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The right to good administration

Proceedings

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Co-operation programme
to strengthen the rule of law

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Opening address
by

Mr Leszek CIEĆWIERZ
Under-secretary of State, Poland

The Conference on the right to good administration is devoted to very important issues pertinent to organisations which exercise the duties and obligations of the State to its citizens. Hence, it is topical to look at problems at stake in public administration in order to develop solutions to make the administration good, friendly to citizens, fit to meet their needs and to face challenges.

The Polish Ministry of the Interior and Administration has taken the initiative to implement our vision of effective and modern administration. In particular, we are working within the framework of the governmental programme "Anticorruption Strategy," taking measures aimed at effective performance of public administration and at making institutions transparent and friendly to citizens. These initiatives also include the drafting of a new Law on Local Government Civil Servants which introduces the concept of civil service in local government into the Polish legislation. Another initiative is the Friendly Institution Programme based on a long-term strategy of promoting and implementing optimum solutions in institutions. We are also taking other initiatives corresponding to the themes of this conference in order to continuously improve the organisation of public administration and to instil model behaviour of public officials and civil servants, including draft codes of ethical behaviour for councillors and civil servants in local governments.

Due to rapid changes in today's world, society, and economy, we are faced with new challenges, in public administration as well. Continued efforts to enhance effective operation of public administration is the prerequisite of the quality of the State which must improve the standards of its services in view of growing needs. It is necessary to develop and reinforce public administration as a modern and effective organisation subject to public scrutiny and fit to fulfil citizens' needs. One of the measures of the quality of public administration is the level of the services it offers to meet the basic needs of a changing society. In view of new challenges, public administration should be friendly to citizens and serve society; it should also have a transparent structure of management and provision of public services, indispensable in any country which is a democratic State under the rule of law. An effective administration, trusted by the public and complying with top European standards, must hire professional staff, apply state-of-the-art management techniques, take a proactive approach to citizens' needs, and improve the quality of its services.

It is very important to hold meetings to discuss the development and promotion of standards and concepts of modern public administration. This conference organised by the Council of Europe, with the participation of all of its member States, brings together distinguished experts from many countries and is a good forum for exchange of opinions and experiences. There is no doubt that this conference is a step forward in developing the best solutions for good modern public administration.

Opening address
by

Mr Andrzej ZOLL
Ombudsman, Poland

We will speak today about good administration as a civic right; about citizens' right to good administration. It is natural that the Ombudsman should have a particularly strong interest in the enforcement of this right in Poland. No other institution has as much insight into cases of maladministration. The Polish Ombudsman receives over 50,000 complaints per year, which suggests that we have a long way to go before the Polish administration meets the standards of good administration. Two years ago, the Code of Good Administrative Behaviour drawn up by the EU Ombudsman Mr Söderman, recommended for enforcement in EU institutions by decision of the European Parliament, was published in Poland. I have requested the Polish Prime Minister to implement the Code in the Polish national administration and to recommend the Code to local government. This has been done. The Polish administration now has a very good benchmark. Alongside the Polish Code of Administrative Procedure, which is the legal basis of good administration, the EU Code of Good Administrative Behaviour sets out standards of behaviour for civil servants and benchmarks for citizens who know what to expect of civil servants. My institution carefully follows the work of the administration in Poland and all measures aimed at improvement; we also prevent such actions as would cause the situation to deteriorate.

May I mention that last year I proposed a motion that the Constitutional Court review compliance of the suspension of the Civil Service Law with the Constitution. In December 2002, the Constitutional Court decided that the Law was not in compliance with the Constitution. I think that reinforcement of the civil service, both at the national level and in local government, is one of our priorities. Civil service should be more than theory: it should work effectively. Civil servants must not be replaced after each parliamentary election, as has been the case in Poland. We cannot afford to lose well-educated people just because they are not in favour with the political party in power.

Let me raise two points of fundamental importance. One is the education of the Polish people. This hardly seems to be an issue related to good administration. Yet, a civil servant who is more knowledgeable than a citizen approaching an institution may be prone to use this knowledge against the interests of the citizen. Citizens who approach an institution should be well informed about their rights. I believe that the process of civic education is one of the major challenges ahead, including education on EU law. We should found legal counselling structures, working on a large scale independently of the administration, to help citizens understand whether civil servants respect their rights.

The second major issue is the implementation of the Law on Access to Public Information, which came into force in Poland two years ago. Good administration means that it is open, transparent, and subject to public scrutiny. Polish citizens do not always know how to use the Law, and the public administration is not always ready to

use it. On the one hand, citizens should have access to public information, and on the other hand, civil servants should feel obliged to provide public information to citizens.

I hope that this high level international conference will underscore the importance of good administration as a fundamental civic right. I thank the organisers of the conference and I hope that we will all learn from this exchange of experience to the advantage of our citizens.

The constitutional basis for the right to good administration

Mr Leon KIERES
President of the Institute of National Remembrance,
Professor of Administrative Law, Poland

1. The constitutional basis for the right to good administration

1. The specific character of the right to good administration constitutes a distinct and specific issue in legislation, jurisdiction and *theoretical* interpretations. Recognition of this category of civil rights as a special subjective right seems to be the appropriate approach. The right to good administration is qualified as a fundamental right when appropriate regulations are introduced in constitutional provisions: "in the national legal system of each State, fundamental rights and freedoms are simply those which are embedded in the Constitution."[1] Fundamental rights are the rights inscribed in legal acts at the constitutional level as well as the rights educed by the courts based on principal laws.[2]

Civil rights and freedoms are classified as fundamental also in view of international legal regulations. Similarly to legal solutions at the national level, acts of international law of special significance confer on the rights and freedoms a fundamental status.

The catalogue of fundamental rights is also identified in national legislation through an adequate interpretation of the domestic legal order in jurisdiction. Consequently, this concept also relates to the jurisdiction of international courts (the European Court of Human Rights and the European Court of Justice). Citizens should have the right to formulate claims and present them in the course of legal proceedings. Claimants may in particular request a particular type of action on behalf of the administration, either by initiation or by abandonment of the action indicated in the claim. Therefore, the legislator should clearly differentiate situations in which citizens (organisations) are entitled to present a specific standpoint towards the administration and its action in the course of legal proceedings.

2. Regulations concerning the structure and the principles governing public administration in the member States of the Council of Europe and the European Union are the domain of national governments, but documents have been developed at the international level to address common values for the officers of the administration of international institutions and the civil services of the European Union and the Council of Europe as well as the division of powers between the European, national, local and regional authorities.

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[1] B. Banaszak, p. 25 [in] B. Banaszak, A. Preisner, Prawa i wolności obywatelskie w Konstytucji RP /Civil Rights and Freedoms in the Constitution of the Republic of Poland, Warsaw 2002.
[2] See B. Banaszak, A. Preisner, Prawa i wolności obywatelskie w Konstytucji RP /Civil Rights and Freedoms in the Constitution of the Republic of Poland, Warsaw 2002, p. 22 ff.

The rights which constitute the broadly understood right to good administration are formulated in Council of Europe documents, in particular the European Convention on Human Rights. This relationship is increasingly often regarded as an act of competition which gradually replaces the cooperation between the European Union and the Council of Europe[3], a fact that has been particularly noted by the institutions of the Council of Europe. They have pointed to the growing problem of regulatory competition or dualism[4], particularly visible in relation to the European Convention on Human Rights in the European Union. I will not cite opinions, including the jurisdiction of the Court of Justice, regarding the possibility of the European Union's accession to the European Convention on Human Rights[5]. The view that in the future, the Council of Europe and the European Union are increasingly likely to adopt separate regulations (not only normative regulations) concerning the same matters seems to be justified. If this is the case, the Council of Europe may find it challenging to maintain its political role of an institution which supports the protection of human rights at the same level in European countries and institutions.

The Council of Europe's legislation in the area of human rights protection is part of '*soft law'*. The above also applies to the right to good administration. Yet the soft law of the Council of Europe has the distinctive feature of encompassing the organisation's legislation and prestige. This is especially visible in the standpoint taken by the member States who approve the reports, recommendations and resolutions in selected areas within the provisions of the Council of Europe's soft law. I subscribe to the opinion that "at any rate, it should be noted that the soft law developed with the involvement of the Committee [of Ministers] is not, in actual fact, 'soft', weak or worthless, and the member States do make an effort to ensure that such legal norms are quite effective."[6]

The Council of Europe's legal acts tend to formulate the regulated issues in a specific manner, including the right to good administration. Rather than offering a strictly regulatory approach, they offer an incentive for legislative activities. A detailed regulatory approach is secondary to guiding directives or procedural principles[7]. The subject of regulations outlined in Council of Europe documents relates to the citizen's rights before the administration or its institutions and the rights of the administration in its relations with citizens (organisations). More importantly, the conduct of the administration is related to a hierarchical organisational structure. In view of the above, phenomena regarded as 'stable' are accounted for as 'administrative practice' when the central (superior) administrative authorities inspire or tolerate certain types of behaviour. A comparison of the manner in which the Council of Europe formulates 'administrative practice' with the recommendations to promote the principle of subsidiarity in the distribution of competencies among public authorities shows a certain degree of inconsistency.

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[3] F. Jasiński, Karta Praw Podstawowych Unii Europejskiej/Charter of Fundamental Rights of the European Union, Warsaw 2003, p. 239.
[4] Regulation no. 1108, 28 January 1997.
[5] F. Jasiński, Karta Praw Podstawowych Unii Europejskiej/Charter of Fundamental Rights of the European Union, Warsaw 2003, p. 240.
[6] A. Jasudowicz, Administracja wobec Praw Człowieka/Administration towards Human Rights, Toruń, 1996, p. 76.
[7] A. Jasudowicz, *ibidem,* p. 79.

The documents relating to good administration are classified into two groups by A. Jasudowicz. Recommendations - of 1980 concerning the performance of the administration's discretional competencies; of 1987 relating to administrative proceedings which are of interest to large groups of citizens; of 1991 relating to administrative sanctions - delineate the administration's duties to its clients. The subsequent four documents: resolution of 1977 on the protection of individuals against administrative acts; recommendation of 1981 on access to data held by public authorities; recommendation of 1989 on temporary court protection in administrative cases; recommendation of 1984 on public liability - regulate the citizens' status before the administration. The relationship between Community law and Community institutions on the one hand, and between ECHR and Strasbourg-based institutions on the other, should be defined.[8]

3. Documents presenting the views of various European Union institutions on the desirable structure of public administration in the Member States should be mentioned. Those documents are not binding - they merely express the opinions held by the European Commission, the European Parliament or the Committee of the Regions.

The idea of the right to good administration appears in the Charter of Fundamental Rights (art. 41), implying that it is regarded as a fundamental right. Pursuant to the provisions of art. 6 of the Treaty on European Union (TEU), the Union respects fundamental rights guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as well as the rights following from the common constitutional traditions of the Member States as general principles of Community law. Since the end of the 1960s, fundamental rights have been protected by the European Court of Justice[9] which has recognised its competence to assess the validity of the member States' regulations for compliance with fundamental rights.[10]

The European Code of Good Administrative Behaviour, developed by European Union Ombudsman Jacob Södermann, is a Community document. On 6 September 2001, the European Parliament adopted a resolution approving the Code which the European Union bodies and institutions should respect in their relations with the public[11]. The Code outlines the general terms of good administrative behaviour which govern the relations of the administration and its officials with individual members of the public. The Code contains fundamental principles which should be observed by European officials: lawfulness (Article 4), absence of discrimination (Article 5), proportionality (Article 6), absence of abuse of power (Article 7), impartiality and independence (Article 8), objectivity (Article 9), fairness (Article 11),

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[8] F. Jasiński, Karta Praw Podstawowych Unii Europejskiej/Charter of Fundamental Rights of the European Union, Warsaw 2003, p. 239 ff; P. Filipek [in:] Traktat o Unii Europejskiej /Treaty on European Union, edited by K. Lankosz, Warsaw 2003, p. 125 ff.

[9] See European Court of Justice's ruling in the following cases: 29/69 Stauder, ECR [19691 419; 11/70 Intemationale Handelsgesellschaft, ECR [1970] 1125.

[10] European Court of Justice's ruling in case 5/88 H. Wachauf v. Germany, ECR [1989] 2609.

[11] Andrzej Zoll, Prawo do dobrej administracji / Right to Good Administration, introduction to the European Code of Good Administrative Behaviour, edited by Jerzy Świątkiewicz, Ombudsman's Office, Warsaw, 2002.

courtesy (Article 12) and reply to letters in the language of the citizen (Article 13). Officials are bound by specific requirements, such as legitimate expectations, consistency and advice (Art. 10), acknowledgement of receipt and indication of the competent official (Art. 14), obligation to transfer the document to the competent service of the institution (Art. 15), right to be heard and to make statements (Art. 16), reasonable time-limit for taking decisions (Art. 17), duty to state the grounds of decisions (Art. 18), indication of the possibilities of appeal (Art. 19), notification of the decision (Art. 20), data protection (Art. 21), requests for public access to documents (Art. 23), keeping adequate records (Art. 24). Citizens also have a right to complain to the European Ombudsman (Art. 26).

It should be noted that the Code was developed in response to **article 41** (right to good administration) of the **Charter of Fundamental Rights of the European Union** adopted in Nice in December 2000. Section 1 of article 41 states that 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. Section 2 describes the detailed rights of every person: 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 professional and business secrecy; the obligation of the administration to give reasons for its decisions. Pursuant to section 3 of article 41, every person has the right to have the Community make good any damage caused by 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. Every person may write to the institutions of the Union in one of the languages of the Treaties (in one of the official languages of the EU - 11 languages at present) and must have an answer in the same language (Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, 2000/c 364/01, 18 November 2000).

The legal status of the Charter of Fundamental Rights raises a controversy. According to art. 5 1, section 1, the provisions of the Charter are addressed to the institutions and bodies of the Community and the Union. The Charter is an expression of constitutional traditions common to the Member States as well as an inspiration for the European Court of Justice in the process of safeguarding fundamental rights.[12]

An analysis of the Charter inspires a discussion on the relationship between the adopted solutions and the national legislation of the member States. It should be noted that the Charter does not place the member States under an obligation to integrate its solutions in national legislation. It merely indicates that the legal nature and, consequently, the nature of the solutions adopted in the Charter, may offer an incentive for the member States to accommodate (improve) the provisions of the Charter in domestic law, as argued by F. Jasiński (p. 217). The application of the Charter has, in fact, been limited by addressing its provisions to "... the institutions and bodies of the Union with due regard to the principle of subsidiarity and to the Member States only

[12] See A. Wyrozumska, Jednostka w Unii Europejskiej /Individual in the European Union [in:] Prawo Unii Europejskiej. Zagadnienia Systemowe /European Union Law. System Issues. Warsaw 2002, p. 346; C. Mik, Karta Praw Podstawowych Unii Europejskiej. Zagadnienia podstawowe /Charter of Fundamental Rights of the European Union. Principal issues [in:] Traktat Nicejski /Treaty of Nice, edited by A. Podraza, Lublin 2001.

when they are implementing the Union law" (Art. 51 of the Charter). This approach indicates that the discussed issue exists on two levels. The first level comprises legal-international regulations which incorporate issues characterising the content of the right to good administration. Legal-international regulations thus standardise (consolidate) the existing legal provisions. Nevertheless, legal regulations in national legal systems are diversified - the Constitution, legislation and jurisdiction. This relation is worth noting, bearing in mind that the Charter of Fundamental Rights - with the incorporated Code of Good Administrative Behaviour - is not a binding legal act, despite the fact that the principles of good administration established in the Charter are observed in practice by the institutions of the European Union.[13]

Although the Code of Good Administrative Behaviour is not a formally binding legal act as part of the soft law, the latter category of legal acts is beginning to play an increasingly important role in the European Union. To this end, the Code of Good Administrative Behaviour will have a growing practical impact on the national law and will be applied internally in the system of normative acts adopted by legislative bodies. This approach illustrates the implementation of the principles of subsidiarity[14] and proportionality in the decision-making process. The principle of proportionality advocates the achievement of set goals with the application of the appropriate instruments - political acts (deprived of normative character) and legally binding acts.

Legal acts (actions) established in the soft law have evolved into measures which oblige the addressee to observe the indicated standards, as clearly illustrated by the bodies and institutions of the European Union[15]. This interpretation of the provisions of the right to good administration could, however, lead to differentiated opinions regarding the binding 'force' of the adopted solutions. Court jurisdiction and acts of national law offer a remedy in the shaping of an adequate standpoint. This is how soft law is transformed into hard law.[16]

As regards regional and local authorities, the European Parliament supports the strengthening of the local self-governments' role in its Resolution on the role of the regional and local authorities in building Europe (2002/141 (INI). In this document, the European Parliament supports the incorporation of the European Charter of Local Self-Government into the *acquis communautaire*; calls on the Commission to involve local and regional authorities in the preparation of legislative acts and in the devising of Community law policies; welcomes the submission of Commission proposals on the possibility of introducing tripartite contracts involving the Union, the member States and the territorial authorities appointed by them, and proposes that co-operation be stepped up between regional assemblies and the European Parliament, in particular

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[13] Compare CHARTE 4204/00 of 4 April 2000; F. Jasiński, Karta Podstawowych Praw Unii Europejskiej /Charter of Fundamental Rights of the European Union, Warsaw 2003, p. 223 ff.

[14] A. Jurcewicz, Rola "miękkiego prawa" w praktyce instytucjonalnej Wspólnoty Europejskiej /The Role of Soft Law in the Institutional Practice of the European Community [in:] Implementacje prawa integracji europejskiej w krajowych porządkach prawnych /Implementation of the European Integration Law in National Legal Systems, edited by C. Mik, Toruń 1998, p. 112.

[15] A. Jurcewicz, *ibidem,* pp. 113, 118.

[16] A. Jurcewicz, *ibidem, p.* 114; see *ibidem,* p. 111 ff.

through its Committee on Regional Policy, Transport and Tourism[17]. In the Resolution on the division of powers between the European Union and the Member States (2001/2024 (INI), the European Parliament addresses the role of local self-government. While postulating that internal organisation and the division of competences in every member State must remain at the national level, the above document points to the growing role of regions and other territorial authorities in the implementation of the Union's policies. In the resolution, the European Parliament calls for the support of proposals from the member States regarding the greater involvement of local self-government in the procedure of drafting and transposing European Union laws.[18]

In the face of the growing role of local and regional authorities in drafting and implementing Community legislation, the European Commission developed the concept of tripartite contracts involving the European Union (represented by the European Commission), the member States and the territorial authorities appointed by them. This concept originally appeared in the White Paper on European Governance, adopted by the Commission in 2001. It recognises the need for agreements between European, national and territorial authorities to ensure the improved, quicker and more effective implementation of Community regulations at the national, regional and local level. The objective of tripartite contracts would be the practical application of binding secondary Community law (regulations, directives and decisions), while tripartite agreements would provide for the application of laws which remain outside a binding Community framework[19]. The Commission has also developed the "Commission Working Paper: Ongoing and Systematic Policy Dialogue with Local-government Associations" in which it lays down the framework, goals and procedures governing the dialogue with local and regional government associations. The objective of the dialogue is to involve local actors in the process of initiating the decisions and policies of the European Union. In the Commission's document, the Committee of the Region assumes the role of organiser of a political dialogue between the European Union and national associations of regional and local government.[20]

2. Constitutional laws as a framework for detailed rights establishing the right to good administration

In the tradition and evolution of administrative systems in European countries, the governing standards are categorised as administrative proceedings. The administrative procedure is subject to intense regulatory efforts as part of the national legal order. The ongoing integration process takes place at various levels which extend beyond the economic co-operation of the European Union's member States and inspire citizens to become active on the territory in more than one country. This issue particularly applies to the freedom of movement which enables citizens to contact the administration of various countries in accordance with the respective administrative

[17] European Parliament resolution on the role of regional and local authorities in European integration. P5_TA-PROV (2002) 0009.
[18] European Parliament resolution on the division of competences between the European Union and the Member States. P5_TA(2002)0247.
[19] Communication from the Commission: A Framework for Target-based Tripartite Contracts and Agreements between the Community, the States and Regional and Local Authorities, Brussels, COM (2002) 709, p. 3.
[20] Commission Working Paper: Ongoing and Systematic Policy Dialogue with Local-government Associations, p. 7.

procedures[21]. The principles which shape procedural solutions are subject to constitutional provisions. The constitutional order of each country standardises the citizens' status in their relations with the administration, laying down the course for detailed solutions. This order defines the specific nature of administrative proceedings, determined by the tradition of the country (society).

Every citizen risks facing the consequences of a 'bureaucratic delay'[22]. This expression contains an almost pathological element which should not occur in the conduct of public authorities. The citizens - clients of public administration - expect the authorities to undertake measures which are characterised as effective and verified. The administration should be aware of its obligation to respect the law. The principle of lawfulness (binding the administration by law) is the criterion associated with acts of 'good administration'. Nevertheless, legal regulations - including those of the highest rank - will not replace the adequate attitude of persons representing the administration. Such attitudes determine the positive or negative approach of the State in its duty to carry out its obligations to the citizens. An adequate approach to the financing of public administration, elimination of pathological elements, which are an attempt to protect (carry out) group interests in public administration, elimination of nepotism and clientism with the associated corruption, give the desired level of prestige to the laws governing the citizen's relations with public administration and international institutions.

The material scope of the right to good administration encompasses the following rights: a) every person's right to have his or her affairs handled impartially, fairly and objectively, b) the right of every person to be heard before any individual measure which would affect him or her adversely is taken, c) the right of every person to have access to his or her file, e) the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, f) the right to request that public administration officials act according to the law, g) the right to equal treatment and non-discrimination, h) the right to request that the measures applied by the public authorities are proportional to the aim pursued, i) the right to acquire information and advice, and the right to the protection of justified expectations, j) the right to a reasonable time-limit for taking decisions, k) the right to the protection of personal data and the individual's privacy by public administration, 1) the right of access to public documents.

a) Impartiality and objectivity are the features of administrative proceedings relating to the exercise of a discretionary power: the concept of objectivity and impartiality is laid down by Recommendation No. R (80) 2 of the Committee of Ministers of the Council of Europe of 11 March 1980;[23]

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[21] A. Jasudowicz, Administracja wobec praw czlowieka/ Administration towards the Human Rights, Toruń 1996, p. 77.
[22] Z. Kmieciak, Postępowanie /Proceedings, p. 26.
[23] See Z. Kmieciak, Ogólne zasady prawa i postępowania administracyjnego /General Provisions of Administrative Law and Proceedings, Warsaw 2000, pp. 119-120.

b) the right to privacy in the Polish constitutional system is laid down by art. 47 of the Constitution on the concept of privacy and its limitations.[24] This right is also construed as the public administration's restraint from acquiring (gathering) data on the individual; the purpose and the form of acquiring data on the private lives of citizens is subject to a legitimate basis laid down by the law;[25] the concept of personal data and personal data protection has been incorporated in the Constitution (art. 51). This right has been guaranteed - but is subject to limitations - in consequence of the adoption of respective international legal regulations.[26] Similar solutions have been implemented by the Council of Europe, including Convention No. 108 on the Protection of Individuals with Regard to Automatic Processing of Personal Data of 28 January 1981;[27]

c) the principle of legalism was formally incorporated in art. 7 of the Constitution: all public authorities shall exercise their powers on the legitimate basis of and within the limits of the law;[28]

d) the right of access to public information is regulated by Community Law (Regulation /EC/ no. 1049/2001 of 30 May 2001). In Poland, this issue is regulated by art. 61 of the Constitution and the Law on Access to Public Information. The incorporation of the right of access to public information in the Polish Constitution is regarded as a special achievement in the area of human rights (civil rights and freedoms). It is expressed in the philosophy of human freedom - a freedom which determines the public administration's activities addressed to citizens solely to the extent and in the form laid down by the law[29]. This issue has been regulated by the Council of Europe in the Committee of Ministers' Recommendation No. R (81) 19 on the access to information held by public authorities of 25 November 1981.

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[24] See M. Jabłoński, K. Wygoda, Dostęp do informacji i jego granice /Data Access and Limitations, Wrocław 2002, p. 61 ff.

[25] M. Jabłoński, K. Wygoda*, ibidem* p. 221.

[26] Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights, see K. Wygoda, p. 403.

[27] See K. Wygoda, Ochrona danych osobowych i prawo do informacji o charakterze osobowym /Personal Data Protection and Civil Rights in the Constitution of the Republic of Poland [in:] Prawa i wolności obywatelskie w Konstytucji RP /Civil Rights and Freedoms in the Constitution of the Republic of Poland, edited by B. Banaszak, A. Preisner, Warsaw 2002, p. 399 ff; M. Jabłoński, K. Wygoda, *op. cit.,* p. 207 ff.

[28] See I. Oniszczuk, Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego /Constitution of the Republic of Poland in the case-law of the Constitutional Tribunal, Zakamycze 2000, p. 166 ff; B. Adamiak [in:] B. Adamiak, J. Borkowski, Kodeks postępowania administracyjnego. Komentarz /Code of Administrative Proceedings. Commentary, Warsaw 2003, p. 55 ff.

[29] M. Wyrzykowski, in reference to A. Piskorz-Ryń, p. 364.

The right of access to public information is cited by legal interpretations which provide the citizen's right to good administration with the status of a subjective public right[30]. In the process of incorporating normative regulations, domestic legislation should gradually account for situations in which the administration defines the citizen's status. This postulate is well illustrated in the opinion of J. McEldowney (p. 357) which is expressed in postulates relating to good administration:
- citizens shall have the right, in cases where a decision concerning their interests has to be taken, to submit comments and observations before the decision is taken;
- decisions with retroactive force shall not be taken;
- decisions shall be taken based on defined material facts of case;
- all rational requests for data access addressed to public bodies shall be taken into account;
- grounds for a decision shall be stated if provided for under respective 'oral' procedures.

The right of access to information held by the public authorities is regarded as a subjective public right;[31]

e) the right to equal treatment applies to public administration bodies and their partners. Public administration bodies are under the obligation to offer equal treatment to all persons appearing as a party in their relationship with those bodies. This concept applies both to individuals and distinctive groups of people representing the citizens' common interests or other common features.[32]

The legislative norms laying down the right to equal treatment are also addressed to the public administration during the processing of complaints regarding the discrimination of citizens by public bodies in view of the adopted criteria. The courts and judges have a special role in promoting the set principles. Court jurisdiction enables us - clients of the administration - to entertain a belief that legal solutions and political declarations are not merely a verbal ornament, as confirmed through the practice of public administration (as expressed in art. 32 of the Polish Constitution). The protection of individual rights should be manifested in the jurisdiction of public bodies. Public jurisdiction restores order in the legal framework through its just and equal application to persons in the same situation;[33]

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[30] A. Piskorz-Ryń, Czy prawo do uzyskania informacji od władz administracyjnych jest publicznyrn prawem podmiotowym/ Is the right to obtain information from administration a public subjective right? [in] Administracja i prawo administracyjne w trzecirn tysiącleciu/Administration and Administrative Law on the Verge of the Third Millenium, Łódź, 2000, p. 367.

[31] See Administracja i prawo administracyjne u progu trzeciego tysiąclecia /Administration and Administrative Law at the Threshold of the Third Millennium, Łódź 2000; M. Wyrzykowski, Status informacyjny obywatela /Citizen's Information Status/ [in:] Prawo i ład społeczny /Law and Legal Order, Warsaw 2000; M. Jabłoński, K. Wygoda, *op. cit.,* p. 97 ff.

[32] M. Masterniak-Kubiak, Prawo do równego traktowania/ Right to Equal Treatment, [in] Prawa i wolności obywatelskie w Konstytucji RP/ Civil Rights and Freedoms in the Constitution of Poland, p. 126.

[33] See M. Masternak-Kubiak, Prawo do równego traktowania /The Right to Equal Treatment, [in:] Prawa i wolności obywatelskie w Konstytucji RP /Civil Rights and Freedoms in the Constitution of the Republic of Poland, *op. cit.,* p. 199 ff; Zasada równości w orzecznictwie trybunałów konstytucyjnych /Principle of Equality in the Jurisdiction of Constitutional Tribunals, edited by J. Trzciński, Wrocław 1990.

f) the right to redress any damage caused by public authorities in the performance of their duties; this right is guaranteed pursuant to art. 77 of the Constitution in relation to the consequences of individual and normative administration acts;[34]

g) the right to request that the measures applied by the public authorities are proportional to the aim pursued;[35]

h) the right to petition and complain to the public administration; in Community law, citizens have the right to file complaints regarding the violation of the terms of good administration before the European Commission[36]; in Poland, this issue is regulated by, among others, art. 63 of the Constitution.[37]

4. The protection of the right to good administration constitutes, above all, an obligation (competence) of every State and its internal legal system. It is also related to the activity of international institutions as an incentive to adopt respective legal international regulations. A specific significance is attached to constitutional laws which should delineate the subjective scope of rights to good administration and should guarantee their performance to citizens. The diversity in the regulations of international acts of law are clearly visible, in particular in relation to the manner in which the citizen's (organisation's) right to good administration is formulated following its adoption by the Council of Europe and the European Union. These regulations have a clear tendency to point to constitutional solutions and traditions which shape their content. The above in particular applies to the legislative acts adopted by the Council of Europe, but it also refers to the regulations of the European Union. A suggestion to gradually merge legal international solutions systematised as part of the above two legal systems may offer a certain incentive. This suggestion is especially valid in the light of the resolutions adopted by the European Court of Human Rights and the European Court of Justice in matters relating to the right to good administration and characterising this right as a subjective public right.

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[34] See M. Safjan, Odpowiedzialność Państwa na podstawie art. 77 Konstytucji RP /The Liability of the State Pursuant to Art. 77 of the Constitution, PiP 1999, no. 4, p. 3 ff; W. Jakimowicz, Publiczne prawa podmiotowe / Subjective Public Rights, Zakamycze 2002, p. 467 ff.

[35] See K. Wojtyczek, Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP/Limitations of Legislative Interference in Human Rights, Zakamycze 1999, p. 136 ff; D. Kijowski, Pozwolenia w administracji publicznej /Concessions in Public Administration, Białystok 2000, p. 249 ff.

[36] See A. Łazowski, Ochrona praw jednostek w prawie Wspólnot Europejskich /Protection of Individuals in the Community Law, Zakamycze 2002, p. 150 ff.

[37] See W. Orłowski, Prawo składania petycji, wniosków i skarg /The Right to Petition, Motion and Complain [in:] Wolności i prawa polityczne /Political Rights and Freedoms, collective work., Zakamycze 2002, p. 149 ff.

The role of a modern administration in a State governed by the rule of law

Mr Marten OOSTING
Member of the Council of State,
former National Ombudsman,
Professor of administrative law and public administration
at Groningen University, The Netherlands

I. The quest for legitimacy

Government is an actor with considerable power in society. It needs that power to perform its tasks, and should be prepared and willing to use it where necessary. Government is a monopolist in many fields: from the classical monopoly on the legitimate use of force to far reaching powers to steer society and to provide services.

As a consequence, the individual has a relationship of dependency with the government. This means that the concept of 'client' to describe the position of the individual *vis-à-vis* the government is inadequate: in his relationship with the government, the individual does not have the freedom of a customer at a market. For the individual, government is inescapable: it follows him like a shadow, wherever he goes.

The power of government articulates the importance of the question whether and how this power is accepted in society. This is the question of legitimacy, i.e. the transformation of power into authority.

Authority (power which is accepted as legitimate) is an essential condition for the effectiveness of government/ public administration when implementing public policy *vis-à-vis* the individual, as well as for the continuity of the political-administrative system in the long term. In that respect, legitimacy can be seen as the working capital of any government, which may be used, but should be supplemented regularly, in order to avoid a deficit and hence a threat to continuity.

Government is not a goal in itself: it derives its raison d'être from the functions it performs in society. In the end: government rules in order to serve. Governments should make efforts to diminish or cancel the dependency of the individual. In that respect, public administration should perform its duties in such way that it can be characterised as: *administration of justice*.[38]

The reply to unregulated and uncontrolled public power, and hence to the question of legitimacy is: the rule of law. The idea of the rule of law implies that government must promote its own heteronomy: its powers are constrained through binding them by the law it has itself created, and which is the basis for its legitimacy.

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[38] See the task of the UK Parliamentary Ombudsman: to fight 'maladministration leading to injustice'.

II. The rule of law

From the foregoing it follows that the concept of the rule of law is an essential condition for the quality of government. It is the response[39] to an absolutist (i.e. above any regulation and supervision/control) way of exercising public power.

The function of the rule of law is to be a guarantee against arbitrariness, uncertainty and favouritism when public power is used by public authorities. Mechanisms to combat and prevent these problems are essential elements of the concept of *good governance*[40]. Democracy and the rule of law, in their interrelationship, are the basis for good governance, and hence for the stability of the political-administrative system, and for economic development.

Elements/requirements of the rule of law

Four elements/requirements of the rule of law may be distinguished:

1. Written constitution, with basic/human rights

The constitution is the basic law of the State. From the point of view of the rule of law, the issue of human rights deserves special attention. This is clearly visible in particular in States which have faced a period of totalitarian rule, and after that made a new start as democratic States governed by the rule of law by adopting a constitution in which human rights, and provisions to protect and defend them, have a prominent place.

In particular from a comparative point of view (a focus of this meeting), not only the constitution is important when human rights are concerned. Attention should also be drawn to the development of human rights in the *international* legal order, starting with the UN Universal Declaration of Human Rights (1948), with respect for human dignity as its starting point. Some of the most essential international treaties regarding human rights are:
- UN: International Covenant on Civil and Political Rights and that on Economic, Social and Cultural Rights;
- Council of Europe: European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter.

All these treaties contain far reaching requirements, which are part (directly or through implementation) of the domestic legal order of the member States, and hence of their rule of law.

With regard to the EU-countries, the Charter of Human Rights, which is to be embedded in the European Constitution (as drafted by the European Convention) should also be mentioned here.

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[39] Originating in the 19th century, after the absolutist rule of the preceding period.
[40] See a number of developing countries where these problems are persistent, and where good governance still has a long way to go.

2. Legality

The requirement of legality means that the State not only creates law, but that it, and all its bodies and officials, are bound by that same law, which they must obey: *nomocracy*. This requirement has evolved and widened from conformity with the written law to *lawfulness*: those who exercise public power are also expected to obey the law as it is interpreted and applied by the independent courts. Therefore, also unwritten principles of law as developed in jurisprudence have become an important element of the rule of law.

The rule of law with its requirements of legality and that of a constitution with basic rights is interwoven with the concept of democracy: a political system in which the people elect a representative body that (basically/ultimately) enacts the written law. Democracy and the rule of law presuppose each other.

3. Separation of powers

The third requirement refers to the concept of the *trias politica*. The three powers in the State – legislative, executive and judicial – are distributed over separate institutions, while the relationship between them can be characterised by the concept of checks and balances.

4. Independent judiciary

Finally, there is the requirement of an independent and impartial judiciary: supervision of the executive power meeting the requirement of legality/rightfulness is in the hands of independent courts. In almost all countries of the Council of Europe, the institution of the Ombudsman has been established in order to supplement the protection of the individual against the government offered by the courts.

Two views on the concept of the rule of law may be distinguished.

Firstly, a *static/institutional* view. This view is related to the continental Western European idea of (in German) the *Rechtsstaat*. The emphasis is on the institutional arrangement, based in the constitution, which must be *respected*.[41]

Secondly, a *dynamic/cultural* view. This view is more related to the Anglo-saxon concept of the *Rule of Law*, with its public order characterised by checks and balances, and a prominent role for the judiciary interpreting and developing the law. The emphasis is on the internalisation in public administration of the idea of the rule of law, and on the permanent duty to *realise* it (bring it into practice) in the daily work of implementing public policy.

The concept of the rule of law sets premises for public administration in two ways:

[41] See the obligation of public authorities to act within the limits of the competence the law has attributed to them.

- *material/substantial*: conditions for the tasks to be performed and the substance of the policy to be developed and implemented;
- *formal/procedural*: conditions for the way in which public administration performs its duties when implementing public policy vis à vis the public.

The implications of the rule of law for public administration according to these two premises will be further elaborated below (see IV). However, attention should first be given to:

III. The development of public administration

1. Classical administration

Before turning to the role of modern administration, and for a sharper, comparative perspective of it, I will first go briefly into the classical administration, as related to the classical concept of the rule of law (*Rechtsstaat*) in continental Western European countries.

The classical concept of the rule of law takes us back to the late 19th/early 20th century, when:
- the extent of the duties/responsibilities of the State was still limited; the State abstained from interfering in civil liberties, which would later be qualified as the first generation of human rights;
- the legislature enacted the written law;
- public administration was supposed to apply the written law almost mechanically;
- public administration was an instrument in the hands of political leadership, to which it was hierarchically subordinated;
- the relationship between the individual and the government was steeply vertical.[42]

A famous description and analysis of public administration in continental Western European countries about 100 years ago was made by the German lawyer and sociologist Max Weber; he constructed an empirically based model of public administration in the Prussian *Rechtsstaat* of his days, which he called *bureaucracy*. In his work, this word did not have the negative connotation it would later acquire.

In order to meet the basic requirements of the rule of law, Weber's concept of bureaucracy is characterised by:
- impersonality: the official dealt with the individual without respect of persons (*sine ira et studio*), in order to meet the requirement of equality;
- foreseeability: the acts of the official should be foreseeable, in order to meet the requirement of legal certainty;
- formalism: the official should abstain from any arbitrariness, in order to meet the requirement of fairness.

The written law was the basis for the exercise of public power, and for its acceptance: the *rational-legal* type of authority.[43]

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[42] See the German concept of *Hoheitsverwaltung*.
[43] As compared to authority based on *tradition* or *charisma*.

2. Modern administration

Since the days of Weber much has changed in the role of the State and its relationship with its environment, in particular during the second part of the 20th century:

a. Role of the State:

The rise of basic/human rights has already been mentioned. *Human rights are government obligations*, i.e. to respect, protect and fulfil these rights.

For the first generation of human rights (the civil and political rights) the focus is primarily on the negative obligation of the State and its officials to respect these rights and (within certain limits) to abstain from any behaviour that could interfere with them. However, these rights may also require an active, positive role of the State to establish the necessary practical conditions (e.g. to ensure that the judiciary is sufficiently equipped, or to establish the necessary conditions with regard to the right to life, to the integrity of the body or to private life and family life).

On the other hand, the second generation of human rights (the economic, social and cultural rights) may primarily require an active role of the State and its institutions in order to fulfil these rights. However, some of these rights also suppose an attitude of respect by public authorities (e.g.: the field of education, where the views of parents are concerned).

In particular, the second generation of human rights implied new duties for the State, in order to guarantee and realise these rights in the field of economic, social and cultural policy. Here, the focus is not on protection of the individual and his liberties against the State, but rather on his protection by the State, against personal and social risks and threats, in order to promote his development and liberties. In combination with economic growth for many decades after World War II, western democracies in particular consequently established the welfare State.

In the present rather difficult economic circumstances, governments in welfare States now face the need to find a new balance between political ambitions and budgetary constraints, which may result in a lack of sufficient resources to meet all human rights obligations as elements of their rule of law. The same holds true even more for those States that are at a lower level of economic development. Nevertheless, these obligations continue to be a standard for government policy, and should be realised to the greatest extent possible within the available resources of the State concerned.

b. Relationship between State and society

The *Hoheitsverwaltung* is history: nowadays relationships between the government and the individual are horizontal rather than vertical, and the individual has a more emancipated position *vis-à-vis* the public authorities.

In the last quarter of the 20th century, limits to the capacity of the government became the subject of debate,[44] in particular based on a comparison between *government* and *market* as different institutional arrangements to provide public goods and services.

However, privatisation has also demonstrated failures and risks, and awareness has grown that in many fields the State continues to have its own and unique role, also in order to guarantee and supervise the proper functioning of markets.

Consequences

What are the consequences of these developments for the role of modern administration? With the increase in the roles and duties of the State, the extent, diversity and responsibility of public administration have increased tremendously. At the same time, the legislature has withdrawn from giving detailed rules, and thus made room for public administration to set rules as well. Moreover, for the implementation of the law and public policy, public administration has gained wide discretionary powers. In the same period, the dominant role played by lawyers in public administration for so long came to an end.

Altogether, nowadays, within the modern State, public administration is itself an actor with impressive powers.[45] The word 'bureaucracy' has gained a negative connotation. As a consequence, the need for regulation, supervision, control and accountability of public administration has a new dimension.

The answer (combined with reinforcement of democracy) is: the rule of law. The essentials of the rule of law as they already existed in the days of Max Weber continue to have their meaning now. They must be respected and obeyed, and carried out and implemented in tune with the developments and requirements of modern society. This brings modern administration face-to-face with new dilemmas and the necessity of striking a proper balance, inter alia, between the requirement of foreseeability/certainty and flexibility, between the requirement of equality and the need to respect individuality, or between the requirement to avoid arbitrariness and the need to demonstrate a client oriented attitude.

Against this background, focus will now be placed on the implications of the rule of law for modern administration.

