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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT REPORT**  
**ON THE NOTIONS OF “GOOD GOVERNANCE”**  
**AND “GOOD ADMINISTRATION”**

**on the basis of comments by**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

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## I. Introduction

1. *In its Recommendation 1791(2007) on the state of human rights and democracy in Europe the Parliamentary Assembly of the Council of Europe called on the Committee of Ministers of the Council of Europe to reinforce its own activities in the field of democracy, in particular by reacting to identified deficits of democracy in member states. The Parliamentary Assembly called on the Committee of Ministers to continue its work on democracy and good governance in the information society. At its 2007 session, the Council of Europe's "Forum for the Future of Democracy" encouraged the Venice Commission to pursue this matter.*

2. *Mr Oliver Kask acted as rapporteur with Mr Asbjørn Eide, expert from Norway. They decided to examine the different existing concepts of the notion of "good governance" as well as the notion of "good administration" and the relation between "good governance" and human rights.*

3. *A preliminary version of this report (CDL(2008)091) was prepared on the basis of comments by Messrs Kask and Eide and considered by the Venice Commission at its 76<sup>th</sup> Plenary Session (Venice, 17-18 October 2008). A revised version, which takes into consideration the discussion held in Venice and the observations by Ms Gret Haller (CDL(2009)052), was then prepared and adopted by the Venice Commission at its ... Plenary Session (Venice, ... 2009).*

## II. Origin of the concept of "Good governance" and main characteristics

4. The concept of good governance was first used by Aristotle for describing a state ruled by ethical and just governor. Substance of that ethical/philosophical concept was developed by the World Bank with a view to identifying criteria for granting loans. Good governance aimed at measuring the economic performance of the states and their institutions from outside, without a direct involvement of those concerned in the country. Good governance was marked by largely informal monitoring procedures, as well as the treatment of private actors on an equal footing with governments. It was exclusively based on economic factors and focused on the output, both of private entities and public institutions.

5. The World Bank developed the concept of good governance partly to assist those States which had not yet established efficient institutions to manage the loans they received. It avoided on purpose the use of the term "government" so as not to infringe upon state sovereignty. The concept of good governance developed by the World Bank, however, largely neglected some important aspects of democracy. This was inherent to its very nature and main features, which hardly made it possible to oppose, even through a democratic process in the country concerned, an assessment based on economic efficiency. It is argued that through the promotion of good governance by the World Bank, some governments have been affected in their capacity to strike a fair balance between private interests and public interests, which may have contributed to a certain weakening of democratic principles.

6. The concept of good governance developed by the World Bank has since been endorsed by a range of other international actors and organisations, which have often adapted it to their own needs. A number of attempts have in particular been made to modify it with a view to including a democratic element. As results from the survey compiled in sections III and IV below, the use and understanding of the concept of good governance has significantly evolved over time, also depending on the international institution referring to it. This notwithstanding, the concept of good governance does not find its origin in the constitutional or legal discourses. It is rather a non-legal concept, which is virtually absent from the legal order of the Council of Europe member states.

7. Good governance is often said to include good administration. The principle of good administration is based on clearly identifiable procedural rights, the alleged violation of which can be invoked before a court. It is therefore widely accepted that good administration is a legal concept in itself, which is enshrined in international documents as well as in the legal order of several states. This difference in nature must be borne in mind and good governance can therefore not be equated with good administration.

### III. “Good governance” at the international level

8. There has been a multitude of different definitions or descriptions of “good governance” at the international level. This part of the report lists different concepts employed by international organisations and their bodies.

#### A. The Council of Europe

##### a. The 2005 Warsaw Summit

9. At the Warsaw Summit in 2005 the Heads of State and Government of the member States declared that “democracy and good governance at all levels are essential for preventing conflicts, promoting stability, facilitating economic and social progress, and hence for creating sustainable communities where people want to live and work, now and in the future”.<sup>1</sup>

##### b. The Committee of Ministers

10. In 2005, the Committee of Ministers adopted Recommendation Rec(2005)8 to member States on the principles of good governance in sport which include, but are not limited to:

- democratic structures for non-governmental sports organisations based on clear and regular electoral procedures open to the whole membership;
- organisation and management of a professional standard, with an appropriate code of ethics and procedures for dealing with conflicts of interest;
- accountability and transparency for decision-making and financial operations, including the open publication of yearly financial accounts duly audited;
- fairness in dealing with membership, including gender equality and solidarity.<sup>2</sup>

##### c. The Parliamentary Assembly

11. In Parliamentary Assembly Resolution 1060(1995) good governance was explained as including “democracy and human rights, the absence of corruption, social reform favouring the disadvantaged, economic reform in the direction of market principles, adequate protection of the environment, and more open trade including trade with other developing countries”.<sup>3</sup>

12. In two recommendations of 2005 and 2006 the Parliamentary Assembly stressed the Council of Europe’s important role in improving good governance, without however defining it. Good governance was mentioned alongside democracy, the rule of law and human rights standards.<sup>4</sup>

13. In Parliamentary Assembly Resolution 1547(2007) on the state of human rights and democracy, the principles of subsidiarity and proportionality were considered necessary to

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<sup>1</sup> Warsaw Declaration adopted at the Third Summit of Heads of State and Government of the Council of Europe, point 3, available at: [http://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2005\)79&Language=lanEnglish&Ver=final](http://wcd.coe.int/ViewDoc.jsp?Ref=CM(2005)79&Language=lanEnglish&Ver=final) (last visited on 28 August 2008).

<sup>2</sup> Recommendation Rec(2005)8 of the Committee of Ministers to member States on the principles of good governance in sport, adopted on 20 April 2005.

<sup>3</sup> Parliamentary Assembly Resolution 1060(1995) on development co-operation policies, point 8.

