

# General Principles of Administrative Law

## § 2 The Council of Europe and the Emergence of Pan-European-Principles of Administrative Law

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## **§ 2 Administrative Law and the Council of Europe**

- A) Aims, Organs and Instruments of the Council of Europe**
- B) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Impact of Administrative Law**
- C) Other Conventions in Terms of Art. 15 § a of the Statute of the Council of Europe**
- D) Recommendations of the Committee of Ministers of the CoE Concerning Administrative Law**
- E) Concept of Pan-European General Principles of Good Administration**

## A) Aims, Organs and Instruments of the Council of Europe

- **5. May 1949:** Treaty of London. [Statute of the Council of Europe](#) (SCoE) was signed by Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom
- **Between 1949 and 1970** joined (in order of accession) Greece (membership was suspended between 1969 and 1974), Iceland, Turkey (problems between 1981 – 1984), Germany, Austria, Cyprus, Switzerland and Malta. .
- **1976:** Portugal; **1977** Spain
- **Since 1990:** Accession of all European countries of the former „Eastern Bloc“ (Georgia 1999) with the exception of Belarus (and Kosovo)

# A) Aims, Organs and Instruments of the Council of Europe

## Organs of the Council of Europe (Art. 10 et seq. SCoE)

- **Committee of Ministers:** one representative, one vote for each member state
- **Parliamentary Assembly** (Consultative Assembly): 318 parliamentarians (and 318 substitutes) from the national parliaments of the member states. Number of representatives and consequently of votes is determined by the size of the country. The biggest number is eighteen, the smallest two.
- **Secretary general** of the Council of Europe (appointed by the Parliamentary Assembly on the recommendation of the Committee of Ministers for a period of five years). Head of the Secretariat of the Council of Europe.
- Other committees and institutions (Art. 17 et seq. SCoE): [Venice Commission](#), [Congress of Local and Regional Authorities](#), [Group of States against Corruption](#)

## A) Aims, Organs and Instruments of the Council of Europe

### Art. 1 of the Statute of the Council of Europe

- a) The aim of the Council of Europe is to achieve a greater unity between its members for the **purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.**
- b) This aim shall be pursued through the organs of the Council by **discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.**
- c) Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations and of other international organisations or unions to which they are parties.
- d) Matters relating to national defence do not fall within the scope of the Council of Europe.

# A) Aims, Organs and Instruments of the Council of Europe

## Statute of the Council of Europe

**Art. 3.** Every member of the Council of Europe must accept the **principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms**, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I. .

**Art. 4.** Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute.

**Art 8.** Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

## A) Aims, Organs and Instruments of the Council of Europe

### Art. 15 of the [Statute of the Council of Europe](#)

a) On the recommendation of the Consultative Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the **conclusion of conventions or agreements and the adoption by governments** of a common policy with regard to particular matters. Its conclusions shall be communicated to members by the Secretary General.

b) In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members, and the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations.

See on these instruments: [U. Stelkens/Andriauskaitė, FÖV Discussion Papers No. 86, 2017, pp.. 9 et seq.](#)

# A) Aims, Organs and Instruments of the Council of Europe

## Excursus: Russia and the CoE today

- [Parliamentary Assembly Resolution 1990 \[2014\] v. 10.4.2014](#): Suspension of the voting rights of the Russian's delegates in the Parliamentary Assembly due to the Crimea Crisis
- prolongation of the sanctions by [Resolution 2034 \[2015\] v. 28.1.2015](#)
- Since then no further credentials presented by Russia for 2016 and 2017
- June 2017 Russia cancels payment to the CoE contributions after claiming its delegates are being 'persecuted' in response to the Crimea Crisis (ca. 33,03 Million Euro per year)

## Other 'problematic cases':

- Turkey
- Azerbaijan (see [Interim Resolution CM/ResDH\(2017\)379](#)),
- Ukraine (see [ECtHR, judgement of 2017/10/12, application nos. 46852/13 et al.\[Burmych and Others v. Ukraine\]](#))



## B) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

### I. ECHR in General

- Convention in terms of Art. 15 of the Statute of the Council of Europe
- Drafted in 1950 by the Council of Europe, the convention entered into force on 3 September 1953; all Council of Europe member states are party of the Convention and new members are expected to ratify the convention at the earliest opportunity
- The Convention established the **European Court of Human Rights** and the possibility of individual applications (Art. 34 et seq. ECHR)
- The Committee of **Ministers of the Council of Europe monitors the execution of judgments**, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained.
- The establishment of a court to protect individuals from human rights violations is an **innovative feature for an international convention on human rights**

## **B) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**

### **I. ECHR in General**

- From an organisational point of view the ECHR and its system of legal protection has become a second pillar of the Council of Europe: There are many organizational interdependencies
- [ECtHR, judgement of 2011/07/07, application no. 55721/07, Rn. 141 \(Al-Skeini and others v. United Kingdom\)](#)

“141. The Convention is a constitutional instrument of European public order.”