IV. Implications of the rule of law for modern administration

The basic principles of the rule of law have remained unchanged, and continue to have their implications for modern administration. Given the separation of powers, public officials must respect:
- the law as it has been established by the democratically elected representative bodies, and

[44] 'The government as the problem'.
[45] So that it can be described as a *'fourth power.'*

- the final word of the independent court in individual disputes in which the government is involved as a party. This not only implies full co-operation as party in the judicial process, but also prompt obedience to the decisions of the courts. Given the internationalisation of the legal orders, this includes, for the Council of Europe member States the European Court of Human Rights in Strasbourg, and for the EU countries[46] the Court of Justice in Luxembourg.

The starting point for the use of public power is its basis in the law: a public official may only use public power if this has a basis in the law, and only for the purpose for which the law has attributed this power.[47] Related to the attribution of public powers is the duty of accountability for their use. This accountability has various avenues. From the point of view of the rule of law, the judiciary and (where this institution exists) the Ombudsman are the relevant fora. Wider accountability also involves the political forum, the auditor and also the public, through the requirement of open government and transparency. Public power therefore always is, and should be, *limited* power.

An essential condition for the rule of law to be respected and realised is that it has become part of *administrative culture*: that public officials have assimilated the idea of the rule of law as natural for the way in which they perform their duties.

Against this background, I now return to the distinction I made earlier between material and formal premises derived from the rule of law. When talking about the implications of the rule of law for public administration, there seems to be a tendency to focus primarily on formal requirements: premises regarding the implementation of public policy and the law in the administrative process *vis-à-vis* the individual. However, the rule of law also implies that the law sets rules for the *substance/content* of decision-making, both public policy in general and decisions in individual cases.

Therefore, I shall start by referring to the tasks and duties of the State as laid down in the law, and in human rights provisions in particular, and after that turn to the ways in which public administration should implement these tasks when dealing with the individual.

1. Duties of the modern State

For the purpose of analysis in this contribution, the activities of the modern State can be divided into three categories:

a. To uphold the integrity of the State and its territory and interests, to guarantee and maintain public order in society, and to guarantee and provide safety.[48]

This is the classical role of the State, to which the monopoly of the legitimate use of force, as well as civil and political rights, are related.

[46] With a view to the permeation of EC law in the national legal orders of the EU member states.
[47] Ban on *abus de pouvoir* and *détournement de pouvoir*.
[48] In German: *Ordnungsverwaltung*.

An important area is that of the application of criminal law: fighting criminal behaviour and, today, organised crime and even terrorism. Here, the rule of law sets requirements which may create tensions between basic rights and the aim of effectiveness. For example:
- the effective tracing of suspects of crimes, with all available methods and modern techniques, may conflict with the elementary human rights of suspects, such as their right to protection of their privacy and the *nemo tenetur* principle;
- protection of and respect for the rights of the suspect may conflict with the interests of (possible) victims, and of the safety of society in general.

The rule of law may also imply the need for public administration in individual cases to strike a proper balance between possibly conflicting civil rights, e.g. the right to equality and to freedom of religion.

b. Giving guidance to/steering of the future development of society.[49]

Here, the rule of law both sets premises for public policy-making based, inter alia, on the second generation of human rights, and at the same time implies limits for policy-making and decision-making, for instance the need to balance different requirements. For example:
- the promotion of economic development and the need to respect the interests of the environment. For instance, for the EU-countries, the Habitat Directive poses important limitations on decision-making regarding projects in protected areas;
- the use of new scientific/technological possibilities such as in the field of transport, communication or life sciences and the need to protect other interests, such as the environment or the privacy of the individual.

c. Providing services to the public.[50]

Here, the rule of law is the basis for claims by the individual *vis-à-vis* the government, also derived from second generation human rights, e.g. in the field of education, social security, combating poverty, housing and health care. At the same time, there are limits with regard, inter alia, to the freedoms and responsibilities of the individual and his or her relevant groups, as well as the continuous need to adapt public policy to new developments regarding, for instance, the composition of the population (which changes as a consequence of the ageing of the population or of immigration) and economic or technological developments.

More particularly, it is the duty of public administration to decide whether requests/applications by the individual fall within the limits of the rights laid down in the law in the fields mentioned.

The rule of law has important implications for modern administration, regardless of the duty/field concerned, and common to all of them:
- the need to identify and balance different and occasionally opposite values, rights and interests. This requires keeping an eye open for when this is needed, and the ability to take fair decisions;

[49] In German: *Steuerungsverwaltung*.
[50] In German: *Leistungsverwaltung*.

- the need for thorough preparation of the decision to be taken, based on the investigation required for that decision;
- the need to be as foreseeable as possible, and to be transparent, in open communication with all interested parties.

Meeting these needs implies that public administration has both to respect and to realise the rule of law. As the role of the written law (and hence the influence of the democratically legitimized legislature) in a large number of policy areas has declined, the discretionary powers and accordingly the responsibility of public administration have increased. Similarly, in a State governed by the rule of law, the supervision by the courts of the ways in which the public administration performs its duties, and their impact on these ways, has also increased.

2. Implementation

To begin with: the concept of good administration has a wide range, and includes a variety of requirements for modern public administration. They have a legal dimension, which refers to the rule of law, and an *economic* dimension, which refers to the important requirements of *effectiveness* and *efficiency*. Given the subject I was invited to deal with, this paper is limited to the consequences of the rule of law for modern administration.

Article II-41 (in the Title on Citizenship) of the European Constitution, as drafted by the European Convention, deals with the *right to good administration*: the right of every person *'to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union'*. This right had already been elaborated earlier by the European Ombudsman, in *The European Code of Good Administrative Behaviour*.

Requirements of good administration such as those established by the European Ombudsman, and incorporated in the draft European Constitution[51] serve to protect the individual against maladministration. They are not only of relevance for the bodies and officials of the European Union, but may be considered part of the legal-administrative culture of every modern European State governed by the rule of law. Together, their application guarantees that the implementation of public policy is in accordance with the requirements of the rule of law, so that it can be seen as administration of justice.

Good administration refers both to the full range of actions of public administration in general, and its written decisions in particular. The starting point for public administration in complying with the rule of law through good administration is its duty to respect the written law and the limits of its powers as defined by the legislature, and not to abuse these powers for purposes beyond those for which they have been attributed, let alone for personal purposes.

[51] See also, for Council of Europe countries: *The administration and you*. Principles of administrative law concerning the relations between administrative authorities and private persons. A Handbook. Council of Europe Publishing, 1996.

Further, good administration implies the following requirements for public administration:

a. With regard to the attitude, behaviour and communication of the official towards the individual in general:

- attitude: impartiality; objectivity; avoidance of prejudice;
- behaviour: courtesy and helpfulness; giving due care; transparency and accessibility.

However, it should be observed that there is also a duty for modern administration to actively supervise and uphold the compliance of individuals and organisations with the legal obligations imposed on them and, where necessary, to impose sanctions on those who violate those obligations, in order to defend and protect all those whose interests are served by these obligations;

- communication: in comprehensible language and documents/forms which are comprehensible to the individuals for whom they are intended; giving the necessary information and, in particular, access to files or other relevant documents; acknowledgement of receipt of letters; giving adequate information about the right to complain and/or to appeal.

b. With regard to the substance of decision-making:

- respect for the principle of equal treatment of cases to the extent to which they are equal, and avoiding discrimination;
- respect for the principle of legal certainty/foreseeability, in order to meet legitimate expectations;
- consistency; avoid arbitrariness/fulfilment of the requirement of fairness; proportionality.

c. With regard to the process of decision-making:

- to form decisions: giving reasons;
- preparation of decisions: hearing interested parties; adequate investigation of all relevant circumstances;
- timing of the process of decision-making: with due speed and within reasonable time.

In many cases, the individual must observe certain legal terms, with a serious outcome if he or she exceeds them. From the point of view of credibility of government, it is very important for public administration in its turn to observe legal terms set for its own decision-making.

What has been said above shows that the concept of good administration covers a wide range of requirements. At the same time, study of the development of modern administration makes it clear that good administration is a dynamic concept, the content of which has evolved and may continue to do so, in relation with development of the environment of public administration. Against this background, codification of the right to good administration in a text like article II-41 of the European Constitution, with only three requirements, deserves critical attention.

Infrastructure

Compliance with the requirements of good administration also has consequences for modern public administration from the point of view of organisational infrastructure:
- personnel: the need for sufficient capacity and quality, inter alia in the field of legal expertise. A *legal controller* could contribute to monitoring the quality of the work from a point of view of the rule of law;
- standards: the need to develop benchmarks and set standards to be complied with;
- complaint mechanisms: the establishment of institutional arrangements for dealing with complaints by the public, both internally and by an independent Ombudsman;
- feedback: the need to guarantee that decisions of external control bodies (e.g. courts; Ombudsman; auditor) are obeyed and receive the necessary follow up, also with a view to preventing the same problem from arising again;
- internal checks and balances: the prevention of abuse of power by public officials for personal purposes, and promotion of their integrity.

V. A right to good administration?

At the beginning of this paper the significance of the concept of the rule of law, in a democratic State, was related to the need for legitimacy of the exercise of public power. When public administration meets all the requirements that follow from the rule of law, it fulfils the requirement of *good administration*. Good administration is not a goal in itself, but a means for implementing the rule of law. It may be seen as the umbrella covering a variety of specific requirements, all which have their special contribution to make to imposing the rule of law, and promoting the legitimacy of government and its decisions. Each of these requirements is an instruction for modern administration and, if it fails to follow this instruction, a criterion for the assessment by independent monitoring bodies: the judiciary and the Ombudsman.

If modern administration meets these requirements, it may indeed be qualified as good administration. And this is what we wish every individual citizen in all the member States of the Council of Europe, and worldwide, to experience in his or her contacts with public administration.

Panel discussion: Principles governing good administration

(transparency in administrative action; access to the administration; effective and clear administrative procedures)

Principles governing good administration[52]

Mr Theodore FORTSAKIS
Professor of Public Law, Athens University, Greece

In the field of administrative law, the principle of good administration is at once a long-standing idea and a ground-breaking one. Its specific content has gradually been nurtured within the framework of the long-established concept of user protection (***A***) and this principle, enshrined and elaborated on in various instruments and European case-law, now stands as one of the cornerstones of modern administrative law (***B***). The following observations centre on these two points. They are based not on any one body of national administrative law, but rather on a general European model which is essentially a distillation of the rules of administrative law commonly accepted in Council of Europe States, as cited in "*The administration and you – A handbook*[53].

A. *"Good administration" as a factor in user protection*

The notion of good administration, in terms of the development of administrative law, is closely bound up with the idea of user protection. Indeed, as will be explained in due course, it originated there. User protection has long been recognised in administrative law as an important counterweight to the considerable privileges which this right confers on the administration, whose actions are, by definition, designed to serve the public interest. For administrative action exposes users to the constant risk that their lawful interests and/or individual and social rights, as enshrined in various bodies of legislation and guaranteed by supralegislative international provisions, might be infringed through the actions of the administration. The necessity for user protection, as a general principle that informs all administrative action, thus stems from the very principle of administrative legality.

It is worth noting that, in administrative law, this protection operates on two fronts: firstly, in a negative sense, in that it prevents administrative bodies from taking steps that would harm users' lawful interests and rights, and secondly, in a positive sense, in that it actively requires administrative bodies to exercise their statutory (by issuing

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[52] Introductory report for the panel discussion.

[53] The administration and you – A handbook. Principles of administrative law with regard to relations between the administrative authorities and private individuals. Council of Europe Publishing, Strasbourg, 1997.

administrative acts of any kind) and practical activities in such a way as to serve the lawful interests or specific rights of users.

User protection needs to be understood in very broad terms, therefore: it needs to be included in our understanding of all the provisions that define the powers and responsibilities of the administration but also its aims. Where the activities of public corporations are exercised not through instruments that involve public authority, but through private-law instruments, service users will further enjoy the protection that is afforded them by private law (like any user/consumer governed by private law), in addition to that afforded by administrative law. The notion of "users", meaning any third parties who are affected by the regulatory and productive activities of the administration, needs to be understood, too, in such a way as to encompass the administration staff, whatever the nature of the employment relationship.

Case-law breaks down the idea of user protection by assigning it a series of concrete principles. These principles are effectively the means available to users to enable them to obtain effective protection vis-à-vis administrative action. They can be listed as follows:[54]

- *The principle of equality.* The principle of equality of users in their dealings with public services. The notion of public services needs to be understood here in a functional sense, as encompassing any State body, local and regional authorities, public corporations and any other legal entity (ie a legal entity belonging to one of the entities mentioned but governed by private law), all of which have a duty to provide their services or produce their goods with due regard for the constitutional principle of equality.

- *The principle of "good administration" (in the strict sense) or "useful administration".* The principle of good administration: here, the term "good administration" has a much narrower meaning than that ascribed to it in the context of this conference and signifies "useful administration". We find ourselves here at the very roots of the idea of good administration: according to this more limited principle, administrative bodies have a duty to exercise the powers and responsibilities vested in them by existing laws and regulations, by drawing on the prevailing concept of law, in such a way as to avoid an overly rigid application of the statutory provisions. In other words, not only must they avoid any unfair doctrinal approach but they must also endeavour to adapt the legal rules to social and economic realities. The measure of "good administration" in these circumstances is dictated by the key notions of proportionality and legitimate user expectations, notions which, in most European countries, have already been elevated to the status of self-contained principles and even, in some cases (as in Greece) given constitutional force. These, too, are now regarded as general principles of European law.

- *The principle of proper functioning of the administration.* According to this principle, administrations are required to carry out their activities not only in accordance with the relevant legal rules but also in a professional manner and in keeping with the facts of

[54] This list basically echoes that compiled by Professor Spiliotopoulos in his *Droit administratif hellénique*, Paris, L.G.D.J. 1991, § 82.

common experience. They are further required to behave in good faith, such as this needs to be understood in relation to a particular activity.

- *The principle of establishing procedures for hearing users beforehand and providing them with information.* According to this principle, users have the right to be invited by the administration to express their views and to be actually heard by the administration prior to the adoption of any individual decision that might adversely affect them, insofar as this decision is not unrelated to any subjective behaviour on the part of the user concerned. Secondly, the administration has a duty to provide users with any information in the possession of the administrative departments that concerns them, while offering them the opportunity to state their views, something that can be done through a variety of arrangements. In addition, users must have some guarantee that their affairs will be dealt with in a thorough and impartial manner. They must also be able, through various types of administrative appeal, to ask the administration to review their case.

- *The principle of appointing an ombudsman.* The principle of appointing an ombudsman in the various branches of law, which has already been applied in most European countries, represents a major step forward in user protection and does not require any particular comments here. The fact, too, that this conference was organised with the help of the Polish Ombudsman's Office shows to what extent this principle, derived from the context of user protection, has come to be equated today with the idea of sound administration.

- *Justification of administrative decisions.* Like the previous principle, the principle of justifying administrative decisions does not call for any particular comments, as it is already widely accepted in virtually every European legal system.

- *The principle of access to administrative documents.* The principle of access to administrative documents, to which must be added the principle of the need to regulate the formation, composition and operation of corporate bodies and, more broadly still, the principle of the need to apply to administrative action rules of administrative procedure, has its roots, beyond the specific legal rules establishing them, in the seminal idea of user protection.

- *The principle of establishing independent administrative authorities.* The purpose of the principle of establishing independent administrative authorities, ie authorities which, while still administrative in nature, are not part of the administrative hierarchy and therefore provide, from this point of view, an additional safeguard for users, is to protect the latter in the field of individual rights or in areas which involve the use of sophisticated technologies. The Swiss Constitution, which was recently revised and breaks new ground in this respect, now provides for five "independent authorities" which, although still (tacitly) administrative, actually have a hybrid status, standing as they do on the boundary between the executive and the legislature.

- *The principle of establishing judicial protection*. The principle of establishing judicial protection implies the power to set aside or amend any administrative decisions which infringe the lawful interests or rights of users. In addition, this protection includes compensation for any damage or loss suffered by users as a result of the unlawful performance of administrative action, and also criminal prosecution of those

responsible. Finally, too, this principle could not be effective without special provision for alternative solutions to administrative disputes, such as troubleshooting, negotiated settlement, mediation, arbitration, etc. The recent Council of Europe recommendation No. (2001) 9 is explicit on this point.

*(**B**) European right to "good administration"*

The expression "right to good administration" has become somewhat fashionable and appears in various European and national legal instruments. Reference to it can also be found in the case-law of the different European courts. There is, however, some uncertainty as to its precise meaning. For in order to be of use, ie capable of serving as a legal basis that would enable users to obtain effective judicial protection, any reference to this general principle needs to be specific, indicating the precise rule derived from this principle that has been infringed in a given case. No doubt as its content gradually develops, it will acquire a framework that will create new obligations for the administration. Its function is thus ambivalent.

On the one hand, it acts as an umbrella, under which disparate rules are clustered together around a common, guiding idea, namely the idea of good administration; the right to good administration, indeed, can now be said to encompass most of the specific rights stated above as forming part of the arsenal aimed at protecting users from administrative action, which it presents as a kind of generic system. From this point of view, the right to good administration is the culmination of an evolutionary process which dates back several decades.

On the other hand, it can itself serve as a springboard for specific new rules relating to the same idea. The principle of good administration could be to administrative law what "good governance" (a time-honoured expression) and "good legislation" (a less established term) are to international and constitutional law. Both concepts are very much in vogue at present. The first implies that any power in the field of international relations and constitutional law is to be exercised for the purpose of rendering democracy and the rule of law effective[55]. The second, "good legislation", involves applying a series of rules to ensure that government regulations are of the requisite quality. These rules are more specifically aimed at ensuring that regulation is necessary, that the regulation agreed upon is the most appropriate one in relation to the aim pursued, that the consequences of the regulation have been properly weighed and that its content is clear and consistent and its implementation effective. These rules have been enshrined in a recommendation by the OECD[56]. In a broad sense, these precepts may be seen as forming part of the notion of good administration, particularly as administrative action also involves issuing general rules of law.

*(**a**) The European Commission*

The Commission's Rules of Procedure [C(2000) 3614] is particularly useful in obtaining a sound grasp of precisely what is meant by the right to good administration.

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[55] See for example Boutros Boutros-Ghali, An Agenda for Democratization, United Nations, New York, 1996.

[56] Recommendation of the Council of the OECD on improving the quality of governement regulation (adopted on 9 March 1995).

For attached to this text is the "Code of good administrative behaviour for staff of the European Commission in their relations with the public". At the beginning of this document, it is stated that the Commission and its staff have a duty to serve the Community interest and, in so doing, the public interest. The Code goes on to say that the public has a right to expect quality service and an administration that is open, accessible and properly run. Quality service, it is explained, requires the Commission and its staff to be courteous, objective and impartial. Under the heading "Purpose", it is stated that to enable the Commission to meet its obligations of good administrative behaviour, in particular in its dealings with the public, the Commission undertakes to observe the standards of good administrative behaviour set out in the Code and to be guided by these in its daily work.

The Code centres around six points. It begins by establishing the general principles of good administration: lawfulness, non-discrimination and equal treatment, proportionality and consistency. Secondly, it lays down guidelines for good administration, namely objectivity and impartiality, and information on administrative procedures. Thirdly, under the heading "Information on the rights of interested parties", it establishes the principle of listening to all parties with a direct interest, the duty to justify decisions and the duty to state arrangements for appeal. Fourthly, it establishes the rules for dealing with inquiries, including notably: requests for documents, stipulating that if the document has already been published, the person making the inquiry must be directed to the official sales agents or to centres which provide free access to documents, including in electronic form; correspondence, with the duty (Art. 21 of the Treaty) to reply in the language of the initial letter provided that it was written in one of the official languages, within 15 working days, indicating the person responsible - where a reply cannot be sent within 15 working days, a holding reply is to be sent; telephone communication, with staff being required to identify themselves when answering the telephone and to return calls as promptly as possible; electronic mail, with the duty to reply promptly unless the e-mail message is the equivalent of a letter, in which case it is to be handled according to the guidelines for handling ordinary correspondence; the protection of personal data and confidential information, with a duty to respect the rules on the protection of privacy and personal data, to respect professional secrecy (Art. 287 of the Treaty), to respect the rules on secrecy in criminal investigations and the confidentiality of matters falling within the ambit of the various committees and bodies of the Administration (Art. 9 of and Annexes II and III to the Staff Regulations). Sixthly, under the heading "Complaints", it is stated that in the case of a breach of the principles set out in the Code, complaints may be lodged directly with the Commission, which will forward them to the relevant department, who is bound to reply to the complainant within two months. The complainant then has one month in which to apply to the Secretary-General of the European Commission to review the outcome of the complaint, who is in turn required to reply within one month. It is further stated that a complaint may also be lodged with the European Ombudsman (Art. 195 of the Treaty).

Even though the principles laid down in the Code do not really contribute anything new to what has already been said on the subject of user protection, and even though the Code in theory applies only to Commission staff, this instrument, by its nature, clearly has a symbolic significance that goes far beyond its formal scope, and provides a template that could be used by any administration.

*(**b**) The Court of Justice and the Court of First Instance*

The case-law of the Court of Justice and the Court of First Instance often refers to good administration, to conclude that there has – or has not – been an infringement of "good administrative practice" or of "proper Community administration" or even of "the principle of good administration". In order to decide such matters, the courts generally begin by seeking to establish the infringement of a more specific rule. A recent example was the judgment handed down by the Court of First Instance on 17 September 2003 (case T-76/02), where it was found that the failure to provide access to administrative documents constituted a breach of good administrative practice. The judgment was careful to state precisely which rule had been infringed, namely Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, which was adopted to clarify Art. 255 of the Treaty in which such access is grounded. Sometimes, however, instead of this reference to a very specific, pre-existing rule, the courts will find that good administration has been impaired by the display of a particular attitude, referred to as "maladministration": according to the Court judgment of 18 September 2003 (case C-338/00 P), for example, while it is acknowledged that by disclosing to the press, with a high degree of accuracy, an essential element of the contested decision before it was adopted, namely the amount of the fine envisaged, the Commission adversely affected the dignity of the undertaking charged and acted contrary "to the interests of proper Community administration", this irregularity was not enough to set aside the decision in question, as it had not been established that the content of the decision would have differed if that irregularity had not occurred. Sometimes mention is made of an infringement of the principle of good administration without any further elaboration, as in the judgment of the Court of First Instance of 30 September 2003 (case T-346/02 and T-347/02). Elsewhere, the principle of good administration is referred to as one of a series of other similar principles, without actually singling it out. The judgment of the Court of First Instance of 21 October 2003 (case T-392/02) accordingly dismissed the application on finding that there had been no infringement of "the principles of equal treatment, legal certainty, sound administration and good faith". Sometimes, the reference to the principle of good administration is left implicit, as in the Court judgment of 16 October 2003 (case C-339/00), where the application was dismissed because there had been no infringement of the principle of the protection of legitimate expectations, without expressly referring to the principle of good administration from which it derives.

*(**c**)The European Ombudsman*

(c-1) Instruments establishing the European Ombudsman

Legally speaking, the appointment of a European Ombudsman has its origins in Article 195 of the Treaty (Art. 138 added at Maastricht) and in a European Parliament decision adopted in 1994 (O.J. L 113 of 4-5-1994, p. 15) concerning the statute and general conditions governing the performance of the duties of the European Ombudsman. Article 195 provides for the appointment of a European Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a member State concerning "instances of maladministration in the activities of the Community institutions or bodies", with the

exception of the Court of Justice and the Court of First Instance acting in their judicial role; where the Ombudsman establishes an instance of "maladministration", he refers the matter to the institution concerned, which has a period of three months in which to inform him of its views. Under Article 2 of the 1994 decision by the European Parliament, any citizen of the Union or any natural or legal person residing or having his registered office in a member State of the Union may, directly or through a Member of the European Parliament, refer a complaint to the Ombudsman in respect of an instance of maladministration in the activities of Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. The draft European Constitution provides a constitutional framework (Art. 1-48) for the appointment of a European Ombudsman, in the following terms: "A European Ombudsman appointed by the European Parliament shall receive, investigate and report on complaints about maladministration within the Union institutions, bodies or agencies. The European Ombudsman shall be completely independent in the performance of his or her duties". Neither of these texts, therefore, elaborates on what is meant by the notion of "maladministration" to which they refer. It is not clear whether it is to be defined in terms of lawfulness or whether it applies more generally to any instance of "maladministration", in the sense of a poorly run administration. It remains to be established, too, under what circumstances "maladministration" may be said to have occurred.

(c-2) The decisions of the Ombudsman

The same practices observed in relation to European case-law can be found in the decisions of the European Ombudsman: decision 43/2000/PB, for example, refers to the idea of a breach of the "normal practice" of the Commission and to the notion of "maladministration". To give just a few recent examples, selected at random, decision 1206/2000/BB refers to an instance of "maladministration". Decision 232/2001/GG refers to the Code of Good Administration and concludes that the principles of good administration would have required the Commission to carry out a comprehensive examination in cases where it was alleged that there had been "maladministration" in a tender procedure. According to decision 1702/2001/GG, "good administrative practice" or the "principle of good administration" demands that applications be examined in the light of the requirements to which they are subjected by the rules in force; likewise, applicants must be kept informed about the decisions the administration adopts in their regard, all the more so if such information is requested by applicants; dealing with applications within a reasonable time is also part of these same principles, as is the right to be heard before an adverse decision is taken. Decision 1767/2001/GG concludes that it is good administrative practice to reply to citizens' letters within a reasonable time, and that failure to do so constitutes an instance of "maladministration". According to decision 331/2002/(SM)GG, the principle of good administrative behaviour likewise requires that decisions be taken within a reasonable time, while decision 914/2002/ADB holds that the same principle requires letters to be answered and decisions taken within a reasonable time. According to decision 1237/2002(PB)OV, respect for legitimate and reasonable expectations is part of good administrative practice. Similarly, decision 1579/2002/IJH states that it is good administration to respect the reasonable expectations created by the behaviour of an institution or body. Finally, decision 1837/2002/BB looks to the code when citing the right to receive a prompt reply to a letter.

It is worth noting that the office of the European Ombudsman has its own system for classifying cases where the right to good administration is deemed to have been infringed, based on the following categories: abuse of power, avoidable delay, defence, discrimination, failure to ensure fulfilment of obligations, lack or refusal of information, legal error, negligence, lack of reasoning, procedure (see the Ombudsman's website and the Guide for citizens, published by the Ombudsman in December 2002, p. 36).

*(**d**) The Charter of Fundamental Rights of the European Union and the draft European Constitution*

The principle of good administration finds a fuller expression in the Charter of Fundamental Rights of the European Union, Chapter V of which, on citizenship, expressly guarantees the right to good administration (Art. 41):
"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 notably 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."

The Charter goes on to establish other principles which, according to what has been said, bear a direct relation to the principle of good administration, even though they are treated separately. Some examples are the right of access to documents (Art. 42) and to the Ombudsman of the Union, to whom any EU citizen may refer cases of maladministration in the activities of Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role (Art. 43). Others include the right to petition the European Parliament (Art. 44), the right to the protection of personal data (Art. 8) and equality before the law (Art. 20), non-discrimination (Art. 21), the right to cultural, religious and linguistic diversity in the European Union (Art. 22), the principle of equality between men and women (Art. 23) and finally, the provisions pertaining to justice, in particular the right to an effective remedy and to a fair trial (Art. 47).

Here again, there is no denying the highly symbolic value of the Charter even though, in theory, it applies only to EU institutions and bodies with due regard for the principle of subsidiarity and to the member States only when they are implementing Union law, it being understood that they shall respect the rights, observe the principles and promote the application thereof in accordance with their respective powers, and even though the Charter does not establish any new power or task for the Community or the

Union, or modify powers and tasks defined by the Treaties (Art. 51). Should the draft European Constitution be adopted in its current wording, the Charter will form part of it (part II).

The draft Constitution contains other provisions as well which, although they do not expressly refer to good administration, either derive from or rely upon it. Notable examples include the provisions on transparency of the proceedings of Union institutions (Art. 49), which refer specifically to the idea of "good governance", the provisions on participatory democracy (Art. 46), the provisions on protection of personal data (Art. 50), on citizenship of the Union, the European Ombudsman (Art. 48), etc.

Conclusion

Having reviewed the history of the "new" European right to good administration and sought to understand it in its present, still rather fuzzy form, the time has now come to ponder its future. Before making any predictions, however, it needs to be established whether this notion now acts as a kind of umbrella for the numerous disparate rules previously grouped around the notion of user protection – in which case the change would be a quantitative one – or whether it is of an entirely new nature – in which case there has been a qualitative shift. It is still too early to give a definite answer. There is good reason to think, however, that in future, any oversight brought to bear on the activities of the administration will focus not just on specific administrative acts, but also on the administrative procedures themselves. In other words, there has been a shift in emphasis from the outcome of administrative action (result) to administrative behaviour (functioning). Other clues, the discussion of which is beyond the compass of the present report, suggest that this is indeed the direction in which the concept of good administration is moving. "Good administration", "good governance", "good legislation" all effectively presuppose the existence of a large pool of "good people". Is a "good administration" one that makes "good decisions" (ie legal decisions) or will we eventually come round to the view that "good acts" are ones that are produced by a "good administration", without the need for any other reference to some predefined legality? In other words, are "good" acts to be defined objectively in their own right or should they, as Aristotle suggests, more properly be regarded as the acts of a "good" person?

Panel discussion: Principles governing good administration

(transparency in administrative action; access to the administration; effective and clear administrative procedures)

Right to Good Administration: Procedural, Systemic and Substantive Aspects

Mr Zygmunt NIEWIADOMSKI
Head of the Chair of Business Law,
Warsaw School of Economics (SGH)
Justice at the Supreme Administrative Court, Poland

Surely, there is not a single State whose citizens are perfectly happy with its administration, not just central government, but more or less so at the local government level. There is not a single State whose politicians and public administration employees do not see a need to improve administration. Hence the frequency of rehabilitation programmes and administrative reforms, quite often abortive and, consequently, resulting in zero improvements.

As a result, good administration is no longer the issue for political programmes and reform plans of successive cabinets. It is becoming a demand from each individual, a more or less conscious need translated into citizens' demands on the State: "I pay my taxes; therefore", as one may frequently hear, "I expect good administration. It is my right."

The right to good administration has become standard issue; where until recently it remained an appeal, owing to recent measures taken within the EU it is evolving into a norm. From the realm of declarations and expectations, it is slowly seeping into the EU legal system. The foundation was laid by the European Charter of Fundamental Rights adopted in Nice in 2000. Its catalogue of rights includes, inter alia, the right to good administration. Pursuant to Art. 41.2 of the Charter, every person has the right to have their affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. Consequently, every person has the right to be heard, before any individual measure which would affect him or her adversely is taken, except for cases of legitimate interests of confidentiality and of professional and business secrecy. The right breeds the obligation for administration to give reasons for its decisions.

Moreover, 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.

Last, but not least, 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 (Art. 41.3 and 4 of the Charter). Notwithstanding the above, pursuant to provisions of Art. 43 of the Charter, any citizen of the Union and any natural or legal person residing or having its registered office in a member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

The Code of Good Administrative Behaviour drafted by Jacob Södermann, EU ombudsman, on the initiative of Roy Perry MEP, stems from the right to good administration regulated by the EU Charter of Fundamental Rights and, as such, has become an act recommended for application in Community institutions and bodies.

Despite its lack of absolutely binding force, the Code may play an important role in enhancing the functioning of public administration/ civil service in EU countries, especially given that not all have codified their internal administrative procedures. The Code sets out the subjective and objective scope of application for its provisions, the general principles for handling cases, the procedure and time for handling a case, the appeals procedure, protection of personal information, right of complaint to the European Civil Rights Commissioner, obligation of giving widespread information on Code provisions and supervision of its application.

As for the subjective and objective scope of the Code's application, pursuant to the provisions of Art. 2, it is recommended that it should be applied not only before EU bodies, but also other European Communities institutions. The recommendation to apply the Code has been addressed to all Community civil servants regardless of their employment relationship, by the employer's express will, encompassing persons acting for the Community, including persons employed under civil law-regulated agreements, experts delegated by national civil service, and trainees. The Code is applicable to the handling of affairs of natural and legal persons regardless of their domicile or registered seat. This means, then, that the Code is applicable to natural and legal persons coming from non-member States if they appear before Community institutions and bodies.

Still, the Code is not binding upon the member States; this is not to say that their domestic bodies and other public institutions may not apply Code provisions. On the contrary, as mentioned above, the Code has been recommended by the European Parliament for use in each member State. Code provisions may not, however, be applied to internal relations between Community bodies (institutions) and employees. These are subject to separate regulations.

To summarise, the objective and subjective scope of applying the Code of Good Administrative Behaviour has been broadly defined to encompass both issues within the remit of public administration and private law affairs that natural and legal persons handle in contacts with EU bodies and institutions. The Code is binding on all institutional employees, not just civil servants, in terms of applying Code provisions regardless of the legal form in which a case is handled.

An attempt at evaluating the European Code of Good Administrative Behaviour and its provisions entails a statement that they are based on traditional values rooted in national codes of administrative proceedings. The Code is indeed a standard set of general rules for handling individual cases of natural and legal persons. It focuses less on regulating detailed procedural matters. It is a minimum set of universal rules for administrative conduct that modern-day administration should abide by. In this context, Poland's code of administrative proceedings is more advanced in terms of such regulations. This holds true also for other European Countries with codified administrative procedures.

Therefore, for such countries the Code will be not so much a set of legal regulations to be adopted in national legal systems as serve to enhance a conviction that procedural standards today play a significant role in the legal systems of States, and the democratic rule of law simply cannot do without them. In other words, without clearly regulated administrative procedures, civic rights may not be fully warranted. The assertion will have to be treated very seriously in countries attaching lesser importance to procedural matters.

Surely, the absence of codified administrative procedures does not mean that the legal systems of such States lack extensive procedural standards. They indeed exist, albeit largely intertwined with substantive law and less integrated internally. Meanwhile, in a modern State, a maximum possible degree in homogenising the modes of handling citizens' affairs is becoming a value in itself and the Code serves perfectly well to recall this, and also sets out the way to proceed before Community bodies and institutions. These fundamental functions of the Code alone are enough to be positive about its usefulness in today's environment.

The Code's significance goes well beyond the aforementioned functions, and is decisive for its relative use in the Polish environment, too, and for two reasons at least.

Firstly, with Poland's EU accession, the Code will become recommended procedural law.

Secondly, the Code illustrates the need to extend procedural regulations into extra-jurisprudential forms of administrative operations. Poland's Administrative Proceedings Code regulates proceedings which result in an individual administrative adjudication (decision, order), and on principle fails to stipulate other legal forms of administrative measures (understanding, agreement). Meanwhile, today's administration increasingly handles cases in extra-jurisprudential forms of actions. Power (governance through administration) is being replaced by negotiation and, consequently, concord (consensus). Hence, limiting procedural laws to public administration chiefly issuing decisions leads to a situation where the individual is deprived of procedural regulations when administration acts in other than jurisprudential forms.

Matters are regulated differently by the Code of Good Administrative Behaviour that is applicable to all forms of handling cases by Community bodies and institutions, including civil law mechanisms. There is also a procedural aspect to an agreement and, depending on the procedure for concluding an agreement by public

administration entities, its scope and content may vary. If this is the case, the Code has increased significance in Polish circumstances because Poland, on its EU accession, is obliged to extend provisions of the national Administrative Proceedings Code over all legal forms of operation by public administration so that administration is bound by procedural norms also when fulfilling its responsibilities in private law-regulated forms and, equally importantly, when setting policies in a given area.

This line of thinking leads to the conclusion that the right to good administration may not be limited to purely procedural aspects.

What is the right to good administration, then? What is its content? Is it meant to be about efficient, procedurally correct handling of a case, or is there much more to it? Will the right to good administration be consumed when an individual is served in a manner set out by the law, or will it happen only when, irrespective of procedurally correct operation of the administration, the individual obtains what is guaranteed by substantive law regulations and from a clearly designated body at that, which will then rule out possible disputes surrounding competencies?

Should the right to good administration be seen primarily in the context of procedural law, or is it equally a matter for substantive and systemic laws? The aforementioned regulation by the EU Charter of Fundamental Rights, as exemplified by the European Code of Good Administrative Behaviour, relates the right to good administration to procedural law. Likewise, in each member State, the right has so far been derived chiefly from procedural standards, especially in countries with codified administrative procedures. Nevertheless, the doctrine increasingly points to the right to good administration as one to be deduced also from substantive or even systemic law regulations.

What, then, should be the content of the right to good administration in substantive or systemic law? In the former, will the essence of the right to good administration be determined by the scope and quality of public services on offer, or by other factors and, if so, which? Another question is whether ensuring a clear-cut division of competencies in systemic law will suffice to assert that the right to good administration has been fulfilled? Or, is it a mistake to seek the right to good administration in the entire legislation? The perspective on the issues at hand would then change.

The above considerations and questions warrant a statement that treating good administration in terms of rights forces one to revisit views on the matter, both in doctrine and legislation. It would seem that it spawns a need to construct a new category of notion, i.e. right to good administration. While it should not pose any major problems in terms of doctrine, a normative construction of the above right may signify a revolution of sorts in systemic and substantive law. It will require a shift of mind in the philosophy underlying the construction of the substantive law system. Treating the right to good administration in substantive law terms should breed the individual's claim on the State to have good administration. The individual may thus effectively demand from the State not just to see a specific legal standard implemented, but to refer to the fact that, despite a specific legal norm being put in place, their right to good administration has been prejudiced, thereby exposing the individual to negative

consequences. Is such a claim legally feasible? If so, how should it be shaped for it to be realistic and enforceable?

Is it possible in the context of currently effective substantive law, underpinned by the idea of protecting individual rights from administrative activities? Administration may encroach on my rights only along the principles stipulated by the law. By limiting my rights, the law protects them at the same time, for it does not allow interference in cases other than those set out statutorily. Certainly, it is difficult to oppose protection of individual rights thus construed, but is the protection sufficient these days?

Surely, from the formal and legal perspective, as a rule the answer is 'yes'. In defence against administration, one may complain to courts, but this is a long and tedious exercise. Should mechanisms not be put in place to strengthen the administration's duty to protect citizens' rights? It seems they should. This, then, would mean taking the road referred to in German literature as "protection through administration", rather than "protection from administration" as has been the case for the "judicial rule of law".

Panel discussion: Principles governing good administration

(transparency in administrative action; access to the administration; effective and clear administrative procedures)

The right to information as a criterion of good administration

Mrs Teresa GÓRZYŃSKA
Professor, Institute of Legal Science,
Polish Academy of Sciences, Warsaw

1. It is not easy to identify what constitutes good administration. What is its role? What criteria should be used in evaluating it? What criteria must it meet to be qualified as "good"? Can good administration really exist? There is no doubt that it can better or worse, and one knows that the goal is to be closer to the first description. But how is this to be achieved?

In spite of these doubts, it is certain that there are conditions which facilitate good quality administration. Compendiums of rules for good administration, such as the European Code of Good Administrative Behaviour (2001), exist as official documents. This text does not concern national administrations directly, but it contains universal principles which can and should be applied by them. The principles of legality, non-discrimination, proportionality, impartiality, objectivity, a duty to state the grounds of decision, the right of appeal, etc., are, I believe, known in all European legal systems. In addition, the principles of numerous codes of conduct for various civil services seek to achieve better administration.

The criteria for good administration include access to public information. An administration which operates on the basis of secrecy cannot be considered a good one, since transparency has now become a legal principle on which the democratic countries are founded (and secrecy or confidentiality has become the exception). This rule emerged in western Europe in the 1950s and has now spread to almost all European States.

The public's aspirations to participation, influence, knowledge of what is going on, supervision of the authorities, autonomous and independent activity, and an opportunity to exercise or share power were grounds for calling into question the traditional model of administration and for seeking new administrative methods and new forms of relations between administrations and citizens. It is acknowledged that access to information is the means by which the conditions for communication, dialogue and participation in public life are created, and that it facilitates contacts between the various players and reduces conflicts. This more open-minded approach

was introduced using vocabulary that was sometimes fairly affected and pretentious, namely "glasshouse government", "transparent government" or "administrative democracy". In reality, the issue was action to ensure good administration.

The "movement to transparency" was considered by some to be a myth. Today, however, it must be acknowledged that this "myth" had, to a large extent, changed politics, administration and society, since it had endowed them with new instruments instituting a new balance between the obligation to maintain confidentiality and the requirement to make public information accessible. These instruments are the laws on freedom of information, on the right of access to public (official and administrative) documents, in which due account is given to the exceptions set out in the legislation, which are necessary in a democratic society and determined on the basis of legally-established interests.

Transparency and access to documents have their roots in international law texts and international documents which have moral force. In particular, the Universal Declaration of Human Rights (1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Covenant on Civil and Political Rights (1966) and the Charter of Fundamental Rights of the European Union (2000) represent a source and inspiration for national legislators.

The introduction of administrative transparency was a step towards better administration. This process has lasted until now, and continues to be developed.