<sup>4</sup> Parliamentary Assembly Recommendation 1708(2005): Current situation in Kosovo, adopted on 21 June 2005, point 1; Parliamentary Assembly Recommendation 1771(2006): The establishment of a stability pact for the South Caucasus, adopted on 17 November 2006, point 1.

achieve good governance, which in turn is said to be essential for strengthening democracy.<sup>5</sup> In the same resolution the role of good governance in preventing corruption is stressed.<sup>6</sup>

- d. The Conference of European Ministers responsible for local and regional government

14. The Conference of European Ministers responsible for local and regional government adopted at their fifteenth session in October 2007 the “Council of Europe Strategy on Innovation and Good Governance at Local Level”. It states that good governance has become a model for giving real effect to democracy, the protection of human rights and the rule of law. The strategy lists twelve principles of good democratic governance which draw on the Council of Europe’s *acquis* in the field of democracy, the rule of law and the protection of human rights. Those principles encompass the rule of law, the protection of human rights and democracy. Among others, they also include effectiveness and efficiency, openness and transparency, accountability and responsiveness.<sup>7</sup>

- e. Committee of Experts on Good Governance in Health Care

15. In September 2007, the new Committee of Experts on Good Governance in Health Care (SP-GHC) started its work. Its mandate is “to help member States to promote value-based governance in health care, based on human rights, equity, transparency, accountability and participation”.<sup>8</sup>

- f. The North-South Center of the Council of Europe and the Association of Europeans Parliamentarians for Africa (AWEPA)

16. In the framework of the Austrian Presidency of the European Union the Association of European Parliamentarians for Africa (AWEPA) and the North-South Centre of the Council of Europe organised a seminar in Cape Town in 2006 for African and European Parliamentarians to discuss the new EU-Strategy for Africa. In the “Recommendations for Action” good governance figures alongside democracy and human rights as the key elements for improving living standards. Furthermore, it is said that good governance requires effective parliamentary action and a consensus on the definition of good governance and its relationship with development.<sup>9</sup>

## B. The European Union

- a. The European Council

17. In 1991 the European Council adopted a resolution on human rights, democracy and development setting guidelines for the co-operation with developing countries. It was stated that “[a]t the same time, human rights and democracy form part of a larger set of requirements in order to achieve balanced and sustainable development. In this context, account should be

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<sup>5</sup> Parliamentary Assembly Resolution 1547(2007): State of human rights and democracy in Europe, adopted on 18 April 2007, paragraph 62.

<sup>6</sup> Id. at paragraph 83.

<sup>7</sup> The Council of Europe Strategy on Innovation and Good Governance at Local Level, MCL-15(2007)8, adopted on 16 October 2007.

<sup>8</sup> [http://www.coe.int/t/dg3/health/goodgov\\_en.asp](http://www.coe.int/t/dg3/health/goodgov_en.asp) (last visited on 28 August 2008).

<sup>9</sup> Euro-African Pact for Africa’s development: The role of Parliamentarians, Recommendations for Action, Cape Town, 25 - 26 May, available at:

[http://www.coe.int/t/e/north%2Dsouth\\_centre/programmes/5\\_europe%2Dafrica\\_dialogue/b\\_hr\\_and\\_democratic\\_governance/Declaration\\_Cape-Town\\_mai2006.pdf#xml](http://www.coe.int/t/e/north%2Dsouth_centre/programmes/5_europe%2Dafrica_dialogue/b_hr_and_democratic_governance/Declaration_Cape-Town_mai2006.pdf#xml) (last visited on 28 August 2008).

taken of the issue of good governance as well as of military spending". However, no definition of good governance was given.<sup>10</sup>

b. The European Community

18. In 2000 the European Community defined good governance in the Partnership Agreement between the States of the African, Caribbean and Pacific Group and the European Community (Cotonou Agreement) as follows:

*"In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption."*<sup>11</sup>

c. The European Commission

19. Good governance in the EU is of special relevance to the European Commission, which defines common policies at the European level.<sup>12</sup> In 2001, the European Commission identified five principles of "good governance" in a White Paper on European governance: openness, participation, accountability, effectiveness and coherence.<sup>13</sup>

C. The United Nations

a. Co-operation between the United Nations and the Council of Europe

20. In its Resolution adopted at its sixty-third session of 29 October 2008, the General Assembly encouraged further co-operation between the United Nations and the Council of Europe in the area of democracy and good governance, and in particular with regard to the International Day of Democracy, *inter alia* through the Venice Commission and the Forum for the Future of Democracy.<sup>14</sup>

b. The "Agenda for Development"

21. The "Agenda for Development" submitted by Secretary General Boutros Boutros-Ghali to the General Assembly in 1994 addressed the importance of development and its basis for peace. The agenda's purpose was to give a new impetus to the discussion of development building on the United Nations' experience. The agenda stressed the important role of good

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<sup>10</sup> Resolution of the Council and the member States meeting in the Council on human rights, democracy and development, paragraph 2, available at:

[http://ec.europa.eu/external\\_relations/human\\_rights/doc/cr28\\_11\\_91\\_en.htm](http://ec.europa.eu/external_relations/human_rights/doc/cr28_11_91_en.htm) (last visited on 28 August 2008).

<sup>11</sup> Article 9(3) of the Partnership Agreement between the States of the African, Caribbean and Pacific group of States on the one part, and the European Community and its member States on the another part, available at:

[http://ec.europa.eu/development/icenter/repository/agr01\\_en.pdf](http://ec.europa.eu/development/icenter/repository/agr01_en.pdf) (last visited on 28 August 2008).

<sup>12</sup> See Christoph Möllers, European Governance: Meaning and Value of a concept in Common Market Law Review 6/2006, pp. 313-336.

<sup>13</sup> European Commission, European Governance – a White Paper, 25 July 2001, COM(2001) 428 final, p. 10, available at: [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0428en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf) (last visited on 5 September 2008).