## B) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

### II. ECHR and Administrative Law

- ECHR is a source of administrative law if it is “transformed” to (directly applicable) national law
- Great influence on certain branches of „**special administrative law**”: immigration law, rules concerning methods of interrogation of the police, law of expropriation, law concerning the status of transsexuals ...
- At the beginning: No general principles regarding administrative law and administrative procedure: Regarding the non-applicability of Art. 6 § 1 of the ECHR on administrative procedures:

[European Commission of Human Rights, decision of 7 May 1962/05/07 application no. 1329/62 \(X v. Denmark\), Récueil 9. pp. 28 et seq. \(p. 33\)](#)

[European Commission of Human Rights, decision of 8.4.1967/04/08 application no. 2942/66 \(X v. Germany\), Récueil 23, pp. 51 et seq. \(p. 62\)](#)

[European Commission of Human Rights, decision of 1970/10/05, application no. 4304/69 \(X v. Germany\), Récueil 36, pp. 76 \(p. 78\)](#)

## B) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

### II. ECHR and Administrative Law

*ECtHR*, judgement of 2000/01/05, application no. 33202/96 (Beyeler v. Italy)

» 120 [...] In that connection it should be stressed that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency. «

*ECtHR*, judgement of 2009/09/15, application no. 10373/05 (Moskal v. Poland)

» 51. Moreover, **the principle of “good governance”** requires that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency «

## B) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

ECtHR, decision of 2014/06/10, application no. 25330/10 (Eckenbrecht and Ruhmer v. Germany) – settled case law on Article 8 ECHR

»36 The Court reiterates that whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on the State, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case-law that, whilst Article 8 contains no explicit procedural requirements, **the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.** It is therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process and the procedural safeguards available. [...].«

## B) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

### Elements of the « good-governance » principle

- Too long administrative proceedings must not lead to **de-facto-decisions** (*ECtHR, judgement of 1987/07/08, application no. 9749/82 [W v. United Kingdom], para 65*).
- The authority has to hear the affected party before taking any legal action and has to provide him/her the opportunity to reason/provide his/her opinion; furthermore the authority has to ensure mechanisms to consider these opinions of the affected party adequately during the administrative proceedings (*ECtHR, judgement of 2008/07/08, application no. 21151/04, [Megadat.com SRL v. Moldavia], para 72 et seq.*).
- Legal actions including burdens for the affected party have to be based on sufficient evaluation/enquiry of the relevant/substantial facts. (*ECtHR, judgement of 2005/02/02, application no. 46626/99, [Partidul Comunistilor und Ungureanu v. Romania], para 49*).

## B) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

### Elements of the « good-governance » principle

- Executive/Interfering legal actions have to be reasoned. If the duty to reason the decisions has been violated an intervention can be assessed as „legally not foreseen“ and unlawful. ([ECtHR, judgement of 2007/04/05, application no. 18147/02 \[Church of Scientology Moscow v. Russia\], para 88 et seq.](#));
- The principle of legal certainty can (also) oppose the withdrawal of unlawful administrative decisions; hence the public interest in such a withdrawal has to be weighed against the interest of the affected party to maintain/uphold the decision. In doing so, one/the authority must ensure that the affected party will not suffer of disproportionate burdens, if the administrative decision is withdrawn. ([ECtHR, judgement of 2009/09/15, application no. 10373/05 \[Moskal v. Poland\], para 44, 64, 82 et seq.](#))

## B) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

### Elements of the « good-governance » principle

- A governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake (*ECtHR, decision of 2014/06/10, application no. 25330/10 [Eckenbrecht and Ruhmer v. Germany], para. 36*)
- Article 10 (1) ECHR guarantees free access to information of general interest held by public authorities at least for the media, political parties, NGO's, blogger... (*ECtHR, judgement of 2016/11/8 – application no. 18030/11 Magyar Helsinki Bizottság v Hungary, para. 156 et seq.*)



## B) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

### Elements of the « good-governance » principle

- Case law on **legality of administration**: [ECtHR, Judgment of 2008/11/6, no. 58911/00 \(Leela Förderkreis e.V. and Others vs. Germany\)](#) – see § 4
- Case law on **judicial control and discretion**: [ECtHR, Judgment of 2011/07/21, no. 32181/04 and 35122/05 \(Sigma Radio Television Ltd vs Cyprus\]](#) para. 151 [et seq.](#)) - see § 5 B