2. These ideas have also reached Poland. I would not venture to state that good administration is already operating in Poland, but I can indicate that the right to information does exist, including access to public information and the principle of transparency in the legal sense. These principles are increasingly well-known. Thus, we have made considerable progress in this area by comparison with the previous era, a major step towards good administration, even if the reaction to these new mechanisms, and to the administration in general, is not enthusiastic. All too often, implementation of these laws is characterised by inaccuracies and lack of competence, and certain practices lead to a failure to observe the ethical principles concerned. Politics, often guided by the interests of various political parties or their particular interests, has a negative impact on administration. The politicisation of the executive branch, in the sense of political dependency that is almost equivalent to subordination, is currently highly visible, and is increasing. The old mentality is still alive, as is the fondness for secrecy.

We are not in the vanguard in this question of the right to information, and we are not yet fully accustomed to the principle of transparency, but this word no longer produces panic, and we are gradually adapting to it. Our experience is short, but the first steps have been taken. The history of the right to information in Poland is tied in with our country's recent history.

In Poland, the right to information was essentially brought to the awareness of the Polish public authorities and citizens by the Supreme Court, the High Administrative Court and the Constitutional Court, after 1989. Before this date, there existed the case-law of the High Administrative Court, which mainly concerned parties' access to information in the course of administrative procedures.

The right to information was introduced to the Polish legal system as a consequence of ratification of the International Covenant on Civil and Political Rights in 1977. However, the standards of international law were in reality applied very rarely in Poland by the administration's bodies or by the judges at that time. References to international law appeared in the judgments of certain courts just before 1989 and, of course, after that date. Today, this is common practice. In the new post-1989 era, the treaties and provisions have remained the same, but the interpretation has changed.

In 1992, the right to information entered the Polish legal system for a second time, following ratification of the Convention on the Protection of Human Rights and Fundamental Freedoms.

The above-mentioned case-law and ratification of the European Convention opened the way for the new Constitution of the Republic of Poland in 1997. Recognition of the right to information and the introduction of regulations governing the relationship between domestic law and international law created a constitutional basis for the development of each individual's new right and the new obligations incumbent on the public authorities.

During the period 1989-2001, in spite of the three courts' case-law and the entry into force of the Constitution, the Polish Parliament failed to adopt a law on access to public information. Resistance was clear in certain political circles. Opinions were aired to the effect that the constitutional provisions were sufficient for the exercise of this right, especially since the Constitution established direct application of constitutional provisions. The basic law provided that only the form of access to information would be the subject of legislation, and, for the Diet and the Senate, their rules of procedure.

Finally, the law on access to public information, dated 6 September 2001, entered into partial force on 1 January 2002, and its full entry into force is scheduled for 1 January 2005[57]. Its current implementation has already raised numerous practical problems which are being resolved by an evolving case-law approach.

Criticisms are frequently expressed about the 2001 law, and I share them. Despite this, it must be acknowledged that some of the regulations in this law are transforming the previous habits.

I will begin with those positive features which, in my opinion, bring us closer to good administration:

1) the very fact that the law was adopted, 11 years after the political transition;

[57] For example, the law requires the creation of a Bulletin of Public Information (BIP), which will contain an index of the bodies which should disclose information (the nature of these bodies, the scope and form of the information's transmission, the index of public information that may be disclosed). The BIP will be in electronic form, and be prepared by the government Website. This is an enormous task, and is being carried out in Poland for the first time.

2) the acceptance of the principle that every person has a right to public information, including foreigners and stateless persons. Opinions are divided on this subject, since the Constitution refers only to citizens as enjoying this right. In my opinion, the Constitution creates a basis for affirming every person's right. With regard to the constitutional provisions on the relationship between international law and domestic legislation, the rules of the European Convention and the International Covenant have primacy over national texts. According to the new case-law of the High Administrative Court, this concerns the right of every person;

3) acceptance of the principle that the person requesting public information should not be bound to provide an explanation for why he/she wishes to have access to the said information;

4) the range of bodies covered by the term "public information" is wide (wider than in Recommendation (2002) 2 of the Committee of Ministers of the Council of Europe to the Member States on access to public documents). They are: the State authorities – legislative, executive and judicial -, the bodies of the territorial authorities, bodies which represent the State Treasury, State legal entities and territorial authorities, trade unions and political parties which hold public information;

5) access must be implemented: a) through the Bulletin of Public Information, b) by individual request, c) through participation in the discussions of collegial bodies elected through universal suffrage, including sound or picture recording;

6) access is, in principle, free of charge, except for exceptions set out in the legislation;

7) if access is forbidden, the legal justification and the identity of the person who took the decision must be indicated;

8) the persons responsible for disclosing the information are obliged to identify themselves;

9) information on individual request may be disclosed in writing or orally;

10) information may be sent or transmitted by an appropriate means of communication;

11) the information must be disclosed as rapidly as possible, except in those circumstances set out in the legislation;

12) an administrative legal method (appeals against decisions to refuse access or against decisions not to consider a request) is provided for under the code of administrative procedure; after exhaustion of these appeals, it is also possible to submit a complaint to the High Administrative Court or to an ordinary court, depending on the subject-matter of the case in question.

These principles in the law on access to public information are transforming the relations between the administration and citizens. Does this represent progress towards good administration? Certainly, but as always with one proviso: that the bodies

which are obliged to disclose information are willing to fulfil their obligations and that the habit of disclosing information takes root in administrative circles. In other words, on condition that the law's provisions are correctly observed.

The above principles in the Polish law give us grounds to hope that there will be better administration. Unfortunately, there are also shortcomings, some of them serious:

1) the first shortcoming lies in the relationship between access and confidentiality. The 2001 law is not an implementing law to which the provisions of other laws concerning access or secrecy would be adapted. On the contrary, the law on access to public information follows the lead of former specific laws governing confidentiality in particular areas. In other words, this new law changes nothing in previous specialised legislation concerning the extent of confidentiality. This means that, in effect, legislative regulations governing confidentiality (e.g. the law on protection of personal data – 1997, or the law on protection of confidential information – 1999) preceded the adoption of the general legislation on the principles of access to public information – consequently, the cart has been put before the horse;

2) the language and terminology used in the law on access to information are not its strong feature; it fails to provide a clear definition of the main concepts: "public information", "public documents". The civil servants and other persons who are obliged to interpret the law find it difficult to understand;

3) the law fails to resolve certain important problems in practice: it does not shed light on the doubts concerning the accessibility of a document that is under preparation, the procedure for a request that is evidently unreasonable or, finally, access to the non-confidential section of a document that also contains protected information;

4) the law does not provide for any body that will monitor observance of its provisions; e.g. decisions refusing access to information are decided by the courts, which are already overburdened;

5) the law does not set out an obligation to inform the public about their right of access, or an obligation to provide the necessary training in this matter for civil servants. So far as I am aware, such training is organised in a relatively haphazard manner; in other words, it depends on each institution and the conscience of management staff.

These shortcomings could have been avoided, but the will to do so was absent. When the parliamentary discussions on the draft law were taking place in Poland, the Council of Europe's Group of Specialists on Access to Official Information (DH-S-AC) was drawing up a draft recommendation (official document Rec (2002) 2, adopted by the Committee of Ministers on 21 February 2002). During the parliamentary discussions, the draft recommendation was insufficiently used. In reality, although the Polish law admits a much wider range of bodies which are obliged to disclose public information than those in the recommendation, covering not only the executive branch, but also the legislative and judicial authorities, it completely neglects the question of exceptions to the principle of access, in that it fails to create a catalogue of subjects

which must or could constitute a ground for refusing access, and instead refers to the laws governing the different forms of confidentiality.

In my opinion, the Polish legislation does not regulate the problem of confidentiality in a felicitous manner. Although the right to information is included in the Polish constitution, and Parliament has recognised the need to regulate on the problems of access to public information through an ordinary law, it seems that the relationship between access and confidentiality is still far from being perfectly understood in our country.

In spite of these shortcomings and continued resistance to the right to information, access to public information and transparency, this last concept is making inroads into new areas of public life, particularly as a result of the new parliamentary and non-parliamentary texts (e.g. the Council of Europe Recommendation), our obligations under ratified international agreements, and the process of European integration. Evidence of this increased openness in Poland is provided by transparency in corruption cases. For example, the hearings of the parliamentary investigation committee have been broadcast for months now, in full public view. This is enabling light to be shed on the unofficial relations between the public authorities, politicians, senior civil servants and businessmen. This was previously unthinkable. One can choose to watch or not to watch, but access is available - and the right to information is being implemented.

3. In addition to the law on access to public information, this problem is also regulated by other laws, such as the 2001 law on The Right to Environmental Protection, especially its Chapter IV (designed on the model of the 1998 Aarhus Convention) on access to information, setting out the essential concepts and rules of procedure, which are different to those set out in the 2001 law; the State's monitoring of the environment and the dissemination of information about the environment; the public's participation in the procedure for protection of the environment.

As for the other laws, these include, *inter alia*, the 2003 law on regional planning and management (which sets out a procedure for informing interested parties), the 2003 law on the disclosure of economic information, the 1998 law on public finance (which includes a chapter on the transparency of public finances), the 2000 law on the promulgation of parliamentary legislation, and the 2001 law on the collection, processing and communication of information regarding criminal matters.

These are laws which have entered into force over the last few years. They are new not only in terms of age, but because this is the first time that such laws have existed in the Polish legal system, introducing new rights, new obligations on the public authorities and new customs.

The provisions regarding access to information are dispersed across several pieces of parliamentary legislation; e.g. the laws on regional authorities contain provisions on access to their bodies' debates, or on economic transparency.

It cannot be said that the right to information, access to public documents or transparency are unknown in Poland today, or that they are not regulated in the judicial sense. On the contrary, we have several legal instruments, but what is lacking is

awareness of their existence and of how they are applied. It should also be noted that the administration is increasingly aware of its new obligations and of the procedure set out in the law. In addition, the interested parties are increasingly informed about their rights.

Access is limited by the provisions on confidentiality (more than 40 forms of confidentiality).

4. Does the inclusion of the right to information and the principle of transparency in the legal system and in administrative practice mean that the Polish administration is experiencing a qualitative change? Has it become more effective? In my opinion, it has. In spite of some legislative shortcomings, in spite of the difficulties in implementation and in achieving uniform interpretation, the public authorities and the interested parties are increasingly aware of these new mechanisms. The French or American administrations do not perhaps remember their early steps in this area, accompanied by resistance and aversion on the part of civil servants. This phase has now passed for them, but not for us, and we are currently experiencing an occasionally painful adaptation period.

These new rights are also an opportunity to improve the relationship between the State and administration on the one hand, and citizens and all other interested parties on the other. Access and transparency in the contacts between citizens and the public authorities, and between the State bodies, the local authorities and various organisations are the antithesis of secrecy and distrust. The rights in question impose an obligation on the public authorities to provide information on their own initiative, and to reply to individual requests by disclosing the information in their possession.

The rights mentioned are not always easily applied, but an assessment of their benefits is unambiguous and important. They correspond to several tasks, particularly the need for cognitive, communicative, educational, mediation, protective and supervisory functions; in addition, they democratise social relations, participation in public life and decision-making.

The right to information is important in all spheres of public life, but it also has a part in private life. In examining this right, we think in particular of human and civic rights, subjective constitutional rights, the public authorities' obligation to inform the public, access to public documents, the question of closed debates within the legislative, executive and judicial bodies, transparency as a procedural principle (administrative, civil and criminal procedure), the transparency of the law (publication of parliamentary legislation); the press and other means of communication, the opportunity to criticise holders of public office, transparency in public finance, the financing of political parties, etc.

The right to information and the principle of transparency are very useful and very important mechanisms, but they can also be dangerous. They continue to operate in a highly politicised setting.

The right to information and, consequently, access to public information are a condition of good administration. There can be no good administration without access to information, but it is not the only criterion.

Panel discussion: Principles governing good administration

(transparency in administrative action; access to the administration; effective and clear administrative procedures)

Principles of Good Administration in the Light of the Practice of Poland's Civil Rights Commissioner

Mr Andrzej MALANOWSKI
Director of the Legal Department,
Office of the Ombudsman, Poland

Pursuant to Art. 80 of the 1997 Constitution, Poland's Civil Rights Commissioner has the task of helping to protect the rights and freedoms of every person, not only Polish citizens, when their rights are infringed by public authorities. The rights and freedoms may be and indeed are breached by each constitutional power: the legislative, the executive and the judiciary. The debate's general theme of "The Right to Good Administration" focuses attention on the executive (administration), with elements of administration present in operations of the other powers as well. For instance, what is a Parliament that appoints a government, if not an administration body?

In my discussion of the right to good administration as exemplified by the practice of the Civil Rights Commissioner, I intend to demonstrate a specific state of affairs in which the Ombudsman has been called to take measures. Certainly, I cannot help referring to certain general issues, both those previously alluded to and new ones. I also wish to stress that I limit myself here to Polish laws which, as I believe, offer sufficient normative ground for acknowledging such a right.

To start with, I fully endorse the view presented by Professor Kieres that the right to good administration is a fundamental, if not constitutional legal principle. The Polish constitutional system substantiates such an assertion well. The doctrine of Polish constitutional law points to fundamental, systemic principles of various kinds. There are principles worded precisely in a single body of legal text which constitutes a complete legal norm, for example, the principle of democratic rule of law set out in Art. 2, or the division of and the checks and balances between powers enshrined in the Polish Constitution Art. 10. Yet, constitutional lawyers also formulate principles that are not so clearly stated in a single body of text; rather, they are distributed, with their constituent parts contained in various texts. To draw a common denominator for them means to formulate a fundamental principle. One such example is in the civic society principle, parts of which are present across the Constitution, starting from the preamble, as manifested *inter alia* by political pluralism, self-governance or freedom of the media.

The principle of the right to good administration has not been explicitly addressed in the Polish constitutional law doctrine, as yet. However, I believe that is a matter for the future because – as I see it – the constitution is a good enough basis for formulating such a principle. Besides the provisions Professor Kieres has alluded to, let me quote from the Constitution starting with the Preamble, which is of equal legal and normative import for interpreting the entire body of the Constitution and offering guidance in interpretation. The Preamble says: "with the desire to forever guarantee civic rights and ensure reliability and efficiency of public institutions". What could the idea behind the reference to the Constitution's stated desire to ensure reliability and efficiency in operation of public institutions be? Surely the reference is about good administration in a broader sense than discussed here, because one most frequently talks of good administration *sensu stricto.* Yet, administration may and should also be understood *sensu largo*.

Aspects of administration are inherent not just in the executive and legislative, as mentioned above, but also in the judiciary. Jurisprudence aside, there is the serious problem with administrating the judiciary. If a complaint was filed with the Polish Civil Rights Commissioner where the requesting party demanded information from the Warsaw courts as to which judges adjudicated in a specific court division, and the court administration refused such information, which consequently required several interventions to bring the courts to compliance, this would be an example of bad administration by the judiciary of refusing public information.

Aspects of the right to good administration are to be found also in Art. 1 of the Constitution, which provides that the Republic (*Rzeczpospolita*) is common wealth[58]. If it is so, undoubtedly the administration has the obligation of taking due stock of the 'common wealth' aspect. I shall refrain from referencing the provision previously recalled by Professor Kieres whereby public bodies work on the basis and within the confines of the law, hence the seminal issue of legality for all agencies of public authority.

Obviously, aspects of the right to good administration making up the fundamental legal principle may also be found in other constitutional or statutory provisions. For instance, Art. 77.1 of the Constitution vests everyone with the right to seek redress for damage caused by unlawful actions of public authorities; Art. 78 provides for each party's right to appeal from first instance judgments and decisions. Likewise, it seems that, just like the Charter of Fundamental Rights, the Polish law gives grounds for considering the right to good administration to be not merely a civic, but a human right proper.

A claim that this is a fundamental and normative principle is further corroborated by the fact of there being administrative courts, i.e. the law – primarily the Constitution – penalises bad administrative conduct. If there is a body with due jurisdiction over misadministration, with detailed regulations offering sanctions potentially leading to abrogating bad acts or administrative decisions, the conclusion may be that the Polish law does contain elements of rights in the context of good administration. Regarding all and any acts and actions of administrative authorities, an

[58] Etymologically, *rzeczpospolita* (Pl) translates as *res publica* (Lat.) or, indeed, *common wealth* (En) [transl.]

individual may file a complaint with an administrative court and thus seek compensation.

As a sideline, there is notably yet another power other than the courts, whose merits are worth mentioning. Doubtless, this fourth power, that is to say the free media, with their coverage of maladministration and ridicule of bad administration, have a major role to play and are the grand ally of citizens in their striving towards good administration.

One needs to agree with an idea brought up in the discussion so far that there is also a certain basis for compelling stakeholders to abide by the right to good administration. If administration is paid for from our tax monies, we clearly have the right to be provided with adequate service for our money.

Let me stress again that, when evoking the right to good administration, one should not limit the notion of administration to administration *sensu stricto*, i.e. central government; it should rather be deemed to mean the totality of civil service. This, therefore, focuses attention on the fact that a number of public statutory responsibilities is ensured by private law entities, local government authorities or autonomous trade organisations.

Undoubtedly, one of the pre-conditions for good administration is what Professor Niewiadomski has referred to as the right to good law. If this element is absent, an efficient system is out of the question on principle. True enough, the best law that there is does not preclude abysmal administration, and vice versa: with bad laws in place, an intelligent, imaginative and well educated administration may make up for legal shortcomings, just as a good court is capable of adjudicating wisely despite a faulty legal environment.

Also, there is merit in a statement that good administration should demonstrate the features of a good judiciary such as impartiality, reliability or adjudication in reasonable time. It should also be efficient and have what it takes to call it a citizen-friendly administration that does not say 'no' to individuals for the sake of it, on the assumption that an across-the-table applicant can never be right.

The organisers of this conference call for the structuring of the debate around three themes: transparency of administrative operations, access to administration and clear procedures. I shall at least in part try to stick to the three precepts, given the time constraint that does not allow for exhaustive treatment of all the fundamental issues. Let me start by saying that, to my mind, a good administration is professional, cognizant of substantive law and procedures, and transparent – and this touches on the issue raised by Professor Górzyńska.

The Polish legal system is well suited to ensuring transparency of administration by granting the constitutional right to public information for citizens (Art. 61). The Constitution ensures the right of access to information on the functioning of public authorities (i.e. not just pure administration) and persons in public office. The right also includes accessing information on the activities of trade/ autonomous professional bodies, and other persons and entities insofar as they perform the tasks of public authorities and manage municipal assets or State property.

As stressed in the literature, the Polish Constitution contains three more provisions regarding information: Art. 51.3 warranting everyone's right to access official documents and sets of personal data of relevance to that person, Art. 54.1 ensuring freedom to obtain and disseminate information, and Art. 74.3 granting a universal right to information on the status and protection of the environment.

The right to information in the public domain stipulated in Art. 61 was further developed in the Public Information Access Act of 6 September 2001. The law provides for converting a right inherent in Polish citizenship into a universal right, and sets forth procedures ensuring implementation of the right, including recourse to courts of law. One may venture the statement, then, that the Polish law offers clear constitutional and statutory regulations of transparency, and compliance therewith should not pose problems for good administration.

Undoubtedly, good administration has nothing to conceal except for whatever is subject to requirements of statutory constraints on disclosure with regard to protected legal secrets or moral rights. Practically, however, our administration to often refuses to disclose information clearly without legitimate grounds, most frequently under the pretext of protecting moral rights. Such malpractice, itself the evidence of maladministration, may be illustrated by various examples where, interestingly, the conduct of the Supreme Administrative Court was not flawless either as, over the past three years, it has groundlessly 'absolved' unlawful refusal to provide public information in at least three instances.

The first example of the Supreme Administrative Court verdicts that comes to mind was a case of 'gross professional misconduct', as it were: it regarded access to information on municipal financial affairs. The Court found that access to the documents of the Finance Committee of a municipal council was legitimately denied. Fortunately, the Chair of the Supreme Administrative Court himself appealed against the verdict in an extraordinary procedure initiated before the Supreme Court of Justice, where the latter found the refusal of information to be inadmissible.

In another case, a local educational authority denied information to the „Rodzice w szkole" [Parents in Schools] periodical on public[59] schools where head teachers were nominated regardless of the statutory competition procedure. The refusal was substantiated by the purported desire to protect privacy. The Supreme Administrative Court, when presented with the case, found no breach of law and upheld the unlawful decision. It took the prerogatives of the Civil Rights Commissioner which fortunately also cover broad judicial competences, and his extraordinary appeal to the Supreme Court, to have the latter adjudicate that such refusal of public information is unlawful on all accounts and to order transfer of the case for re-trial. The Supreme Court did not doubt that head teachers in public schools are public figures, as they are responsible to the public and are paid by public monies, hence information related to their performance of public office is not subject to protection under the Privacy Act. Consequently, a subsequent verdict of the Supreme Administrative Court has led to the repeal of an ill-founded decision to deny public information.

[59] meaning 'state-owned' and operated [transl.]

In another case, the Civil Rights Commissioner filed for extraordinary appeal against a Supreme Administrative Court verdict dismissing a local newspaper's complaint related to refusing access to administrative building permit files. Similarly, in this verdict, the legality of refusing to impart information was allegedly founded on provisions of the Personal Data Protection Act. Yet, the ombudsman did not share the court's opinion and pointed out in his extraordinary appeal that the Personal Data Protection Act allows for the processing of personal information regarding, inter alia, issues of public interest, and media operations under the Press Act that fulfil the citizens' right to reliable information, transparency in public life and public scrutiny and criticism are within the scope of measures taken in the public interest. This extraordinary appeal was also taken up by the Supreme Court on the grounds that administrative proceedings are not secret, and information on developers and designers is, by virtue of the Building Act, made public on relevant notice boards. This was therefore yet another case where the administration used privacy regulations as an excuse to evade scrutiny and criticism by the general public.

Problems with accessing public information are to be found also at the ministerial level. For instance, the Ministry of Home Affairs and Administration and the Ministry of National Defence denied information to a newspaper which, in line with the Public Information Access Act, demanded disclosure of health and retirement benefits of generals who had previously occupied top positions in both ministries, which was again refused under the pretext of provisions of the Personal Data Protection Act.

The ombudsman requested the General Inspector for Personal Data Protection, a dedicated statutory body, to take a position on the issue and learnt that the refusal of information was inadmissible. Consequently, the ombudsman addressed a request to both ministers to take measures to change the unlawful policy.

The National Defence Minister shared the ombudsman's position and stated that his reporting units' end entities will be guided by the ombudsman's interpretation in applying provisions of the Public Information Access Act. Meanwhile, the Minister of Home Affairs and Administration found his ministry's practice to be correct. In response, the ombudsman informed him that in the event of future similar occurrences, the ombudsman will advise individuals and media concerned to go to court and will consider the possibility of being party to such proceedings.

Jurisprudence may therefore be said to be slowly blazing the trail ahead and specifying the practical scope of applying the right to public information. While I share the view that the Public Information Access Act is not perfect, I am nevertheless of the opinion that it certainly vests individuals with good instruments for combating bad administration.

Professor Fortsakis clearly indicated that it is much easier to show good administration by setting it against bad administration. It is far easier to state what bad administration is, as these cases are most frequently encountered by bodies which audit and oversee compliance, or supervise administration. Likewise, the ombudsman is not given the good news that an administrative body has handled an individual affair well; rather, individuals complain about breach of their rights and report badly handled

cases. Sometimes, as a result of a successful procedure initiated by the ombudsman, the ombudsman's office receives a letter of thanks if and when a case is finally handled successfully. By nature, however, the ombudsman tends to see the dark side of administration.

Professor Fortsakis also emphasised the point that good administration is not just one that acts lawfully, i.e. in line with certain rules of the art of the trade; it must also act in good faith. While sharing his opinion, I should like to illustrate a case in the Polish ombudsman's practice where both the substantive and formal laws were breached, and – doubtlessly – also the principle of good faith. The case concerns administration in the broad sense of the word because, as underscored above, the notion of good administration may not be limited to administration *sensu stricto*, or central government administration. This one concerns the functioning of medical doctors' self-management in Poland.

In 1999, the medical doctors' professional organisation in Warsaw refused a permanent permit for practice as a medical doctor to a citizen of Tanzania married to a Polish woman, with an M.D. diploma from the Warsaw school of medicine and a record of local mandatory placements, followed by a temporary medical professional permit issued in Warsaw. The negative decision was justified in a strange way: if Polish doctors have problems with finding a job in Poland, a foreigner should be refused the right to practice the medical profession despite his compliance with all statutory conditions.

Naturally, the plaintiff appealed to the Supreme Medical Board. It must be added that professional self-management bodies take decisions in such cases pursuant to the administrative proceedings code. Hence, the case is undoubtedly in the remit of public administration.

The Supreme Medical Board overruled the Warsaw Medical Chamber's decision, transferred the case for reconsideration, and justified that the law does not allow for a refusal thus substantiated so long as the party concerned fulfils all the conditions. The Warsaw Medical Chamber again denied the right on the same grounds, with the Supreme Medical Board again repealing the decision and transferring it for reconsideration.

When appealing to the Supreme Medical Board for the third time, the applicant also addressed the Civil Rights Commissioner. The CRC took part in the case as a party to administrative proceedings with attorney's powers.

In the ombudsman's view, the Supreme Medical Board was by all means right in stating that the substantive law disallows refusal, since the applicant fulfilled all the conditions. In the course of the proceedings, the ombudsman pointed out an error on the part of the Supreme Medical Board which had used the wrong procedure: the latter pursued a cassation procedure and transferred the case back for reconsideration, yet the Warsaw Medical Chamber 'thumbed their nose' at the Supreme Medical Board by repeatedly adopting unlawful resolutions. Meanwhile, as the rules of legal practice suggest, the Supreme Medical Board should have quashed the unlawful resolution and acted on the substance of the case itself.

As a result of the ombudsman's intervention, the case was finally resolved as follows: the Supreme Medical Board repealed the unlawful decision and issued a new one awarding the requesting party with a permanent permit to practice in the medical profession. This has also set a precedent for other doctors who were foreign nationals, as the issue concerned not only this one Tanzanian doctor; it was equally relevant for doctors coming from post-Soviet countries. Quite a number of foreigners resident in Poland were ineffectively vindicating a right which, undoubtedly, they were entitled to enjoy.

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As a summary, I wish to state my view that the right to good administration is normatively supported by the Polish legal system and, despite problems in its practical realisation, there surely are mechanisms and institutions in place which offer opportunities for its execution.

Panel discussion: Principles governing good administration

(transparency in administrative action; access to the administration; effective and clear administrative procedures)

Strengthening the rule of law and improving service in administrative procedure

Mr Imre VEREBÉLYI
Envoy Extraordinary and Minister Plenipotentiary,
Permanent Delegation of Hungary to the OECD

1. Public-authority application of legal rules affects millions of people annually, so it is a matter in which governments and local authorities are bound to take a keen interest. (The Hungarian local authorities alone are responsible for over five million eight hundred thousand measures per year, to which must be added an even larger number of measures by central and decentralised administrative services.) The main purpose of public-authority action is to ensure that people comply with public policy as laid down in legal rules (for example, the private citizen needs individual permission for certain activities, a civil-status certificate and other certificates, attestations, an identity card; the details are held in computerised data banks and the authorities can check them as necessary. However, the fact that the public has obligations **does not exclude its having rights in procedural matters or prevent the administrative authorities from acting as service-providers to the public**.

Before the 1980-90 period, the goal of European governments was to secure the public maximum entitlements in administrative procedure as long as official control of procedure and decisional powers and enforcement were unaffected. In addition, government measures raised professional standards as well as ensuring that public authorities were more impartial in performing their function of applying legal rules. The emergence of a new trend in the early 1990s which continued until now has placed the emphasis on greater protection of individual data and on observance of professional and business confidentiality. Completion of formalities via the Internet (ie electronically) has made new legal rules necessary. The changes have improved the public's rights and the legal prerequisites for the exercise of those rights (notifying the private citizen when procedural steps affecting him or her are to be taken, the general requirement to keep individuals informed, the obligation on the authority to give private citizens a hearing before taking any measure adversely affecting him or her, and so on). A further emphasis is on improved reception of the public considered as clients. This progress has mainly come from procedural reorganisation (the one-stop shop, Internet completion of formalities, better facilities for the public, speeding up procedure, more flexible treatment of formalities, a friendlier approach generally). With regard to administrative procedure, and in particular its characteristics relative to the rule of law, Hungary was ahead of both left-wing and right-wing dictatorships as early as 1957. One of the features of dictator regimes was the severe restrictions on

fundamental rights and the use of administrative procedure as a means of attaining the dictatorship's objectives. Equally, to salve their consciences, those same regimes introduced measures that gave citizens a large number of procedural rights and guarantees.

Its 1957 general law on administrative procedure and the introduction of various other legal instruments on a range of procedure made Hungary one of the first countries to move closer to a number of western democracies and even in some cases outdo them. During the Communist dictatorship, set up and maintained by foreign armed forces, the adopted administrative procedure allowed a reasonably "happy" co-existence (complementarity) of laxist elements within the dictatorship and the reformers who were keen to exert meaningful influence on procedure. In the 1970s solutions deriving from the rule of law were supplemented by procedural reorganisation that paid more attention to reception of the public. (From 1977 onwards, on the basis of the results achieved by constructive national experiment and methodological advice from the then Institute for Administrative Organisation, local advice services – local offshoots of national bodies – set up client-reception centres to which files could be sent from the different administrative authorities.) The process of strengthening the rule of law in administrative procedure continued with the political changes in the 1990s, in particular the advent of judicial supervision of administrative decisions as general practice. In 2004 the government produced a new piece of draft legislation on administrative procedure. If Parliament passes the legislation, Hungary will join the ranks of European countries and will become in many respects one of the most advanced of democracies.

To ensure that citizens are aware of the beginning of the procedure and therefore able to exercise their rights, the new draft law provides that the individual concerned (and the opposing party) are to be informed that their request for procedural steps to be taken has been registered, or where appropriate that procedure has started automatically. (The person concerned must likewise be told how long the procedure will take, the name and official details of the staff member handling the case, how to gain access to the file, and that observations can be submitted or information obtained by Internet). It is for the administrative authority party to the case, and never the individual, to set out the specialist authority's position. The individual cannot be asked to supply information that the public authorities already have on computer. If several people are involved in the procedure they may be represented by one joint representative with a university degree. The public authority can decide to hold a public hearing if appropriate. The new procedural feature is that before a decision is taken, and except in specified cases, the administrative authority must notify the person involved in the proceedings of any charges being made against them so that they can exercise their defence rights, which include the right to a hearing. The person has a choice between conventional and computerised arrangements for completion of formalities and that right may be restricted only in exceptional cases specified in legislation. Under the new draft law the administrative authorities may conclude electronic contracts with the members of the public for completion of administrative formalities, with assignment of a registration number to anyone who does not have an electronic signature. If an administrative authority has a general-access computer system and the law does not disallow it, it can make its system available to anyone who does not have a computer of their own so that they can access other departments' sites to obtain information or submit requests. The draft law requires that the reasons the

authorities give for their decisions include any important substantive or procedural factors *if use was made of discretionary powers*. Where there is no provision in law for the competent authorities to make an administrative decision, they are allowed to conclude an administrative contract with the private citizen instead. (If the person concerned breaks the contract, it becomes a final enforceable decision.) With three exceptions the new legislation allows members of the public to appeal against any first-level decision adversely affecting them. The existing practice whereby the minister deals with any appeal against a first-level decision of one of the ministry's departments is to be done away with. (To determine any such appeal the minister will now convene a committee composed of three specialists. The committee chair must be independent – he or she must not have any working relationship with the minister or the ministry.) After the decision has become final the person concerned can ask for the case to be reopened if they become aware of any fresh facts or evidence that existed at the time of the procedure. The individual may request a fair hearing in the event of any relevant factor arising after the decision becomes final. The authority may then amend or withdraw its decision provided the decision is not illegal. With one exception, under the new procedural law appeal to the courts is available to everyone against administrative decisions adversely affecting them.

By carrying out a succession of reforms the central European transition countries, in particular Hungary, have moved close to the highest standards of administrative procedure. The 1957 law introduced Austrian procedural methods. When the 2004 draft legislation was being prepared it was German methods that received most attention (the administrative contract is one example). Innovations in French administrative procedure (such as notifying the member of the public of the start of procedure) were also examined, as were proposals from the European Ombudsman and the Council of Europe (see, for example, the basic procedural principles and the practice of giving the member of the public a hearing before any individual measure adversely affecting them). It is an observable fact that in those countries which have introduced successive reforms and have a strong procedural tradition, reforms are not just paper ones but have been effectively implemented. Those countries have the opportunity to become models for widespread introduction of a number of administrative practices. In the first decade of the 21st century the countries that can take on a leading role in producing procedural guidelines are those that have already drafted procedural legislation and new legal rules that have been through governmental and parliamentary scrutiny. Hungary and the Czech Republic are two notable examples. In my view Hungary could play a leading part here and thus make a contribution to the development of European administrative procedural law.

2. "The right to good administration" as **a new fundamental right** could be included in the Hungarian constitution. When we look at the different stages in the development of European constitutional law we see that there have been three generations of fundamental rights. The classic freedoms are found in the first generation of fundamental rights. The second-generation fundamental rights (economic, social and cultural rights) were established in constitutions largely at the instigation of left-wing political forces. The third-generation rights emerged some decades ago. They include those relating to procedure (confidentiality of personal data, the right of appeal to a tribunal and so on). In 2003 the draft European Union constitution ushered in a new era in constitutional law. Article II.41 of the draft constitution establishes the right to good administration and its components, and

Article II.47 lays down rights relating to judicial procedure such as the right to an effective remedy and the right to a fair trial. In addition the draft constitution separately lays down three basic rights and three basic principles relating to criminal proceedings. The draft European Union constitution currently under debate brings in a new developmental era by summarising and developing European citizens' main rights as regards administrative procedure. Previously, in deciding what fundamental rights to include in European countries' constitutions, constitution drafters paid little attention to rights concerning citizens' dealings with the administrative authorities and tribunals (administrative procedure is governed by legislation, except for a few rules laid down in constitutions; there is no constitutional-level general right). The ambition of the EU constitution can be expected to influence member States' constitutions and potential amendments to them. In accordance with the 1950 Rome Convention the Hungarian constitution dealt only with the rights generally granted to all in judicial proceedings. At the time there was no international convention on administrative procedure, and so there was no provision in our constitution for administrative rights. The Hungarian parliament will shortly be examining the draft law on administrative procedure in detail. There is a good case for considering at the same time, rather than putting it off to later, a constitutional amendment adding the right to good administration to the constitution. We might be the first country, or among the first, to deal with the matter at a constitutional level, without necessarily following Article 41 of the draft EU constitution literally. Article 41, for example, establishes only the right to an effective remedy, without any reference to such a right within the administrative system. It will be possible for national constitutions to be more detailed – on account of EU structure it will be easier at a national level to establish the institution framework for a remedy against administrative decisions. National constitutions and the Hungarian constitution can of course adapt the rules on the right to use one's mother tongue. However constitutions will not be able to restrict the right of request to written requests. On the other hand they will be free to add to the modest content of that basic European right. For example, further ingredients can be added to citizens' right to good administration, such as the right to a legal representative, the right to information and legal assistance, the right of the honest-dealing citizen to maintenance of acquired rights, or the right to appeal against administrative decisions.

Taking all these considerations into account, I believe that Article 41 of the draft EU constitution should include: impartiality, fair procedure, handling of cases within a reasonable time, hearing the person before any individual measure that adversely affects them is taken, the individual's right of access to any file concerning them, an obligation on the authority to give reasons for its decisions, and the language right. The constitution should formulate these rights broadly rather than narrowly: for instance the citizen should have access to all documents concerning him or her and not just to personal files. Mention should also be made of other components of the general right to good administration, to be found in particular among the basic rights and official obligations in the administrative sphere which are intended to protect and allow effective exercise of the public's rights in administrative matters. It seems clear however that it will not be possible for principles relating to the organisation of administrative procedure, such as efficiency or effectiveness, to become ingredients of the basic right. At the same time they might be included in the first part of the framework law on administrative procedure as an objective of the State. Lastly, mention should be made of one or two special features of the procedure for dealing with breaches of administrative law. The new ground-laying legislation should

summarise the basic general requirements of administrative procedure applying to the public, together with various specific procedural provisions on breach of administrative procedure, which have been drawn from different examples of procedural framework legislation.

This new basic constitutional right might make it possible to extend the jurisdiction of the constitutional judge as regards interpretation and protection of the constitution, to give the Parliamentary Commissioner for Basic Rights wider responsibility for dealing with defects in the new ground-laying law on administrative procedure, and improve the safeguards concerning legislation on administrative matters (as in the case of prohibitions that interfere with the very core of fundamental rights). Constitution-level regulation might help improve knowledge and recognition of an area of law that is no less important than the other basic procedural provisions in constitutions concerning the authorities' obligations as regards judicial procedure and setting out the basics of criminal procedure.

3. The fundamental principles are listed and set out in the first section of recently enacted procedural framework legislation. The European Ombudsman has issued 23 rules and principles summarising the essential features of good administrative conduct. Foreign legal literature on the subject divides the basic principles into between 9 and 18 groups (18 was the figure mentioned in the 1996 Council of Europe publication, *The Administration and you. A handbook*. This was a first attempt at an international summary of legislation and case-law, together with various Council of Europe recommendations since 1977 dealing with some basic aspects of administrative procedure. What the Council of Europe has yet to produce is as full as possible an international survey covering all the basic principles and describing their development stage by stage. The procedural laws currently being drafted and the various advice which experts have given could be a help to the Council here.

As regards the new general legislation on administrative procedure – and assuming that the right to good administration will eventually be included in the constitution – I suggest that it incorporate more of the basic principles, namely 25 principles classified as follows:

3.A **The citizen's administrative rights and obligations**

1. The right to procedure (*unconditional*).
2. The right to use one's mother tongue.
3. The right to a representative.
4. The right to legal aid and information.
5. The right of access to documents.
6. The right to protection of personal data.
7. The right to a hearing and to make observations.
8. The right of appeal.
9. The right to protection of acquired rights exercised in good faith.
10. The right to compensation for injury (whether material or non-material) caused by the administrative authorities.
11. The obligation on the citizen to obey the law in procedural matters.
12. The requirement not to make requests vexatiously or mischievously.

3.B **Administrative authorities' rights and obligations**

13. The right to take administrative decisions binding on persons within the particular administrative jurisdiction and on others, the right to enter into administrative contracts replacing administrative decisions, and the right to enforcement of administrative decisions.
14. Freedom of administrative action subject to the limits laid down in law (*discretionary powers and equity*).
15. The obligation to perform the specified functions.
16. The obligation to take action of their own motion.
17. The obligation to take decisions within a reasonable time.
18. The obligation of lawfulness.
19. The requirement not to depart from legal practice in discretionary matters.
20. The obligation to ensure equality of the parties in procedure.
21. Objectivity.
22. The obligation to maintain impartiality in procedure.
23. The obligation of proportionality.
24. The obligation to communicate decisions and give reasons for them.
25. The obligation of procedural efficiency and effectiveness.

The basic principles I have enumerated are essentially legal principles, and the 25th principle is an organisational objective of the State. Of these principles, several can be worded either as citizens' rights or as obligations of the administrative authorities. This, however, does not affect the list as a whole or the actual essence of the basic principles. As regards structure, the principles could be set out in the first part or at the very beginning of the general procedural law. They could also be published separately as a booklet or poster aimed at the general public. In addition to traditional considerations the legal content of the principles needs to take into account legal developments and new procedural trends.

For example, several types of administrative appeal may be distinguished. In Hungary the citizen could be given a right of appeal against any first-instance decision of an administrative authority (*judicial review does not cover legal matters in discretionary matters*). Powers and responsibilities need to be set with that requirement in mind, and so it would be necessary to have a higher body to which appeals would be made from decisions of the first-instance authority. In the cases provided for in law, and where there was no opposing party, the administrative body determining the appeal against the first-instance decision would be able to alter a lawful decision only in the appellant's favour.

In administrative procedure the authority has a duty of efficiency so as to ensure that whatever action it takes constitutes genuine progress in terms of the economic and social outcome. In addition the administrative authority is required to maintain a high degree of professionalism in its procedure and to observe such duties towards the citizen as speediness, simplicity, the least onerous method, *easily understood language* and courtesy. In their procedural arrangements the public authorities are bound, in the interests of efficiency, to ensure that procedure generates as little financial cost as possible. In some cases other rights or obligations may be linked to the organisational obligation. It should be possible to invoke such auxiliary rights and obligations in procedure.

Except for procedure dealing with infringements, the new law could take in all administrative matters. Most of the rules in the administrative procedure law will be procedural rules applying compulsorily to all administrative procedure (in particular the rules on basic rights and obligations and the special rules setting them out in detail). Another, shorter section of the rules (thirty paragraphs or so) will be composed of secondary procedural rules – that is, rules applying where there is no regulation to the contrary. In addition, the new procedural legislation might even provide for exceptions to its compulsory provisions in specific cases. However, there will be no more than half as many special exceptions as compulsory rules.