<sup>14</sup> UN General Assembly Resolution A/63/L.12 of 29 October 2008, paragraph 7.

governance in development<sup>15</sup> while stating that democracy is “inherently attached to the question of governance.”<sup>16</sup> Democracy is described as the only reliable means to achieve improved governance.<sup>17</sup>

22. Good Governance is described as having several meanings in the context of development:

*“In particular however, it means the design and pursuit of a comprehensive national strategy for development. It means ensuring the capacity, reliability and integrity of the core institutions of the modern State. It means improving the ability of government to carry out governmental policies and functions, including the management of implementation systems. It means accountability for actions and transparency in decision-making.”<sup>18</sup>*

23. The Agenda for Development resulted in General Assembly Resolution 49/126, which took note of the Secretary General’s report and put the item “Agenda for development” on the provisional agenda for its fiftieth session.<sup>19</sup> However, no further action was taken by the General Assembly.<sup>20</sup>

c. The United Nations Millennium Declaration

24. The Millennium Declaration was adopted by the General Assembly in 2000 to reaffirm the organisation’s role in the new millennium. It mentioned good governance in connection with the eradication of poverty, stressing that its success depended on good governance at the national and the international level.<sup>21</sup> Good Governance was also mentioned in the title of Part V called “Human rights, democracy and good governance”, but was not dealt with in the substantial text. The term “good governance” was not defined in any part of the declaration.

d. The United Nations Commission on Human Rights

25. In 2000, 2003 and 2004 the Commission stated that the foundation of good governance is “transparent, responsible, accountable, and participatory government, responsive to the needs and aspirations of the people”. The Commission noted, however, that good governance practices may vary from society to society and that determining and implementing such practices rests with the States concerned.<sup>22</sup>

e. The United Nations Development Program (UNDP)

26. The UNDP considers that human development and good governance are indivisible. It describes good governance as follows:

*“Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance*

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<sup>15</sup> An Agenda for Development, Report of the Secretary General, 6 May 1994, A/48/935, paragraph 125; available at: <http://www.globalpolicy.org/reform/initiatives/ghali/1994/0506development.htm> (last visited on 28 August 2008).

<sup>16</sup> Id. at paragraph 120.

<sup>17</sup> Id. at paragraph 128.

<sup>18</sup> Id. at paragraph 126.

<sup>19</sup> Resolution adopted by the General Assembly on 20 January 1995, A/RES/49/126.

<sup>20</sup> Beate Rudolf, “Is ‘Good Governance’ a Norm of International Law?”, in: Common Values in International Law: Essays in honour of Christian Tomuschat, Pierre-Marie Dupuy et al. (editors), 2006, p. 1010.

<sup>21</sup> The United Nations Millennium Declaration, Resolution adopted by the General Assembly on 18 September 2000, A/RES/55/2, paragraph 13.

<sup>22</sup> The role of good governance in the promotion of human rights, Commission on Human Rights Resolutions 2000/64, 2003/65 and 2004/70.

*ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.*<sup>23</sup>

f. The Third United Nations Conference on the Least Developed Countries

27. The “Brussels Declaration” adopted at this conference in May 2001 considered that good governance at the national and international level was a means to achieve the eradication of poverty. The rule of law, respect for human rights and the promotion of democracy were listed as other means figuring alongside good governance.<sup>24</sup> This was repeated in the “Brussels Programme of Action for the Least Developed Countries” adopted on the last day of the conference.<sup>25</sup>

g. The “Monterrey Consensus” of the International Conference on Financing for Development

28. The International Conference on Financing for Development in Monterrey in March 2002 was the first United Nations-hosted conference on key financial and development issues.<sup>26</sup> In the “Monterrey Consensus” the States committed themselves to good governance in order to achieve, among others, the goals set in the Millennium Declaration.<sup>27</sup> However, no definition of good governance was provided.

h. “Plan of Implementation of the World Summit on Sustainable Development”

29. This plan of September 2002 stressed once again the importance of good governance at the national and international level for sustainable development.<sup>28</sup> The need for respect for human rights and democracy figured alongside good governance.<sup>29</sup>

D. Organisation for Economic Co-operation and Development (OECD)

30. The OECD lists the principles of good governance as follows: respect for the rule of law; openness, transparency and accountability to democratic institutions; fairness and equity in dealings with citizens, including mechanisms for consultation and participation; efficient, effective services; clear, transparent and applicable laws and regulations; consistency and coherence in policy formation; and high standards of ethical behaviour.<sup>30</sup>

<sup>23</sup> UNDP, Good Governance – and sustainable human development, available at:

<http://mirror.undp.org/magnet/policy/chapter1.htm> (last visited on 28 August 2008).

<sup>24</sup> Brussels Declaration, adopted at the third United Nations Conference on the Least Developed Countries, A/CONF.191/12, point 2, available at: <http://www.unctad.org/en/docs/aconf191d12.en.pdf> (last visited on 28 August 2008).

<sup>25</sup> Brussels Programme of Action for the Least Developed Countries for the Decade 2001–2010, A/CONF.191/11, paragraph 25, available at: <http://www.un-documents.net/ac191-11.htm> (last visited on 28 August 2008).

<sup>26</sup> <http://www.un.org/esa/ffd/ffdconf/> (last visited on 5 September 2008).

<sup>27</sup> Monterrey Consensus adopted at the International Conference for Financing for Development, A/CONF.198/3, annex, point 4, available at:

<http://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/267/66/doc/N0226766.DOC?OpenElement> (last visited on 20 August 2008).

<sup>28</sup> The Plan of Implementation of the World Summit on Sustainable Development, paragraphs. 4,138 and 141, available at: [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf) (last visited on 28 August 2008).

<sup>29</sup> Id. at paragraph 62.

