrecy of files worth of protection, there are no *in camera* proceedings as in German law. Rather, the authorities are allowed to withhold information, which has to be justified and can be reviewed by court; additionally, the files kept secret have to be paraphrased. Accordingly, the parties have the right to substantial, unlimited access to legal files, with the exception of drafts of and preparatory documents for judgments.

Chapter 8 determines the types of complaints, temporary legal protection and the contents of rulings. As types of complaints, it stipulates the motion of quashing an administrative act, the motion of compelling an administrative body to issue an administrative act, to provide a service or desist from some activity ('*mandamus*' in English law) and the motion to declare the existence or non-existence of a legal relationship between the parties. The very controversial issue of the right of standing was solved in a *via media* between approaches oriented towards subjective rights and those oriented towards protected interests.²⁷ For all types of complaints, it is equally required that the plaintiff has to assert that he is directly and individually affected in a legally protected interest. Furthermore, it is determined that administrative acts can be annulled without full checking, if a deficit in the legal investigation or evaluation has been established.²⁸ As the willingness of authorities to obey to judgments cannot easily be assumed in Georgia, the law stipulates that the court can decree the act of administration itself.

Moreover, it is determined that motions of quashing administrative acts have a suspensive effect. Administrative acts are then not allowed to be enforced, except in extraordinary circumstances or if an authority has ordered the immediate execution justified by explicit reasoning. Three tiered constellations pose specific problems here. If upon complaint of a third person (e.g. a neighbour) the administrative act (the construction permit) is suspended the beneficiary (the house builder) can ask the court to repeal the suspensive effect. For this he must show that the complaint has a low chance of success or that substantial disadvantage is caused. *Vice versa*, the party burdened by the administrative act can ask the court to establish suspensive effect if the administrative body has ordered immediate execution.

²⁷ Cf. G. Winter, 'Individualrechtsschutz im deutschen Umweltrecht unter dem Einfluss des Gemeinschaftsrecht', *NVwZ* 1999, pp. 467 ff.

²⁸ Similarly Article 113(3) of the German Law on Administrative Court Procedure.

According to the LACP, motions for quashing sublegal regulations are also admissible. As in the case of complaints against individual administrative acts, the precondition is the potential violation of legally protected interests. The complaint has no automatic suspensive effect, yet such an effect can be ordered by court following a respective request.

The 9th and last chapter enables the appeal and revision to the Appellate Court and the Supreme Court respectively. Appeal and revision can be asked for regardless of the extent of the gravamen. Here the notion prevailed that legal protection in public law should be provided even for small amounts under dispute. An admission procedure for an appeal does not exist. It seems unsuitable – at least in an early phase of administrative law, such as in Georgia. Revision is only admissible if the matter is of significance for the legal development, if the court of appeal deviates from the jurisprudence of the Supreme Court, or if essential procedural provisions have been violated.

8 Concluding Remarks

With the introduction of the Administrative Codex and the Rules for the Administrative Courts, Georgian administrative law was put on new foundations in the year 2000. On this basis, a multifaceted jurisprudence has developed, confronting issues that are also on the daily agenda of legal systems with a long tradition in administrative law. Judges and other legal practitioners have authored textbooks and commentaries, in most cases with support of the GTZ and sometimes involving my consultation. A commentary of the LACP as well as a commentary and textbook concerning the GAC have been published. Concomitantly, seminars have taken place repeatedly, inviting administrative judges to discuss current legislation and matters of codification.

Thus, Georgia has moved a step forward on its way to the normal life of a society that both empowers its public administration to take measures for the benefit of society, and protects individual rights against arbitrary administrative action or inaction.

However, in this process three issues have been neglected and are now increasingly addressed: the introduction of the public to the new rights of citizens, the education of administrative staff on the new legal provisions, and the teaching and research of administrative law at universities. Here, the more important tasks loom, because only if legal texts and rulings find their way into the heads of individuals, administrative law really enters into force. To the radical skeptics of institution building it might be replied that good texts are simply indispensable. Georgia has progressed in achieving them, and it is on its way to put them into practice.