The aim of the model is to ensure that the rules in the administrative procedure law are compulsory ones applying generally and to which exceptions will be possible only under "special" procedure. My personal view is that it is time to move on from "mixed" models to purer regulatory models in which there will be no place for legislative delegation: legislative delegation in "special" cases allows any legislative measure to derogate completely and unrestrictedly from the rules. The delegation approach introduced ingredients into Hungarian law that are foreign to the framework law: in "special" cases, numbering several thousand, delegation has had the effect of sidelining procedural law. In recent decades ministries have mainly used "special" procedure either to restrict or eliminate citizens' rights or to enlarge the administrative authorities' powers.

The position of the public official with regard to politics (the separation of administration and political power)

Mr Wolf OKRESEK
Director General, Constitutional Law Department,
Federal Chancellery, Austria

Introduction

"The right to good administration" is the general topic of our meeting and my topic, which relates to the position of the public official with regard to politics, must therefore be seen against the background of the right to good administration, namely in other words, against the background of the question of what dangers emanate from a politicisation of the administration. In discussing this topic, I shall consider the right to good administration in the sense in which it is paraphrased in Article 41 of the Charter of Fundamental Rights of the European Union. In this sense, it means that every person has the right

"to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions, bodies and agencies [of the Union]."

This wording appears to have been inspired by the first paragraph of Article 6 of the European Convention on Human Rights ("the Convention") – the right to a fair trial-, not only as regards the handling "within a reasonable time" but also the requirement of a "fair hearing" and the principle of "impartiality". In respect to this right, there are abundant judgments by the European Court of Human Rights ("the Court") regarding the prerequisites to be met by proceedings before a public authority – at any rate proceedings in civil and criminal cases – in order to comply with this fundamental right.

In respect to my topic, this will in particular be the demand for an impartial and fair handling of a matter which may be threatened by political influence. I shall therefore try to show, especially with regard to the position of the public official, the conditions which must exist in a public administration in order to guarantee the impartial and fair handling of a matter. In doing so, I shall repeatedly refer to the situation in Austria and I wish to point out in advance that Austria has a long civil service tradition that goes back to the 15th century.[60] I must add, however, that in addition to appointed "civil servants", public officials employed under contract have also been part of the public administration for a long time.

[60] While the belief that, with the legal safeguard provided for their work, public officials were an indispensable cornerstone of a correct administration went undisputed for a long time, more recent surveys show that civil servants are regarded as a privileged group and that most people consider their appointment for life outdated. As a result of the Contractual Employees' Reform Act adopted in 1999, Federal Law Gazette Vol. I 1999/10, the public official appointed for life is – slowly but surely – becoming extinct. As *Barbara Weichselbaum* put it in: Berufsbeamtentum und Verfassung, Vienna 2003, 16 to 19.

My topic does, however, also cover another aspect which I would like to discuss in greater detail, namely the aspect of the political rights of public officials and the question of whether and to what extent an interference with the fundamental rights and freedoms of public officials is admissible in connection with political activities. This issue also has a legal basis in the Convention and the case-law of the Court, and I shall discuss it below in greater detail.

Administration and Politics

a) Definition

I shall use the term administration in a meaning that corresponds to a sociological point of view. Accordingly, administration in an institutional sense means all those organisations which are primarily under an obligation to fulfil the tasks of law enforcement. As regards personnel, administration would thus be understood as that group of persons employed within these organisations.[61] In this sense, the term administration also comprises public officials.

From the point of view of political science, politics is understood as that part of society which has taken on the tasks of making binding decisions on its behalf, and which tries to do this through the systematic cooperation of various institutions (political parties, associations, the government, parliament).[62] On the basis of such an understanding, a distinction is drawn between political decisions on the one hand and their implementation – be it within the framework of the legislature, or be it within the framework of law enforcement. The enforcement of legal provisions, referred to above as a task of the public administration, could in that sense be distinguished in clear terms from politics because although a law is the result of a political decision, its enforcement – separate from that political decision – is, however, a truly classic administrative task.

b) Relationship between public officials and politics

It is one of the basic concepts of the administration that it is carried out by politically neutral civil servants, who are assumed to enforce the laws in accordance with the intention of the entire population represented by parliament, and who in doing so do not have to take into account the particular interests of the respective government.[63] In this approach, public administration is considered a neutral representative of the interests of the general public, which is subject to tensions vis-à-vis the "party State" and its spheres of influence.[64] Public officials are said to subordinate themselves

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[61] Peter *Gerlich*, Administration and Politics, in: *Federal Chancellery* (editor), Public Administration in Austria, Vienna 1992, 257.
[62] *Gerlich*, loc. cit. 258.
[63] *Barbara Weichselbaum*, loc. cit. 80; *Ulrich E. Zellenberg*, Bundesverfassung und Berufsbeamtentum, Zeitschrift für öffentliches Recht, ZÖR (Public Law Journal) 2003, 227; *Roul F. Kneucker*, Austria: An Administrative State, The Role of Austrian Bureaucracy, Österreichische Zeitschrift für Politikwissenschaft, ÖZP (Austrian Journal of Political Science) 1972, 95 (114).
[64] *Heinrich Neisser*, Die Rolle der Bürokratie im Regierungsprozess, in: *Fischer* (editor), Das politische System Österreichs, 1974, 233; the same author in: *Dachs and Others* (editor), Handbuch des Politischen Systems in Österreich, 1992, 146.

loyally to the political heads of the administrative divisions, but are rather sceptical with regard to party politics.[65]

We have thus, as it seems, made a clear separation between politics and the administration. A closer examination shows, however, that such a clear separation, especially in modern society characterised by political parties, associations and welfare ("*Parteien-, Verbände- und Leistungsstaat*"), cannot be deemed realistic.[66] In particular when it comes to the upper bureaucracy – represented by senior public officials in the ministries and regional government offices, but also in major subordinate bodies – there are numerous relationships between the political system and the civil service, which I shall discuss below in greater detail.

The image of a "non-political bureaucracy" as a neutral apparatus for enforcing the law can therefore not fully be maintained[67] (the political role of the upper bureaucracy is, however, repeatedly overestimated by the general public, see below). The representatives of the upper bureaucracy have been referred to in the literature as "mandarins" who are the real governors of the State and have the required sense "for the thousand shades of administrative work and decision-making".[68] Here, reference is made to the particular expertise represented by the upper bureaucracy, which cannot be left out of consideration in the decision-making process. As a result of many years of experience in an – albeit – restricted technical field, the members of the upper bureaucracy have acquired a knowledge of facts enabling them to foresee the consequences inherent in a certain political decision. In addition, knowledge of the circumstances to be considered in taking a decision, and finally knowledge of the ways and means which best serve the implementation of the political decision, play an important role.[69]

By acting as advisors, public officials within the upper bureaucracy play a not inconsiderable role by giving shape indirectly to politics. However, this does not mean that the real power within the State is exercised by the members of the upper bureaucracy (on the role of bureaucracy, see below). Rather, this influence is merely an unavoidable side effect in making their specific knowledge available to the political decision-makers, and finally they provide this advice in the interest of the smooth functioning of the administration. The fact must not be overlooked that the upper bureaucracy constitutes only a small fraction of the entire administration, even if there are numerous possibilities for exerting influence because of the usually hierarchical structure of the administration and the fact that it is characterised by the principle of having the authority to issue directives.

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[65] *Gerlich*, loc.cit. 258; *Engelmayer* (editor), Die Diener des Staates, 1977.
[66] *Gerlich* loc. cit.
[67] *Klaus Berchtold*, Die Regierung, in: *Fischer* (editor), Das politische System Österreichs, 1974, 151; *Gerlich* loc. cit.
[68] *Franz Werfel*, Eine blassblaue Frauenschrift, quoted by *Neisser*, Bürokratie 239 and *Klaus Hartmann*, Das Personal der Verwaltung in: *Holzinger*, *Oberndorfer*, *Raschauer* (editors), Österreichische Verwaltungslehre, 2001.
[69] *Berchtold* loc. cit. 172.

c) The dangers of political influence on the administration

Political ideas are to a considerable extent implemented by the administration. This implementation is carried out – in very simple terms –within the following two basic models of civil service:[70]

1. The entire civil service should follow the respective governing majority and should be composed accordingly.
2. The civil service should, on the contrary, be structured in such a manner that changing majorities have no influence on it.

Both models can rely on properly functioning examples in their practical implementation by States. Danger may lie in the fact that the second model – always adhered to by Austria – is "watered down" by introducing elements of the first model without making an open statement to that effect.

The greatest danger lies in the fact that political functionaries – as *Adamovich* puts it – may be "smuggled in", who in their activities consider themselves bound by certain political goals and not primarily as neutral representatives of the interests of the general public.[71] *Adamovich* considers it, however, a gross misrepresentation and injustice to assume that every civil servant affiliated to a certain political group will in his or her overall conduct act as a vassal of that political force. In the same way, he believes that the theory that political orientation and qualifications in a specific field have a negative correlation is wrong. A pluralistic democracy also includes political parties, which naturally have a uniting effect on the three powers; their representatives are the decision-makers at the top of the administration.

The "politicisation" of the administration may on the one hand, be understood as a question of the political convictions of civil servants and, on the other, also as the exertion of a party-political influence on the bureaucracy of the State.[72]

What are the specific possibilities of exerting a political influence on the administration and a politicisation of the administration?

A study of the Belgian administration carried out many years ago describes the various ways of exerting party-political influence.[73] It distinguishes in particular four areas in which an influence is to be observed:

1. Taking account of party political affiliations in the recruitment and advancement of administrative personnel;
2. influencing administrative decisions by way of party politics;
3. abusing information for the benefit of political parties;

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[70] For a comparison in a nutshell see: *F. Morstein/Marx*, Eine Einführung in die Bürokratie, 1959.
[71] *Kneucker* loc. cit. 122 and 127, Ludwig *Adamovich*, Zur heutigen Lage des Berufsbeamtentums, Festschrift *Klecatsky* 1980, 1.
[72] *Adamovich*, loc. cit. 4.
[73] Quoted by *Neisser* with reference to *Moulin* in: *Dachs and Others* (editor), Handbuch (Handbook) des politischen Systems Österreichs, 1992, 146.

4. abusing occupational activities for the benefit of political parties (for example, using the resources of the administration in order to work for a party, such as for the preparation of programmes).

All this is reprehensible and it is obvious that, in the light of what has been said before, it is to be regarded as detrimental to a properly functioning administration. An identification of these phenomena in quantitative terms would, however, be extremely difficult, which is why we will have to confine ourselves to more or less general statements. Such reproaches, in particular within the meaning of the first two items, cannot, it appears, be entirely excluded, at least in the majority of our administrations.

In a modern, pluralistic society one must, however, - as I have said before – not reject completely any political relations by public officials; an implementation of the programmes of the governing bodies would hardly be imaginable without such a relationship. It is certainly legitimate for political decision-makers to surround themselves with persons in their confidence who also "speak their language from a political point of view"(*Adamovich*). *Adamovich* believes, however, that this is legitimate only if these persons come and leave together with the political leadership and that they do not abuse their positions.[74] I will come back to this issue when discussing the activities of ministerial offices, etc.

The politicisation of the civil service – as noted in the Austrian literature – will turn out to be a real danger to the State and its citizens if party-political influence combined with office patronage leads to a total restriction ("entanglement") of politics and the administration, which eliminates the separation of powers completely. We must in any event counteract such a danger and apply security mechanisms that may ensure for example, an "objective recruitment of personnel".[75]

The role of bureaucracy

a) Influence on the decision-making process

Here, bureaucracy is to be understood as referring to the personnel component of the administration.[76] This term is often identified with the public administration as such.[77] The term bureaucracy in the sense of "power of the desks" indicates that this type of organisation is considered to have a decisive influence on State activities. [78]

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[74] *Adamovich* loc. cit. 5.
[16] *Hartmann*, loc. cit.; *Adolf Merkl,* Entwicklung und Reform des Beamtenrechts, VVdSt RL 7 (1932) 70 and 102, *Neisser*, Bürokratie 241.
[76] *Morstein/Marx* loc. cit., gives the term "bureaucracy" a four-fold meaning. It is a type of organisation embodied in particular in the civil service. Moreover, bureaucracy means a formal and mechanical type of work in discharging the functions of the modern State. Third, the term refers to a political system in which the executive power plays an increasingly important role vis-à-vis the legislature and the judiciary. Last but not least, bureaucracy means a type of State in which it is not for the electorate but for a "horde of power-hungry and conceited officials" to exercise control (quoted by *Neisser*, Bürokratie 264). In the 20th century the term "bureaucracy" was used to refer to the civil service since the Enlightenment: see *Gabriele Kucsko-Stadelmayer*, Die Entwicklung des österr. Beamtenrechts, ZÖR 1985, 33 (44).
[77] *Neisser*, Bürokratie 234.
[78] *Gerlich*, loc. cit; Martin *Albrow*, Bürokratie 1972.

It is evident from what I have said before that the possibility of exerting political influence is to be assumed especially when it comes to the upper bureaucracy. *Berchtold* noted that this possibility is often overestimated because it is competing with other powerful forces, in particular the political parties and interest groups. According to *Berchtold,* the emergence of these powerful groups has considerably reduced the political influence of the upper bureaucracy. The political influence of high bureaucracy is, however, also increasingly being restricted by other measures.

In this context, *Berchtold* mentions in particular the shift of the review, control and preparation of decisions to commissions and project groups. It is certainly true that the upper bureaucracy is as a rule also represented on these commissions with, however, much less influence. Apart from weakening bureaucracy, which is apparently due to a certain distrust of it, such commissions give the impression of objective decision-making that takes societal structures into account. *Berchtold* adds, however, that the decision-making of such commissions may be controlled by their composition. In practice, the numerous advisory boards have similar effects. They are advisory bodies – usually provided for by law – for the political decision-makers, and - already at an early stage of the political decision-making process - permit the initiation of a consensus policy, and they restrict the possibilities of the upper bureaucracy for exerting political influence.

This competitive situation faced by the upper bureaucracy is also seen by *Fischer*.[79] Here, one must also take into account the self-understanding of the Austrian civil servants referred to above. Despite all the current efforts aimed at reform and the already existing amendments to the legal system, this self-understanding is still based on the concept of "serving the State", which sees its goal as serving the common good and which as a rule also results in the loyalty of the members of the bureaucracy towards the respective minister, irrespective of his political affiliation.[80]

b) Political civil servants

In some parliamentary democracies the dividing line between politics and the administration is not drawn between the minister on the one hand, and the entire administration on the other. Such systems rather have rather instituted the "political civil servant" who "comes and leaves together with the minister" (*Fischer*).

But in systems where the institution of the political civil servant is unknown, there are also points of contact with this institution: for example, one step in that direction is that virtually every minister has a small staff of his/her own, consisting partly of civil servants in the respective ministry and partly of members "borrowed" from other sources, for instance from organisations with party affiliations, who are particularly close to the minister with regard to the type of work and personal relationship. These "ministerial offices" are entrusted with responsible tasks, which is also why in this respect points of contact are discernible with the institution of political civil servants who support the minister in the preparation of his or her decisions and their implementation, who - at least in part – constitute a link between the minister and

[79] *Fischer* loc. cit.
[80] *Berchtold* loc. cit.; *Kneucker* loc.cit. 127.

"classical bureaucracy".[81] In the Austrian legal system, where the concept of the political civil servant does not exist, there are only a few signs in respect of such political civil servants such as, for example, in the 1986 Federal Ministries Act, Federal Law Gazette no. 76, which permits the establishment of "other organisational institutions designed to advise and support the Federal Minister in the decision to be taken by him or her in the field of general government policy". On that basis, so-called ministerial offices have been established. Since the amendment to the Federal Ministries Act, Federal Law Gazette vol. I, no. 161/2000, every minister may entrust to a "secretary-general" the task of dealing in an overall manner with all the affairs in the Federal Ministry's domain. Such an entrustment is, however, limited in each case to a period of five years. According to recent civil service regulations in Austria, such a restriction is increasingly being provided for other leading positions in the ministerial administration. This facilitates at least the exertion of political influence in filling vacancies.

Separation between politics and administration

In my previous observations I have already referred to the separation between politics and the administration within the meaning of a separation of powers. According to the system of separation of powers developed by *Montesquieu*, the right of the individual to develop freely is secured only if a constitutional order prevents those persons entrusted with exercising public authority from using it arbitrarily. An important aspect to ensure the achievement of that aim is the separation of the powers of the State. Even if *Montesquieu* based his considerations on the three classical powers of the State, the basic consideration aimed at the free development of the individual also seems to be applicable to a separation of politics and law enforcement. As *Adamovich* puts it, this "becomes particularly evident, if one considers that the application of the law - even if the law is precisely defined in substantive terms – always entails a certain (more or less extensive) leeway. How that leeway is made use of, will depend, last but not least, on the person of the organ in whose hands it has been laid. Anyone who is an expert on the historical connections of ideas will realise that behind these problems also lies the question of how the separation of powers principle is understood these days."[82]

Heinz Fischer begins his considerations on the topic "Civil Servants and Politics" by referring to the separation of powers laid down in the Austrian Constitution:

"The Austrian Federal Constitution separates the legislature from the executive and, within the executive, the administration from the judiciary. Finally, within the administration, the Federal Constitution distinguishes between the highest organs of the administration and the organs of the administration that are basically bound by instructions and have been appointed on a permanent basis – in short, between politicians and civil servants. However, while there are clearly discernible and definable delimitations at least from a legal perspective, between civil servants and politicians, this is by no means the case in the same way between civil servants (administration) and politics."[83]

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[81] *Fischer* loc. cit.; *Adamovich* loc.cit. 5.
[82] *Adamovich* loc. cit 3.
[83] *Heinz Fischer*, Beamte und Politik, in: *Engelmayer* loc. cit. 93

In his examination, *Fischer* concludes that a complete separation between politics and the administration is a fiction:

"Even if the administration is bound in the most rigorous manner to the law (as the epitome of an objective norm), this does not provide a guarantee for non-political conduct. For the legislative process is a highly political process, and the law itself finally is the product of a variety of social, ideological, economic, group-specific and other forces, which in the course of the preparation of a law, have found their way into it in various forms: why should the application of a law created in such a way suddenly be separated from all these forces?"

Against the background of these considerations, it must also be said that, in line with *Montesquieu,* a clear separation of politics and the administration would basically be desirable - especially in the light of the possibilities of abuse set out above. In the same way as the effect of the political parties as a binding link between the individual powers is discernible also in the relationship between the legislature and the administration, it cannot be completely excluded from the relationship between politics and the administration, in particular because the exercise of their political rights and the protection of fundamental rights, in particular the right to freedom of expression, is also guaranteed for public officials.

Public officials and the exercise of fundamental rights

a) Concept of an effective democracy

In its statements concerning the exercise of fundamental rights by public officials, the European Court of Human Rights (the Court) has regard to the concept of an effective democracy and recognises the legitimacy of that concept not only at the national level but also at the community level. The relevant statements on this issue were made by it in the case of *Ahmed* and others v. the United Kingdom.[84] I shall refer to this case below.

b) Political rights of public officials

The securing of the unrestricted exercise of their political rights by public officials is a basic element of democratic understanding. In this context, the Austrian Federal Constitution provides that public officials, including members of the Federal Army, shall be guaranteed the unrestricted exercise of their political rights. These "political rights" were first only held to be the right to vote and the right to stand for elections as well as the plebiscitary rights of the people. It has, however, been convincingly set out in legal literature that political rights also include freedom of association, freedom of assembly, freedom of expression of opinions and the freedom of the press, as well as the right to petition and the right to equal access to public offices.[85]

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[84] Judgment, 2 September 1998.

[85] Cf. *Gabriele Kucsko-Stadelmayer* in*: Korinek - Holoubek* (editor), B-VG Kommentar; Walter *Berka*, Lehrbuch der Grundrechte, 2000, 218.

It is undisputed in Austria that public officials and members of the armed forces may be members of and actively work for a political party. [86]

The question of whether it is admissible for public officials to exercise a mandate as a member of Parliament at the same time constitutes a special aspect of the exercise of their political rights. In Austria, public officials may be members of legislative bodies or local councils at the same time. Unlike for example, in the Anglo-American legal system, a mandate is compatible with public service, a principle that is part of an Austrian tradition. The legal position of elected public officials is specifically secured by a right to be granted leave.[87] Public officials applying for election to the European Parliament must also be given the time required for that purpose. Public officials elected as members of the European Parliament, are to be given leave for the duration of their mandate during which they will receive no remuneration from the State. They are given leave because of the time burden resulting from the exercise of their mandate and not because of any incompatibility of their parliamentary activity with the fulfilment of sovereign tasks.[88]

c) Public officials and the freedoms of expression and association

The Court has stressed in its case-law that a right of recruitment to the civil service cannot be deduced from the Convention. This does not mean, however, that a person who has been appointed as a civil servant cannot complain on being dismissed if that dismissal violates one of his or her rights under the Convention. Civil servants do not fall outside the scope of the Convention. In Articles 1 and 14, the Convention stipulates that "everyone within [the] jurisdiction" of the Contracting States must enjoy the rights and freedoms in Section I (without discrimination on any ground). Moreover Article 11 para. 2 *in fine*, which allows States to impose special restrictions on the exercise of the freedoms of assembly and association by "members of the armed forces, of the police or of the administration of the State", confirms that as a general rule the guarantees in the Convention also extend to civil servants.[89]

The particularities of the public service may, however, justify certain restrictions in the public interest. The freedom of expression of civil servants and soldiers may, for example, be restricted within certain limits for the protection of a democratic State adhering to the rule of law.

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[86] There is no unanimous agreement on whether and to what extent public officials may go on strike.

[87] *Kucsko-Stadelmayer* loc. cit.; The arbitrary introduction of particularly unfavourable office hours may, for example, also violate Art 7 para. 4, if it is made to restrict the official's political activities. Nor may the exercise of political rights be made the subject of disciplinary proceedings under the heading of the official's duty of allegiance. On the other hand, a public official must, however, as long as he/she is "on duty" as a rule fulfil his/her official duties and cannot invoke his/her political activity as a reason for periods of absence; Art 7 para. 4 does not provide for any privileges compared with other officials.

[88] Government bill 27 BlgNR 19. GP

[89] Cf. the *Glasenapp and Kosiek* v. Germany judgments of 28.8.1986, A/104 para. 49 and A/105 para. 35 and the *Vogt* v. Germany judgment of 26.9.1995, A/323 para. 43 as well as the *Wille* v. Liechtenstein judgment of 28.10.1999.

Pertinent decisions by the Court

The Court has taken a number of decisions on the admissibility of such a restriction, which I shall outline below:

The Court proceeds on the assumption that a democratic State is entitled to require public officials to be loyal to the constitutional principles on which it is founded. Although it is legitimate for it to impose on civil servants, on account of their status, a duty to show restraint, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental rights of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in the respective interference reservation.[90]

a) The *Vogt* case[91]

Since February 1979 the applicant was a teacher at a secondary school and as such a permanent civil servant. In August 1986 she was suspended because she was a member of the German Communist Party (DKP) and dismissed in 1987. This measure constituted a disciplinary sanction imposed on the ground that she allegedly did not comply with the duty of every civil servant to bear witness to the free democratic constitutional system within the meaning of the Basic Law (*Grundgesetz*). As a result of her activities for the DKP and her refusal to dissociate herself from that party, she had expressed views that, in the opinion of the authorities, were detrimental to the above-mentioned system.

The Court first noted that a number of contracting States impose on their civil servants a duty of discretion – apparently as regards their political opinions. German civil servants must at any time bear witness to the free democratic constitutional system within the meaning of the Basic Law and uphold that system. [92] This duty is based on the idea that civil servants are the guarantor of the Constitution and democracy. Accordingly, by dismissing the applicant, the authorities have pursued a legitimate aim within the meaning of Article 10 para. 2 of the Convention – apparently to safeguard the free democratic constitutional system referred to above.

In assessing whether the applicant's dismissal corresponded to a "pressing social need", the Court proceeded on the assumption that a democratic State is entitled to require civil servants to be loyal to the fundamental constitutional principles. In this context, the Court took into account "Germany's experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949." The Court criticised, however, the absolute nature

[90] See for example, its statements on Art 10 para. 2 of the Convention in the *Vogt* and *Volkmer* cases

[91] EuGRZ (Journal on Fundamental Rights in Europe) 1995 590; ÖJZ (Austrian Journal of Legal Practitioners).

[92] As regards the legal situation in the Federal Republic of Germany, in particular the fight against extremism, see the German Federal Constitutional Court, decision of 22.5.1975, EuGRZ 1975 398, and EuGRZ 1978 100, 303 and 533.

of that duty as construed by the German courts. That duty is owed equally by every civil servant regardless of his or her function and rank and it implies that every civil servant, whatever his or her own opinion on the matter, must unambiguously renounce all groups and movements which the competent authorities hold to be inimical to the Constitution. It does not allow for distinctions between service and private life; the duty is always owed by civil servants in every context.

The Court finally came to the conclusion that the reasons put forward by the Government in order to justify the interference with Mrs. Vogt's right to freedom of expression were insufficient to establish convincingly that it was necessary in a democratic society to dismiss the applicant. A decisive factor for its decision was the fact that no other member State of the Council of Europe required a similarly strict duty of loyalty at the relevant time.

b) The *Volkmer* case[93]

The applicant in that case was a teacher of German, Latin and civic education. From 1970 to 1977 he served as honorary secretary of the East German Socialist Unity Party (SED) and from 1977 to 1981 was employed on a full-time basis by the SED. After the German reunification he was integrated as a teacher into the public service in Berlin. A former pupil alleged that the applicant, in his capacity as SED representative, had asked him to attend a church conference about which he had later been interrogated by an official of the East German authorities. In 1992 the Special Commissioner of the Government for person-related documents of the former State Security Police of the German Democratic Republic, informed the authorities that the applicant had been registered as contact person in the files of the Ministry of State Security.

The applicant invoked, inter alia, his right to freedom of expression.

The Court accepted the view of the German courts that the use of a pupil as an instrument to spy on political opponents is incompatible with a teacher's duty to educate his pupils so as to ensure their respect for the principles of freedom of expression and tolerance for other opinions.

In the light of the foregoing and taking into account the specific situation of German reunification, the Court concluded that, in the specific circumstances of the case, even assuming that the applicant's dismissal amounted to an interference, it was proportionate to the legitimate aim pursued.

c) The *Rekvényi* case

This case concerns the admissibility of a restriction on the exercise of fundamental rights by police officers.

The applicant was a police officer and the Secretary General of the Police Independent Trade Union. On 24 December 1993 Act no. 107 of 1993 on Certain Amendments to the Constitution was published in the Hungarian Official Gazette. This Act amended, *inter alia*, Article 40/B(4) of the Constitution to the effect that, as from 1 January 1994,

[93] ÖJZ 2003, 273.

members of the armed forces, the police and the security services were prohibited from joining any political party and from engaging in political activities. In a circular letter dated 28 January 1994, the Head of the National Police demanded, in view of the forthcoming parliamentary elections, that policemen refrain from political activities. He referred to Article 40/B(4) of the Constitution as amended by Act no. 107 of 1993. He further indicated that those who wished to pursue political activities would have to leave the police. In a second circular letter dated 16 February 1994, the Head of the National Police declared that no exemption could be given from the prohibition contained in Article 40/B(4) of the Constitution.

Bearing in mind the role of the police in society, the Court recognised that it is a legitimate aim in any democratic society to have a politically neutral police force. In view of the particular history of some contracting States, the national authorities of these states may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate.

Regard being had to the margin of appreciation left to the national authorities in this area, the Court found that, especially against this historical background, the relevant measures taken in Hungary in order to protect the police force from the direct influence of party politics can be seen as answering a “pressing social need” in a democratic society.

These statements made in the light of Article 10 of the Convention, are also relevant – as has been stressed by the Court – to Article 11 of the Convention, and it considered the challenged measure justified also within the meaning of Article 11 para. 2 of the Convention.

d) The case of *Ahmed and Others*

In 1990 the United Kingdom Secretary of State for the Environment, pursuant to section 1(5) of the Local Government and Housing Act 1989, made Regulations to restrict the political activities of local government officers in "politically restricted posts". These measures were a follow-up to the recommendations made by a Committee ("the Widdicombe Committee") which had been set up in 1985 to inquire into the respective roles of elected members and officers of local government authorities in view of the increasing politicisation of local politics.

The applicants all held politically restricted posts. Mr Ahmed was a solicitor with the London Borough of Hackney. He was adopted as Labour candidate for municipal elections in Enfield in 1990, but was unable to stand because of the Regulations. Mr Perrin was Principal Area Planner with the Devon County Council and had to give up his position as vice-chairman and property officer of the Exeter Labour Party. Mr Bentley, a Planning Manager with Plymouth City Council, was forced to resign from his position as Chairman of Torridge and West Devon Constituency Labour Party. Mr Brough, head of the Committee Services Department with the London Borough of Hillingdon, had previously been involved in local politics in Harrow East and was regularly invited to speak at public meetings, but he had to abandon these activities when the Regulations came into force.

The Government defended their view that the Regulations were essential to the functioning of the democratic system of local government in the United Kingdom. They stressed that the restrictions contained in the Regulations were intended to strengthen the tradition of political neutrality on the part of specific categories of local government officers by prohibiting them from participating in forms of political activity which could compromise the duty of loyalty and impartiality which they owed to the democratically elected members of local authorities.

The Court observed that the local government system of the respondent State has long rested on a bond of trust between elected members and a permanent corps of local government officers who both advise them on policy and assume responsibility for the implementation of the policies adopted. The relationship of trust stems from the right of council members to expect that they are being assisted in their functions by officers who are politically neutral and whose loyalty is to the council as a whole. Members of the public also have a right to expect that the members whom they voted into office will discharge their mandate in accordance with the commitments they made during an electoral campaign and that the pursuit of the mandate will not founder on the political opposition of their members' own advisers; it is also to be noted that members of the public are equally entitled to expect that in their own dealings with local government departments they will be advised by politically neutral officers who are detached from the political fray.

The aim pursued by the Regulations was to underpin that tradition and to ensure that the effectiveness of the system of local political democracy was not diminished through the corrosion of the political neutrality of certain categories of officers.

The Court concluded that the interferences which resulted from the application of the Regulations to the applicants pursued a legitimate aim within the meaning of paragraph 2 of Article 10.

As regards the question whether the measure was necessary in a democratic society, the Court noted that the organisation of local democracy and the arrangements for securing the functioning, funding and accountability of local authorities are matters which can vary from State to State, having regard to national traditions. Such is no doubt also the case with respect to the regulation of the political activities of local government officers where these are perceived to present a risk to the effective operation of local democracy, especially so where the system is historically based on the role of a permanent corps of politically neutral advisers, managers and arbitrators above factional politics and loyal to the council as a whole.
In that case, the Court did not find a violation of the Convention, noting that it was particularly relevant for its finding that the Regulations were not designed to silence all comment on political matters, whether controversial or not. The Court reiterated in this respect that the vice which they are intended to avoid is comment of a partisan nature which, judged reasonably, can be considered as espousing or opposing a party political view. The same conclusion can be drawn in respect of the restrictions which are imposed on the activities of officers by reason of their membership of political parties. As with speech and writing of a partisan nature, paragraph 4 of Part I of the Schedule is directed at precluding participation in only those types of activity which, on account of their visibility, would be likely to link a politically restricted post-holder in the eyes of

the public or council members with a particular party political line. There is no restriction on the applicants' rights to join a political party or to engage in activities within that party other than the limited restrictions identified by paragraph 4 of the Schedule.

Having regard to the need which the Regulations sought to address and to the margin of appreciation which the respondent State enjoys in this area, restrictions imposed on the applicants cannot be said to be a disproportionate interference with their rights under Article 10 of the Convention.

e) Evaluation

The above examples show that the Court is trying to strike a fair balance regarding the restriction of fundamental rights and freedoms of public officials. The Ahmed case shows, however, that it attributes particularly high relevance to the aim of politically neutral civil servants.

Conclusion

The right of citizens to an undelayed, fair and impartial consideration of their matters by public authorities requires an administration supported by qualified public officials who fulfil their tasks in an objective manner, taking into account the interest of the general public. A staff policy influenced by party politics entails the risk that vacancies are not filled with the best-qualified applicants. Even if a strict separation between politics and the administration is impossible, there should be suitable safeguards to ensure a staff policy that is as objective as possible. The complete exclusion of a party-political influence is, however, impossible in a modern pluralist democracy.

The demand for a neutral civil service must not lead to disproportionate restrictions on the members of the civil service in exercising their fundamental rights and freedoms. Restrictions designed to protect the democratic constitutional system for example, against radical forces are, however, admissible.

As regards the limitations of political activities to ensure the impartiality of the administration of the State, the concrete historical and political context is of relevance. The special protection of the police – and apparently also the armed forces – against party-political influences in such specific contexts, is a legitimate demand.

Reforming civil and local government services in Europe: the issues

Mr Giovanni PALMIERI
Head of the Public Law Department,
Directorate General of Legal Affairs,
Council of Europe

I would like to begin by thanking the Polish authorities for their warm welcome and for their help in organising the multilateral meeting which is starting today. Their assistance and hospitality demonstrate Poland's interest in the activities of the Council of Europe in general and those related to the rule of law in particular.

The right to good administration has a bearing on the fundamental concerns of our organisation, particularly the rule of law, for the absence of sound, efficient public administration can put the rule of law at risk.

This theme also affects human rights, and the very title of today's meeting is significant in this respect. All citizens have the right to good administration. The report to be presented concerning the case-law of the European Court of Human Rights in this area is a particularly important element of this meeting.

Finally, parliamentary democracy is at stake in the daily exercise of power and the legitimate expectations of citizens vis-à-vis that power. A democracy which lacks a public administration that lives up to its own high standards is a frail one.

The aim of this meeting is to enable the participants to discuss a whole series of issues and choices. There is no point in trying to impose a single model of public administration on all European States. There is a range of problems with a number of different solutions. There are therefore choices to be made. If this meeting manages to clarify the options regarding the most important aspects of public administration, it will have been a success.

There may be several different reasons for wanting to reform public administration. Such reforms may, on the one hand, be linked to a radical overhaul of a country's political and economic system, but may, on the other, be the result of periodical reforms or a rationalisation process. In short, every single Council of Europe member State is currently considering how it should develop its laws governing the organisation and functioning of its public administration.

But before introducing reforms, the legislator needs to consider a series of questions, which can be summarised as follows: what social model are we trying to achieve? What economic model do we want to implement in order to achieve that social model? What should be the State's role? What means should be made available to the organs of central government and to those of regional and local government?

The answers to these questions are incredibly diverse because national and local administrative systems in Europe are so different.

Nevertheless, there seem to be two main types of system: the job-based system on the one hand and the career-based system on the other.

In the job-based system, administrative posts are classified according to the level of qualification they require, the tasks they involve and the relevant salary. This system is not much different from that of the private sector. Public officials tend to be specialists rather than all-rounders. They are recruited to a particular post and their employment can even be dependent on the existence and future of that post. There is therefore a certain lack of job security.

The career-based system, on the other hand, is based on the reverse principle: the specificity of public administration. The State therefore seeks to appoint staff with particular skills who are prepared to devote their whole professional life to serving the State. The public administration therefore has a hierarchical structure. Public officials receive general training and enjoy a career in which, based on seniority and/or merit, they can be promoted through the various grades in the hierarchy. They are governed by civil service regulations and enjoy a high degree of job security.

It is quite clear that both of these systems - job-based and career-based - are theoretical models. Virtually no State practises either of them exclusively. The actual situation is usually somewhere in between and Europe has a very wide range of mixed systems based to varying degrees on one model or the other.

The choice of system depends on the answer to the following question: is a State employee in exactly the same situation as someone working in any other sector of employment? Many European States - particularly in northern Europe - refuse to draw a distinction between these two types of employees and therefore, more or less explicitly, do not recognise the specificity of the role of public officials. Elsewhere – especially in southern Europe – the general interest is thought to form the basic principle behind the rules governing public administration. These countries therefore accept the specificity of the role of public officials.

There is therefore a conflict between the pragmatic and systematic approaches, but I do not intend to go into that tricky debate today.

Despite the different structures of national public administration, there are currently a number of points and factors of convergence. This trend is based on a key concept which is becoming increasingly popular throughout Europe: **flexibility**, defined as the ability to take into account external constraints as soon as they arise. This movement towards flexibility requires public officials, or at least those at the top of the hierarchy, to adopt a new "managerial culture".

Discussion of such things automatically brings to mind a whole series of concepts: competition, contract, objectives, evaluation, performance, and so on. If we look at more detailed, sophisticated definitions of flexibility than that which I have just mentioned, we will find that they incorporate all of these concepts and this culture. According to the OECD, for example, flexibility is defined as – and I quote – *"all the resources implemented with a view to improving the efficiency of public organisations in order to promote a result-oriented approach, and all the methods of human and*

financial resources management based on the decentralisation of responsibilities and adaptation to the rules of the market".

Such a definition is based on the assumption that the States have answered the fundamental questions to which I alluded at the start of my speech. What social model do we want? Most European countries these days are looking to develop a consumer society inspired largely by the American and Anglo-Saxon models, which are based on individual well-being. In these systems, the people are no longer just citizens, but consumers and potential customers.

Which economic model is most suited to this social model? States with a market economy can choose between two options: the interventionist model in which the State is aware of its social role and responsibility to protect social cohesion, and the liberal State model based on non-interventionism.

And so to the third question. What form should public administration and the civil service take in order to help the States follow these social and economic models? In this regard, a whole series of concepts has emerged:

- relaxing of conditions for staff recruitment and greater use of contracts in order to meet the demand for flexibility;
- calling into question of career development rules provided for by statutes and based primarily on length of service;
- introduction into remuneration scales of the notions of productivity, efficiency and merit through the establishment of performance evaluation systems.

The notion of flexibility therefore offers strong justification of the job-based system and its development, to the detriment of the career-based system. In this context, more and more tasks of public administration are being contracted out. In the United Kingdom, for example, many of the internal activities of the administration are subcontracted and some civil servants work under the authority of a private sector employer.

Still with flexibility in mind, it is also important to consider whether civil service statutes should be replaced with contractual mechanisms. Recent examples certainly show that a system of general collective agreements is not necessarily any more flexible than that of State employment. The regulations and protection provided in collective agreements can be just as inflexible as those offered by the most rigorous statutes.

Furthermore, European civil services operating the career-based system have, in recent years, shown a considerable degree of flexibility. This is the case in Spain, Belgium and France, for example, who despite their various constraints, have managed to develop a "managerial" culture. This is illustrated by the system of performance-related bonuses and payments adopted in France and Belgium, for example.

Whatever basic system is chosen, convergent policies will need to be developed in Europe on crucial issues such as the recruitment, training and necessary

political neutrality of public officials. Many of these themes are included on the agenda of this meeting.

I would like to say a few words about **recruitment**. This is a tricky subject insofar as a number of conflicting interests need to be reconciled. Of course, new recruits need to be broadly independent and the State should be entitled to verify this, since these people will be serving the State. The State looks for efficiency and equality in its assessment of potential employees. However, if the public administration is to retain a certain dynamism, total uniformity must be avoided. Nevertheless, European civil services seem to be abandoning the principle of competitive recruitment, which inevitably has repercussions for the principle of equal access for all citizens to employment in the public administration.

As far as **training** is concerned, initial training must be distinguished from further training. The former is given upon entry to the civil service and one of its objectives is to help public officials become acclimatised to their new environment and to ensure they adopt the cultural and administrative mentality that prevails in their new workplace. Further training, on the other hand, continues throughout the career of public officials and is designed to keep them up-to-date in terms of the knowledge and techniques they use in their work.

However, it is necessary to distinguish between the training of senior officials - a political matter - and that of operational staff, which is a technical issue. In particular, it seems indispensable that future senior officials should be allowed to mix with serving politicians, so that they feel part of the administrative structure and can familiarise themselves with their future working environment.

This brings me to the question of relations between public officials and the political powers. Here also, there are, in principle, two opposing systems: the "spoil system" and the guaranteed employment system.

The "spoil system" takes its name from the fact that, if there is a change of government, the new authorities can dismiss public officials and fill the vacant posts with supporters of the majority party or, at least, people whom they trust. Consequently, public officials are not guaranteed a job. In other words, their legal tie to the State can be broken by a unilateral act taken by the administration at any time and at its total discretion.

Under the guaranteed employment system, which is more common in Europe, the legal tie between public officials and the State is valid for a fixed period of time, i.e. until the official reaches the age limit laid down by law. During that period, the official may only be laid off or dismissed for certain reasons and in accordance with specific procedures. Redundancies must also be approved by competent administrative or civil courts.

The guaranteed employment system is meant to create a civil service whose members are adequately trained and willing to devote their whole professional life - a long period of time - to the State. This system gives public officials stability and personal independence which enables them to perform their duties impartially and

lawfully. The political neutrality of public officials is an indispensable consequence of the principles on which the guaranteed employment system is based.

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In **conclusion**, I would like to emphasise two recent changes of perspective. The first concerns citizens and their relationship to the State. The second involves public officials themselves.

Regarding the first of these, the concept of passive citizens no longer exists. They have been replaced by consumers or customers, in other words legal subjects with demands and needs that must be met. The notion of service and increasingly personalised services is, not without difficulty, replacing the idea that the role of the public administration should be limited to the laying down of standards.