More examples:

- [Andriauskaitė, Good Governance in the Case Law of the ECtHR: A \(Patch\)Work in Progress, 2018 \(Preprint at Researchgate\)](#)
- [U. Stelkens/Andriauskaitė, FÖV Discussion Papers No. 86, 2017, pp. 18 ff.](#)

## C) Other Conventions in Terms of Art. 15 § a of the Statute of the Council of Europe

### Art. 15 (a) of the Statute of the Council of Europe

a) On the recommendation of the Consultative Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters. Its conclusions shall be communicated to members by the Secretary General.

See [U. Stelkens/Andriauskaitė, FÖV Discussion Papers No. 86, 2017, pp. 30 et seq.](#)

## C) Other Conventions in Terms of Art. 15 § a of the Statute of the Council of Europe

### Conventions concerning human and social rights:

- Protocols to the ECHR securing additional rights (eg. right of peaceful enjoyment of property, right to education, prohibition of state expulsions of own nationals, abolition of death penalty ...)
- European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- European Social Charter and European Social Charta (Revised)
- European Charter for Regional or Minority Languages
- [...]

## C) Other Conventions in Terms of Art. 15 § a of the Statute of the Council of Europe

### **Conventions concerning local government**

- European Charter of Local Self-Government
- Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority
- European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities
- Convention on the Participation of Foreigners in Public Life at Local Level

Monitoring is done by the Congress of Local and Regional Authorities

## C) Other Conventions in Terms of Art. 15 § a of the Statute of the Council of Europe

### **Conventions concerning transborder cooperation**

- European Convention on the Calculation of Time-Limits
- European Agreement on the Transmission of Applications for Legal Aid
- European Convention on the Service Abroad of Documents relating to Administrative Matters
- European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters

## C) Other Conventions in Terms of Art. 15 § a of the Statute of the Council of Europe

### **Conventions concerning data protection and transparency**

- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981)
- Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (2001)
- Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (2018)
- Council of Europe Convention on Access to Official Documents (2009)

## D) Recommendations of the Committee of Ministers of the CoE Concerning Administrative Law

### Art. 15 (b) of the [Statute of the Council of Europe](#)

b) In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members, and the Committee **may request the governments of members to inform it of the action taken by them with regard to such recommendations.**

See [U. Stelkens/Andriauskaitė, FÖV Discussion Papers No. 86, 2017, pp. 34 et seq.](#)

## D) Recommendations of the Committee of Ministers of the CoE Concerning Administrative Law

- [Resolution \(77\)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities](#)
- [Recommendation No R\(80\)2 concerning the Exercise of Discretionary Powers by Administrative Authorities](#)
- [Recommendation No R\(81\)19 on the access to information held by public authorities](#)
- [Recommendation No R\(84\)15 relating to public liability](#)
- [Recommendation No R\(91\)1 on administrative sanctions](#)
- [Recommendation No R\(91\)10 on the communication to third parties of personal data held by public bodies](#)
- [Recommendation No R\(93\)7 on privatisation of public undertakings and activities](#)
- [Recommendation No R\(97\)7 on Local public services and the rights of their users](#)
- [Recommendation No R\(2000\)6 on the Status of public officials in Europe](#)
- [Recommendation Rec\(2000\)10 on Codes of conduct for Public officials](#)
- [Recommendation Rec\(2003\)16 on the execution of administrative and judicial decisions in the field of administrative law](#)
- [Recommendation Rec\(2004\)20 on judicial review of administrative acts](#)
- [Recommendation CM/Rec\(2007\)7 on good administration](#)



## E) Concept of Pan-European General Principles of Good Administration

**Neologism** created by combining

- ‘Allgemeine Rechtsgrundsätze des Verwaltungsrechts’ / ‘principes généraux de droit administratif’ / **‘general principles of administrative law’**

and

- **‘principles of good administration’**

and avoiding by the use of the adjective

- **‘pan-European’** instead of ‘European’, in order not to confuse them with the ‘general principles of European law’ as a synonym for ‘general principles of Community law’ or **‘general principles of EU law’**
- ‘pan-European’ instead of ‘CoE’s’, in order to avoid any rash discussion about the ‘nature’ of ‘CoE law’ as well as about the ‘top down’ or ‘bottom up’ origin of these principles

## E) Concept of Pan-European General Principles of Good Administration

### Purpose of the neologism:

- ‘Labelling’ the outcome of the work of all CoE organs and the ECtHR in the realm of (general) administrative law;
- without referring to a specific concept of ‘good administration’, ‘good governance’, etc.;
- without starting a fundamental debate on the issue if there is a difference between general principles of administrative law and principles of good administration in regard to their quality as standards of judicial review;
- Creating a **‘magic concept’** which may enrich the discussion about ‘good governance’ and ‘good administration’ from the specific ‘pan-European’ comparative law perspective;
- Showing its nexus to the **‘European legal space’** and, thus, no intention of having ‘global’ ambitions (and therefore staying immune to any allegation of ‘legal imperialism’).