<sup>30</sup> OECD: Public Governance and Management, available at:

[http://www.oecd.org/about/0,3347,en\\_2649\\_37405\\_1\\_1\\_1\\_1\\_37405,00.html](http://www.oecd.org/about/0,3347,en_2649_37405_1_1_1_1_37405,00.html) (last visited on 28 August 2008).



#### E. The World Bank

31. In 1989 the World Bank identified “bad governance” as the main obstacle to development, describing “bad governance” as the absence of accountability, transparency and efficient administration combined with corruption in respect of financial spending.<sup>31</sup>

32. In 1992 the World Bank defined “governance” as “the manner in which power is exercised in the management of a country’s economic and social resources for development”.<sup>32</sup>

33. In 2007, in the context of the bank’s 2007 governance and anticorruption strategy, the World Bank defined governance as “the manner in which public officials and institutions acquire and exercise the authority to shape public policy and provide public goods and service”.<sup>33</sup>

34. When granting a loan the World Bank may only take into account economic factors; the consideration of political factors is expressly excluded.<sup>34</sup>

#### F. The International Monetary Fund (IMF)

35. The IMF places good governance next to combating corruption as outlined in its 1997 “Guide on the IMF’s Approach to Good Governance and Combating Corruption” and the term has a purely economic meaning. It encompasses the transparency and accountability of public resource management and the financial sector.<sup>35</sup>

#### G. The African Development Bank

36. In its policy paper on good governance of March 2001 the African Development Bank named five elements of good governance: Accountability, Transparency, Combating corruption, Participation and Legal and Judicial Reform. The Bank stated that “good governance is a necessary condition for the success of the bank’s core interventions to promote economic and social development in its regional member countries”.<sup>36</sup>

#### H. The Inter-American Development Bank

37. In a strategy document of July 2003 the Inter-American Development Bank viewed the requirements of (democratic) governance in light of the general goals of sustainable growth and poverty reduction and focused mainly on strengthening democracy, the rule of law and justice reform.<sup>37</sup>

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<sup>31</sup> Beate Rudolf, “Is ‘Good Governance’ a Norm of International Law?”, in: Common Values in International Law: Essays in honour of Christian Tomuschat, Pierre-Marie Dupuy et al. (editors), 2006, p. 1009.

<sup>32</sup> Governance Indicators: Where Are We, Where Should We Be Going? Policy Research Working Paper 4730, Daniel Kaufmann, Aart Kraay, p. 4, available at:

[http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2007/10/31/000158349\\_20071031085226/Rendered/PDF/wps4370.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2007/10/31/000158349_20071031085226/Rendered/PDF/wps4370.pdf) (last visited on 28 August 2008).

<sup>33</sup> Id.

<sup>34</sup> Article IV section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD).

<sup>35</sup> The IMF and good governance – a fact sheet (May 2008):

<http://www.imf.org/external/np/exr/facts/gov.htm#top> (last visited on 28 August 2008).

<sup>36</sup> African Development Bank, Operational Guidelines for Bank Group Policy on Good Governance, II., 2.1, March 2001, available at:

[http://www.afdb.org/pls/portal/docs/PAGE/ADB\\_ADMIN\\_PG/DOCUMENTS/NEWS/OPERATIONAL%20GUIDELINES%20FOR%20BANK%20GROUP%20POLICY%20ON%20GOOD%20GOVERNANCE.PDF](http://www.afdb.org/pls/portal/docs/PAGE/ADB_ADMIN_PG/DOCUMENTS/NEWS/OPERATIONAL%20GUIDELINES%20FOR%20BANK%20GROUP%20POLICY%20ON%20GOOD%20GOVERNANCE.PDF) (last visited on 28 August 2008).

<sup>37</sup> Inter-American Development Bank, Modernization of the State (Strategy Document), 4.7, July 2003, available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1441783> (last visited on 28 August 2008).

## I. The Asian Development Bank

38. The Asian Development Bank identifies four elements of good governance: accountability, participation, predictability and transparency.<sup>38</sup> Accountability is described as public officials' responsibility for their behaviour, but also the measuring of their performance. Participation means that people have access to the institutions that promote development, thus participating actively in economic life. Predictability refers to the existence of laws, regulations and policies and their fair and consistent application. Transparency refers to the availability of information to the public and clarity about government rules, regulations and decisions. It is therefore linked to predictability.<sup>39</sup>

## IV. Good administration at the international level

### a. The Council of Europe

39. Good administration is not enshrined, as such, in any Council of Europe treaty. Certain conventions, however, protect some aspects of the right to good administration. This is notably the case of the European Convention on Human Rights (ECHR), which guarantees the right to a fair trial in its Article 6. The ECHR case-law has developed a number of material principles and procedural requirements based on Article 6 and other articles, which point to a right to good administration of justice and also protects, at least to some extent, private persons in their relations with the administration. Other Council of Europe conventions, such as the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, further contribute to the codification of certain aspects of the right to good administration.

40. The Committee of Ministers of the Council of Europe adopted a number of recommendations related to some aspects of the right to good administration, such as: exercise of discretionary powers by administrative authorities,<sup>40</sup> access to information held by public authorities,<sup>41</sup> public liability,<sup>42</sup> administrative procedures affecting a large number of persons<sup>43</sup> and communication to third parties of personal data held by public bodies.<sup>44</sup>

41. Drawing on these recommendations, the Committee of Ministers recently adopted a far more comprehensive recommendation on good administration.<sup>45</sup> In doing so, the Committee of Ministers had regard to Recommendation 1615(2003) of the Parliamentary Assembly, which called on the Committee of Ministers to draft a model text for a basic individual right to good administration and a single, comprehensive, consolidated model code of good administration in order to define the basic right to good administration and, therefore, facilitate its effective implementation in practice. The proclaimed intention is therefore to combine the various recognised rights with regard to the public authorities into a right to good administration and to clarify its content.