Secondly, the Taylorian system is being demolished by the new demands of modern society, or to put it more simply, our old Napoleonic, Prussian, bureaucratic and military administrations are collapsing. It seems that, these days, employees' motivation and commitment levels are dependent on a close relationship with and true recognition from their superiors. Systems which focus on staff participation and competence will win the day. Some countries have experienced terrible conflicts within the State administration as a result of abuses of hierarchy and, ultimately, a lack of consideration and recognition. Public officials want respect and to have their views heard. The new models require responsible people with qualities such as initiative and consultation skills.

It is with both these perspectives in mind that we should consider the citizen's right to good administration of justice on the one hand and the range of public officials' rights and duties on the other.

The Council of Europe constantly receives requests from its member States for expert opinions on new legislation related to public administration. This is clear evidence of the authorities' trust and of the quality of our experts. The Council of Europe can point to the work of its Project Group on Administrative Law, an intergovernmental committee which has provided the inspiration behind some important legal texts, such as Recommendation No. R (2000) 6 on the status of public officials in Europe. I should also mention Committee of Ministers Recommendation NO. R (2000) 10 on codes of conduct for public officials. The Group is currently discussing the draft Recommendation on judicial control of administrative acts.

I would like to thank the participants, particularly the rapporteurs, for agreeing to share with us their ideas and experiences.

The rights, duties and responsibilities of public officials

Mr Jorge CRESPO GONZÁLEZ
Professor of Political Science and Public Administration,
Complutense University, Madrid, Spain,
Member of the Scientific Council of the Association "Europa"

Introduction

The political and economic changes of recent years have engendered new challenges for public administrations, in particular those requiring that they adapt to the increasing globalisation of the economy and the rest of public affairs, ensure economic growth but also social development and welfare, and modernise administrative structures by mastering the new information and communication technologies and bringing the administration closer to citizens, while at the same time providing them with high quality services.

Governments have to rely on a responsible, effective, efficient and open public administration at a time when there is no consensus as to what the State should be doing or on management methods, and civil society is emerging with unprecedented strength.

In this changing context public officials carry out their duties and are subject to pressures resulting from increased monitoring and greater expectations on the part of citizens and politicians, since the basis of the legitimacy of public action seems to be changing. It is because of this that we are now seeing the emergence or re-emergence of certain concepts better able to survive and be operational in the new situation, in particular that of good administration (hereinafter GA).

The concept of GA is a conceptual and practical challenge for public administrations and their officials. This report seeks to shed some light on the way GA affects the rights, duties and responsibilities of public officials. In this connection and in order to open the debate, three subjects will be put forward for examination: the concept of the infrastructure of GA; the need to consider GA as a public policy with both internal and external dimensions; and, lastly, the fact that the status of public officials is seen in the light of GA while, at the same time, it is becoming an essential tool for its own implementation.

I. – GA as a public policy

Strictly speaking, considering GA as a public policy stems from the concept of GA.

One formulation of GA, although based on the institutions and bodies of the European Union, appears in Article 41 of the Charter of Fundamental Rights of the European Union. Under the terms of this article it is the impartial, fair handling of a person's affairs within a reasonable time by public institutions and bodies. This concept, conceived as a 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.

To the right to compensation for harm caused by institutions or their officials in the performance of their duties, and still with respect to EU institutions, should be added the right to address the institutions in one of the languages of the treaties and to receive a reply in the same language.

According to this concept, it can be noted, firstly, that GA is composed of a set of rights with normative effect, at the same time having a still more important role, namely creating a sort of philosophy of management enabling on-going debate on, and possible reformulation of, public objectives, their management (in terms of procedure and means) and the position of citizens. People's expectations and preferences are becoming more and more important for public bodies, just as their participation is permitted, even required, from a procedural point of view. This gives rise to two ideas about the application of GA: the first is that it is a permanent process of integrating adaptation and change, and the second that this process should include communication and participation both internally and externally.

In this context, and without condemning other approaches, GA provides a functional view of public institutions and bodies, which leads to another necessary debate: the conditions for its application to the various sectors of activity managed in ways akin to those of the market.

There is also a further aspect that increases the complexity of the issue: GA consists of a horizontal, multi-directional public policy since it concerns:

1. All administrative services and bodies, although in different ways according to the specific characteristics of each.
2. All fields of activity (sovereignty, social welfare, economy, justice, intervention in public administrations, etc).
3. The phases affecting the analysis of public policies (for example, formulation, implementation, evaluation, etc)
4. Persons (general discussion focuses on "external" persons, but it should not be forgotten that GA has an internal aspect, since its application should be envisaged with respect to people working in public administrations).
5. The legitimacy of public action, whether institutional or simply economic or connected with yields, which deserves special attention.
6. All the factors that can be identified in administrative analyses: organisation charts, economic and material resources, management methods and the ways of producing and distributing information and communications, and human resources. It goes without saying that very special attention will have to be given to this last – human resources.

II. – GA and the rights, duties and responsibilities of public officials

II.1. The civil service and its status: a few values and principles to be considered

These principles and values flow both from the criteria that should govern relations between administrations and citizens and from GA and the status of public officials.

II.1.1. The principles governing administration/citizen relations

These principles may be taken as being those listed in the European White Paper on Governance, namely:

a) Openness
b) Participation
c) Responsibility
d) Efficiency
e) Coherence

To these principles should be added those of GA.

II.1.2. The principles flowing from GA

GA as defined in the Charter of Fundamental Rights is based on a set of general principles (legality, non-discrimination and equal treatment, proportionality and coherence), which should be supplemented by a number of guidelines for administrative good conduct[94] (objectivity and impartiality, as well as providing interested parties with information on administrative procedures within the time set for the specific procedure).

From the operational point of view, these principles can be organised as follows:

a) Those concerning the rights of the parties concerned by the procedures and information, such as the hearing of all the parties directly concerned by the procedures, the duty to give reasons for decisions and, sometimes, the duty to indicate appeal procedures.
b) Those that lay a duty to respond appropriately and as quickly as possible to requests from the public, with respect, for example, to requests for copies of legislation, receipt of correspondence and replies to it, telephone calls, emails, etc.
c) Those that lay a duty to protect personal data and confidential information.

[94] It is useful here to take into consideration the information provided in the Code of Good Administrative Behaviour drawn up by the European Commission in 2000.

d) Those concerning the possibility of complaining to the relevant administrative authority or the mediator/ombudsman in the event of failure to respect the rights to GA.

II.1.3. The principles and values flowing from the status of public officials

First of all, an operational concept of public official is needed. The Council of Europe has set out a reasonable definition on several occasions[95]. In the Appendix to Recommendation R (2000) 6, the term "public officials" is defined as "any members of staff, whether statutory or contractual, employed by State authorities or departments whose salary is paid out of the State budget, excluding elected representatives and certain categories of staff in so far as they come under special regulations". Thus, despite the broad definition, it does not cover the performance of tasks or provision of services by private companies paid out of public funds, so these are not covered. I will take this concept as my starting-point in the following paragraphs.

It should be noted that the reform of public management undertaken in almost all countries has involved a transfer of responsibilities with respect to decision-making and resources to various management bodies, public or private[96]. Although this situation has enabled ministries to adopt the practices most appropriate to their needs, by strengthening the responsibility of managers and improving the results of resource management, there is also a fear that a coherent vision of the civil service, public-spiritedness and the traditional values of the public service will gradually disappear, particularly those based on professional socialisation.

It is because of this and the wish to maintain coherence in the ethics of the civil service that attempts are being made to establish a set of principles generally applicable to public services as a whole that can then be developed fairly independently to meet the particular needs of each part of public organisation. In fact, many countries are trying to define overall values in order to promote them in the public services. These values are on the whole very homogeneous, and their definition, sometimes in the form of codes, is designed explicitly to indicate the behaviour expected of public officials. According to OECD surveys (2000), countries are re-emphasising so-called "traditional" values and at the same time giving them a modern content and adding "new" values closer to the requirements of a public sector ever more focused on results. According to these surveys, the essential values on which the public service is based are as follows (based on how frequently they were mentioned by the countries surveyed):

- Impartiality
- Legality
- Integrity
- Transparency

[95] For example, Recommendation R (2000) 6 of the Committee of Ministers to member states on the status of public officials in Europe, and Recommendation R (2000) 10 of the Committee of Ministers to member states on Codes of Conduct for Public Officials.

[96] Usually the transfer of responsibilities is from central management bodies to operational ministries and agencies within ministries, from central government to local authorities, and from the public sector to private sector sub-contractors. (OECD, 1996)

- Efficiency
- Equality
- Responsibility
- Justice

It is interesting to note that these findings are very consistent with those of other OECD studies[97] and the latest recommendations on public officials made by the Council of Europe[98] and the reforms undertaken by the European Union[99]. It is clear that the public administration has to act within the Rule of Law, be neutral and loyal to democratic institutions and citizens, and that its officials should have a number of characteristics such as, for example, the required qualifications (personal qualities as well as education and training), a dynamic vision of participation and attentiveness to the duties and obligations incumbent on them as public servants[100], as set out in the following paragraph.

II.2. – Rights, duties and responsibilities in the light of GA

The various Council of Europe recommendations on public officials will be used as a reference framework for rights, duties and responsibilities, particularly Recommendations R (2000) 6 and R (2000) 10, and on the basis of this framework a number of aspects will be noted for consideration in the light of GA in the general context of the reform of public services at present under way.

First of all, it should be noted that GA should not only be applied to relations between public officials and citizens (the external dimension), but also to relations between public officials and the various public administrations in order to regulate aspects concerning their status (the internal dimension). This is all the more important since a large proportion of the conflicts and problems public officials encounter (as they perceive them) result from questions connected with the internal management of their status and particularly from rights as to remuneration and promotion. This aspect is barely covered by the reforms with which I am familiar and yet is one of great practical importance. Moreover, this seems still clearer when one remembers that

[97] OECD (1996, 59-60) describes the key-values for various countries and one finds, for example, that Australia gives precedence to receptiveness, attention to results, personnel management based on merit, probity and integrity of behaviour and a strong feeling of responsibility, while the Netherlands stresses impartiality, competence and professionalism, reliability, loyalty and transparency. Portugal's essential values are public service, legality, neutrality, responsibility, competence and integrity, while the United Kingdom enumerates seven principles for public life: selflessness, integrity, objectivity, accountability, openness, honesty and leadership.

[98] Articles 4 to 11 of Recommendation (2000) 10 set out the general duties incumbent on public officials (respect for the law, hierarchical superiors and professional ethics, loyalty, honesty, impartiality, conscientiousness, fairness and justice; working in a politically neutral way, only in the public interest and being courteous towards all those with whom they come into contact, etc.)

[99] For example, in the proposed Council Regulation amending the Staff Regulations of officials of the European Communities (see COMMISSION 2002), the second preambular paragraph stresses a European public service characterised in particular by the principles of competence, independence, loyalty, impartiality and permanence.

[100] All these characteristics are drawn from Recommendation R (2000) 6 of the Council of Europe.

public officials are also citizens acting within the administration as internal clients/citizens. However, staff regulations are usually designed to guarantee application of the principles of GA with respect to persons wishing to apply for posts in the civil service.

Furthermore, one cannot speak about the status of public officials without mentioning the reform processes under way in some countries and the European Union that are seeking, in most cases, to cover five major areas:

a) Making promotion dependent on performance.
b) Creating modern working conditions and ensuring equal treatment.
c) Maintaining ethical and professional standards.
d) Simplifying the status of public officials.[101]
e) Improving management procedures, recruitment methods, career structure and development, and staff assessment, as well as social and training policies. These procedures and methods should correspond with the standards of a dynamic, transparent, efficient administration that wishes to serve citizens.

II.2.1 – Rights

Public officials are citizens and should as far as possible have the same individual rights as other people. The various inalienable rights of public officials include individual rights (freedom of expression), political rights (participation in political life), collective or union rights[102], social rights (protection against accident and illness, etc) and certain specific rights (promotion, remuneration and training). I shall therefore try to look at some of these rights in the light of GA, if possible in the internal and external dimensions mentioned above.

a) Access to the public service or recruitment

Recruitment based on GA principles should respect the principles of transparency, access to information, clear and efficient procedures and reasoned decisions (which necessarily lead to observing good practices, planning competitive examinations and selection procedures based on equal treatment of all candidates, speeding up recruitment procedures, abolishing certain discriminatory rules, such as age limits, etc). It should also be noted that examinations should include GA-related values since what is needed is to change the culture through effective socialisation.

b) Promotion

This is a right developed particularly in closed or career civil services.

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[101] A remarkable example of reform is under way in the European Union under the aegis of the Commission. See COMMISSION (no date) for details.

[102] Both political and union rights receive special mention in Council of Europe Recommendation No. R (2000) 6 since in some countries they are limited or even prohibited; while accepting that these rights may be restricted, it is considered that, if this is to be the case, it should be within the bounds of what is necessary for the smooth running of civil services.

Career management should give precedence to services rendered according to an evaluation or assessment system based on merit and be less dependent on length of service. In this area GA could be extended to the following: introducing more transparent and objective procedures for appointments to vacancies; introducing evaluation procedures generally based on merit[103] but also able to measure observance of GA principles in the work carried out, which would mean including it in job descriptions[104] and objectives; compulsory mobility for certain "sensitive" posts, etc.

c) Remuneration

Public officials should receive adequate remuneration, the precise salary being linked primarily to the tasks entrusted to them. From the point of view of GA, there should be compliance with principles similar to those defined with respect to promotion, without neglecting non-discrimination. The task evaluation system should be drawn up by establishing a number of indicators, also GA-related, to be applied to the particular post. It is important to be aware that inadequate salaries may increase the risks of corruption or involvement in other, incompatible, activities.

d) Training

Training is a right, but also a duty, closely associated with various human resource management activities concerning principally access and promotion. It is obvious that training should be managed in accordance with GA principles and, in order to go further, these same principles should be the subject of specific activities forming an integral part of programmes. The importance of training as a tool for transmitting cultural change is clear. Similarly, care should be taken that there is no discrimination between public officials as regards access to training during their careers.

e) Protection of public officials

As the above-mentioned Recommendation R (2000) 6 provides, "A legal remedy before a court or other independent institution should be available to public officials for the protection of their rights in relation to their employer".

II.2.2. – Duties

In most European countries public officials have certain specific duties, in particular respect for the rule of law, impartiality, discretion, integrity, loyalty and neutrality. These duties are essential to the public service (cf point II.1 of this report). Obedience to hierarchical superiors should also be emphasised, something that is a problem in some countries if the instructions received are manifestly illegal.

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[103] The evaluation system should assess the official's performance, aptitudes and conduct.

[104] All job descriptions should include the profile (duties and responsibilities to be assumed), environment (the factors and circumstances connected with the post influencing working conditions) and job requirements (education, training, knowledge, experience and abilities regarded as essential for the job).

Other duties may also be cited, such as the duty to comply with rules on incompatibility which, as is well known, are linked with the neutrality of the service, the level of officials' remuneration, the question of corruption and the confusion between officials' private interests and public interests. All this may affect GA, and there are therefore provisions in staff regulations which should be simplified or clarified. For example, conflicts of interest should be avoided (working public officials should not deal with any matter in which they have a direct or indirect personal interest, in particular a family or financial interest), and not only for currently serving public officials but also for former civil servants a transitional period should be set during which they may not exercise another activity which may give rise to a conflict of interest. It is therefore necessary to clarify what is meant by "external activities", "political duties" and "commercial interests" and to consider that incompatibility criteria may be more strict or flexible according to the socio-economic and cultural context in each country.

Similarly, in many corpora of staff regulations certain limits are placed on transparency and freedom of expression. Under differing formulations, a duty is laid on public officials not to make any comment that might compromise the dignity of their posts and to be discreet about facts and information of which they have become aware in the course of their work.

To conclude, I should mention the novelty and importance of certain measures against harassment-related behaviour, absences from work, and those that stress factors closely related to GA such as respect for the public and concern for citizens in the provision of services.[105]

II.2.3.- Responsibilities

The consequences of imperfect performance of the tasks entrusted to public officials and failure to respect their duties may lead to disciplinary proceedings resulting in the imposition of sanctions which may include written warnings, reprimands, temporary suspension of step advancement, demotion, dismissal, etc. The importance of disciplinary proceedings is such that the procedure to be followed by the authorities, in which GA principles may have a prime position, should be clearly set out. Among the most frequently reproduced GA criteria with respect to disciplinary proceedings are: public officials should in principle be informed of investigations concerning them; reasons should be given for the proceedings; the official's right to be heard should be guaranteed; the proceedings should be adversarial; the official should have a right of access to documents and information, etc.

Lastly, in many administrations there is also a concern to protect public officials who have reported irregularities they have identified in the course of their work (fraud, corruption, etc) from the harmful consequences to which this might lead.[106]

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[105] All these duties incumbent on public officials are accompanied by codes of conduct or professional ethics reminding those concerned of all their professional and ethical duties.

[106] See in this connection the report "An administration at the service of half a billion Europeans" drawn up by the COMMISSION (undated)

II.3. Ways of improving GA outcomes with respect to public officials. The infrastructure of GA.

This section will analyse a number of factors that influence GA, at the same time emphasising the need to consider all the recent instruments and initiatives together. In this connection I have found the outline provided by OECD in its report on Ethics in the Public Service[107] very useful, particularly the concept of "infrastructure". This concept and its component elements can generally be used to explain that the capacities of different countries to respond to the challenges of GA depend to a great extent on effective management, the penetration of GA deep within the institutional and cultural fabric of the country and the competences of formulation, application and evaluation of public action associated with GA.

III - For an overall view of application: reasoning in terms of GA infrastructure

Countries and the European Union use a set of instruments and processes in their regulations in order to offer incentives to good administrative conduct, as well as to inhibit undesirable conduct. These tools used by administrations may follow the eight elements composing GA infrastructure:

Table 1: The key elements of GA infrastructure

1. Political engagement with GA
2. An effective legal framework on GA
3. Effective mechanisms to encourage responsibility being taken on GA principles and values
4. Codes of conduct geared to GA
5. Professional socialisation mechanisms (including training) that consider GA principles and values
6. Conditions in the public service favourable to GA
7. Existence or establishment of an organic back-up infrastructure for the setting up of GA and co-ordination of actions
8. Attentive, organised citizens to monitor public officials' actions with respect to GA

This infrastructure allows GA to be understood and used globally and coherently, although the synergies, and even conflicts, between the different components depend on the administrative and cultural traditions of the country, the public management paradigm favoured and previous initiatives to promote GA-based behaviour.

In addition, as with ethical infrastructure, GA fulfils three functions: supervision (the legal framework providing means of investigating and punishing maladministration, mechanisms to encourage people to be responsible; citizen participation); guidance (coherent support by politicians; codes of conduct setting out GA principles and values; professional socialisation activities on GA); management (good conditions in the civil service, based on human resource policies; co-ordination by a body specifically responsible for GA).

[107] OECD (1996).

Although all the components of the infrastructure are almost completely interdependent and reciprocal, because of the specialisation of this report I shall concentrate on the key components nearest to our subject, ie public officials and their status.

III.1.- The legal framework

This framework consists of all the laws and regulations that set out standards of conduct for public officials in relation to GA and impose observance of certain limits (supervisory function). It provides a number of important points to GA infrastructure: it sets out the boundaries of behaviour for civil servants and provides a system of sanctions. Under various formulations, it also gives citizens access to public information and processes, at the same time improving the transparency of the work of public authorities and their public officials. It is clear that increased transparency requires greater responsibility. The legal framework should be accessible and adaptable, indicate to public officials what they should do and how to do it, and also inform the public of what the public service is supposed to do.

The legal framework is often surrounded by a set of mechanisms to encourage responsibility with concurrent objectives. In order to increase the effectiveness of internal preventive mechanisms to encourage responsibility for GA, they should be part of a clear management framework reflecting the real roles and responsibilities of public officials.

III.1.1. Means of investigation and assessment

In addition to their role of supervising management, mechanisms to encourage responsibility also serve for investigation and evaluation in relation to GA. The means include audits (internal and external, focusing above all on financial responsibility and on performance), mediators (who deal with complaints about administrative procedures, but may also contribute actively to seeing that GA-related regulations are complied with), "community visitors" and consultative committees.

III.1.2. Codes of conduct[108] on GA

These may take the form of a legal document or a simple administrative declaration setting out the level and quality of performance expected of the employees concerned. A code of conduct for a particular organisation may combine a whole series of elements: values to be upheld, its functions, employees' responsibilities with respect to them, the legal obligations of public officials (such as declaring conflicts of interest, etc), procedures, warning, etc. Codes thus play a guiding role in GA infrastructure.[109]

[108] As recognised in the explanatory memorandum to Recommendation R (2000) 10 of the Council of Europe, codes of conduct may be called "codes of good practice". Generally, codes of conduct set out the principles that should guide the behaviour of public officials, while codes of good practice are often addressed to clients, setting out the standards they have a right to expect, rather than to members of the institution.

[109] For more information on codes of conduct see OECD (1996, pp. 38 ff) and Council of Europe Recommendation R (2000) 10.

III.1.3. Civil service conditions

These are very important for GA infrastructure since they can be more or less propitious to good administrative conduct.

They are influenced by external factors (adjustments to the public sector, degree of social maturity and citizen demands) and internal factors (human resource policies). I shall concentrate on the latter, trying to draw some conclusions.

In the first place, it must be recognised that these policies have a direct impact on the behaviour of public officials and that to a certain extent they constitute/demonstrate a major part of the organisational culture of the public service (one might think of recruitment, training, other rights, duties and responsibilities. In the public sector all these reflect a cultural vision linked to values and principles).[110]

As was emphasised above, work needs to be done to apply GA factors to human resource management activities. Firstly, by considering these activities a very appropriate area for the internal management of GA which will probably result in not insignificant cultural and socialisation effects; next, an examination of the content of the various personnel management activities is required in order to include GA factors in them, and this leads to the question of the establishment of indicators. In this way, it is quite conceivable that GA aspects might be considered when drawing up entrance examinations, in the training required and in in-service training, in defining the merits leading to promotion, etc. Most of these changes are not dependent on amending the formal regulations on public officials or personnel administration in the traditional sense[111], but on strategic, innovative human resource management allowing a new vision of officials' rights, duties and responsibilities based on knowledge, transparency and service to citizens.

[110] See section II.1 of this report.

[111] The experience of reforming the European Union civil service shows that many changes can be made without modifying regulations (internal provisions on training policy or the system of staff evaluation and promotion), but the implementation of other provisions do require their modification. These modifications seek, for example: to ensure the unitary nature of the civil service, introduce progress and innovation in the work environment (in particular the Charter of Fundamental Rights and the culture of serving citizens), clarify rights and duties, etc.

Conclusions

Bearing in mind that this is a debate that has just started, the following conclusions may be drawn. They do not close the debate, but should help to open it up.

1.- GA is composed of a set of rights with varying legal impact but also a sort of management philosophy allowing ongoing examination of public objectives, their management and the position of citizens with respect to it.

2.- GA is a horizontal public policy in that it concerns all administrative services and bodies, all fields of public activity, citizens and public officials, all phases of analysis of public policies, the legitimacy of public action and, lastly, all the factors that can be distinguished in administrative analyses (including the importance of human resources and their management, without neglecting the need to examine legal means relating to them, particularly the regulations on rights, duties and responsibilities).

3.- GA requires an external and internal reading since it is not enough simply to apply it to relations between public officials and citizens – it also has to be applied to relations between public officials and the various public administrations in order to regulate matters concerning their status. This means that the rights, duties and responsibilities of public officials have to be managed taking GA principles into account, both in the context of procedures and assessment of knowledge and merit to gain access to public employment and, once a public official is appointed, in connection with promotion, remuneration, duties and responsibilities.

4.- A number of key elements can be identified in relation to GA which together form a sort of "GA infrastructure"[112] which makes it possible to systematise its planning and implementation within administrations and to create synergies. The activities associated with infrastructure fulfil three functions: monitoring, guidance and management of GA. Among GA management activities, human resource management should be emphasised and, again, the importance of the status of public officials and the values of the public service. It is here and in the values and maturity of the society that the keys to answering the following question are to be sought: Why, given that certain basic principles of GA have long existed in the administrative legislation of many countries, have they not been satisfactorily observed and legally protected? This is a theoretical challenge and an invitation to debate addressed to everyone.

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[112] As mentioned above, the term "infrastructure" is taken from an OECD report. See OECD (1996).

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Monitoring of the performance of the administration's functions by society

Mr Cezary BANASIŃSKI
Warsaw University, Department of Law and Administration
President of the Office for the Protection
of Competition and Consumers, Poland

1. Public control of the operation of public administration designed to ensure the openness of operations reflects the principle of belief in democracy and the trend towards empowering the citizen in the broadest legal and political sense. Hence, transparency in public administration's functioning is one of the fundamental operating rules to govern the administration of a modern State.

To establish and present various aspects of public administration's respect for openness of operation is a daunting task if not impossible, as each aspect of complying with the rule may only be exemplified by specific cases or situations. The principle of openness of operations in the service-providing administration differs from that in public governance, or in anti-monopoly proceedings, for instance, or when assessing the scope of admissible State aid.

Regardless of their multiplicity, aspects of the openness principle in public administration operations are undoubtedly underpinned by a common legal category of the right to access information on the functioning of public administration.

2. The right to access information on the functioning of public administration should be treated broadly as "the citizen's right to know". In other words, the right is construed as a condition for the citizen's actual participation in decision-making in public affairs. Hence the significance attached to this right in modern European legislation, including constitutional legislation which contains the legal foundations for public control of operations of public administration.

This holds also for the Polish legal system. Among the civic political rights and freedoms, Art. 61 of the Polish constitution warrants a universal civic right to access information on the operation of central and local government agencies representing public authority, and the information on the activities of persons in public office. The right also includes accessing information on business and trade self-management bodies and other persons and entities insofar as they perform public authority responsibilities and hold self-managed assets or State property under management.

The right to access information on the operations of public authority bodies covers access to documents, attendance at meetings of collegial bodies of public authority constituted in public elections, and the possibility to record sound or images.

The universal civic right to access information on public authority operations, as warranted by the Constitution Art. 61, is in a way an acceptance of the first recommendation by the Ministerial Committee of the Council of Europe no. R/81/19 of 25 November 1981 on access to information held by public authorities.

The provisions of Art.61 of the Constitution reflect practically all the fundamental principles formulated by the recommendation, such as: the right of each person to obtain information held by a public authority irrespective of whether he or she has a legal interest; the right to equal access information; or restricting refusal to access information to instances related to the necessity of defending justified public and individual interests in the event of information directly affecting the individual.

When analysed, the provisions of Art. 61 of the Constitution clearly point to the conclusion that the scope of the right to information provided therein is largely determined by the Constitution itself. The provisions set forth the types of citizen's powers entailed by the right's effective operation; furthermore, they indicate the entities which have the obligation to take such actions as to ensure the exercise of the right. Last, but not least, they set out the substantive scope of the right. Therefore, possible limitation of the right is admissible with a view to protecting the rights and freedoms of other individuals, business entities and preserving public order, security or protecting an important business interest of the State. The Constitution vests the ordinary lawmaker with the task of setting forth the procedure for making information on operations of public administration available.

3. The exceptional degree of precision in the provisions of Art. 61 means that the constitutional right to information on the operations of public authority agencies raises no major doubts as to their interpretation. This is affirmed by the Constitutional Tribunal in the verdict of 16 September 2000 (K 38/01) pointing to the need to separate the substantive right to information from the procedure for making such information available. The substantive right to public information and its scope is quite different from access to documents and their use, and from setting out relevant policies to regulate these issues.

According to the Constitutional Tribunal, "the scope of the right to information is directly provided for by Art. 61 of the Constitution and ordinary statutes. The 'procedures for providing information' in their turn are procedural directives which indicate the manner of realising the substantive aspect of this right".[113]

The Constitutional Tribunal's assertion is by all means pertinent. Procedural directives may concern issues such as:

- implementing details of the forms of access to information by deciding whether such information is to be made available by advertisement in (mass) media, or by announcing or posting it in publicly available places,
- decisions as to the medium for information – e.g. the *Biuletyn Informacji Publicznej* (Public Newsletter) is an official telematic medium,
- determining whether information is to be available ex officio, or upon request and by binding the agency requested with a specific deadline for reply,
- indicating dates and deadlines for publishing specific types of information, e.g. about the environment,
- designating the legal form in which information may possibly be refused, specifying the means for challenging decisions in this respect.

[113] Constitutional Tribunal verdict of 16 September 2002 (K 38/01).

Other than procedural directives, regulations regarding organisation and technical issues related to exercise of the right to access information are significant. They may pertain to issues such as:

- determining the office hours/ time in which a document is available,
- indicating a unit responsible for making specific documents available in the structure of an administrative body,
- specifying rules governing duplication of the available documents, etc.

Relevant procedural directives and rules for technical and organisational issues alike are important inasmuch as their absence hampers the realisation of the right to access information. Likewise, the work of administration may also be made more difficult.

As viewed by the Constitutional Tribunal, "the constitutional order to normalise the procedure for giving information on the operations of public authorities is both an authorisation and a commitment to specify aspects of the mode of conduct in such a way that – by regulating procedural, technical and organisational issues – the exercise of the right to information may be practicable".[114]

4. Constitutional provisions on citizens' rights to information and its complement are put into effect by provisions of the law of 6 September 2001 on access to public information.[115] They fine-tune both the characteristics and the scope of entities obliged to give information, as well as issues related to the information's content and mode of soliciting information.

The aforementioned law has broadened the range of entities entitled to the right to public information as the Constitution vests this right merely in the citizen. Meanwhile, the law on the right to public information vests this right in anyone requesting information, whereby such persons may not be required to prove their legal or factual interest (Art. 2). Consequently, anyone, i.e. both Polish and foreign nationals, may demand access to public information without having to substantiate their demand in any way.

5. Provisions of the law on access to public information are complemented by specific regulations which warrant public control of public administrations. These include primarily:

- the Environmental Protection Act of 21 Act 2001 which guarantees the right to information on the environment;[116]
- the Administrative Proceedings Code of 14 June 1960,[117] which provides for issues such as petitioning, filing complaints and requests (Arts. 221 – 259),

[114] Constitutional Tribunal verdict of 16 September 2002 (K 38/01).
[115] *Journal of Laws*, 2001, no. 112, item 1198.
[116] *Journal of Laws,* no. 62*,* item 627, as later amended.
[117] *Journal of Laws*, 2000, no. 98, item 1071, as later amended.

- the Press Act of 26 January 1984,[118] which obliges public authorities to provide information on their operations (refusal to provide such information may be challenged in the administrative tribunal).

Special regulations of the right to public information include also the Protection of Competition and Consumers Act of 15 December 2000, which has obliged the President of the Office for the Protection of Competition and Consumers (OPCC) to publish the Official Journal of OPCC. The journal contains decisions, resolutions and communications of the President of the OPCC, and judgments of the Court for Protecting Competition and Consumers, and the Supreme Court. It may be added that the aforesaid was the first act of Parliament to warrant formal access of citizens to public information. Practically speaking, the citizen's right to access information was broadly warranted before the Protection of Competition and Consumers Act came into force; the decisions and resolutions were promulgated on the Web. The dedicated OPCC website is also used to publish the opinions of the President of the OPCC on granting State aid to specific entrepreneurs. Similarly, issues related to product safety (market supervision as from 1 May 2004) must be published. This applies in equal measure to the outcome of consumer affairs audits, which in effect contributes to enhanced transparency in the operations of public administration.

The only type of information not made available is on the progress in anti-monopoly proceedings before a decision is issued, and relevant information constituting business secrets, as implied by Art. 63.3 of the Protection of Competition and Consumers Act (this applies also to the Court for Protecting Competition and Consumers pursuant to Art. 47933 of the Civil Proceedings Code).

6. In conclusion, one may note that, from the legal perspective, public control of public administration (referred to as unorganised public civil control) has its model regulation at the level of the Constitution.

Likewise, no doubts surround the regulation of procedural, technical and organisational matters contained in the law on Public Access to Information of 6 September 2001.

Moreover, detailed provisions normalise the right of access to information in a manner allowing for its full exercise, as perfectly exemplified by regulations in legal areas as 'hermetic' as the law of competition.

Consequently, public control of public administration does not seem to be an independent legal issue; rather, it is to be seen in the context of good administrative practice. And, the latter depends solely on the human element.

[118] *Journal of Laws*, no. 5, item 24, as later amended.

The right to good administration in the case- law of the European Court of Human Rights

Mrs Dimitrina LILOVSKA
Lawyer, Department for the execution of Judgments of the European Court of Human Rights,
DGII, Council of Europe

I should first like to thank the organisers of this conference for giving me the opportunity to present certain aspects of the right to good administration in the case-law of the European Court of Human Rights.

The contribution of the European Court of Human Rights in this field should be placed in the broader context of the Council of Europe's activities to strengthen the legal framework of good administration as an essential component of good governance. As examples of the diversity of those activities, I should like to mention the 1981 Convention on the Protection of Personal Data, the 1999 Civil Law and Criminal Law Conventions on Corruption, Committee of Ministers Resolution (77) 31 on protection of the individual in relation to acts of administrative authorities and Recommendation R (80) 2 concerning the exercise of discretionary powers by administrative authorities.

The specific interest of the European Convention on Human Rights of course lies not only in the catalogue of rights guaranteed, but also in the judicial system for protecting those rights with the establishment of the European Court of Human Rights, which is competent to hand down legally binding judgments.

The question before us is how the right to good administration is guaranteed in the framework of this system. The Convention does not set out "a right to good administration" as such nor, moreover, does the term "good administration" appear in the case-law of the Court, unlike the term "good administration of justice", which concerns above all the functioning of the courts.

In order to define this right, inspiration might be sought in the provisions of the Charter of Fundamental Rights of the European Union (adopted at Nice in December 2000) which expressly refers to the right to good administration in Articles 41 et seq (which are to a great extent a codification of the case-law of the Court of Justice in Luxembourg). These provisions mainly concern procedural rights (if one may be permitted the term): for example, the right to have one's case dealt with impartially, fairly and within a reasonable time; the right to be heard; the right to access to one's file; the administration's duty to give reasons for its decisions. The wording of Article 41, paragraph 1, certainly seems to be heavily based on Article 6 of the European Convention on Human Rights, although Article 6 guarantees the right to a fair hearing and its rules therefore apply mainly to the good administration of justice, which will not be the focus of this presentation.

One might also try to give different definitions of "good administration" – from a positive or negative point of view (ie what good administration is not).

What especially interests us here, however, are the principles governing the relations between private persons and the administration according to the case-law of the European Court. These principles may be divided into two major groups, although the distinction between the two is not clear-cut: substantive principles (I) and procedural principles (II).

I. Substantive principles

The substantive principles above all concern all the conditions under which national authorities may limit exercise of the rights established. The second paragraphs of Articles 8 to 11 of the Convention contain a general clause enabling the State to restrict exercise of the right laid down. However, this authorised limitation of fundamental rights is in conformity with the requirements of the Convention only if two basic principles are complied with: lawfulness of the interference (principle of the rule of law) and proportionality of the limitation of the right protected with the legitimate aim of the measure in question.

A. Lawfulness

The idea of the rule of law lies at the very heart of the Convention. The concept appears in the preamble and is one of the fundamental principles for interpreting its provisions. The Court said very early on in the *Engel* judgment of 1976[119] that the whole Convention was inspired by this principle. Fairly early on as well, the Court made an explicit link between the "rule of law" and prohibition of arbitrary measures (*Winterwerp v. the Netherlands*[120]). The rule of law means above all that the actions of those in public authority, like those of ordinary private individuals, should be within the limits that the law has defined in advance. Such an objective imposes certain requirements that laws themselves must reflect. Thus the terms "in accordance with the law" and "prescribed by law" used in the second paragraphs of Articles 8 to 11 of the Convention mean first that restrictive measures should have a legal basis in domestic law, but also concern the quality of the law in question.

The European Court has a broad conception of the notion of "law" and interprets it in the sense of substantive rather than formal law. It includes both enactments of lower rank than statutes and unwritten law, including case-law, not only in common law countries but also in continental countries under certain conditions (for example in the *Kruslin v. France* judgment[121]).

The Court has set out more specifically the conditions any law used as the basis for interference must fulfil. In order to emphasise that the power of the authorities to restrict the right guaranteed should not be exercised in an arbitrary manner, the Court has established in its case law that a law must contain "accessible" and "precise"

[119] Judgment of 8 June 1976, A22 (A – Court of Human Rights, judgments and decisions, Series A – up to 31 December 1995).
[120] Judgment of 25 October 1979, A33.
[121] Judgment of 24 April 1990, A 176-1. The Court also considers international law to be equivalent to the "law" where domestic law expressly refers to it and includes it in the corpus of lawfulness (for example, international telecommunications law, *Groppera Radio AG v. Switzerland*, judgment of 24 March 1990, A 173, and *Autronic AG v Switzerland*, judgment of 25 May 1990, A178).

standards. "Accessible" means that citizens are able to become aware of its substance (through publication, for example). The law should also be precise and foreseeable in its consequences. This means that it should set out sufficiently clearly the conditions under which and the ways in which a right may be limited in order to enable citizens to regulate their conduct and enjoy protection from arbitrary measures.

For example, the Court considers that, in view of the seriousness of the violation of private life and correspondence it involves, telephone tapping should be based on a particularly precise law. This condition was not fulfilled in the above-mentioned *Kruslin* case; French law, principally case-law, did not "indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity". In six recent cases concerning detention conditions in prisons in Ukraine the European Court concluded there had been a violation of Articles 8 and 9 of the Convention on the grounds that the limitations on prisoners' rights to visits, correspondence and to consult a priest were regulated by an unpublished internal instruction.[122] However, the requirement of precision and foreseeability is relative: the level of precision required of legislation depends to a great extent on the field concerned and the number and status of those to whom it applies: the European Court has thus accepted that with respect to competition, in the technical telecommunications field, with respect to military discipline and the pharmaceutical industry, the wording of the law does not necessarily have to be absolutely precise.[123]

Since foreseeability is expressed by the requirement that the law should be precise, it again comes into play with respect to laws conferring great power of discretion on judicial or executive authorities. The rule of law would be meaningless if those authorities were able freely to decide to restrict the rights recognised by the Convention. It must therefore be ensured that the competence conferred includes a minimum of limitations, that case-law and written law can lay down. It was the judgment in *Silver and others v. United Kingdom*[124] that introduced the idea that "A law which confers a discretion must indicate the scope of that discretion", but immediately stressed that absolute certainty was impossible. The *Malone*[125] judgment stated that "the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference", before concluding that in the instant case "the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking".

In the judgment in *Hasan and Chaouch v. Bulgaria*[126] the Court considered that domestic law did not provide substantive criteria on the basis of which the Council of

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[122] See, for example, the judgment in *Poltoratsky v. Ukraine* of 24 April 2003, available on the website of the European Court of Human Rights: www.echr.coe.int

[123] See respectively, *Markt intern Verlag GmbH and Klaus Beermann,* 20 November 1989; *Groppera Radio* op. cit.; *Vereinigung Democratisher Soldaten Österreichs*, 19 December 1994; *Cantoni v. France*, 15 November 1996.

[124] Judgment of 25 March 1983, A61.

[125] Judgment of 2 August 1984, A82.

[126] Judgment of 26 October 2000, Reports 2000-XI. (Reports of Judgments and Decisions of the European Court of Human Rights – since 1 January 1996)

Ministers and the Directorate of Religious Affairs registered religious organisations and changes in their management, in particular in a situation, such as in the instant case, of conflict between two representatives of the Moslem religion. The Court went on to observe that there was no adversarial procedure for disputing decisions of the executive on such questions and that, in addition, the parties concerned had not been informed of the content of the administrative documents concerning them, and concluded that the interference by the authorities in the applicants' right to freedom of religion was not provided for in law since the relevant legislation conferred unlimited discretionary power upon the executive.

In the *Rotaru*[127] case the Court found that Article 8 of the Convention had been violated since domestic law enabled the national authorities to record and store national security-related data on the private life of its citizens without setting any limits on the exercise of this power (such as, for example, the conditions under which such records would be made, the persons concerned by such measures, how long the information could be kept by these State services, etc).

The principle of accessibility, precision and foreseeability of the law also applies to limits on property rights. Under Article 1, paragraph 1, of the First Protocol, no one may be deprived of their possessions except in the public interest and subject to the conditions provided by law.

While the legal basis that provides for interference by the authorities in the rights guaranteed by the Convention corresponds to the requirements just examined, the Court assesses the legitimacy of the goal pursued by such restrictions and their "necessity in a democratic society", according to the wording of the second paragraphs of Articles 8 to 11.

B. Proportionality

According to established case-law based on the *Handyside* and *Sunday Times* judgments, "necessity" implies a "pressing social need" (which means the term "necessary" may not simply equate to "useful" or "expedient") and in particular that the measure taken must be proportionate to the legitimate aim pursued. The Court assesses whether the reasons for interference given by the national authorities are "relevant and sufficient" and if a fair balance has been maintained between the general interest and the interests of the individual.