## E) Concept of Pan-European General Principles of Good Administration

### Why putting the outcome of the work of different institutions of the CoE in one basket?

- Conventions, recommendations and other documents of the CoE as well as the case law of the ECtHR in the realm of administrative law – independent of their nature and their legal sources – are often referring to each other.
- They seem not to be a loose bundle of various rules in administrative matters but form a ‘coherent whole’, a real ‘package of good administration’.
- They focus on the **‘limiting function’ of administrative law** (protecting individuals from arbitrary power) – ‘rule of law and administration’) and the **‘legitimizing function’ of administrative law** (by guaranteeing democratic decision making processes and accountability and participation) – ‘democracy and administration’

## E) Concept of Pan-European General Principles of Good Administration

Interpreting the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the light of the recommendations of the Committee of Ministers: [ECtHR, Grand Chamber, judgement of 2008/11/12, application no. 34503/97 \(Demir and Baykara v. Turkey\)](#)

85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies [...].

## E) Concept of Pan-European General Principles of Good Administration

- ‘Global’ legal interpretation technique of the ECtHR “Demír and Baykara” has been confirmed: [ECtHR, judgement of 2016/11/8 – application no. 18030/11 Magyar Helsinki Bizottság v Hungary, para. 118 et seq.](#)
- While interpreting the ECHR the ECtHR refers regularly to
  - other CoE conventions
  - Recommendations in the sense of Article 15 (b) SCoE)
  - Recommendations of the Parliamentary Assembly
  - Recommendations, reports guidelines of other institutions of the CoE like [Venice Commission](#), [Congress of Local and Regional Authorities](#), [Group of States against Corruption](#)
- Recommendations of the Committee of Ministers on administrative law build on each other and refer to each other ([U. Stelkens/Andriauskaitė, FÖV Discussion Papers No. 86, 2017, S. 40 ff.](#))
- The organs of the COE become increasingly aware that all the conventions, recommendations and other documents of the CoE are interdependent and should consistently follow a coherent concept within the framework of the SCoE.

## E) Concept of Pan-European General Principles of Good Administration

What is meant by “rule of law” in the framework of the Council of Europe?

[118th Session of the Committee of Ministers \(Strasbourg, 7 May 2008\) – Communiqué \(CM\[2008\]47 final\)](#)

“The Ministers reaffirmed the importance of the rule of law for consolidating democracy and the respect for human rights. The Council of Europe’s activities in the field of the rule of law, in particular on the legal framework for, and organisation of, a democratic state, the independence and overall functioning of justice and citizen’s security, will continue to receive high priority. **The Ministers [...] and asked their Deputies to examine how full use can be made of the Council of Europe’s potential in enhancing the rule of law and good governance** and report back on the occasion of the handover of the chairmanship of the Committee of Ministers from Sweden to Spain in November 2008.”

## E) Concept of Pan-European General Principles of Good Administration

What is meant by “rule of law”?

- [The Council of Europe and rule of law – an overview CM\(2008\)170, 21 November 2008](#) (Report of the Secretary General of the Council of Europe)

“59. All these rule of law requirements under the ECHR pursue an important objective: **to avoid arbitrariness and offer individuals protection from arbitrariness**, especially in the relations between the individual and the state. In addition, there are some indications that the rule of law may on occasion take on a broader meaning in the Court’s case-law [...]. In this broader sense, the rule of law means that not only the state and its agents but all individuals are subject to the law (“**no one is above the law**”). This explains why the state’s duty to ensure the security of all persons as well as everyone’s enjoyment of human rights [...] also extends to countering threats posed by other individuals.”