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<sup>38</sup> <http://www.adb.org/Documents/Policies/Strategy2020/Strategy2020-print.pdf> (last visited on 28 August 2008).

<sup>39</sup> <http://www.adb.org/Documents/Policies/Governance/gov310.asp?p=policies> (last visited on 28 August 2008).

<sup>40</sup> Recommendation No. R (80)2 of 11 March 1980.

<sup>41</sup> Recommendation No. R (81)19 of 25 November 1981.

<sup>42</sup> Recommendation No. R (84)15 of 18 September 1984.

<sup>43</sup> Recommendation No. R (87)16 of 17 September 1987.

<sup>44</sup> Recommendation No. R (91)10 of 9 September 1991.

<sup>45</sup> Recommendation CM/Rec(2007)7 of 20 June 2007 on good administration.

42. Recommendation CM/Rec(2007)7 recalls that good administration is an aspect of good governance and encourages the Council of Europe member states to promote good administration within the framework of the principles of the rule of law and democracy. The recommendation contains, as an appendix, a model code of good administration, which sets out 9 principles of good administration, namely: lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy and transparency. The model code also contains several rules governing administrative decisions, as well as a section devoted to appeals against administrative decisions and compensation. Member states are invited to adopt, as appropriate, the standards set out in the model code and ensure their effective implementation.

b. The European Union

43. Under the title "Right to Good Administration", Article 41 of the Charter of Fundamental Rights reads as follows:

*"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.*

*2. This right includes:*

*- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*

*- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*

*- the obligation of the administration to give reasons for its decisions.*

*3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*

*4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."<sup>46</sup>*

44. The adoption of this provision may be seen as a decisive step in the codification of a right to good administration towards the institutions of the EU. It applies not only to EU citizens, but to every person coming into contact with these institutions. The principle of good administration has been developed by the case-law of the Court of Justice of the European Communities and the Court of First Instance,<sup>47</sup> and some elements of this principle have been further defined.<sup>48</sup> Good administration is based on the existence of a Community governed by the rule of law. The right to good administration arises from a concern for equal treatment, in accordance with the case-law of the Court, and with the right to an effective remedy (Article 47 of the Charter) as well as rights which go with it (right to be heard and right to access one's own file). The EU institutions' obligations arise from the provisions of the Treaties: the general obligation to give reasons for decisions (Article 253 EC), making good of damages (Article 288 EC) and the possibility of communicating with the institutions of the EU in one of the languages of the Treaty (Article 21 EC).

45. The European Code of Good Administration Behaviour,<sup>49</sup> which consists of 27 Articles, is a non-legally binding instrument, drafted by the European Ombudsman and approved, with some

<sup>46</sup> Article 41 of the Charter of Fundamental Rights of the European Union, available at:

[http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) (last visited on 28 August 2008).

<sup>47</sup> See CJCE judgment of 31 March 1992, *Burban*, case C-255/90; Court of First Instance judgments of 18 September 1995, case T-167/94 *Nölle* [1995] ECR II-2589, and 9 July 1999, case T-231/97 *New Europe Consulting and others* [1999] ECR II-2403.

<sup>48</sup> See CJCE judgment of 15 October 1987, *Heylens*, case C-222/86; CJCE judgment of 18 October 1989, *Orken*, case 374/87.

<sup>49</sup> The code is available at <http://www.ombudsman.europa.eu/resources/code.faces>

amendments, by the European Parliament in its Resolution of 6 September 2001. This approval gives a strong legitimacy to the principles contained therein, which can subsequently be considered as applicable to all Community institutions and bodies. The Code contains detailed rules implementing the general principle that underlines Article 41 of the Charter. At present, there are at the EU institutions' level the Code of Good Administrative Behaviour and a number of individual codes which the Community institutions, bodies and decentralised agencies have all adopted with various forms and content, some of which are textually the same as the European Code of Good Administrative Behaviour.

46. The European Code of Good Administrative Behaviour sets out a number of principles which should be observed by European officials, including lawfulness (Article 4), absence of discrimination (Article 5), proportionality (Article 6), consistency (Article 10), absence of abuse of power (Article 7), impartiality and independence (Article 8), objectivity (Article 9), fairness (Article 11), courtesy (Article 12), duty to reply to letters in the language of the citizen (Article 13). There are also important rules on procedure such as the obligation to notify all persons concerned of a decision (Article 20), the obligation to keep registers and the obligation to document administrative processes (Article 24).

## V. "Good governance" at the national level

47. While the term "good governance" is frequently used at the international level, it appears only rarely at the national level. The Venice Commission examined whether the term is used or defined in constitutions, legislation or case-law.

### A. Constitutions

48. No constitution in Europe sets out a right to good governance or mention it as a principle. This has mainly to do with the origin and nature of the concept (see Section II above) and reflects the limited influence it has, so far, exercised on national legal orders.

### B. Legislation

49. On the basis of the survey carried out by the Venice Commission, there seems to be a very limited number of European states which have incorporated the notion of good governance in their statutory laws. The only examples found are listed below and concern the Netherlands and Latvia.

#### a. The Netherlands

##### aa) Section 16 of the Media Act (*Mediawet*)

50. Section 16(5) of the Media Act prescribes that the Netherlands Broadcasting Corporation must draw up a code of conduct in order to advance good governance and integrity for the benefit of the institutions which have obtained national broadcasting time. The code refers in any case to a) recommendations to the point of administrative organisation, including rewards and supervision, b) rules of conduct to the point of integrity, c) rules of conduct to the point of public and transparent accountability and reporting procedures, d) procedures for processing notifications and suspicions of alleged abuses, and e) supervision of and compliance with the codes of conduct.