The European Court's control of the necessity of the restrictive measure is based on the notion of "domestic margin of appreciation". This notion is a creation of the case-law of the European Court and is an expression of the principle of subsidiarity according to which national authorities remain free to choose the measures they consider appropriate for the implementation of their obligations under the Convention, so long as they comply with its minimum standards. The supervision of the European Court therefore only concerns whether or not those domestic measures are compatible with the Convention. Its assessment focuses on the purpose of the disputed measure and on its "necessity" in the light of the circumstances of the particular case.

[127] Judgment of 4 May 2000, Reports 2000-V.

The assessment of proportionality varies according to several parameters the Court combines. The first concerns the nature of the right at issue – the Court's assessment will be more strict and the margin of appreciation left to the State less if the interference concerns a right affecting the individual's private life, such as the right to confidentiality of personal data concerning health,[128] a parent's right to visit children,[129] the right to have homosexual relations,[130] etc. Conversely, the technical nature or complexity of the activities at issue (unfair competition,[131] town planning policy,[132] etc) will lead the Court to give States great discretionary power. The State also has a broad margin of appreciation when it draws up and implements tax policy.

The presence or absence of "a common European approach" to a particular problem is also taken into account. The existence of common legal principles reduces the State's margin of appreciation – this is the case with equal treatment between legitimate and natural children (*Marckx v. Belgium*, judgment of 13 June 1979, A31), the protection of journalistic sources (*Goodwin v United Kingdom*, judgment of 27 March 1996, Rec. 1996-II), etc. Conversely, the absence of a common approach leaves the State a broad margin of appreciation as to the necessity of the restrictive measure – with respect to granting parental rights to transsexuals (*X.Y. and Z v. United Kingdom*, 27 April 1997, Reports 1997-II) or again the right of homosexuals to adopt (*Fretté v. France*, 26 April 2002).

A few examples will certainly help to illustrate the application of this principle more clearly.

The Court has consistently regarded the placing in care of a child by the public authority and the consequent restrictions on parental rights as interference in the right to respect for family life.[133] European case-law on parent-child relationships is guided by the search for a balance between the requirements of child protection and respect for parental rights. The Court has therefore considered that the placing in care of a newborn baby without warning the parents and as soon as the child was born constituted excessive interference in family life which could only be justified by "extraordinarily compelling reasons", which was not the case in *K. and T. v. Finland*.[134] The Court very rigorously controls "taking into care" measures, such as restrictions or prohibitions on contacts between parents and children. Measures placing children in care are only compatible with Article 8 if the national authorities have fulfilled their positive obligation to take the measures that could reasonably be required of them in order to facilitate family reunion.[135]

With respect to freedom of religion, the Court concluded in *Metropolitan Church of Bessarabia v. Moldova*[136] that the authorities' refusal to recognise the applicant church

[128] *Z. v. Finland*, judgment of 25 February 1997, Reports 1997-1.
[129] *B. v. United Kingdom*, judgment of 8 July 1987, A121.
[130] *Dudgeon v. United Kingdom*, judgment of 22 October 1981, A45.
[131] *Markt intern Verlag GmbH and Klaus Beermann*, op. cit.
[132] *Sporrong and Lonnroth v. Sweden*, judgment of 23 September 1982, A52.
[133] *Olsson v. Sweden*, judgment of 24 March 1988, A130.
[134] Judgment of 27 April 2000.
[135] *Gnahoré v. France*, judgment of 19 September 2000, Reports 2000-IX.
[136] Judgment of 13 December 2001 Reports 2001-12.

(and its legal personality) had such consequences on the religious freedom of the applicants that it could not be regarded as proportionate nor therefore as necessary in a democratic society and that there had been a violation of Article 9 of the Convention.

The Court seems to be particularly exacting when examining the conditions that restrictions on freedom of expression must fulfil in order to be compatible with the Convention. Freedom of the press and the protection of journalistic sources are particularly highlighted in the case-law. Therefore restrictions on the press must be strictly proportionate and concern statements that have actually gone beyond the limits of acceptable criticism.[137]

The freedom of association of political parties also enjoys special protection in a democratic society which must ensure pluralism and the effectiveness of political debate. The Court has several times considered that a measure as radical as definitive dissolution of a political party simply on the grounds of its programme is disproportionate and therefore a violation of Article 11.[138] In *Stankov v. Bulgaria*[139] the Court concluded that in the circumstances of the case, which did not indicate any real foreseeable risk of violent action, incitement to violence or any other form of rejection of democratic principles, the mayor's banning of the political party's commemorative meetings was neither justified nor necessary in a democratic society.

With respect to protection of the right to property, in its 1982 judgment in *Sporrong and Lonnroth*[140] the Court laid down that there was a general requirement that limitations on this right should be proportionate: a fair balance had to be maintained between what was required by the general interest of the community and the requirements of safeguarding individual interests. In the instant case the time limits of the expropriation permits combined with prohibitions on construction constituted disproportionate interference in the applicants' right to respect of their possessions. The assessment of this balance obviously takes into account the conditions of compensation, the right to compensation being a constituent part of the right to property. The Court takes a stricter view where there has been substantive infringement of the right to property (the majority of violations concern this). The Court gives itself the power, after the national authorities, to assess the balance of interests at issue and to examine the appropriateness of the measure complained of. When it has to assess the compensation awarded following deprivation of property, the Court assesses whether the compensation is commensurate with the value of the property. Furthermore, compensation has to be forthcoming within a reasonable time. For example, an abnormally long delay in paying compensation for expropriation due solely to the slowness of the administration increases the financial loss to the person whose property has been expropriated and amounts to a violation of the general principle of respect for property, distinct from the expropriation measure itself.[141]

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[137] See, for example, the judgment in *Lingens v. Austria*, 8 July 1986, A103.
[138] For example, in the judgment in *Socialist Party and Others v. Turkey*, 25 May 1998, Reports 1998-III.
[139] *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, judgment of 2 December 2001, Reports 2001-IX.
[140] Op. cit.
[141] See, for example, the judgment in *Akkus v. Turkey*, 9 July 1997, Reports 1997-IV.

Clearly, the rights of individuals would be better guaranteed if the assessment of all these factors, respect of the principles of lawfulness and proportionality, took place at national level. The Convention entrusts, in the first place, to the State authorities – and more particularly the domestic courts which are more familiar with the national system – the task of ensuring enjoyment of the rights and freedoms enshrined in the Convention. States themselves have the responsibility and obligation to adjust the legal system and the effective guarantee of these rights in accordance with the principle of subsidiarity of European control. These guarantees at national level, that individuals must have available in order to assert their rights and freedoms and protect themselves from arbitrary decisions by the administration, are regulated at the level of the Convention by procedural rights.

II. Procedural principles

Protection of freedom would be meaningless if it were not entrusted to an independent and impartial judiciary, the guarantee of a fair hearing. Two elements inherent in the right to a fair hearing guaranteed under Article 6 of the Convention are of particular interest for the regulation of relations between the administration and private individuals – the right of access to a court and the right to have judicial decisions enforced.

1. Effective review of administrative acts

The right of concrete and effective access to a court implies that the person has a "clear, practical opportunity to challenge an act that is interference with his rights." In its *Golder* judgment[142] the Court, after noting that "one can scarcely conceive of the rule of law without there being a possibility of having access to the courts", States that the right of access to a court is an inherent element of the right to a fair hearing. In *Klass and others*, 1978,[143] where the issue was whether secret telephone tapping allowed by German law under anti-terrorism measures complied with Article 8, the Court said that the "The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure". This requirement should be read together with Article 13 of the Convention which provides for "an effective remedy before a national authority" for every person "whose rights and freedoms as set forth in this Convention are violated" and also with the right to have the lawfulness of detention tested (Article 5, paragraph 4).

Before presenting a few examples of the Court's case-law on the right of access to the courts, something should perhaps first be said about the scope of application of Article 6. The right to a fair hearing does not apply to all legal disputes but only "in the determination of civil rights and obligations and criminal charges". The Court has accepted in its case-law that these are "autonomous" concepts whose meaning differs from that given them in domestic legal systems. I will not enumerate here the fields in

[142] 21 February 1975, A18.
[143] Judgment of 6 September 1978, A28.

which individuals have the right of access to the courts. In order to understand the scope of this provision a few examples can be given directly concerning the activities of the administration which show the trend towards extending the scope of application of this provision. For example, the Court has found that Article 6 applies to procedures concerning various administrative decisions affecting the right to property (refusal of a building permit, refusal to grant an exemption from a plan prohibiting building, expropriation procedure, etc) or to the exercise of a professional activity – authorisation to run a clinic or a bar. The Court has included in the scope of application of this provision disciplinary proceedings and labour relations proceedings (for example, the suspension by a medical association,[144] dismissal from a private company[145]). The right of access to the courts also applies to procedures concerning the granting of social services and assistance,[146] etc. With respect to "criminal" matters the Court has extended the application of Article 6 to disciplinary measures, disciplinary measures in prisons, and also to administrative sanctions and tax penalties.

In all these fields and of course in "classic" civil and criminal areas, individuals have the right to ask the courts to settle, on the basis of the law, their disputes with the public authorities and therefore to supervision of those authorities. The European Court has concluded that there has been a violation of the right to access to the courts where such access has been excluded. For example, with respect to the deportation of a foreigner, the Court concluded that domestic procedure did not comply with the requirements of the Convention because no supervision by an independent court was provided for where the grounds for deportation put forward by the authorities were connected with national security and, in addition, the administration had not followed a procedure with the participation of the person concerned and had not given reasons to justify the argument of protecting national security.[147] The authorities may not rely on the argument of guaranteeing national security in order for decisions violating the fundamental rights of individuals to escape all judicial review.

Access to the courts only has full meaning where the courts have sufficient power to review the lawfulness of the measures disputed before them in such a way as to eliminate any risk of arbitrary measures being taken. In the cases *O., H., W., B. and R. v. United Kingdom*,[148] 1987, the Court concluded that there had been a violation of Article 6 since the applicants were able to have some aspects of local authority decisions on visits examined by the English courts by asking for judicial review, but the courts were not competent to rule on the merits of the decisions and their power was therefore very limited.

In a number of cases the Court has found that the applicants did not have effective means of appeal against the acts of the executive by reason of the fact that the competent courts had refused to examine their applications as to the merits. For example, in the case of *Hasan and Chaouch*,[149] the Supreme Court had refused to

[144] *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, A43.
[145] *Buchholz v. Germany*, judgment of 6 May 1981, A42.
[146] *Feldbrugge v. Netherlands,* judgment of 29 May 1986, A99, and *Salesi v. Italy*, judgment of 26 February 1983, A257-E.
[147] See the judgments in *Al-Nashif v. Bulgaria*, 20 June 2002, and *Chahal v. United Kingdom*, 15 November 1996, Reports 1996-V.
[148] Judgments of 8 July 1987, A120 and A121.
[149] Op. cit.

examine the merits of a decision by the Council of Ministers, considering that that body had unlimited discretionary powers with respect to deciding whether or not to register the statutes and the leaders of a religious group, and had simply pronounced on the formal question as to whether the disputed decree had been issued by the competent body. In the 2002 case of *Posti and Rahko*[150] which concerned ministerial decrees restricting fishing rights, the Court concluded there had been a violation of Article 6 because the Supreme Administrative Court of Finland had refused to examine the lawfulness of the decrees. It had said it did not have jurisdiction to hear an appeal against an act which in domestic law was considered an administrative regulatory act rather than an individual act.

Moreover, it is not enough for access to the courts to be arranged for in domestic law purely theoretically: there must be a concrete and effective right of access. Access to the courts may be hindered by a legal obstacle, such as the complexity of the appeals procedure available, or a practical obstacle, such as the high cost of the proceedings. Similarly, the European Court considers that the impossibility of obtaining free legal aid (provided for in the Convention only in criminal cases) infringes access to the courts where the complexity of the proceedings or the case make such assistance indispensable or the law requires the presence of a lawyer.[151] The *Serghides and Christoforou v. Cyprus*[152] case is very interesting in this respect since the applicants had not been informed of administrative decisions to expropriate their land and had therefore lost the possibility of disputing them before the courts because the legal time-limit had expired (they had to apply to the court within 75 days of the publication of a notification in the Official Gazette). In a case with some similarities (*De Geouffre de la Pradelle v. France*[153]) the time-limits within which the applicant could apply to the French Conseil d'Etat to dispute administrative decrees classifying a site as being of outstanding natural beauty depended on the categorisation of those acts as general and impersonal or individual. The Court considered that the procedure was so complex that domestic law did not offer the applicant effective access to the courts.

Thus we have seen that there may be various kinds of obstacles between the individual and the courts which should effectively review the administration's acts. The courts also have to fulfil the requirement of independence and impartiality and ensure a fair hearing within a reasonable time. We shall not be looking here at these issues, which lie at the heart of the right to good administration of justice, although they are of crucial importance for the effective guarantee of individuals' rights and freedoms.

To this central aspect of procedural guarantees has to be added another element that deserves our attention – the right to the enforcement of judicial decisions

2. Enforcement of judicial decisions

The *Hornsby v. Greece*[154] judgment marked an important step in extending the guarantees of Article 6, paragraph 1, which are not solely limited to the context of a

[150] Judgment of 29 September 2002.
[151] See, for example, the judgment in *Airey v. Ireland,* 9 October 1979, A32.
[152] Judgment of 5 November 2002.
[153] Judgment of 16 December 1992, A253-B.
[154] Judgment of 19 March 1997, Reports 1997-II.

hearing. The Court stated that the right to a fair hearing "would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party". Considering that "by refraining for more than five years from taking the necessary measures to comply with a final, enforceable judicial decision in the present case the Greek authorities deprived the provisions of Article 6 para. 1 of the Convention (art. 6-1) of all useful effect", the Court clearly indicated that the concept of a fair hearing covered, not only access to the courts and the handling of the case, but also the implementation of judicial decisions. This case-law gives "the right to the courts" its full effectiveness and, more precisely, considers as a violation of Article 6, paragraph 1, the failure to enforce a final judgment either as a result of the behaviour of the administration (for example, *Kyratos v. Greece*, 22 May 2003: prolonged refusal by the local authorities to implement the decisions of the Supreme Administrative Court ordering the demolition of a building), or even of national legislation (*Immobiliare Saffi v. Italy*, judgment of 28 July 1999: legislation paralysing the enforcement of a judicial order to expel the tenants of a building). Indeed, review of administrative acts would have no effect whatsoever if the domestic system enabled its authorities not to comply with judicial decisions.

A number of examples from the Court's case-law illustrate this risk of ineffectiveness of judicial review of the acts of the executive. Again, in the *Hasan and Chaouch* case, the Court considered that the repeated refusal of the Council of Ministers to enforce the judgments handed down by the Supreme Court in 1996 and 1997 was a manifestly unlawful act of particular gravity against the principle of the rule of law inherent in all the articles of the Convention which implies a duty for the State or another public authority to comply with a judgment or decision made against them. Delay in the execution of judicial decisions made by domestic courts can be justified only in particular circumstances. Lack of funds could not justify failure to enforce a judgment providing for the compensation of the persons who took part in emergency actions following the Chernobyl accident (*Burdov v. Russia*, judgment of 7 May 2002). The Court concluded that the lack of any action over a number of years on the part of the Russian authorities to comply with those judicial decisions had deprived the provision of Article 6 of any real effect.

What is still more interesting and directly linked to the principles of good administration is that in the *Vasilopoulou* judgment of 2002[155] the Court considered that the reasonable time, within the meaning of the requirements of Article 6, included the period in which the national authorities complied with the decisions of the courts (or, in this case – did not comply with them). This means that when assessing respect of the right to a fair hearing within a reasonable time the Court also takes into consideration delays imputable to the administration.

Furthermore, henceforth, not only is the phase of enforcement by the administration of a court decision included in the assessment of a reasonable time, but also the phase preceding the case's being referred to the courts. In the 2003 judgment in *Fuchs v. Poland*,[156] the Court considered that the period to be taken into account ran from the date when the mayor issued a building permit to the applicant's neighbour. In the case

[155] 21 March 2002.
[156] 11 February 2003.

Janosevic v Sweden[157] the Court considered that the fact that the tax administration had made its decision three years after the time when the applicant had submitted a request to review its earlier decision imposing a heavy tax penalty was a violation of the applicant's right of access to a court since, under domestic legislation, without that reconsideration of the administrative decision, a court hearing an appeal against it would be unable to give judgment.[158] In the judgment in *König v. Germany*[159] the Court also concluded that the reasonable time mentioned in Article 6, paragraph 1, ran from the date on which the applicant filed an objection to the withdrawal of authorisations to run his clinic and not from the later date when he began proceedings in the administrative court, since he could not take his case to the competent court before having had examined, in a preliminary procedure before the administrative authority, the lawfulness and expediency of the administrative acts.

The applicability of the requirement of the reasonable time referred to in Article 6 to certain procedures before the administration raises the question of the existence of effective appeals at national level against the excessive length of those procedures. This area, like many others, such as the status of civil servants, the right to non-discrimination, etc, which concern the right to good administration should also be the subject of in-depth discussion at national level and in the framework of international co-operation.

[157] Judgment of 27 July 2002, available on the European Court's website: www.echr.coe.int
[158] See also *Västberga Taxi Aktiebolag and Vulic v. Sweden*, judgment of 23 July 2002, available on the European Court's website: www.echr.coe.int
[159] 28 July 1978, A27.

The right to good administration

General report

Mr Pierre DELVOLVÉ
Professor, University of Paris (Panthéon-Assas – Paris II), France

1. The right to good administration is new in its formulation but not in itself.

The identification of the administration, the determination of the law applicable to it and, in particular, the duties laid upon it, have for long resulted in the public's having rights related to the right to good administration, something that is now generally accepted.

2. The administration, understood organically, is composed of a set of institutions directly or indirectly coming under the executive power of the State.

Some administrations do not have a legal personality distinct from that of the State and are situated at central level (in particular ministries) or at local level (eg prefectures in France), while others, though having a distinct personality distinguishing them from the State, are involved in its organisation: this is the case of local authorities. This organisation, which is classic in a unitary State, is also found in federal or even merely regional states: the existence of legislative or even judicial bodies at a level other than just the State does not, in federated States or States where there is regional autonomy, prevent the existence of administrative structures directly linked to them and others which themselves enjoy a degree of autonomy.

In all cases they are marked out by the role they play which allows the administration to be recognised by its functions. According to one classic definition,[160] to administer is to organise, plan, issue directives, co-ordinate and monitor in order to respond to needs. Two objectives are usually identified: public order, corresponding to police activity (essentially, security, public health and order), exercised mainly through directives; and secondly the services provided to the public whose extent varies according to political conceptions: roads, transport, hospitals and schools, for example. The development of the Welfare State increased the number of such services. The result of the retreat of the State is less to eliminate them than to provide them in different ways.

3. In both its meanings the administration has for long been subject to the law, even if it is a special, administrative law.

The principle of legality is, for example, defined in France as the principle that the administration is subject not only to legislation, but also to the law.

[160] Fayol.

This has been illustrated by already longstanding case-law on respecting the rights of the defence before the administration imposes a sanction,[161] the duty of equality in public services,[162] the duty to inform those to whom a new measure is addressed before applying it[163] and to make restrictions on freedoms proportionate to threats to public order.[164]

At the same time, control has been exercised over the administration, in particular in France, through judicial review by the administrative courts – a remedy available even in the absence of a specific provision to this effect – of any administrative act or decision,[165] including those taken by the Head of State by legislative delegation[166] or referendum.[167]

As Mr Oosting showed in his report, the development of the rule of law and a democratic society involves going further. This is already the case in countries with a long-standing legal tradition and all the more so for those which, after a period of administrative authoritarianism or even despotism, are returning to law and democracy.

4. Some of them have introduced provisions requiring good administration in their constitutions.

For example, under the Spanish Constitution of 1978, "The Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralisation, deconcentration and co-ordination, and in full subordination to the law" (Article 103); "The law shall make provision for: a) The hearing of citizens … in the process of drawing up the administrative provisions which affect them. b) The access of citizens to administrative files and records ... c) The procedures for the taking of administrative action …" (Article 105). Supervision of administrative action and compensation for any damage it may cause are expressly provided for (Article 106).

Similarly, the Polish Constitution of 1997 recognises: - to citizens "the right to obtain information on the activities of organs of public authority as well as persons discharging public functions" which implies "access to documents and entry to sittings of collective organs of public authority formed by universal elections" (Article 61); and to everyone "the right to compensation for any harm done to him by any action of an organ of public authority contrary to law" (Article 77).

Constitutional provisions usually either provide that the law shall determine the conditions for exercising the rights they lay down or are silent.

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[161] Conseil d'Etat 20 June 1913, Les grands arrêts de la jurisprudence administrative, M. Long, G. Braibant, P. Weil, P. Devolvé & B Genevois, 14th edition, 2003, p. 166; 5 May 1944, Dame Trompier-Gravier, p 352.
[162] 9 March 1951, Société des concerts du Conservatoire, p. 431.
[163] 25 June 1948, Société du Journal l'Aurore, p 396.
[164] 19 May 1933, Benjamin, p. 294.
[165] 17 February 1950 Ministère de l'Agriculture v. Dame Lamotte, p. 410.
[166] 6 December 1907, Compagnie des chemin de fer de l'Est, p. 114.
[167] 19 October 1962, Canal, p. 560.

It is therefore for the legislature to supplement the Constitution or fill the gaps in it.

5. It may be enjoined to do so by international instruments.

At EU level, the European Commission has adopted a code of administrative good conduct for its officials' relations with the public. The Court of Justice has developed case-law recognising the principle of good administration[168] and detailing some elements of it.[169] And above all Article 41 of the Charter of Fundamental Rights of the European Union is expressly devoted to the "right to good administration".

The European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols do not contain a similar clause, although, as Ms Lilovska has shown, the European Court of Human Rights has recognised, on the basis of Article 6, paragraph 1, of the Convention which guarantees "the right to a fair trial", material principles and procedural requirements which, from the right to good administration of justice, result in a right to administration *tout court*.

The Council of Europe has adopted a number of recommendations related to some of its aspects: exercise of discretionary powers by administrative authorities,[170] access to information held by public authorities,[171] public liability,[172] administrative procedures affecting a large number of persons,[173] the communication to third parties of personal data held by public bodies[174] and, more broadly, the code of conduct for public officials.

A higher level of legal regulation was reached with the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28 January 1981.[175]

6. The purpose of this conference was to determine whether a further step should be taken by recognising, at the level of the Council of Europe, a right to good administration.

Such a right first has to be defined, not an easy task since the topic is so general. Mr Fortsakis has drawn a parallel between good governance, in relation to constitutional law, and good administration, in relation to administrative law. Good governance does not only concern governments; it is often referred to in relation to business management. In any case, what is at issue is ensuring the effectiveness of action intended to respond to certain needs. The right to something dictates a certain result. It also determines how it is to be achieved. With respect to administration,

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[168] C.J.C.E. 31 March 1992, Burban, case C-255/90, Rec. I.2253.
[169] For example, C.J.C.E. 15 October 1977, Heylens, case 222/86, Rec. 4097; 18 October 1989, Orken, case 374/87, Rec. 32.83; 21 November 1991, TU Müchen, case C-269/90, Rec. I.5469.
[170] Recommendation R (80) 2 of 11 March 1980.
[171] Recommendation R (81) 19 of 25 November 1981.
[172] Recommendation R (84) 15 of 18 September 1984.
[173] Recommendation R (87) 16 of 17 September 1987.
[174] Recommendation R (91) 10 of 9 September 1991.
[175] See, Council of Europe, The administration of private individuals, a handbook, 1997.

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.

It is not restricted to that. As Mr Crespo Gonzalez emphasised, public policies may and even should contribute to the achievement of the right to good administration as much as legal norms and mechanisms.

7. These observations highlight the difficulties involved in a right to good administration. While it is easy to agree on the need for an administration to perform its missions satisfactorily, both as to how it acts and the outcomes of its action, as soon as one tries to specify exactly what the right consists of, one encounters objections.

In this connection, an attempt has to be made to answer two questions:
- What is the nature of the right to good administration? (I)
- What is the substance of the right to good administration? (II)

I. The nature of the right to good administration

8. Mr Verebélyi stressed the novelty of recognising a right to good administration as compared to rights that have already been recognised. In this connection he spoke in terms of a second-generation right. In fact, it is even a third-generation right. The first generation consisted of formal freedoms proclaimed on the occasion of the English (Bill of Rights, 1688), American (Declaration of Independence, 1776) and French Revolutions (Declaration of the Rights of Man and Citizens, 1789).

The second generation concerned economic and social rights, recognised after the First, and above all Second, World Wars which enable private individuals to claim protection and services as of right and require State intervention, in particular in the fields of health, education and employment.

Rights connected with good administration differ from these in that they concern the organisation and above all the functioning of the administration. They go further than formal freedoms, conceived as essentially negative, and economic and social rights, which essentially result in positive services for beneficiaries: they above all determine a certain mode of action on the part of public authorities.

9. It is here that the right to good administration appears, in particular in the text that formulates it most clearly, Article 41 of the Charter of Fundamental Rights of the European Union: under the heading “right to good administration”, it enumerates the rules that should be respected “by the institutions and bodies of the Union”.

Within each State the right to good administration thus appears to lay duties upon it (A); it is in the light of those duties that appear the resultant rights for private individuals (B).

A. Right to good administration and role of the State

10. It emerged from the various reports and comments during the conference that the State, whatever its particular constitutional characteristics and especially structure (unitary, federal, regional), must, in order to ensure good administration, respond to certain requirements with respect to organisation (1) and action (2) which, as we will see, do not necessarily in themselves give rise to rights on the part of the public.

(1) 11. The organisation of the administration should be appropriate to the situation of the public. Although this need can be translated into legal terms, for example in order to develop decentralisation, it cannot on its own determine the rights of each individual.

It should lead to material adjustments ensuring the proximity and accessibility of administrative offices: their location, lay-out and opening hours are probably easier to perceive as signs of good administration than are legislative and regulatory provisions.

The importance of the training of public officials was mentioned several times in the course of our work, in particular by Mr Palmieri. It is useless passing laws and remodelling premises if civil servants are unaware of their duties to the public. It is not only a matter of preventing corruption, which in most countries is a marginal issue, but of fully ensuring that civil servants perform their tasks taking both the general interest and the interests of the persons with whom they are dealing into consideration. In some cases a complete change of attitude is required.

Its implementation is more difficult to measure than the passing of laws, since it is a matter of actual behaviours, even professional conscientiousness. It is at least as important.

It is more generally a facet of human resource management, the importance of which was pointed out by Mr Kulesza.

(2) 12. It enables good action by the administration to be guaranteed.

The services it provides should correspond to the needs of the public. Although it is obvious, this requirement needs to be emphasised. It, too, can also, if not better, be satisfied by practical measures rather than legal texts.

Let us take the example of roads: their maintenance and upgrading are a matter of good administration. In order to ensure them, it is enough – but essential – for holes to be repaired, streets and roads widened and pavements lowered, to give only a few simple examples. These can be extended to transport, the emergency services, waste collection, sewage disposal – still only to mention essential services. The development of modern societies is leading to their proliferation in quantitative terms and increasing demands for quality.

As a corollary of this, the administration has to adapt the substance and means of its action. The principle of constant adaptation not only justifies the constraints it

may place on its co-contractors, officials and users, but also and above all should lead the administration to adjust its action according to the needs of those it is designed to serve.

13. Legal directives may lead it to do so.

They may be in international or constitutional instruments, such as those already mentioned (nos. 4 and 5). The latter establish the constitutional foundations of the right to good administration, as Mr Kieres explained.

They are not always enough. Legislative provisions are needed to specify their scope. Mr Banasiński and Ms Górzyńska quoted those that had been passed in Poland (eg the Act of 2000 on access to public information). In France, the Constitution's silence on the right to good administration, which the very general wording of certain articles of the 1789 Declaration (Articles 6 and 14) does little to offset, has been made good by Acts giving access to administrative documents (17 July 1978), requiring reasons to be given for certain administrative acts (11 July 1979), and adjusting citizens' rights in their relations with administrations (12 April 2000). These laws are not general in scope. General laws, like the Hungarian and Dutch Acts on administrative procedure or codes of administrative procedure cover administrative action as a whole.

Other measures may be taken by the administration itself, either centrally, such as, again in France, the decree of 28 November 1983 on relations between administration and users, or at a lower level in the framework of different services. The codes of good conduct mentioned by several speakers combine a reminder of legal requirements and a description of good practices to inform civil servants and guide their action.

They enable full awareness of what private individuals have a right to expect and demand of it to penetrate right to the lowest levels of the administration.

B. Right to good administration and situation of private individuals

14. The term "private individuals" is used here purposely, for want of a better one.

For a long time, the term used was "the (people) administered" (*les administrés*), but the word implies subjection to the administration, something which is no longer acceptable. The word "citizen" is preferred, which has the advantage of highlighting a status that gives rights, but the disadvantage of excluding foreigners, who have the same rights with respect to the administration of a country they have entered legally as the citizens of that country. The word "residents" could be used since it includes everyone, whether or not they are citizens, but it is used more with respect to the scope of application of the laws of a country than the relations between the administration and certain persons. The word "users" is also common but only covers situations in which the administration provides services, not others. The same is true of "customers", used several times at the conference, which also introduces a commercial aspect which has no place in the administrative order.

The term “private individuals” remains, which concerns only natural persons, while legal persons have an equal right to good administration. However, for want of a better term, it may be used since legal persons are in any case necessarily represented by natural persons: in the final analysis, it is therefore with respect to or through private individuals that the right to good administration has to be assessed.

15. Recognising this right raises the essential question of whether it is an individual right of which those concerned can take advantage. Several speakers answered in the affirmative. A more qualified answer would seem preferable according to whether the right to good administration in general (1) or in its particularities (2) is being considered.

(1) 16. The right to good administration concerns the administration in general. It can be agreed that everyone can demand that the administration should be organised and run satisfactorily: maladministration affects the whole community and every one of its members. This is insufficient to give everyone an individual right regardless of his or her particular situation. While Article 15 of the 1789 Declaration lays down that “Society has the right to require of every public agent an account of his administration” and is thus concerned with the right to good administration, it does not give everyone the right to call every official to account.

In the absence of a precise directive or direct service, the right to good administration in general cannot be an individual right.

Private individuals may certainly demand that the administration be better organised (for example, opening offices in new neighbourhoods) or demand better action from it (for example, fuller information on its projects, modification of pavements, improved street lighting, a new bus service or the introduction of a new security system), but their demands are demands for public action rather than demands having a legal basis: they can be voiced through an electoral campaign, not through procedural channels.

In the absence of a legal mechanism specific to each type of subject, the right to good administration cannot give rise to a strictly legal challenge.

17. The same can be said of the aspect of good administration requiring it generally to respect the rule of law. Here again, placing the administration under the law, however necessary that may be, cannot be invoked by every individual as a requirement concerning him or her personally regardless of his or her own situation: in order to justify a legal challenge, one must be able to invoke, if not violation of an acquired right, at least a personal interest.

(2) 18. This brings us to the right to good administration that private individuals could invoke personally.

Everything depends on the law in force.

Recognition through a general wording of the right to good administration would not be sufficient to enable a private individual to rely on it as an individual right.

It would only establish a context in relation to which the administration's behaviour could be examined in certain circumstances or the scope of certain provisions determined. In this respect it is useful as an analytical key for the recognition of specific rights included in the general formulation of a right to good administration, but is insufficient to establish an individual right.

We have proof of this in Article 41 of the Charter of Fundamental Rights of the European Union. The right to good administration is only its heading. It is not repeated as such in the clauses of the article: these set out what should be understood by this right by setting out what rights result from it for "every person". It is only these that have the character of individual rights that every person may claim from the administration.

19. The same would be true of any other legal instrument (international convention, domestic provision) which recognised the right to good administration.

In order to be effective and have real impact, it is not sufficient simply to formulate the right: the exact consequences that result from it in the various aspects of relations between the administration and those with whom it deals have to be detailed.

Only these details would confer individual rights.

The next step is to determine what substance they should be given.

II. The substance of the right to good administration of justice

20. All the speakers brought out the two series of provisions necessary for the right to good administration to be effective and reflected in individual rights for the benefit of the parties concerned.

The first concerns the laws governing administrative action (A), the second the procedures for enforcing them (B).

A. The laws governing administrative action

21. The laws governing administrative action are based on principles with which the administration must comply (1), their implementation being through mechanisms compliance with which is a right for the individuals in question (2).

(1) 22. A number of principles should govern administrative action and be capable of being invoked against the administration: equality, personality, publicity, proportionality, effectiveness.

23. The principle of equality, with its variant, the principle of non-discrimination, is clearly essential in a democratic society. In particular, it precludes any distinction on grounds of origin, race, religion or gender.

It requires the administration to treat everyone in the same situation in the same way.

Simply stating this is enough to realise the difficulties there may be in some cases in assessing the different or identical nature of the situations of people on the receiving end of administrative action. The solution should be determined by the relevance of the particular action to the particular situation. Only the existence of a true relationship between the situations in which the interested parties find themselves and intervention by the administration can justify differences in situations leading to differences in treatment.

Such differences may in some cases be justified by public interest considerations, in particular to discriminate in favour of certain persons. The special character of their situation may not be enough in itself to determine special treatment, but considerations relating to social, or even economic, interest may result in certain categories of persons being given preferential treatment. This is the problem of "positive discrimination", which is acute in some countries. It is not easy to resolve.

It may reverse the rights of private individuals: while they are normally able to demand equality, the result may be to recognise that they have a right to discrimination. The contradictions are difficult to overcome.

24. It is doubtless easier to ensure observance of three principles that, in the final analysis, seem to be variants of the principle of equality: impartiality, neutrality and objectivity, which cannot always be clearly distinguished from one another.

In any case, private individuals have the right to have their cases treated without bias, setting aside any political, religious or other consideration foreign to the administration.

This is the case even, and perhaps especially, when the measures are taken in consideration of the person.

25. In this connection one comes up against another principle which might be called the principle of personality, even though the expression is not usual: it is justified by the requirements specific to the person of private individuals, requirements from which derive certain rights for them when the administration focuses specifically on them. There are at least two.

The first is confidentiality: the right to respect for private and family life implies both that the administration cannot (unless there is a pressing reason) interfere in private life or disseminate the personal data it has obtained in the performance of its duties.

The second principle is the rights which any member of the public may invoke when the administration intends to take not just a measure against him or her but any measure personally concerning him or her.

26. The principle of publicity is most often expressed as the principle of administrative transparency.

It means that the administration should make known, not only the measures it takes, but also the manner of their taking. This requires that there should be information available to private individuals upstream and downstream.

The requirements of administrative action may justify secrecy at certain stages or even, more generally, with respect to certain subjects. The principle of confidentiality may also oppose the divulging of personal data.

The publicity of administrative action therefore has to be adapted to its subject.

27. We find here an illustration of the principle of proportionality which should also govern it.

The measures an administration takes should be appropriate to their subject, the circumstances confronting it and the persons concerned. There must be a balance between contradictory interests and between advantages and disadvantages.

28. Last is the principle of effectiveness. It may seem redundant in relation to a definition of the administration's duties: once those duties have been set out in a particular area, it is obvious that it should execute them fully.

However, the principle of effectiveness can be considered not only as requiring the performance of all its particular duties but, more generally, as requiring of the administration behaviour that goes beyond each of them and guarantees the conditions of life in society in all circumstances.

This is doubtless a less rigorous principle than the others and one whose scope as to the rights resulting from it is not always clear.

It is nonetheless illustrated in the event of shortcomings on the part of the administration: the sanctions members of the public may obtain show there to be a right to effectiveness.

(2) 29. They are means of implementing the principles that have just been mentioned. The national particularities several speakers mentioned may result in situations varying from administration to administration. Solutions are different in kind according to whether services are provided or decisions adopted.

It is above all for the latter that procedures can be formalised that constitute elements of good administration. The decisions themselves are not uniform: account must be taken of the diversity of their nature, individual or general.

The solutions may be identified at different stages of the decision-making process.

30. Before a decision is taken, the right to good administration is embodied in the right of every person who is to be the subject of a measure connected with his or her behaviour to state his or her case and, if the measure envisaged concerns a fault, to present a defence. This implies at least the transmission of his or her file to the person

concerned and the possibility for him or her to respond to it. This should also include his or her being heard, if necessary with the assistance of a lawyer.

With respect to the adoption of general measures, there should be mechanisms to enable various people concerned to give their opinions: public enquiries should be open to as many as possible; opinions should be gathered from bodies with particular competence in the area under consideration.

31. Decisions should be made within a reasonable time limit. Administrative inertia should be palliated, at least for some individual decisions particularly affecting the situation of the people concerned, by a system of implicit decisions once a certain time limit has expired following the application they have submitted to the administrative authority.

Reasons should be given when the decision is unfavourable to the person concerned; they may also be given in other cases.

The person concerned should be informed of the decision. His or her situation may not be changed unless he or she has been personally informed.

Publication is usually sufficient for general measures, but if they affect certain members of the public personally, those persons should also be informed.

32. Notification and publication are procedures that take place after a decision has been taken and that allow access to that decision.

More generally, access to administrative documents – whether or not they contain decisions – should ensure administrative transparency. Access to those that are general should be very open. Those which concern individuals should be restricted to the persons concerned in the interests of protection of personal data.

Furthermore, while access to the law, which covers legislation and case-law as a whole, goes beyond administration in the strict sense of the term, it is nonetheless a function the administration should perform. It is facilitated by modern communication techniques. Use of them is an illustration of the practical means by which good administration can be ensured, without the need to introduce procedural guarantees.

B. The procedures guaranteeing administrative action

33. Procedures in administrative action have already been mentioned in relation to decision-making. Those at issue now are designed to remedy shortcomings and omissions on the part of the administration with respect to the rights private individuals have in relation to it.

The right to such procedures supplements them. They may be extra-judicial (1) or judicial (2) procedures.

(1) 34. Extra-judicial procedures have the advantage of relative simplicity.

This is the case in particular where they are wholly internal to the administration. Members of the public should be able to complain to it without running the risk of retaliation. It is a right that may be recognised at the highest level. For example, the Dutch Constitution gives "everyone … the right to submit petitions in writing to the competent authorities" (Article 5).

The effectiveness of this right should be facilitated by introducing mechanisms such as openness, proximity to the public, or offices where the public can submit requests and present grievances.

The possibility of appealing to the hierarchical superior of the author of the disputed measure or behaviour or to a member of the department in question (the mediator in an administration) combines a degree of proximity with a degree of distance for receiving and examining complaints.

35. Bodies external to the administration are more distant from it and can, for this very reason, have more authority over it.

We are referring here to independent administrative authorities whose development is one of the innovations of recent decades and which are specifically responsible for guaranteeing certain individual rights in relation to the administration. French examples include the National Computing and Freedoms Commission, which is particularly concerned with the content of files, and the Committee for Access to Administrative Documents, whose intervention enables the resistance of the administration in this area to be overcome.

A body with general competence, such as the Ombudsman on the Scandinavian model or the Mediator of the Republic in France, can make up for gaps in the above-mentioned systems and deal with all cases of maladministration. His or her special status in institutions may be enough to make the administration recognise rights which it has not initially respected, without it being necessary to take a measure invested with *res judicata*.

It may be necessary to go further in some cases, however.

(2) 36. This next step is the introduction of judicial procedures to guarantee the right to good administration. Obviously, they are situated downstream of administrative action. However, in this very action the administration may have to take steps to enable interested parties to set such procedures in motion.

The most important thing is to inform those who have received a decision of the possibilities of challenging it by indicating, in particular, the courts that may be applied to and the time limit within which this should be done. If, where such information is not provided, appeals are admissible indefinitely, the possibilities of remedy are preserved and the rights involved safeguarded.

More generally, administrative remedies should be sufficiently open to enable all interested parties to initiate them easily. This is the case in France, for example, of appeals for misuse of power, which, even in the absence of a specific provision to this effect, any interested party can lodge against an administrative act with a view to having it overturned on the grounds of illegality. Emergency procedures should also enable excesses on the part of the administration to be ended speedily. Claims for compensation should enable the damage caused to be made good.

The requirements of impartiality, effectiveness and reasonable time to which the administration itself is subject also apply to judicial supervision. Here, however, we go beyond the bounds of the right to good administration to the right to good administration of justice, and that is another subject.

Conclusions

Meeting on 4 and 5 December 2003 in Warsaw on the subject of the "Right to Good Administration", the representatives of the Council of Europe member States discussed the problems existing between individuals and the public administration, with a view to finding solutions to facilitate these relations, to prevent illegal acts and any discrimination on the part of the administration.

In the light of a comparative examination of questions pertaining to the functioning of the administration from the point of view of respect for the principles of administrative law and administrative procedures that must be applied in member States to guarantee individuals the right to a good administration, the participants arrived at the following conclusions:

The right to a good administration has already given rise to solutions in certain member States which have, in particular, adopted legislative or constitutional provisions concerning administrative procedures, imposing obligations on the administration with regard to the recipients of its services. At the level of the European Union, the community courts have handed down several rulings on the principle of good administration; Article 41 of the Charter of Fundamental Rights is devoted to the "right to good administration". The Council of Europe has already adopted legal instruments on different aspects of administrative action and the case-law of the European Court of Human Rights also contributes to the protection of individuals in their relations with the administration.