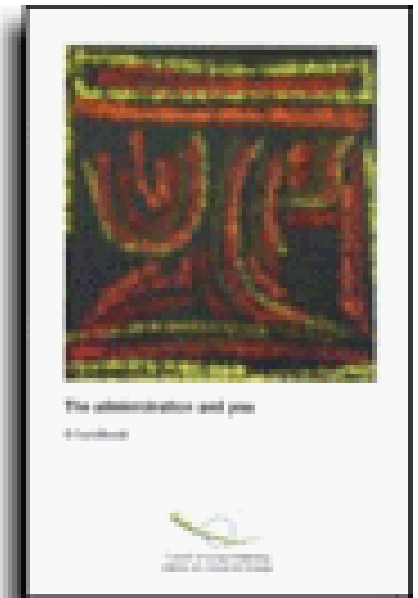
- [29. Council of Europe Conference of Ministers of Justice, Tromsø \(Norway\), June 2009. Resolution N°3 on Council of Europe action to promote the rule of law](#) (Approval of the report of the Secretary General)

## E) Concept of Pan-European General Principles of Good Administration

### “The administration and you” of 1996

„Why this handbook?

This handbook is intended to set out, in a logical and [...] easily comprehensible form, those principles of substantive administrative law and administrative procedure which are considered to be of primary importance for the protection of private persons in their relations with the administrative authorities”





# E) Concept of Pan-European General Principles of Good Administration

## “The administration and you” of 1996

Chapter 1: Scope of the principles, rule of law background and definitions (2 p.)

Chapter 2: Substantive Principles (5 p.)

Chapter 3: Procedural Principles (8 p.)

Chapter 4: Special Issues (Sanctions, Revocation of administrative acts, data protection (9 p.)

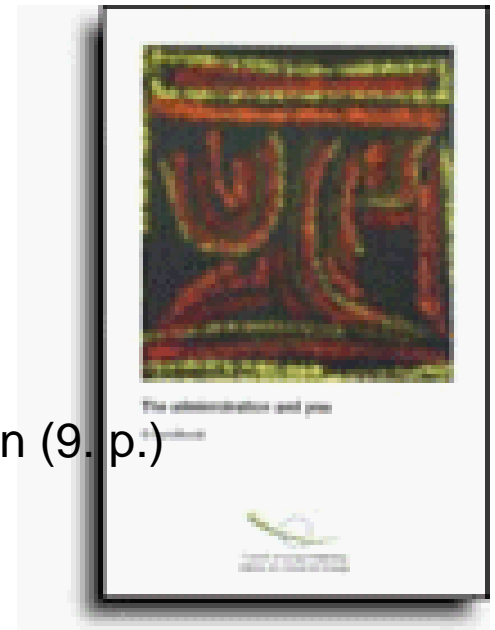
Chapter 5: Judicial Review and alternative dispute resolution (9 p.)

Chapter 6: Public liability and reparation (6 p.)

Appendix 1: Case law of the ECtHR

Appendix 2: Examples of the implementation of the principles in CoE member states

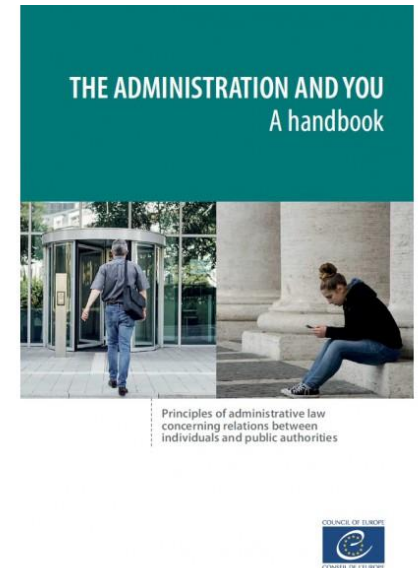
Appendix 3: CoE Recommendations



# E) Concept of Pan-European General Principles of Good Administration

## “The administration and you” of 2018

- Not a real 2<sup>nd</sup> edition of the book of 1996
- Is less ambitious than the book of 2018
- Appendixes are missing



## Hypotheses:

The Pan-European General Principles of Good Administration are

1. part of the '**common heritage**' of the Member States of the CoE because – following **the practical knowledge** acquired by the positive experience of good administration and the negative experience of maladministration in the different parts of Europe – their respect has been proved to be useful to *foster and uphold* 'good administration' (in the sense of an administration respecting the rule of law and being 'open' and democratic accountable) and to avoid and combat 'maladministration' (especially corruption, nepotism, and kleptocracy) – **not only in transition states but also in established democracies**
2. concretizations of the values enshrined in **Art. 3 SCoE** and reflect the '**normative expectations**' stemming therefrom with regard to the 'power limiting' and 'legitimizing' function of domestic administrative law (here: *connection with 'phase 1'*)
3. are therefore particularly suitable to serve as a '**common frame of reference**' to describe and explain the purpose, the functioning of those institutions of administrative law which are part of this common heritage – but also the national leeways in concretizing them
4. may therefore serve as ***tertium comparationis*** and thus make it easier to compare national case law and national legislation in Europe