##### bb) Section 33 of the Pension Act (*Pensioenwet*) and section 42 of the Pension Fund (Obligatory Participation) Act (*Wet verplichte beroepspensioenregeling*)

51. Sections 33 of the Pension Act and 42 of the Pension Fund (Obligatory Participation) Act provide in the first paragraph that a pension scheme administrator must organise him-/ herself in such a way that good governance is guaranteed, which means in any case that a) he/she is accountable to those who may claim a pension or who are eligible for a pension and to

employers, and b) that internal supervision is provided for. The second paragraphs of these sections provide for a legal basis for supplementary legislation.

b. Latvia

52. Section 10(5) of the State Administration Structure Law

*“State administration and its activities shall observe the principle of good governance. Such a principle shall include openness with respect to private individuals and the public, the protection of data, the fair implementation of procedures within a reasonable time period and other regulations, the aim of which is to ensure that State administration observes the rights and lawful interests of private individuals.”*

C. Case-law

53. As is the case with statutory laws, there seems to be very few instances of domestic judicial decisions which have recognised good governance as a principle or mentioned it at all. The only examples found are listed below and concern the Netherlands and Latvia.

a. the Netherlands

54. Dutch courts have held in the context of administrative proceedings that it was incompatible with the principles of good governance to deviate from policy rules set by the Government in circulars.<sup>50</sup>

b. Latvia

55. The Constitutional Court of Latvia held that the principle of good governance may be derived from Articles 1<sup>51</sup> and 89<sup>52</sup> of the Constitution. According to the Court it includes *inter alia* the termination of proceedings within a reasonable time and the respect of provisions protecting human rights.<sup>53</sup>

56. In another judgment the Constitutional Court derived the principle of good governance from Article 89 of the Constitution taken together with Section 10(5) of the State Administration Structure Law. It interpreted those provisions as entailing the State’s duty to simplify, improve and efficiently organise procedures.<sup>54</sup>

## VI. “Good administration” at the national level

57. In contrast with good governance, good administration is a concept which is far more used at the national level. Admittedly, only one State has explicitly enshrined good administration in its Constitution.<sup>55</sup> The requirements of a right to good administration, however, stem from the fundamental principles of the rule of law, such as those of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a

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<sup>50</sup> See the following judgments of the European Court of Human Rights: *Ahmut v. The Netherlands*, application no. 21702/93, judgment of 28 November 1996, paragraph 35; *Nsona v. The Netherlands*, application no. 23366/94, judgment of 28 November 1996, paragraph 49.

<sup>51</sup> “Latvia is an independent democratic republic.”

<sup>52</sup> “The State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia”.

<sup>53</sup> Judgment of the Constitutional Court of Latvia, 25 March 2003, paragraph 6, LAT-2003-1-04 (CODICES).

<sup>54</sup> Judgment of the Constitutional Court of Latvia, 6 April 2005, paragraph 9.3.1., (no. 2004-21-01).

<sup>55</sup> This is notably the case of Article 21 of the Constitution of Finland.

reasonable time limit, participation, respect for privacy and transparency. Today, these principles are already reflected in the constitutions of nearly all European States, which means that interpreting them in combination with each other point to a general requirement of good administration. Consequently, a right to good administration has been recognised in many states by legislation, the judiciary and the legal doctrine. Indeed national case-law frequently deals with alleged violations of the right to good administration as such or, at least, of the various procedural rights which compose it,<sup>56</sup> even those states which have not formally acknowledged a right to good administration.

## **VII. Human rights requirements to good governance**

### **A. Introduction**

58. As shown by the survey above, there is no universally recognized definition of 'good governance'. The present preoccupation with the issue appears to have originated in the World Bank and the other financial institutions, whose primary concern was to ensure that government became a reliable institution for sustainable growth. The World Bank focussed initially on four elements: Good public sector management, a reliable legal framework for development (predictability, rule of law, respect for private property and investments), accountability (to the public and to donors), transparency and information. While all of these are desirable elements in good governance, some important elements are missing, in particular the human rights component and its many dimensions, as discussed below. The neglect of the human rights dimension in the World Bank concept can be explained by its own Articles of Agreement (Article IV section 10) which precludes it when giving loans from taking anything else than economic factors into account.

59. A large part of human rights deal of course also with non-economic matters and must therefore be included in a satisfactory concept of good governance. This now widely recognised, e.g. in Council of Europe Parliamentary Assembly resolution 1060(1995) quoted above, where democracy and human rights are the first elements mentioned, though without spelling out what the human rights requirements to good governance are.

60. In this note, the democracy/human rights linkage will be explored and elaborated. It starts from the premise that the best governance is that which optimally applies and implements human rights, ensuring that all human rights can be enjoyed by everyone under the jurisdiction of that state. The links between human rights and governance include the institutional requirements contained in human rights law, and the state obligations which are necessary corollaries of the rights contained in the international instruments.

### **B. State responsibility for human rights: Levels and nature of obligations**

61. Wherever there is a right, there must be a duty-holder. Under human rights law the state has the primary responsibility for the implementation of human rights. Governance must

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<sup>56</sup> For example, the Supreme Court of Estonia held that a right to good administration could be inferred from Article 14 of the Constitution taken together with the principles of administrative law in the European legal space. According to the Court those principles are: legal certainty, legitimate expectation, proportionality, non-discrimination, right to be heard, right to a decision in reasonable time, effectiveness and efficiency. It took also recourse to Article 21(2) of the Finnish constitution, Article 31(2) of the Spanish constitution and Article 41 of the Charter of Fundamental Rights of the European Union. The Court considered the right to good administration to be a fundamental right (Judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003, paragraphs 14-16, EST-2003-2-002 (CODICES). See also the case of Poland, where the Constitutional Tribunal held that the duties of organs of public authority creating the fundament and standard of "good administration" stem from the constitutional rule of law and the principle of legality. However, it does not mean that the individual has the constitutional right to good administration understood as given procedural rights making administrative proceedings similar to court proceedings, in which an individual has wide guarantees (Judgment of the Polish Constitutional Tribunal of 12 March 2007, ref. No. K 54/05). In a number of judgments, the Constitutional Court of Belgium make reference to the principle of good administration in combination with the principle of equality and non-discrimination.

therefore be so constructed as to obtain the optimal realization of human rights for all under the jurisdiction of the state. Additionally, governance should also be such that it facilitates the co-operation by states in respecting, promoting and protecting human rights in other countries and thus in the world community as a whole, as reflected *inter alia* in the passage quoted above from the Cotonou Partnership Agreement between the States of African, Caribbean and Pacific Group and the European Community, adopted in 2000.