The Conference considers that progress should be made through the adoption of a legal instrument of general scope, reinforcing the requirements of a good administration, to which every person has a right in a democratic society.

These requirements are linked to basic principles which apply to the administration of the Rule of Law, such as principles of equality, non-discrimination, neutrality, impartiality, respect for the rights of the defence, transparency, proportionality and effectiveness.

They call for the adaptation of procedures designed to protect individuals (for example hearing them before adopting unfavourable measures which concern them, making their files available to them, notifying them of reasoned decisions) and to inform them (access to administrative documents).

They oblige the administration to act and to do so within a reasonable time limit, in particular following a request submitted to it.

They imply procedures, whether jurisdictional or not (for example recourse to the Ombudsman) which sanction refusal by the administration, thus allowing a more general control of its activity.

They should be made more clear through legislation which is appropriate to each type of action.

Good administration is not limited to its legal aspects. It is linked to the quality of its management, in particular of its human resources, to the training of its public officials and to the changing of mentalities.

The Conference is ready to study in greater depth the principles that it has identified and invites the Council of Europe to implement them.

It proposes that the Project Group on Administrative Law (CJ-DA) consider the present conclusions in its work on the preparation of proposals for activities with the aim of strengthening the legal framework of good administration as an essential element of good governance.

The Conference wishes to express its gratitude to the Polish authorities and the Council of Europe for the organisation of this important debate.

NATIONAL REPORTS

ARMENIA

The administration in Armenia

Respect of legality is a vital necessity for the implementation of good administration. By laying foundations on the principles of democracy, justice, lawfulness and respect of human rights, the Republic of Armenia has adopted a policy of reforming laws and legislative provisions in the elaboration of administrative law, strengthening democratic principles, controlling administrative acts and rationalising executive power.

As the legal foundation stone of a democratic State, the Constitution of the Republic of Armenia guarantees the rule of law and the exercise of power by the people through free elections and referenda, as well as through State and local self-governing bodies and public officials.

The Constitution lays down that State power shall be exercised in accordance with the Constitution and laws based on the principle of the separation of the legislative, executive and judicial powers.

State bodies and public officials may execute only such acts as authorised by legislation (Article 5).

In the Republic of Armenia, the officials of State bodies carry out the functions and tasks conferred on them by legislation.

They include civil servants, legal officials, special services such as defence, national security, internal affairs, taxation, customs and civil protection in the executive bodies, as well as diplomatic and other services provided for by law (Article 1.3 of the civil service law of the Republic of Armenia).

In the Republic of Armenia, administrative power is exercised not only by the executive bodies, but also by regional and local self-governing bodies.

The exercise of these functions by these bodies is regulated by the laws on the police, customs, taxation, national security, local self-government and other laws.

In the context of democratic reform, provisions have been adopted in the legislation with a view to improving the services of the administration. Amongst these is the law on the order of discussion of suggestions, applications and complaints of citizens. This law puts State and local self-governing bodies and their public officials under an obligation to receive suggestions, applications and complaints from citizens, to discuss them thoroughly in accordance with their competence within a prescribed time, to answer them, to take the necessary measures, as well as to adopt well grounded decisions regarding citizens' suggestions, applications and complaints and to ensure implementation of the decisions adopted.

At present, there is no special legal act in the Republic of Armenia regulating administrative relations. There is only a Code on Administrative Violations (hereafter the Code) adopted by the General Assembly on 6 December 1985, which determines administrative offences, penalties, bringing proceedings on offences, regulation of the proceedings, as well as implementation of decisions on administrative penalties.

Special laws regulate various activities and their relations with the administration. Particular mention can be made of the law on licences, on official registration of legal entities, on names of businesses, on the organisation and conduct of examinations, on tax, on banks and banking, on credit companies, on non-governmental organisations, on parties, on patents, on purchasing, on radio and television, etc.

A number of amendments have been made to the Code for respect of the Constitution and laws of the Republic of Armenia, for proportionality in the acts of the administration, for respect of their obligations by citizens, for increasing public responsibility, and for taking account of the inadequacy and insufficiency of certain provisions of the Code to the current requirements of the legislation of the Republic of Armenia.

Moreover, on the recommendation of the President of the Republic, the Ministry of Justice is drafting a new Code on administrative offences.

In order to improve legislation in this field, a law on basic administration and administrative procedure has been drafted on the initiative of the Government and submitted to the National Assembly for consideration; it has been included in its agenda.

The draft law determines the bases for the administration, regulates the adoption of administrative acts, their entry into force, complaints, exercise of administrative acts and action or inaction of administrative bodies, administrative costs, as well as compensation for damages by administration in connection with relations between administrative bodies and persons or legal entities.

The draft also prescribes the definition of administration, administrative body, administrative act, administrative procedure and fundamental principles of administration, which are legality of administration, a prohibition against abusing administrative bodies' formal requirements and their arbitrariness, limitation of their discretionary power, proportionality of the acts of the administration, presumption of protection of data submitted by persons about factual circumstances considered by administrative bodies, effective and economic use of the means of administrative bodies by officials when exercising authority.

There are exceptions in the draft law for the application of other principles, moreover the code provides that the fundamental principles of administration are not comprehensive and the application of other principles of administration in the Constitution may be applied.

The aim of the draft law is to systematise and unify the activities of administrative bodies concerned with administration and adoption of administrative

acts, to regulate the procedure for the adoption of administrative acts, to increase the responsibility of administrative bodies for the exercise of their authority and for its consequences.

These legislative reforms will therefore promote the strengthening of the foundations of administration in the Republic of Armenia and the effective exercise of administration.

BELGIUM

This report provides an overview of the main provisions in Belgian administrative law and administrative case-law designed to protect the public against administrative action and prevent disputes between the governed and the government more effectively.

I. Improved citizen participation in administrative decisions

Belgian administrative law has various arrangements for enabling citizens to participate in administrative action.

More than ever before, citizens want to be informed of the reasons behind authorities' decisions. They want to be involved in the decision-making process and ensure that sufficient consideration is given to their views.

The various participation arrangements allow the public to intervene in the decision-making process, so that they can defend themselves if the proposed act poses a threat to their interests and also comment on the choices made.

A. Public inquiry

Public inquiries allow the administration to canvas the views of everyone involved. Anyone who has something to say can submit comments. Public inquires are thus a way of directly involving the public in the administrative decision-making process.

Public inquiries are typically used in matters relating to town planning, the environment, expropriation for public utility purposes or when seeking permission to operate an establishment that has been listed as dangerous, insanitary or nuisance-causing.

The procedure applies primarily to projects which are liable to affect the natural and/or human environment.

In order to be effective, the public inquiry procedure must meet at least two conditions.

Firstly, it must be sufficiently publicised to enable the public to have a proper say.

The launch of a public inquiry may be announced through poster campaigns, advertisements in the press or broadcast media or through individual notices sent to the persons most affected.

Secondly, steps must be taken to ensure that all of the parties are heard.

In some cases, the public inquiry will be followed by a consultation meeting if enough people have exercised their right to submit comments or complaints to the administration.

Sometimes, too, information meetings are held to provide the public with detailed information on the project, its objectives and consequences, and to give them an opportunity to make suggestions.

These statutory and regulatory provisions for holding public inquiries and in particular information or consultation meetings facilitate communication between the administration and the public.

B. Consultation

This method of indirect, collective participation through agents representing the public's interests has been widely favoured by the Belgian authorities, notably in the economic and social fields.

Consultation allows the administration to obtain further information or confirm what it already believes.

External or in-house engineers or specialists, other public bodies or agencies representing the interest groups concerned may be consulted.

The *Conseil national du travail*, for example, is consulted on matters relating to labour law, and the *Conseil Central de l'Economie* on matters relating to economic policy.

Mention could also be made here of industrial dialogue, which has a long tradition in Belgium and involves bringing together representatives of federal government, employers and trade unions to conclude major intersectoral agreements in the social field.

Provision for consultation is normally made by statute or regulations.

The authorities, however, can always carry out their own, non-statutory consultation in order to make a more informed decision or provide additional safeguards for the parties involved. In that case, they will be under no legal obligation to abide by the opinion expressed.

Generally speaking, the legal effect of consultation varies depending on whether the applicable rules require the assent procedure, or whether the opinion given is merely advisory.

C. Local popular consultation

The act of 10 April 1995 introduced provisions on local popular consultation into the new local act.

Under these provisions, local councils can consult their electorate on any matters within their competence.

Local popular consultation can be initiated by the local council or at the request of at least one tenth of the local electorate.

The new act requires that measures be taken to publicise the consultation exercise. At least one month in advance, for example, local authorities must issue leaflets to residents, giving an impartial outline of the subject of the consultation.

The questions must be worded in such a way that they can be answered by a simple "yes" or "no". The phrasing of the question is vital.

Participation in popular consultation exercises is not compulsory and the votes will be counted only if at least 40% of the local electorate has taken part.

The aim is to consult the local community, not to hold a referendum. The opinions expressed by the local electorate are merely advisory and therefore not binding on the local council or the college of burgomasters and municipal magistrates.

The purpose of popular consultation is rather to enlighten local elected representatives as to what the community wants so that they can make informed decisions.

II. Enhanced procedural protection for the public in their dealings with the administration

In order to protect citizens from certain decisions and actions by the authorities, the Conseil d'Etat has, through its case-law, developed a number of general principles, requiring the administration to behave in a certain way and thus curbing the use of its discretionary powers.

At the same time, the administration has itself become aware of the need to provide greater protection for the public in their dealings with public services and to make authorities more accessible in general.

1. General principles of law

In Belgian administrative law, the general principles of law are of fundamental importance in protecting the public.

They have been developed through case-law, mainly to act as a curb on the administration in the use of its discretionary power.

These general principles enable the courts to remedy any deficiencies in the statutory or regulatory provisions and to provide citizens with additional safeguards in their dealings with the administration.

The administration is required to abide by these principles when preparing administrative acts and decisions and the courts will check to ensure that they have been implemented correctly. If they have not, the act in question may be set aside by the Conseil d'Etat.

a) Due process or the adversarial nature of the proceedings

Due process is a general principle of public law. The requirement to observe due process may arise from statute or regulation, but even if it is not expressly provided for, the administration must still observe it.

The public must have the opportunity to submit arguments in order to prevent the authorities from taking an adverse decision, ie to prevent a measure that would deprive someone of rights and interests which they enjoy already, or to prevent a decision that would fail to grant someone all the benefits sought by that person. This is effectively an implementation of the "audi alteram partem" rule.

The Conseil d'Etat has a substantial body of case-law on this point, whether in disciplinary matters, in matters relating to the closure of establishments, refusal of permission or, more generally, in cases where the administration's decision is based principally on the personal conduct of the party concerned and where the decision is liable to seriously harm the material or non-material interests of that party. The party concerned must have been given an opportunity in advance to state their views.

b) The principle of impartiality

This fundamental principle applies to the administration under both statute and case-law.

The Conseil d'Etat has ruled that the administration is bound to observe the principle of impartiality and objectivity, even if there is no statutory or regulatory requirement to do so.

c) The principle of equality

The principle of equality is enshrined in Articles 10 and 11 of the Belgian Constitution. It follows from this principle that the regulations apply to all citizens in the same way throughout the country.

Under this principle, everyone in the same position must be treated in the same way. It is nevertheless possible for a distinction to be made between two categories of persons in cases where this distinction is based on objective criteria in relation to the aim legitimately pursued by the administration.

The Conseil d'Etat has ruled that it follows from the principle of equality before the law that a rule is binding on the administration from which it originated in all cases where the administration is called upon to apply it. Rules cannot be amended and no derogations are possible except through general provisions (in accordance with the maxim "patere legem quam ipse fecisti").

d) The principle of what is reasonable or the principle of proportionality

Whatever the administration's margin of discretion, when it comes to taking decisions, it must always have regard to what is reasonable or the principle of proportionality. In

effect, the principle of proportionality requires that there be proportionality, ie a reasonable relationship, between the act committed and the response.

The application of this principle enables the courts to curb the use of the administration's discretionary power or, at the very least, to have some marginal control over the way this power is exercised.

e) The principle of legal certainty

Legal certainty is a fundamental feature of any law-governed State.

The purpose of the law is to create a climate of certainty in order to foster public confidence.

Legal certainty is naturally instrumental, therefore, in improving relations between citizens and the administration.

It allows all citizens to be secure in the knowledge that everyone, whether an administrative authority or private individual, will act in accordance with the existing law and that they themselves may act within the limits prescribed by law.

This is an important feature of the relationship between the administration and the public in that the latter can thus be certain that the administration is bound to act in accordance with the law.

Likewise, the public has a right to have their legal position clearly defined by the administration under the legal rules in force.

2. The Public Service User's Charter

The Public Service User's Charter (published in the Belgian Law Gazette of 22 January 1993) sets out the public's rights vis-à-vis the administration. It is intended as a set of general, operational guidelines for all federal public services, whose sole purpose is to serve the public interest.

Legally speaking, the charter is merely a set of recommendations, devoid of any binding force. It should be seen as a kind of mission statement by the administration vis-à-vis the people who use public services.

The charter contains certain principles which have been enshrined in statute (requirement to give reasons for administrative acts, openness of government and right to protection of privacy).
In laying down the rules of conduct to be followed by federal government, the charter does not in any way deny the general principles of law identified and enshrined in case-law.

The Public Service User's Charter establishes the rule that public services must provide the public with a quality service within a democratic legal framework. High-quality service provision rests on three factors:

- transparency
- flexibility
- legal protection

Transparency is achieved by providing the public with information and giving them the opportunity to consult administrative documents.

Flexibility is about making public services more accessible through high-quality care and communication, the use of clear, precise language and unambiguous laws.

With regard to legal protection, the charter states that the actions of public services must always be compatible with the law. Legal protection for the public is to be ensured:

- by applying the rules on the protection of privacy with regard to the processing of personal data;
- through widespread use of the adversarial procedure in cases where a decision is taken which affects the interests of an individual;
- by dealing with complaints through an ombudsman;
- by ensuring swift payment of any amounts owing to users;
- by improving the effectiveness of appeal procedures against contested decisions and by reminding users of the remedies open to them;
- by suspending the execution of any administrative decisions liable to cause serious damage which would be difficult to remedy.

The Public Service User's Charter is of limited use to individuals as legally speaking it has no binding force.

III. Better public information about administrative action

Major reforms have been introduced in an effort to better inform citizens about administrative action in general (administrative disclosure) and about the adoption of administrative decisions (formal justification for administrative acts).

1. Disclosure

The principle of disclosure is enshrined in Article 32 of the Constitution, which states that everyone has the right to consult any administrative document and to have a copy made, except in the cases and conditions stipulated by laws, decrees or rulings.

In Belgium, both the federal authorities and the Regions and Communities have adopted provisions with regard to disclosure. Mention could also be made of the act of 12 November 1997 on administrative disclosure in the provinces and municipalities.

Only the principles relating to federal administrative disclosure are examined here.

The act of 11 April 1994 on administrative disclosure spells out the "active" and "passive" disclosure obligations of federal authorities and determines the conditions under which citizens may exercise their right of access to information vis-à-vis the federal authorities.

Under the "active" disclosure rules, administrative authorities have a duty to actively provide information to the public. Examples of their obligations in this area include:

- the information service set up within federal administrative authorities;

- the guide to administrations (document setting out the powers and responsibilities and the organisational structure of each federal administrative authority);

- requirement to indicate the name, position, address and telephone number of the contact person in all correspondence originating from a federal administrative authority;

- requirement to indicate the available remedies: any letter notifying a member of the public of a federal authority decision which affects them personally must indicate the available remedies, if any, the competent appeal bodies and the appeal procedures and time-limits, failing which the period for filing an appeal will not begin to run. Mention could also be made of Article 19 § 2 of the co-ordinated laws on the Conseil d'Etat, under which the period for filing an application to set aside will begin to run only if the notice sent by the authority informing the recipient of the act or decision in question mentions these remedies and specifies the procedures and time-limits to be observed.

The provisions on "passive" disclosure set out the arrangements whereby members of the public can consult any administrative document *in situ*, obtain explanations and a copy of the document concerned.

The law also lays down the rules governing exceptions where the authorities can refuse access to documents.

Avenues of appeal are available if the administration refuses to grant a disclosure request.

2. Formal justification for administrative acts

Formal justification for administrative acts is another step in the process of improving relations between the governed and the government. In Belgian law, it has been enshrined in the act of 29 July 1991 on the formal justification of administrative acts.

This requires the administration to formally explain any unilateral legal decision which has personal consequences, ie to indicate in the main body of the decision the legal and practical considerations on which the decision was based.

Case-law requires that the explanation be clear, detailed and specific. Overly vague or general wording is not permissible.

The obligation to give formal reasons for administrative acts thus requires the administration to justify its decisions to the public. It provides the court charged with reviewing the administrative act with a solid framework for verifying its legality.

IV. Ombudsmen

The ombudsman is an intermediary whose job is to facilitate dialogue and prevent conflicts between the public and the administration.

With the act of 22 March 1995, a system of federal ombudsmen was introduced across Belgium. The Regions and the Communities adopted similar initiatives, as did certain local authorities.

Federal ombudsmen are responsible for:

- investigating complaints about the functioning of federal administrative authorities;
- conducting, at the request of the Chamber of Representatives, any investigation into the running of any federal administrative departments which the Chamber may specify;
- making recommendations and reporting on the functioning of administrative authorities.

The ombudsman is a highly accessible institution to whom the public can turn if they wish to complain about the way public services are run.

It should be noted, however, that the proposals and recommendations made by ombudsmen have no binding force. Federal ombudsmen have the power to give opinions.

V. Preventing unlawful regulatory acts

Some mention should be made here of the advisory powers of the legislation section of the *Conseil d'Etat.*

The co-ordinated laws on the *Conseil d'Etat* determine those cases where preliminary draft laws, decrees, rulings or draft regulations must be submitted to the legislation section of the Conseil d'Etat for an opinion.

The legislation section of the *Conseil d'Etat* is responsible for ensuring that all the necessary preliminaries have been completed. It verifies the legality of the texts before it and checks to ensure that any preliminary draft laws and proposals for laws, decrees or rulings are compatible with Belgium's international treaties and the Belgian Constitution.

Checks are also carried out to ensure that draft regulations comply with the directly applicable treaties, the Constitution, laws, decrees and rulings.

The powers and responsibilities assigned to the legislation section play a key role in preventing unlawful regulatory acts and hence disputes between the administration and the public.
Another important function of the legislation section is ensuring that the instruments submitted to it are in the proper form.
Clear, concise, precise and consistent language is a factor in legal certainly and represents an important safeguard for members of the public.

CROATIA

A. The constitutional basis for the right to good administration

In accordance with the Constitution of the Republic of Croatia and the Croatian Government Act, the Croatian Government is the executive branch of power. Under Article 4 of the Constitution, the Republic of Croatia government shall be organised on the principle of separation of powers between the legislative, executive and judicial branches, but limited by the right to local and regional self-government guaranteed by this Constitution. The principle of separation of powers includes the forms of mutual co-operation and reciprocal checks and balances provided by the Constitution and law.

The Government of Croatia, as the executive branch of power, is responsible for co-ordination and internal organisation of all State administration bodies. According to Article 116 of the Constitution, the organisation, responsibilities and operation of the State administration shall be regulated by law. The law may entrust certain responsibilities of the State administration and legal bodies vested with public authority to local and regional self-government bodies. In accordance with the provisions of the State Administration System Act, the Government co-ordinates and supervises the work of the State administration. The Ministry of Justice, Administration and Local Self-Government is the institution responsible for supervision of the implementation of regulations governing the organisation and the scope of activities of State administrative bodies.

In accordance with Article 18 of the Constitution, the right to appeal against first instance decisions by courts or other authorities shall be guaranteed. The right to appeal may exceptionally be excluded in cases specified by law, if other legal remedies are ensured. And, in accordance with Article 19 of the Constitution, individual decisions of administrative agencies and other bodies vested with pubic authority shall be grounded in law. Judicial review of decisions made by administrative agencies and other bodies vested with public authority shall be guaranteed. Article 26 of the Constitution prescribes that all citizens of the Republic of Croatia and aliens shall be equal before the courts, government bodies and other bodies vested with pubic authority. According to Article 46 of the Constitution, everyone shall have the right to submit petitions and complaints, to make proposals to government and other public bodies, and also to receive answers.

B. The role of a modern administration in the Republic of Croatia

The role of a modern administration in the Republic of Croatia is based on the Government Programme for 2000-2004. In accordance with the Programme, through the decentralisation of government functions and strengthening of the financial position of local communities, it is possible to overcome major problems in the economic, educational, cultural and social spheres. The Government Programme is therefore a programme of change founded on the basic commitment to build a civil society, a democratic and market-oriented State integrated into the EU. With the intended changes in the legal system, existing shortcomings will be eliminated and laws harmonised with EU legislation. The Programme also anticipates and implements the

stabilisation of public financing and rational management of budgetary funds. In central government, the primary task of the Government is to stop current expansion. This means that attempts have been made to avoid establishing new administrative organisations and employing new civil servants and employees. A process of horizontal decentralisation has been stimulated, in which a number of activities performed until now by government administration will be transferred to autonomous organisations outside the government administration system, e.g. trade unions, employers' associations, universities, civic organisations and similar bodies. The existing government administrative apparatus will undergo critical analysis, and evaluation of its rationality and economy. Attempts have been made to avoid overlapping of activities and authority and the duplication of administrative functions and structures. Internal organisational reserves have been established, and a programme of reducing expenditures and creating savings implemented.

The National Strategy for the Accession of the Republic of Croatia to the EU has been prepared and it sets Croatia's own objectives in this process and time limits for their implementation, in which all government administrative bodies will have to participate. Following the EU methodology and given parameters following from the predetermined adjustment process, the impact analysis study is currently being drafted from the point of view of Croatia's own strategy on economic and social development.

The Programme of the Croatian Government also anticipates a strengthening of the rule of law. Strengthening of the rule of law includes strengthening citizens' trust in government institutions and creating a new environment for economic activities that will be easily recognisable for investors, in which trades and small and medium-sized enterprises will have special importance. The Programme is based on the assumption of improvement of the system and considerable increase in the efficiency of government, local and regional self-management and their responsibility for the requirements and needs of economic subjects. The Government carries out the entire body of measures of economic policy and each individual measure by strengthening the market orientation of the Croatian economy and by stimulating a quicker transition to an open market and free competition of economic subjects. The main direction of the Government's activities is towards creating possibilities for strengthening entrepreneurship, reducing administrative, fiscal and customs burdens on business activities on the market, and integrating the Croatian economy and market into the European economic environment.

C. Principles governing good administration in the Republic of Croatia

a) Transparency in administrative action – access to the administration

Under the Government Programme, relations between State administration bodies and members of the public shall be based on mutual co-operation, trust and on respect for human dignity. State administration bodies shall give members of the public and legal persons data, information, instructions and professional assistance concerning those activities about which the members of the public and legal persons have contacted State administration bodies. State administration bodies shall inform the public about the activities in their sphere of competence, and report on their work via the mass media or in some other appropriate manner. Refusal to give certain reports may be permitted only if making such reports public was an infringement of the duty to keep official

secrets, or if it were contrary to other protected interests of members of the public and legal persons. The work of State administration bodies, bodies of local and regional self-government units and of legal persons vested with public authority in carrying out the activities transferred to them shall be public. The public may be excluded only exceptionally, in cases permitted by law.

b) Effective and clear administrative procedures

Under the General Administrative Procedure Act, all legal acts by State (public) authorities must be explicitly based in law or a regulation made in accordance with law. All legal acts must be published in the Official Gazette, they must be explained and contain information on legal remedies. In cases where administrative legal acts are issued orally in urgent situations, these administrative legal acts must subsequently be published in writing at the request of a party or by virtue of the office (ex officio). Moreover, the work of the State administration is public, except in cases explicitly prescribed by law. A party able to prove the existence of a legitimate interest may be a party in an administrative procedure or claim the recognition of this right in a corresponding written administrative legal act. An appeal may be filed against individual legal acts, activities or measures adopted by State administration bodies, units of local and regional self-government and legal persons with public authorities in first instance procedures. If an appeal may not be filed, court protection may be requested.

D. The position of the public official with regard to politics (the separation of the administration and political power)

Officials working in the State administration bodies are not entitled to carry out duties in bodies of the legislative or judicial branches of power nor to be members of a representative body of a unit of local (regional) self-government. Officials may freeze their term of office in a body of the legislative or judicial branch of power or in a representative body of a local (regional) self-government body if their functions are incompatible with the function to which they are appointed or elected. They may, once their term of office within the State administration bodies has ended, at their own request, continue to carry out duties within the legislative branch of power or the representative body of a local (regional) self-government body. Incompatibility of functions is set forth either by the law regulating these functions, or by the Act on Rights and Obligations of State Officials, in accordance with a special procedure.

E. The rights, obligations and liability of public officials

The status of civil servants and civil service employees in Croatia is regulated by the Act on Civil Servants and Civil Service Employees. This Act regulates the rights, obligations, responsibilities and method of defining the salaries of civil servants and civil service employees in State administration bodies, and in other bodies established for carrying out civil service. Civil servants and civil service employees are only a part of all public servants and employees, that is to say that all persons who receive a salary from the State Budget or from the financial means of public institutions or other legal persons supervised by the State may be considered, in the wider sense of this term, as public servants or public employees. Public employees are, in addition, civil servants and civil service employees, public servants and employees in public services as well

as State officials. Ministers, their deputies and assistants, directors of State administration organisations as well as their deputies and assistants are State officials of the Republic of Croatia whose status is regulated by the provisions of the Act on Rights and Obligations of State Officials.

Within the framework of the CARDS 2001 programme, the European Commission has financed the project "Assistance to State Administration Reform", the implementation of which started in November 2002. The programme offers assistance for management, development, employment and selection, career development systems, human resources awards system. The project will also aim at improving the existing organisation of the State administration, modernisation of the functioning and coherence of the central management system, building of capacities and improvement of the professional training system in the civil service. In addition, as a sequel to the above-mentioned project, the European Commission approved, within the framework of CARDS 2003, a project entitled "Implementation of the Programme for State Administration Reform".

F. Monitoring of the performance of the administration's functions by society

According to the State Administration System Act, the ministry competent for general administration affairs shall directly monitor the implementation of the provisions of this Act that regulate the conditions and ways of achieving transparency in the work of State administration bodies. Besides the above-mentioned administrative supervision and inspection monitoring, as laid down by the State Administration System Act, within the Croatian Parliament and the Croatian Government certain bodies are established in order to allow citizens to file objections and complaints regarding the work of the State administration bodies. There is also the Ombudsman's Office, a body before which a citizen dissatisfied with the work or actions of public authorities may file objections or complaints. In accordance with the provisions of the Constitution, the Ombudsman, as a commissioner of the Croatian Parliament, protects the constitutional and legal rights of citizens in proceedings before the State administration bodies and bodies vested with public authority.

Furthermore, the increase in transparency and responsibility of public (State) administration in administrative action is a constant concern for administration bodies of Croatia in the procedure of passing bills or amending existing acts. The Government proposed to Parliament the modes of financing and improving the material basis of institutions of civil society. A specific atmosphere has been created in which non-governmental organisations (associations, societies, foundations) are becoming partners to the Government and other administration bodies, in particular, in the implementation of various programmes, such as those concerning minority rights, welfare, environmental protection, aid to war victims, etc. Support for non-governmental organisations and civil initiatives are a necessary presupposition for the democratisation of society and development of civil society. To realise this objective, it is necessary to have the support of the legislator. Therefore, care is taken in Croatia to amend those laws and regulations that limit the right to free association of citizens for the protection of their benefits and objectives within European standards. These standards became a part of the Croatian juridical system on ratification of the European Convention on Human Rights and Fundamental Freedoms.

G. The right to good administration in the case law of the European Court of Human Rights

The legal system of the Republic of Croatia provides a high level of protection of human rights and fundamental freedoms. The basic provisions of the Constitution declare human rights to be "the highest value". Croatia is a party to all basic international agreements related to human rights. Pursuant to Article 140 of the Constitution, international treaties concluded and ratified in accordance with the Constitution, published (in the Official Gazette) and which are in force, make up part of the internal legal order of the Republic of Croatia and have higher legal force than ordinary national legislation. However, in practice the protection of human rights is most commonly exercised through the implementation and application of national legislation harmonised with treaties to which Croatia is a party, and in the case of the rights and freedoms enshrined in the European Convention on Human Rights through the practice of the European Court of Human Rights.

As a party to the European Convention on Human Rights and participating in the Strasbourg system of protection of human rights there is an unequivocal obligation for Croatia to implement the judgments of the European Court of Human Rights. Croatia has during the last two years amended several national laws in line with the judgments of the Court (currently 16 judgments in which violation of the Convention was found) and has carefully followed the legal practice of the Strasbourg system in order to obtain the maximum possible compatibility of its national legislation with the requirements of the Convention.

CZECH REPUBLIC

Constitutional basis

The basic principles of the right to good administration (defined for example in Article 41 of the Charter of Fundamental Rights of European Union) in the Czech Republic are set out in the Constitution and in the Bill of Fundamental Rights and Freedoms (hereinafter referred to as the Bill) that is part of the Constitution in the broader sense. In accordance with Article 1, clause 1, of the Constitution the Czech Republic shall be a sovereign, united and democratic State governed by law, based on respect for human rights and freedoms; in accordance with Article 2, the Czech Republic is bound to adhere to its obligations arising from international law. The foundations of the modern legal State are included in the basic enactments of the Constitution. In accordance with Article 2, clause 3, of the Constitution, State authority shall serve all citizens and may be applied only in those instances, within the limits and in the ways prescribed by law. In accordance with Article 2, clause 4 (or Article 2, clause 3, of the Bill) everyone is free to do what is not forbidden by law and nobody may be compelled to do what the law does not prescribe.

Other basic principles governing the pursuit of public authority (and in terms of it the pursuit of public administration as well) are included in the Bill. In accordance with Article 4, clause 1, obligations may entail only on the basis of law and within its limits while keeping the fundamental rights and freedoms. The Bill contains a conventional list of fundamental rights and freedoms for individuals arising from international documents on human rights, especially UN Pacts (1966) and the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (1950). With regard to the principle of transparency of public administration, Article 17, clause 1, of the Bill is important. Pursuant to it the freedom of expression and right to information are guaranteed. In accordance with Article 17, clause 5, of the Bill public authorities and municipal authorities are obliged to provide information about their activities (other conditions shall be set by an act – analogous to Article 36, clause 2, of the Bill, everyone has the right to timely and complete information of the State of the environment and natural resources). Further, Article 18 of the Bill lays down that everyone has the right to address petitions, proposals and complaints to public and municipal authorities regarding the public or any other common interest. In accordance with Article 21, clause 1, citizens have the right to participate in the administration of public matters directly or through freely elected representatives.

The Bill regulates the principles of judicial control of public administration. In accordance with Article 36, clause 2, of the Bill anyone who claims that their rights have been violated by a decision of a public authority has the right to review the legality of that decision by a court, unless the law provides otherwise. The judicial review of decisions concerning fundamental rights and freedoms pursuant to the Constitution cannot be precluded. In accordance with Article 36, clause 3, of the Bill everyone has the right to obtain reparations for damage caused by an illegal decision of a court or other public or municipal authority and everyone has the right to obtain the reparation of damage caused by incorrect official procedure.

The principle of proceedings undertaken by public authorities is included in Article 38, clause 2, of the Bill. It stipulates that everyone has the right to have his/her case heard publicly, with no unnecessary delays and in his/her presence, and to have an opportunity to express his/her opinion on all evidence produced.

General scope of the public administration's activity – the Act on Administrative Procedure (Administrative Rules)

The particular enactment of the above-mentioned constitutional principles is worked out in detail in acts regulating the public authorities' activity. The general document governing proceedings before public administration authorities (that generally defines the relation between individuals and public administration authorities) is the Act on Administrative Procedure (Administrative Rules) of 1967 (there is a separate act regulating proceedings before tax authorities of 1992). However, the Administrative Rules in particular have for some time not been compatible with the above-mentioned principles of a democratic legal State as defined in the Constitution and in the Bill. The Government (the Ministry of the Interior in particular) has therefore, since 1998, been preparing a complete re-codification of administrative proceedings.

The weak point of the present Administrative Rules is that they relate only to prosecution of the State administration and not to prosecution of the entire public administration (the State administration and municipal administration). The essential part of the prosecution of public authorities has therefore not fallen under the general scope of administrative proceedings since renovation of the municipal administration in 1990. This is because when the Administrative Rules were adopted, there were only State administration authorities at the regional level, and there was no distinction between the State administration and municipal administration (this was amended after 1990). Another problem is that the present enactment of administrative proceedings is not uniform, for there are Administrative Rules and also many other special acts that regulate differences in several spheres of public administration. This is the consequence of the brevity of the Administrative Rules (they do not number more than 80 articles). Many juridical institutes are either regulated deficiently or not regulated at all in the Administrative Rules. So more and more versions and special clauses were necessary in practice. Some acts even reject using the Administrative Rules without even providing their own rules of procedure. Even the Constitutional Court designated it unconstitutional. The new draft Administrative Rules (currently discussed by Parliament) will be a complete re-codification of administrative proceedings law (incidentally they proceed from Council of Europe recommendations). This re-codification will constitute an act applicable to the whole sphere of public administration (many special provisions will no longer be necessary), thus to both State administrative authorities (central, regional and municipal) and municipal administrative authorities (country and community).

The principle of transparency of public administration and the principle of free access to information provided by the public administration are components of the principle of good administration generally defined in Article 17 of the Bill. At the legal level (of the act) these principles are implemented by the Act on Free Access to Information of 1999 and by the Act on the Right to Information on the Environment of

1998. They both regulate procedural guarantees for enforcing the right to information including judicial review of public administrative authorities' procedures.

The status of public officials

The status of persons servicing the public administration, including their relations with elected representatives of political authority, is included in both the Act on State Officials in Administrative Offices (Act on the civil service) and in the Act on Municipal Officials of 2002. The Act on the civil service regulates legal relations of State officials carrying out administrative functions (beginning and end of service, salary, disciplinary responsibility, authority and duties during service) and above all the organisation of the civil service. The Act on Municipal Officials regulates legal relations of municipal authority employees (regional and community) (it is the *lex specialis* that completes the Labour Code). Part of the status of municipal authority employees is included in acts regulating regional and community organisation (appointment of chief officials in regional and community offices that come within the competence of elected municipal authorities).

Judicial and other scrutiny of the public administration

Statutory regulation itself cannot guarantee that the public administrative authorities always conduct themselves in agreement with constitutional and statutory principles, therefore the legal order of the Czech Republic contains means of public administration scrutiny, such as the Supreme Court, administrative courts and the ombudsman.

Administrative justice has existed in the Czech Republic since 1992. In 2002 it was subjected to a grand reform. The most important point was the foundation of the Supreme Administrative Court (based in the Constitution since 1993) and a two-instance system of administrative justice (until then administrative justice was one-instance and the appellate function was performed by the Constitutional Court). The former type of administrative justice was criticised for the absence of mechanisms for unification of the practice of administrative courts (by means of decision review), which led to insufficient pressure on the cultivation of public administration activities. For that reason the judicial scrutiny lacked a unifying function and at the same time the competent supremacy (controversial opinions of different administrative courts about identical matters).

The next change was the extension of the competences of administrative courts. Before 2002 the administrative judiciary was criticised for not providing the judiciary with protection against unlawful procedures or interventions that did not take the form of administrative decisions pursuant to the Administrative Rules. A further criticism was that a legal means for protection of the judiciary from the passivity of administrative offices was lacking. And finally, administrative courts could only annul unlawful administrative decisions and not decisions containing technical errors. In other words, administrative discretion could not be replaced independently of judicial discretion. The new provisions of the administrative judiciary covers all these.

The Constitutional Court (as a further component of the mechanism) has ensured the right to good administration in the Czech Republic in accordance with the

Constitution since 1993. Among its other competences, the Constitutional Court takes decisions on constitutional complaints by legal or natural persons against decisions and other interventions by public authorities (ergo public administration authorities) on the rights and freedoms guaranteed under the Constitution. It is to be expected that the essential matters resolved as constitutional complaints against the public authorities' procedures by the Constitutional Court will be transferred to the Supreme Administrative Court as the appellate court in the administrative judiciary.

Ombudsman

There has been an ombudsman's office since 2000. Its function is to protect citizens against actions by the authorities and other institutions which are unlawful or incompatible with the principles of a democratic State and the principle of good administration and from the inaction of the administration. It is intended to contribute to the protection of fundamental rights and freedoms. Its competence covers most authorities (with the exception of Parliament, the President of the Republic and the Government, the Supreme control office, the reporting service of the Czech Republic, the bodies in charge of criminal proceedings, prosecution and courts).

ESTONIA

The right to good administration in Estonian administrative law

Like other modern European countries, Estonia has codified the most important principles of administrative law in legal acts that form the general part of administrative law. In 2001 three laws elaborating general provisions of administrative law were adopted:[176] the Administrative Procedure Act (APA), the Substitutive Enforcement and Penalty Payment Act (SEPPA) and the State Liability Act (SLA). The laws came into force on 1 January 2002. In addition, the Administrative Co-operation Act (ACA) was adopted and took effect in 2003.[177]

The purpose of all the above-mentioned laws is to establish a uniform legal basis for the functioning of the administration and to ensure improvement of administrative capacity. The laws codify a unified set of norms that can create shared understanding of administrative procedural regularity and principles among agencies, ordinary citizens and the judiciary. The APA, SEPPA, SLA and ACA reflect a substantial step towards consolidating and reinforcing the stability of Estonian administrative institutions guaranteeing democracy, the rule of law, respect for citizens' rights and participation. They not only set the parameters within which public authorities should act, but also contribute to the quality of decision-making. Standards requiring openness, hearings, gathering of evidence, giving of reasons, and providing for recourse can be seen as ways of improving the quality of the results and, therefore, the effectiveness of administrative government.

Before 1 January 2002 the gap in general administrative law principles was filled principally with the help of judgments of the Estonian administrative courts (established in 1993 when the Code of Administrative Court Procedure (CACP) came into force[178]). This court practice was also one of the key elements in preparing the drafts of the laws.

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[176] From a historical point of view it must be recalled that first Estonian APA was adopted already in 1936. From today's perspective, the act was of a remarkably high quality. It stated principles, which are exemplary even today – duty to give reasons, proportionality etc.

[177] All laws are available in English on the Internet: http://www.legaltext.ee/et/andmebaas/ava.asp?m=022.

[178] The Estonian court system comprises three levels. At the first level there are separate administrative courts: County and City Courts, as well as Administrative Courts, are the courts of first instance. County and City Courts deal with all civil and criminal cases, while Administrative Courts hear cases which the court has been specifically empowered to deal with: give judgments on complaints concerning administrative acts and on activities of administrative authorities and give judgments on disputes concerning contracts under public law. On Estonian administrative court procedure see: K. Merusk, Protection of Persons' Rights and Freedoms by Estonian Administrative Courts: Development and Key Problems, Juridica International IV, 1999, pp 45 ff (in English); I. Pilving, Right of Action in Estonian Administrative Procedure, Juridica International IV, 1999, pp 55 ff (in English).

Administrative Procedure Act (APA)

The Administrative Procedure Act is divided into two major parts: the general part and the special part.

General Part

The first chapter of the general part lists the main principles governing administrative proceedings that should be borne in mind in the acts of every administrative authority. As one of the main objectives of administrative proceedings is to ensure efficient and legitimate implementation and execution of law, article 5 of the APA defines the principle of informality (choice of form of administrative activities) and enacts that administrative procedure shall be purposeful, efficient and straightforward and conducted without undue delay, avoiding superfluous costs and inconveniences to persons. At the same time, this objective must not hinder the other objective of the proceedings according to which the protection of the rights of persons must be ensured (article 1) and the fundamental rights and freedoms or other subjective rights of a person may be restricted only pursuant to law (article 3). Other relevant principles named in the APA are the principles of proportionality, investigation, the limits for administrative discretion and accessibility of administrative proceedings.

The general part of the APA gives the most important definitions (administrative procedure, administrative authority, participants in proceedings) and gives general regulations related to them. The first chapter includes also sections on official communication in administrative procedure, official certification, delivery of documents and calculation and restoration of terms for proceedings.

The second chapter of the general part of the APA regulates the conduct of administrative proceedings – commencement, termination and resumption of proceedings, collection of evidence and procedural rights (right to be heard, right to examine documents, right to receive explanations and advice etc).[179] It is very important to understand the usefulness and the meaning of granting procedural rights. Although the accessibility of documents and the right to examine files[180] has come into effect without further problem after the Public Information Act came into force on 1 January 2001, other procedural rights are still quite unfamiliar to officials as well as citizens, especially the right to be heard.