62. Criteria for good governance should focus on institutions and process (obligations of conduct), participation (political rights and cultural rights), and outcomes (obligations of result). Democratic governance in terms of institutions and political processes is a necessary, but not sufficient guarantee for full realization of human rights, which set requirements both to the process of governance and to its results. Even fully democratic states, behaving in accordance with the political will of the majority of its population, must recognise the limitations and duties set by human rights.

63. While every state member of the United Nations has a general duty under the UN Charter to promote and protect the human rights set out in the Universal Declaration, these duties are made more specific in the relevant global and regional international instruments to which they are parties.

#### C. Institutional requirements

64. Modern constitutional doctrines of state government are generally built on variations of the threefold institutional division of competence between the legislative, the executive and the adjudicative branch. There are no explicit requirements under international law for states to conform to that division, but there are significant elements in the normative system of human rights which point in that direction, some implicitly and others explicitly. The requirement of independent courts is explicitly inscribed in international human rights instruments (Article 14 ICCPR and Article 6 ECHR being the most prominent provisions). Furthermore, international human rights law require legality: Many provisions require the use of law as a safeguard, e.g. against illegitimate deprivation of liberty or arbitrary limitations of freedoms of action. The underlying concern is that any tampering with the freedoms and rights of an individual must be based on pre-existing, general norms. Consequently, there must be a legislature which fulfils the procedural requirements of law-making, and it must be separate from the executive branch which implements the law and which often takes the initiative to propose new laws, but which cannot adopt the general norms.

65. It can also be shown that human rights norms require financial accountability and transparency, which also has consequences for the institutional set-up. This includes the requirement of abstention from and prevention of corruption, and responsibility for a human rights-based allocation of available resources. Under Article 2 of the Covenant on Economic, Social and Cultural Rights, states are obliged to take steps *to the maximum of their available resources* to implement the economic, social and cultural rights contained in the Covenant. Corruption by the state or its agents is a direct violation of human rights since it reduces the resources available. Transparency in financial matters is necessary to be able to monitor whether benchmarks have been met by appropriate use of available resources.

#### D. Requirements of participation

66. Human rights contain requirements of participation in the exercise of public power at the legislative and the executive branch. The core provisions are found in UDHR Article 21 and ICCPR Article 25, and (with less elaboration) in protocol 1 para. 4 of ECHR. These provisions are built on the principle of inclusive, popular sovereignty. It is not intended in this Chapter to discuss in general the scope of the right to participation as set out or implicit in international human rights law, but a good reference can be found in a resolution of the United Nations Commission on Human Rights at its 55<sup>th</sup> session in 1999 which proclaimed a right to democracy as part of human rights, and pointed out that

“the rights of democratic governance include, *inter alia*, the following: (a) The rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) The right to freedom to seek, receive and impart information and ideas through any media; (c) The rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; (d) The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) The right of political participation, including equal opportunity for all citizens to become candidates; (f) Transparent and accountable government institutions; (g) The right of citizens to choose their governmental system through constitutional or other democratic means; (h) The right to equal access to public service in one's own country.”<sup>57</sup>

67. The Commission also noted, in the same resolution, that the realization of all human rights - civil, cultural, economic, political and social, including the right to development - are indispensable to human dignity and the full development of human potential and are also integral to democratic society.<sup>58</sup>

#### E. Obligations of conduct and result, and the obligations to respect, protect and fulfil

68. This brings us to the third important point, beyond institutions and participation. One function of human rights provisions is to set limits to or give guidance to process of governance: The state and its agents cannot use arbitrary deprivation of liberty, denial of freedom of expression or information, or prohibition of association and assembly as part of its governance. Another function is to direct the government to achieve certain results: It must ensure generally healthy conditions in society free from avoidable health risks, the government must ensure access to education for all and that everyone has a social insurance or social security. Good governance requires an active, agile state which can draw the appropriate balance in respecting the freedoms of its inhabitants and yet ensuring the results which are required from it under human rights law.

69. In light of evolving practice at the international level, there is now a broad consensus that human rights impose three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*.<sup>59</sup>

70. These obligations apply to all categories of human rights, but there is a difference of emphasis: For some of the civil rights, the main concern is with the obligation to respect, while for some economic and social rights, the elements of protection and provision become more important. Nevertheless, the threefold set of obligations for states - to respect, protect and fulfil - applies to the whole system of human rights, and should therefore be taken into account in the construction of our understanding of what would constitute good governance from a human rights perspective.

71. States must, at the primary level, *respect* the integrity and freedom of the individual, her or his freedom of action, his or her use of own resources, the freedom to find a job freely chosen or accepted, and the freedom to take the necessary actions and use the necessary resources - alone or in association with others - to satisfy his or her own needs.

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<sup>57</sup> Commission on Human Rights Resolution 1999/57.

<sup>58</sup> Commission on Human Rights Resolution 1999/57.

<sup>59</sup> This tripartite level of state obligations were first officially made use of by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 12 (May 1999) para. 15: it has since been widely used in practice and scholarship.



72. State obligations to *protect* consist of the protection of the integrity and freedom of action, including their use of own resources, against other, more aggressive or assertive subjects - protection of the child against maltreatment or exploitation, protecting the woman against violence, protection against fraud, against unethical behaviour in trade and contractual relations, against the marketing and dumping of hazardous or dangerous products. This protective function of the State applies both to civil and to economic and social rights.

73. States have also obligations to *fulfil* the rights of everyone, particularly under economic, social and cultural rights, by way of facilitation or direct provision. The duty to facilitate takes many forms, some of which are spelled out in the relevant instruments. As an example, we can refer to the European Social Charter Article 1 (concerning the right to work) para. 2, whereby states undertake to establish or maintain free employment services for all workers, and under para. 3, to provide or promote appropriate vocational guidance, training and rehabilitation. The implementation of such obligations facilitates the opportunities of the individual to obtain a work freely chosen or accepted.

74. The obligation to fulfil by way of provision consist in making available what is required to satisfy basic need when necessary. Examples of the duty to fulfil could be taken from the European Social Charter, e.g. Article 12 (the right to social security) and Article 13 (the right to social and medical assistance).

### **VIII. Analysis of the concept of good governance**

75. As seen above, the notions of “good governance” or “good administration” vary considerably and they are sometimes used even without a definition. Good governance, which is considered to encompass good administration, contains a multitude of elements, including:

- accountability
- transparency
- responsiveness to the people’s needs
- efficiency
- effectiveness
- openness
- participation
- predictability
- rule of law
- coherence
- equity
- ethical behaviour
- combating corruption
- termination of proceedings within a reasonable time
- protection of human rights
- simplification of procedures.

76. Accountability, transparency and participation are the most frequently mentioned elements, but they seem to have different meanings according to the context in which they are used.

77. There appears to be no consensus on the question whether good governance is a means to achieve a certain aim, for example the protection of human rights, or whether it is an end in itself. This is closely related to the question as to whether good governance encompasses democracy, the rule of law or the protection of human rights or whether it has a separate existence.

78. As regards “good administration”, this term seems to refer to some of the rights enshrined in Article 6 of the European Convention on Human Rights. Some of the elements mentioned are, for example:

- impartiality
- fairness
- termination of proceedings within a reasonable time
- legal certainty
- proportionality, non-discrimination
- right to be heard
- effectiveness
- efficiency

79. Good administration, however, goes beyond the scope of article 6 ECHR in many respects, including in terms of infrastructure and attitudes. States must in particular meet certain requirements with respect to organisation, which should cater for the needs of the public. This cannot always be translated into legal terms as it should lead to material adjustments ensuring the proximity and accessibility of administrative offices. For example, their location and opening hours are easier to perceive as signs of good administration than are legislative and regulatory provisions. Also, ensuring that civil servants perform their tasks both in the general interest and in the interests of the persons with whom they are dealing, is essential for good administration, which makes the training of civil servants indispensable.

80. To date, there is no case-law on good governance or good administration by the European Court of Human Rights. In due time, the Court of Justice of the European Communities will develop the principles referred to in Article 41 of the Charter of Fundamental Rights of the European Union. For the time being, there appears to be no enforceable (“justiciable”) right to good governance or to good administration, unless expressly provided for at the national level.

## **IX. Conclusion**

81. As the use of the notion “good governance” at the international and the national level shows, the exact content of this notion remains vague and there is no consensus on a definition. Among the bodies of the Council of Europe, there is hardly any consistency or co-ordination as to the use of the concept of “good governance”.

82. The concept of good governance stems from Aristotelian ethics and has been developed in present-day by the World Bank with a view to helping the states manage the loans they were granted in an efficient way. It is therefore largely inspired from economic considerations. Additional components, such as respect for human rights and democratic requirements, have been added over time as additional indicators, without however being consubstantial to the notion of good governance.

83. While the concept of good governance was first used in legal documents by the World Bank, it has since been borrowed by a range of other international organisations, which have included new elements in it. It is, however, striking that good governance has almost never been used in domestic legal orders, be it the constitutional or legislative level or even in case-law. This bears witness to its non legal-nature and to the fact that it was originally aimed at monitoring from outside, i.e. without a direct involvement of those concerned in the country.

84. Good governance is generally considered to include good administration, which is far more used at the domestic level. In recent years, new instruments have largely contributed to the codification of good administration both in the EU and in the Council of Europe. National legislation and case-law have also confirmed this development.

85. Good administration is recognised as a legal principle and even as a right in many contexts. The right to good administration should, however, not be seen as an enforceable right itself since it needs to be specified in a set of rights and obligations that are more

concrete. It is only these that have the character of individual rights that every person may claim from the administration.

86. Good administration implies that procedural mechanisms are as important as outcomes: they are themselves an integral part of the right to good administration. How the administration acts is inseparable from the substance of the action itself. The right to good administration therefore includes both basic principles and procedural guarantees. Its legal nature notwithstanding, good administration also requires measures to (re)organise the administration, to encourage certain behaviours and to facilitate the training of civil servants

87. In view of the foregoing, the Venice Commission considers that the concept of good governance can offer some guidance especially for States in a transition process provided it is not used to weaken key requirements in terms of democracy, rule of law and human rights. In that sense, good governance can only exist in societies where democratic institutions and processes including transparency and accountability prevail, and where the authorities respect and comply with the full range of human rights. The lack of consensus of the exact content of the concept of good governance including within the Council of Europe, combined with its non-legal nature and quasi-absence at the domestic level, makes it however difficult to turn it into a workable principle.

88. A more consistent use of the concept of good governance within the Council of Europe, which could pave the way for a definition, could be a useful step forward and the Venice Commission stands ready to assist in this matter. In any event, good administration should remain a key principle materialised through a set of specified rights and obligations and efforts to promote it within the Council of Europe member states should be pursued.