The third chapter is devoted to open procedure, which is a sub-category of administrative procedure. One of the characteristic and distinctive features of open procedure is publicity, which brings with it widening of the circle of participants who are able to take an active role in the formulation of the result of the procedure. Not only those whose rights are at stake can take part in the proceedings, but also those who have some interest in the result of the proceeding.

[179] See K. Merusk, Presumptions of Law for Ensuring Fundamental Rights in Administrative Proceeding, Juridica International VII, 2002, pp 76 ff (in English).
[180] See I. Pilving, Rule of Law and Information Society: Constitutional Limits to Active Information Provision by Government, Juridica International VII, 2002, pp 86 ff (in English).

Special Part

The special part of the APA deals with several specific types of results of administrative procedure. It enacts prerequisites for the lawfulness of different categories of administrative decisions: administrative act, administrative rule-making (regulation), administrative contract and informal measure.[181] Detailed regulation is provided for repealing and changing former decisions by administrative authorities. In addition, the general framework for non-obligatory pre-trial challenge proceedings in executive authorities is given. Challenging administrative acts in administrative court procedure is, together with other remedies, regulated in the CACP and the SLA.

Substitutive Enforcement and Penalty Payment Act (SEPPA)

The APA and SEPPA can be looked at as different parts of one continuous procedure. If the APA deals with the procedure for issuing administrative acts, the SEPPA is aimed more at securing enforcement of the administrative act on the presumption that the administrative act by its character imposes obligations on a person. For that reason both acts should be regarded as different phases of one process.

Until 2002, the Estonian legal order laid stress on punishment for failure to comply with an administrative act, not on the enforcement of an administrative act. However, as administrative practice showed, administration remains inevitably inefficient as long as punishment is the only means of securing enforcement of the administrative act. The aim of the SEPPA was to create pre-conditions for the introduction of non-penal coercive measures into the Estonian legal order, using substitutive measures and penalty payments. The main purpose of the administrative body should not be primarily to punish a person, but to secure the performance of obligation.

A penalty payment is the amount payable by the addressee of a precept if the addressee fails to perform the obligation imposed by the precept during the period indicated. Substitutive enforcement means performance of the obligation by the competent administrative authority on behalf of the person obliged and at his expense if an addressee fails to perform the obligation and the obligation is not inseparably bound to the addressee. The administrative authority can also arrange for the performance of the obligation by a third party.

In addition to the definitions of substitutive enforcement and penalty payment, the SEPPA provides addressees of the implementation of coercive measures with presuppositions and principles of application of coercive measures, facts eliminating their application and procedure for implementation.

[181] Norms concerning administrative rule-making and informal measures are very general and specified by special laws. Issuance of regulations by the Government of the Republic and local government institutions is regulated by the Government of the Republic Act and the Local Government Organisation Act. But they are important as codifications of former constitutional and administrative case law, e.g. principles for delegation of legislative powers to executive authorities.

State Liability Act (SLA)

Under article 25 of the Constitution of the Republic of Estonia everyone has the right to compensation for moral and material damage caused by the unlawful action of any person. Article 3 (1) declares that State authority shall be exercised solely pursuant to the Constitution and laws which are in conformity with it. As the Constitution does not differentiate as to who has caused the damage, the State is also responsible for its own wrongful activities and must ensure that compensation is awarded for damage caused while executing public power.

The aim of the SLA is to provide grounds and procedures for the protection and restoration of rights which are violated when exercising powers of public authority and for compensation for damage caused.

The scope of application of the SLA is not restricted to damage that was caused by unlawful execution of powers of public authority. The SLA also contains a chapter on unjust enrichment and so- called special cases of liability:

1) damage caused by lawful administrative acts or measures (the so-called sacrificial claims where a single person must submit to damage for the benefit of society);
2) damage caused by legislation of general application (especially taking account of accession to the EU and the case-law of the European Court of Justice on State liability);
3) damage caused in the course of judicial proceedings and extrajudicial hearings.

The SLA provides for all claims a person may make for the protection and restoration of his rights and compensation for damage in public law relationships (but not private law relationships). The emphasis of SLA is thus not on financial compensation for damage but restoration of rights by issuing an administrative act or taking a measure.[182] The aim of the principle is first of all to protect the individual who must not be satisfied only with financial compensation, but with restoration of the real situation. Secondly, this approach helps to keep costs to the State low.

Estonia has chosen the approach of many other countries in continental Europe: the obligation to compensate rests with the public authority whose activities (or failure to act) caused the damage. The liability of the public authority thus usually does not depend on the question of fault. Natural persons, who directly cause damage while performing the functions of a public authority, are not liable to the injured party unless otherwise provided for by law. If the State, local government or other legal person in public law has authorised the natural person or legal person in private law to perform public duties the State, local government or public law person remains liable for the damage unless otherwise provided for by law.[183] Although through authorisation a

[182] This arises from the obligation of a person to submit primary claims and the possibility (right to claim) to eliminate unlawful consequences of administrative acts or measures instead of financial compensation.

[183] The authorisation can take place on the basis of a contract under public law (administrative contract) the conclusion and terms of which are regulated by a separate law (ACA).

natural or legal person in private law becomes an administrative authority[184] and is generally responsible for his activities the obligation to compensate for damage remains with the authority that authorised the obligations. This is because the possibility of obtaining commensurate compensation should not depend on the question of who executes the powers of public authority and whether the private person has sufficient financial resources to pay compensation.

The obligation of a public authority to compensate for damage caused to individuals is accompanied by the right to file an action for indemnity against the official or any other person who caused the damage. The main principles of action against officials are:

1) an official is required to compensate for damage, wrongfully caused as a result of a breach of duties. Consequently there is no recourse if damage was caused lawfully or if the official was not guilty;

2) the amount of compensation is determined on the basis of the economic situation of the official, the assessment of the risk of causing damage arising from the nature of duties, lack of experience objectively arising from the length of service, the service-related orders and instructions issued to the official, and other circumstances which would render compensation for damage by the official in full unfair;

3) if damage was not caused intentionally, the compensation shall not exceed six times the amount of the total of salary and additional remuneration of the official.

Administrative Co-operation Act (ACA)

The aim of the ACA is to create favourable conditions for administrative organs for transition to quality management; it creates the appropriate legal environment for more economical use of taxpayers' money. The ACA determines the conditions and procedures for granting authority to natural and legal persons to perform public administration duties and procedures for the provision of professional assistance between administrative authorities.

The transfer of tasks from the hands of the State or local government to legal or natural persons should guarantee more efficient use of public resources; however the quality of public services must not fall. Therefore the ACA provides rules and conditions that must be followed, e.g. the transfer of services from public to private hands should be based on economic analysis, the performance of public duties by private persons and agencies must take place under continuous public supervision, etc. The principle that public interests should not be impaired applies also to the provision of professional assistance.

[184] Article 8 (1) of the APA provides: "'Administrative authority' means any agency, body or person which is authorised to perform public administration duties by an Act, a regulation issued on the basis of an Act or a contract under public law."; article 4 (1) of CACP provides: "Administrative acts against which an action or protest may be filed with an administrative court are the orders, directives, resolutions, precepts or other legislation which regulate individual cases in public law relationships, issued by agencies, officials or other persons who perform administrative functions in public law.".

Right to good administration as fundamental right

The APA, SEPPA, SLA and ACA form the legal basis for the right to good administration in Estonia. In addition, the right to good administration will be *expressis verbis* enacted in legal act from 1 January 2004, when amendments to the Legal Chancellor Act[185] come into force. According to article 19 (1) of the Legal Chancellor Act everyone has the right of recourse to the Legal Chancellor in order to have his or her rights protected by way of filing a petition to request verification of whether or not a State agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties adhere to *the principles of observance of the fundamental rights and freedoms and to the principles of sound administration*. The idea that the right to sound or good administration should be considered as one of the fundamental rights that must be observed by public authorities arises from the chapter where the afore-mentioned supervision is provided, called "Supervision over observance of fundamental rights and freedoms".

The approach that the right to good administration is one of the fundamental rights has also been acknowledged by the Supreme Court of Estonia. In addition to the Administrative Law Chamber that has repeatedly emphasised the importance of observance of rules of administrative procedure and the internal value of administrative procedure, the Constitutional Review Chamber has *expressis verbis* said that article 14 of the Constitution of the Republic of Estonia[186] gives rise to subjective rights – the general fundamental right to organisation and procedure.[187] "Analysis of the principles recognised in the European legal space[188] leads to the conclusion that article 14 of the Constitution gives rise to a person's right to good administration, which is one of the fundamental rights."[189]

[185] Internet: http://www.legaltext.ee/et/andmebaas/ava.asp?m=022 (in English).
[186] Article 14 of the Constitution provides: "The guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments.".
[187] Judgment of the Supreme Court en banc of 28 October 2002 in case No 3-4-1-5-02, RT III 2002, 28, 308, clause 30; judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003 in case No 3-4-1-1-03, RT III 2003, 5, 48, clause 12 (in internet: http://www.nc.ee/english/, in English).
[188] The Court emphasizes that general principles of law that are recognised in the European legal space are also valid in Estonia and that the principles of good administration have been inserted into several constitutions (e.g. § 21(2) of the Constitution of Finland, § 31(2) of the Spanish Constitution). The Court also refers to Article 41 of the European Union Charter of Fundamental Rights.
[189] Judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003 in case No 3-4-1-1-03, RT III 2003, 5, 48, clause 16 (in internet: http://www.nc.ee/english/, in English).

GERMANY

1. Constitutional requirements for public administration

In Germany, the right to good administration is ensured by democratic procedures set down in the German Constitution (Basic Law of the Federal Republic of Germany). The Constitution guarantees the public that authorities will arrive at fair and just decisions on the basis of inalienable principles; further, the Constitution guarantees individuals that their individual interests will be sufficiently considered in administrative procedures.

Constitutional law strongly influences the setting of procedures and determines the limits of procedural discretion. The following should be mentioned in particular:

- the administration is bound by the basic rights as directly applicable law;

- the principle of the rule of law, in particular as expressed in the guarantee that the rights of citizens shall not be interfered with unless pursuant to a law, in the prohibition against arbitrary decisions, in the principle of proportionality (procedural regulations shall be reasonable, necessary and appropriate to the matter), in the requirement to protect confidence and to ensure the foreseeability of State decisions, and above all in the right to a legal hearing, that is, that the citizen may take part in administrative procedures affecting him/her;

- the principle of the social State, which States that the socially disadvantaged shall receive the necessary assistance to assert their rights;

- the principle of lawful administration, which prevents public authorities from abusing power;

- the principle of equality, which guarantees all a fair trial and prohibits discrimination;

- the prohibition against making citizens the object of a State action;

- the principle of administrative efficiency, which obligates the administration to act in a timely, flexible and uncomplicated manner and to conduct procedures with economy.

These principles guarantee fair treatment of citizens. The principle of fairness has the highest priority when interpreting each individual rule of procedure.

2. The right to good administration in the Administrative Procedure Act

These constitutional principles are further specified in the Administrative Procedure Act. Due to the federal structure of the Federal Republic of Germany, however, the Federation does not have the exclusive right to pass legislation on administrative

procedures in Germany. As they are responsible for their own organisation and, according to the Constitution, legally responsible for carrying out the law, the Länder have their own legislative authority. All the Länder have passed legislation on administrative procedures; this legislation either largely incorporates the wording of the federal Administrative Procedure Act or directly refers to it.

The principles of administrative procedure listed in sections 9 through 30 of the Administrative Procedure Act form the core of codified administrative procedure law. At the same time, these principles serve to uphold the right to good administration.

Public authorities have extensive discretion in determining their procedures. This procedural discretion is a prerequisite for the appropriate execution of the law. Its authority for individual procedural acts is based on the applicable provisions of specialist law insofar as these are characterized by terms such as "can", "should", "is authorised", or on general principles of administrative procedural law. In addition, procedural discretion is expressed in a number of individual provisions of the Administrative Procedure Act, in particular:

- Section 22, which gives the authority the right to make decisions regarding the initiation of proceedings,

- Section 24, which defines the principle of investigation for administrative proceedings, that is, the authority's obligation to officially determine the facts of the case. In doing so, it may use all legal evidence it deems necessary to carry out its duty (Sections 26 ff).

To ensure that the administration fulfils its constitutional obligations, however, procedural determination and discretion are subject to significant restrictions, which are codified in the Administrative Procedure Act. These include in particular:

- the authority's obligation to provide advice and information (Section 25) in order to ensure that the participants' rights guaranteed under substantive law or in the proceedings are not violated due to ignorance or lack of experience or skill in dealing with the administration. The authority is obligated to assist citizens with applications or declarations, providing the relevant information as needed;

- the authority's obligation to allow third parties to participate in proceedings (Section 13, para. 2; Section 41, para. 73), in order to ensure that third parties whose rights or legal interests may be affected by the result of proceedings have the opportunity to assert their rights or legal interests during the proceedings;

- the authority's obligation to grant a hearing to those affected by an administrative act (Section 28) as the most important prerequisite for the relationship of trust, essential to modern public administration, between citizen and authority in a democratic State; this obligation is intended to ensure that citizens are given a sufficient hearing; at the same time, it serves as evidence and aids in establishing the facts in the case;

- participants' right to inspect documents (Section 29), which constitutes a crucial opportunity for participation; it would violate the principle of the rule of law if the authority did not inform those affected of factual and legal grounds for the proceedings;

- the right to representation or counselling (Sections 14 ff). This right of citizens to the services of a lawyer or other adviser of his or her choosing during proceedings unavoidably follows from the principle of the rule of law and the resulting principles of the right to a fair trial;

- further, as an expression of the principle of the rule of law, persons who are prejudiced shall be excluded from participating in proceedings on behalf of the authorities (Sections 20 and 21). These include in particular relatives of the participant(s), persons who may benefit from or be disadvantaged by the proceedings, and any other persons suspected of prejudice in performing their official duties;

- further, participants are entitled to the privacy of their confidential information (Section 30 of the Administrative Procedure Act; Data Protection Act). This measure is intended to create a relationship of trust between citizens and the authority, which is a prerequisite for efficient administration;

- In the interest of the participants, proceedings shall be carried out efficiently and in a timely manner (Sections 10 and 71a ff), in order, firstly, that an optimal result may be achieved with the most economic means possible; and secondly, that participants in the proceedings may gain legal certainty and clarity as quickly as possible;

- In principle, the grounds for written or electronic administrative acts shall be stated (Section 39). This obligation is intended to inform participants of the reasons on which the authority based its decision, in order to convince participants, or to give them the opportunity to appeal the decision and thereby protect their rights.

3. New demands on public administration and how they are being met

In recent years, society and the understanding of the State have changed radically. Whereas public administration was once strongly marked by its sovereign behaviour, the goal of today's enabling State is to maintain a partnership with citizens. This also means expanding existing ways of gaining information about administrative matters. Draft freedom of information legislation provides for greater transparency regarding the activity of federal authorities, beyond participants in proceedings; in some Länder, such laws are already in effect. The Federal Government's goal of simplifying citizens' access to public administration and reducing formal barriers to participation in what society has to offer is also served by the broad utilization of current information and communications technology, which is intended to offer citizens easy access to public administration services. These are the goals of the Federal Government's BundOnline 2005 project, now integrated with similar efforts by the Länder within the project DeutschlandOnline.

LATVIA

Implementation of the principle of good administration in Latvia

Latvia during the past years, especially 2002, 2003, has experienced a steady and coherent implementation of public administration reform. A range of positive and significant changes have taken place in the institutional system of public administration, essential policy papers and fundamental and up-to-date laws have been adopted to regulate issues of public administration, administrative procedure which inescapably deals with the principle of good administration.

The aim of the aforementioned but not exhaustive changes is to strengthen the capacity of the public administration and to create the foundation for effective, transparent, open and accountable operation of the public administration, to develop public administration that operates on the grounds of the principle of good administration. This includes the introduction of up-to-date operation methods, procedures, and culture in the public administration.

The Public Administration Law[190] was adopted in June 2002 and has been in force since 1 January 2003. The aim of the law is to ensure democratic, lawful, effective, open and publicly accessible public administration (Public Administration Law, Section 1). The law establishes legal principles that must be applied in the development of democratic and effective public administration; it determines the responsibility of the public administration in general, including local governments.

Section 10 of the Public Administration Law provides for the principles of public administration. It states that the public administration is governed by the rule of law. Public officers and public administration overall act within the scope of the competence prescribed by regulatory enactments. The public administration may use its powers only in conformity with the meaning and purpose of the authorisation. It also states that the public administration must act in the public interest. Public administration, individual institutions or officials, in implementing the functions of public administration, do not have their own interests.

The public administration according to this section must observe in its activities the principles of good administration:

- openness with respect to private individuals[191] and the public;
- data protection;
- fair implementation of procedures within a reasonable period of time;
- other regulations, the aim of which is to ensure that public administration observes the rights and lawful interests of private individuals.

[190] Available in English on http://www.mk.gov.lv or http://www.ttc.lv

[191] Private individual meaning a natural or legal person governed by private law (Public Administration Law, Section 1)

Furthermore, if the principles of good administration are not complied with, which causes infringement of the private individual's rights to good administration, the private individual whose rights and interests are affected is entitled to require compliance therewith in accordance with the procedures of administrative procedure (Public Administration Law, Section 11).

The openness and transparency of the operation of public administration is ensured by the Constitution of the Republic of Latvia[192] in Article 100, which *inter alia* provides for the right to receive information, and Article 104, which provides for the right to address submissions to the public administration and to receive a materially responsive reply. The Freedom of Information Law[193] specifies the aforementioned constitutional provision.

Nevertheless, openness means not only rights to submit questions, proposals or complaints to a public administration institution. Section 48 of the Public Administration Law states that in order to achieve the purpose of the Law, institutions must involve public representatives (representatives of non-governmental organisations, other interest groups, individuals concerned) in the activities of public administration, by way of including such persons in working groups, advisory councils or by asking for their expertise on drafting policy papers or legislative regulations.

In matters of significance to the public, institutions have a duty to organise public discussion. If an institution takes a decision that does not correspond to the opinion of a considerable part of society, the institution must provide a special substantiation for any such decision.

In order to inform the public about the activities of an institution of public administration, and on the use of the budget resources allocated to such an institution, the institution prepares annual public reports (Public Administration Law, Section 94).

Regulation on data protection is provided in several laws, the Law on Data Protection of Natural Persons, the Freedom of Information Law, etc., in order to protect the person's rights to inviolability of his/her private life, especially in respect to person's personal data. A public official may not disclose in any way the personal data of a private individual without the latter's consent.

Another principle of good administration consists of fair procedures and reasonable time limits. The trends of the past few years has been to establish such procedures as are accessible to private individuals and require perfection of co-operation of public administration institutions. The objective is to eradicate the practice where a private individual must address several institutions in order, for example, to obtain a licence; instead the private individual addresses one institution and if information from other public administration institutions is needed the institution addressed requests the necessary information itself.

[192] Available in English on http://www.ttc.lv
[193] Available in English on http://www.ttc.lv

Another law that should be mentioned is the Administrative Procedure Law adopted on 25 October 2001 which came into effect on 1 February 2004. It provides for administrative procedure by bodies of public persons,[194] as well as courts. The purpose of this law is to ensure observance of the principles of democracy, the rule of law, especially human rights in the relationship between the State and the individual, to subordinate the activities of the Executive Power concerning the public relationship between the State and an individual to the control of an independent, impartial and competent judicial authority.

The Administrative Procedure Law establishes the principles that must be observed in administrative procedure. These are the principles of equality, justice, judicious application of legal provisions, legal certainty, prohibition of the abuse of discretionary power, etc.

Finally, a draft law on the institution of Ombudsman has been elaborated and is to be presented to the Parliament for adoption. The purpose of this law will be to ensure observance of the principle of good administration and effective supervision of public administration, to improve protection of individual's rights, and to increase public confidence in the institutions of State power.

[194] Public person meaning the Republic of Latvia as the initial legal person governed by public law and derived public persons. Such persons act in accordance with the principles of public law. A derived public person is a local government or other public person established by law or on the basis of law. Such public personality has its own autonomous competence under law, which includes also establishment and approval of its own budget. Such a person may have its own property (Public Administration Law, Section 1).

LITHUANIA

The right to good administration in Lithuania

The Constitution is the basic law of greatest power in the country. It is the backbone of the whole legal system, the main element of it. It defines general principles for the other branches of law. It is therefore necessary to consider the constitutional basis of the right to good administration.

The principle of the rule of law, embedded in the preamble of the Constitution of the Lithuanian Republic, constitutes the main basis for the right to good administration. This means that "the law rules, not the people". Furthermore, it is the basis for the interpretation of other principles which are very important elements of it. Some of these principles such as the supremacy of the Constitution and law, the right to defence, the right to be heard, are directly embedded in the Constitution. Other principles - proportionality, legal clarity, legal expectations, simplicity - arise from EU law and they are largely applied in the jurisprudence of the Constitutional Court and other courts in order to ensure the right to good administration. These principles presuppose that the State must discharge its liabilities to a person. If these principles are not safeguarded, trust in State and law would not be ensured.

Moreover, it must be highlighted that a very important human right which can be interpreted as a principle - equality - is enshrined in the Constitution. It requires that all people shall be equal before the law, the court, and other State institutions and officers. A person may not have his rights restricted in any way, or be granted any privileges, on the basis of his or her sex, race, nationality, language, origin, social status, religion, convictions, or opinions. Another very important constitutional principle, formulating the guarantees of human rights, is that institutions of power shall serve the people.

It must be noted that broad possibilities for the functioning of the system of human rights are established in the Constitution: that is to say, the Seimas controllers shall examine complaints of citizens concerning the abuse of powers, through the bureaucracy, by State and local government officers (with the exception of judges); the deeds and actions of local government councils as well as of their executive bodies and officers which violate the rights of citizens and organisations may be appealed against in court.

Another very important legal basis for ensuring the right to good administration is the Law on Public Administration. The purpose of this law is to create the necessary legal preconditions for the implementation of the clause of the Constitution of the Republic of Lithuania stipulating that the responsibility of governmental institutions is to serve the people; it is also to strengthen the administrative capacities of public administration institutions and enhance their effectiveness.

The Law on Public Administration defines the public administration entities of Lithuania and the principles of their activities, establishes the grounds of administrative regulation, of provision of public services and of internal institutional administration as well as defining the administrative procedures and duties for considering and making decisions with regard to individuals' applications and complaints. This law guarantees the right of citizens and other persons to a fair and impartial consideration of their applications in institutions of public administration and adoption of justified decisions on the issue as well as the right to appeal against the decision and receive compensation for damage caused by unlawful administrative activities.

The activities of public administration entities shall be based on the following principles of democratic State administration:

1) supremacy of the law, meaning that the competence of public administration institutions must be defined by the Law on Public Administration, while their activities must be in conformity with the legal principles laid down in this law. Administrative acts relating to the implementation of rights and duties of individuals must in all instances be based on law;
2) objectivity, meaning that decision-making and other official actions of the public administration entity must be unbiased and objective.
3) proportionality, meaning that the scope and severity of an administrative decision must be in proportion to the purpose of administration.
4) prohibition of abuse of authority, meaning that public administration institutions shall be prohibited from performing unauthorised actions or from making decisions within the scope of their competence for purposes other than those prescribed by law;
5) inter-institutional co-operation, meaning that when drafting administrative acts public administration institutions shall, where appropriate, provide each other with the required information and other assistance.

It must be noted that the reform of the system of public administration has been undertaken recently. The Strategy of the Development of Public Administration until 2010 and amendments to the Law on Government and Law on Public Administration have been prepared.

It is planned that the implementation of the strategy will help to establish the policy of social and economic development, based on succession and continuity, to modernize and rationalise the structure of public and local authorities and agencies, as well as planning, organisation and co-ordination relations, to establish a reliable system of control of activities and internal audit. The procedures of administrative decision-making will be improved, and an effort will be made to ensure an optimal distribution of powers, competence and responsibility at central, regional and local level. It is also the wish to establish a professional, stable civil service which will properly exercise its functions during Lithuania's integration into the EU, and to ensure high quality of the services provided. The rapid development of information society will enable the modernisation of the work of State and local authorities and agencies, of the process of

public administration itself and of its effectiveness, openness to people and its rapid and effective response to changing circumstances.

Moreover, in the amendments prepared to the Law on Public Administration, it is proposed to define the concept of applications by individuals and to regulate the order of their consideration, to supplement this law with principles of effectiveness, subsidiarity, "one-stop-shop", pursuant to which the entities of public administration should exercise their powers. It is believed that the embedding of these principles in the law will establish the preconditions for further development of the system of public administration.

The Law on Public Administration guarantees the right of citizens and other persons to fair and impartial consideration of their applications by the institutions of public administration and the right to legitimate solutions. Appropriate procedures and institutions such as administrative disputes commissions and administrative courts have been established in order to ensure this right.

Administrative Procedure

Administrative procedure shall comprise mandatory actions performed pursuant to this law and other laws by public administration entities while considering individuals' applications (petitions, information presented in the mass media or official notifications by the State or local government civil servant) and taking decisions on them.

Parties to an administrative procedure are entities taking part in the public administration procedure: the individual (applicant) who addresses a public administration institution representing one of the parties and the public administration institution representing the other party.

Grounds for starting an administrative procedure:

1) a written application by an individual (applicant);
2) facts disclosed in the in-service report of the State or local government civil servant;
3) information presented in the media regarding the infringement of rights of citizens and other persons by a State or municipal institution;
4) other cases of infringement of the rights of citizens or other persons which have come to public notice.

An administrative procedure shall be initiated by the head of a public administration institution, his deputy or a State civil servant or municipal employee authorised by them for the purpose.

Every public administration institution must accept applications from individuals and consider them according to its competence. The fact of acceptance of an application shall be acknowledged by an appropriate document indicating the date of its acceptance, the name and telephone number of the civil servant responsible for

dealing with the application and the application registration number. The acknowledged document shall be handed or posted to the applicant.

Verbal applications shall be accepted only when they allow for an expeditious investigation without their registration in writing and provided they do not affect either the applicant's interests or those of the State or municipality.

In order to ensure transparency of administrative procedure, the law provides that a State civil servant or municipal employee shall disqualify himself or must be disqualified from participation in an administrative procedure if:

1) a participant in an administrative procedure is his close relative, a family member (within the meaning of definitions given in criminal and civil law), a relative by marriage (relative of the spouse), or if decisions taken may entail personal advantage or when in the case at issue he acts as a representative of the party to the procedure;
2) he is employed in the same institution as one of the parties to the administrative procedure;
3) his impartiality is open to doubt because of any other circumstances which may result in a conflict of interests.

A decision concerning disqualification of a State civil servant or municipal employee from taking part in an administrative procedure shall be adopted by the head of an institution. A decision on the disqualification of the head of an institution from taking part in an administrative procedure shall be adopted by the head himself or by a higher-level institution of public administration in accordance with the procedure prescribed by the Law on the Adjustment of Private and Public Interests in the Public Service.

If the administrative decision on the issue under consideration could change the legal status of persons who are not taking part in the administrative procedure, the administrative procedure shall be suspended, notifying the said persons of their right to participate in the procedure.

Unless the law provides otherwise, the applicant or his representative shall have the right of access to the available documents and other collected information, also the right to voice his opinion and present additional documents.

Unless the law provides otherwise, the consideration of a complaint may not last longer than 30 days.

The administrative procedure shall be completed after the making of a decision to accept or to reject the application and after the notification of the applicant or another interested person thereto.

Administrative Disputes Commissions

As the Law on Administrative Disputes Commissions provides, County Administrative Disputes Commissions and the Chief Administrative Disputes Commission are established for the pre-trial consideration of complaints (applications)

contesting the adopted individual administrative acts and acts (or omission) of civil servants and municipal employees in the sphere of public administration.

The County Administrative Disputes Commission shall consider complaints (applications) contesting the legality of individual administrative acts and actions of territorial State administration entities, i.e., State institutions, agencies, services located in the county, including their employees, as well as municipal institutions, agencies, services located in the county as well as their employees, also the legality and motivation of the entities' refusal to perform the actions assigned to their competence or delay in performing such actions.

The Chief Administrative Disputes Commission shall consider complaints (applications) contesting the legality of the individual administrative acts and actions of central State administration entities, also complaints concerning the legality and motivation of refusal by the above persons to perform actions assigned to their competence or delay in performing such actions.

It must be emphasised that the Chief Administrative Disputes Commission is a legal person. The Commission Chairman and members shall be civil servants and their work on the Commission shall be considered as their principal job Their salaries, as well as the number and salaries of auxiliary personnel, shall be fixed by the Government.

Persons, as well as public administration entities who believe that their rights have been infringed, shall have the right to file a complaint (application) with the appropriate Administrative Disputes Commission within whose competence the matter lies.

The Commission shall not resolve tax disputes and administrative disputes for whose hearing a different procedure is provided for by law.

It must be underlined that Municipality Administrative Disputes Commissions are also established at municipal level. Municipal Public Administrative Disputes Commissions shall be set up by decision of the municipal council. Municipal Administrative Disputes Commissions shall consider individuals' complaints concerning the legality of individual administrative acts and actions of municipal public administration entities, as well as the lawfulness and motivation of the entities' refusal to perform the actions assigned to their competence or delay in performing such actions.

It should be ensured that neither the Law on Public Administration nor the Law on Administrative Disputes Commissions limits the occasions on which appeal should be made to appropriate administrative disputes commissions and to public administration institutions.

Administrative courts

Special administrative courts were established for the consideration of complaints (applications) contesting the administrative acts and acts (or omission) of public and internal administration entities.

Administrative courts shall decide cases relating to:

1) the lawfulness of legal acts passed and actions performed by the public administration entities, and the legality and validity of refusal by these entities to perform the acts within the remit of their competence or delay in performing such actions;
2) the lawfulness of acts passed and actions performed by municipal administration entities, and the legality and validity of refusal by these entities to perform the acts within the remit of their competence or delay in performing such actions;
3) compensation for material and moral damage inflicted on a natural person or organisation by unlawful acts or omissions in the sphere of public administration by State or municipal institutions, agencies, services and their employees (Civil Code, Article 485);
4) payment, repayment or exaction of taxes, other mandatory payments and levies, the application of financial sanctions and tax disputes;
5) office-related disputes, where one of the parties is a public or municipal servant possessing the powers of public administration (including officers and heads of agencies);
6) decisions by the Chief Institutional Ethics Commission and petitions by the Commission for the severance of service relations with public servants;
7) disputes between public administration entities which are not subordinate to one another concerning competence or breaches of the law, except for civil litigation cases assigned to the courts of general jurisdiction;
8) violation of the election laws and the Law on the Referendum;
9) complaints against the decision in the case of administrative law violation;
10) lawfulness of the decisions taken and actions performed in the sphere of public administration by public agencies, enterprises and NGOs with public administration powers, as well as the lawfulness and validity of the refusal by the above entities to perform the actions assigned to their competence or delay in performing such actions;
11) lawfulness of acts of a general character passed by public organisations, communities, political parties, political organisations or associations;
12) complaints by foreigners about the refusal to issue residence and work permits in Lithuania or withdrawal of such permits, as well as complaints about refugee status.

Persons as well as other public administration entities, including State and municipal employees, officers and agency heads, shall have the right to file complaints/petitions against administrative acts adopted by public or internal administration entities or against the acts (omissions) of these entities if they believe that their rights or interests which are protected by law have been infringed.

The complaint/petition shall be filed directly with the administrative court in the cases provided in the Law on administrative proceedings.

Before applying to the administrative court, individual legal acts adopted by public administration entities provided for by law as well as their acts/omissions may, and in the cases established by law must, be contested by applying to the institution for preliminary extrajudicial investigation of disputes.

Unless the law provides otherwise, preliminary extrajudicial investigation of disputes shall be carried out by municipal public administrative disputes commissions, county administrative disputes commissions and the Chief Administrative Disputes Commission.

Civil Service

The Law on Civil Service (hereafter LCS; new wording of the Law on 5 May 2002, came into force on 1 July 2002) lays down the basic principles of the civil service, the status of civil servants, their responsibilities, remuneration, social and other guarantees, as well as the legal basis for the management of the civil service.

It should be noted that the Law on Civil Service shall not apply to State politicians (State politicians means persons who, in accordance with the procedure prescribed by law, are elected or appointed as President of the Republic, Chairman of the Seimas, Member of the Seimas, Prime Minister, minister, member of a municipal council, mayor of a municipality or deputy mayor of a municipality).

While reforming the civil service in Lithuania, it was wished to create conditions for the establishment of the corps of professional civil servants which would ensure continuity of the work of institutions of State government and municipalities, political neutrality, effectiveness, publicity, high quality of service and responsibility for the decisions adopted.

It should be noted that political neutrality is one of the principles on which the civil service of the Republic of Lithuania shall be based. One of the basic principles of ethics of civil servants shall be justice. A public servant shall equally serve all residents irrespective of their nationality, race, sex, language, origin, social status, religious beliefs and political views, shall be fair when dealing with requests, shall not abuse the powers and authority vested in him.

Depending on their positions, public servants shall be divided into career civil servants, civil managers, acting civil servants and civil servants of political (personal) confidence.

This means that the law distinguishes civil servants admitted to a position for the term of office of a State politician or a collegial State institution that has recruited him. Recruitment to the posts of civil servants of political (personal) confidence shall be made without competition on the choice of a State politician or a collegial State institution. Recruitment to these posts shall be made for a period not exceeding the term of office of the State politician or collegial State institution which has recruited the officials.

Civil servants of political (personal) confidence shall have not the right to a career in the civil service according to their qualifications. Civil servants of political (personal) confidence shall be dismissed from office when they lose the confidence of the State politician or collegial State authority which admitted them to office.

As career civil servants shall have the right to a career in the civil service according to their qualifications, different grounds of dismissal from the civil service are applied to them.

It should be noted that civil servants shall have the right to membership of trade unions, organisations or associations, also to membership of political parties or organisations, and of participation in political activities out of office (working) hours.

It is important to note that the LCS provides that public managers shall be recruited on the basis of political (personal) confidence in the cases established by law.

Duties, rights and responsibility of civil servants

Civil servants must:

1) comply with the Constitution and laws of the Republic of Lithuania;
2) be loyal to the State of Lithuania and its constitutional order;
3) respect human rights and freedoms, serve the public interest;
4) duly perform the functions specified in the job description and duly carry out the tasks assigned to them;
5) adhere to the principles and rules of ethics of public servants laid down in the Law on Civil Service and other legal acts;
6) follow the internal regulations of State and municipal institutions and agencies;
7) provide information about their work in accordance with the procedure prescribed by legal acts;
8) study in accordance with the procedure prescribed by the Law on Civil Service;
9) refrain from using and refuse to allow the use of official or work-related information otherwise than set out in laws or other legal acts;
10) refrain from using State or municipal property for activities that are not related to work;
11) refrain from participating in activities specified in the Law on Civil Service which are incompatible with the office of a civil servant, and from using office (work) time for other purposes, except for scientific and teaching activities at higher education establishments or qualification at institutions for civil servants, and non-formal adult education. Laws may also provide for other duties of civil servants.

Civil servants shall have the right:

1) to a career in the civil service according to their qualifications. This right shall be guaranteed only for career civil servants;
2) to receive remuneration as set out by laws and other legal acts;

3) to training in accordance with the procedure prescribed by the Law on Civil Service financed from the State and municipal budgets;
4) to holidays as provided by the Law on Civil Service and other legal acts;
5) to a State social insurance pension, social and other guarantees as set out by the Law on Civil Service and other legal acts;
6) to strike, except for civil servants holding the office of the head of a department at a State or municipal institution or agency or senior positions;
7) to membership of trade unions, organisations or associations, also to membership of political parties or organisations, and to participation in political activities out of office (working) hours.

Civil servants who are members of trade unions shall have the right to participate in dealing with the issues related to the evaluation of public servants, promotion, the imposition of disciplinary sanctions, as well as in organisational activities of trade unions. Ten hours of office (work) time per month shall be allocated for this purpose and remuneration shall be paid for this time.

When the term of appointment of a person to the office of a State politician, the term of the Seimas or the municipal council expires, or a person resigns or is dismissed from the office of a State politician, the person who, before appointment to the office of a State politician or before election to the office of a member of the Seimas or the municipal council, was a public servant (except for public servants of political (personal) confidence) shall have the right, in accordance with the procedure prescribed by the Government, to re-establish the status of public servant (except for a public servant of political (personal) confidence) within three months after the occurrence of the conditions specified herein, i.e. to be reinstated in his earlier position or, if that is not possible, be appointed to another position of the same category and grade. A public servant who has completed the mandatory primary military service or alternative national defence service shall be ensured the right to be reinstated in his former position at the same State or municipal institution or agency.

Responsibility. Civil servants shall incur disciplinary liability for misconduct in office. Public servants shall incur material liability for material damage caused to a State or municipal institution or agency. Disciplinary sanctions shall be imposed for misconduct in office, as set out by the Law on Civil Service. A disciplinary sanction shall be imposed taking account of fault, the causes, circumstances and consequences of misconduct in office, the activities of the civil servant until misconduct in office and the information, given on the occasions and in the order, prescribed by the Law on Prevention of Corruption. One of the following disciplinary sanctions may be imposed upon a public servant for misconduct in office: an admonition, a reprimand, a severe reprimand, dismissal from office. Dismissal from office as a disciplinary sanction may be imposed for gross misconduct in office, also for other misconduct if before that misconduct he was punished by a disciplinary sanction - a severe reprimand - once during the previous twelve months.

Gross misconduct is misconduct which grossly infringes the provisions of the Law on Civil Service and other laws or other legal normative acts regulating the activities of civil servants, or the duties of a civil servant or the principles of ethics of the activities of a civil servant are grossly breached in any other way

The following are considered to constitute gross violation:

1) conduct of a civil servant which discredits the civil service or degrades human dignity, or other activities which directly violate a person's constitutional rights;
2) revelation of a State, official or commercial secret;
3) acts of corruption character of a criminal nature, even if criminal or administrative liability was not imposed on the civil servant for this act;
4) abuse of the civil service, violation of the requirements of the Law on the Co-ordination of Public and Private Interests in the Public Service;
5) involvement in activities which are incompatible with civil service;
6) absence from the office (work) for one or several working days without reasonable cause;
7) intoxication by alcohol, drugs or toxic substances during office (work) hours, if such conduct by a civil servant insults human dignity or discredits the authority of a State or municipal institution or agency;
8) other misconduct which grossly infringes the duties of a civil servant or the ethical principles of civil servants.

Despite the fact that the legal basis for the functioning of the civil service is relatively strong in Lithuania, reliance upon the civil service is low.

MOLDOVA

Brief Information on the situation in the Republic of Moldova relating to an administrative reform

The Parliament of the Republic of Moldova accepted the Declaration on the Sovereignty of 23 June1990 and the Declaration on Independence of 27 August 1991, having proclaimed observance of human rights and construction of the democratic State as the supreme democratic values. Therefore the difficult period of construction of the independent and sovereign Moldovan State has started. In 1992 it became a member of the United Nations Organisation. So far, the Republic of Moldova has established diplomatic relations with more than 112 countries throughout the world.

Since the proclamation of its independence in 1990-1991, the Republic of Moldova has faced a number of economic, legal and political problems. The majority of these problems are connected to the existence of the old administrative system which was left as an inheritance from the ex-USSR. Fundamental changes in various areas of public life in Europe at the end of the 20th century also had considerable influence on the development of democratic processes in Moldova. A significant event was the country's accession to the Council of Europe in July 1995. These and other factors have essentially affected methods and forms of administration and functioning of the State in a modern society.

Functioning of an old administrative system that was based on a principle of strict centralisation has been incompatible with the proclaimed objectives of the Moldovan State. Reforming all fields of activity and administration of Moldova was a vital necessity. The necessity for administrative reform became obvious for the following reasons: firstly, local communities (population) on the basis of principles of local autonomy, administrative decentralisation and electivity, should be involved in the process of realisation of political powers at local level; and secondly, realisation of other reforms (transition to a market economy, agricultural and judicial-legal reforms, etc.) was impossible within the old administrative system. It was necessary to create a society in which the rights and freedoms of individuals would become universal values: for example, equality before the law, family and private life, participation in central and local government, political pluralism, access to justice.

Under Moldovan legislation, the head executive (mayor) and local councils are elected by the population on the basis of *the general, equal and direct suffrage by secret and free ballot*. However, until 1997 Moldovan legislation envisaged provisions on local public administration that were not compatible with democratic principles of local administration. The President of the Republic of Moldova had the right, in some cases, to appoint an executive body led by the mayor in villages (communes), cities (towns). The *Law on local self-government* of 1994 and the *Law on local elections* of 1994 also provided for cases where the State President, following the proposal of the central government, could appoint the heads of executive committees of regional councils

(intermediary level). Moreover, the head of State could appoint a new mayor before new elections if the current mayor did not fulfil his/her duties.

The law on local self-government of 1994 also contained norms which enabled the President of the Republic of Moldova to demand the resignation of the mayor or the head of the executive committee of a regional council, under the proposal of the central government, in cases where they violated the provisions of the Constitution or respective legislation.

Moreover, in cases where local councils had not been elected, the President enacted the chief executive (mayor) to act as the local elective council. In all, 99 cases of assignment to the post of elective local persons were made by Presidential decrees.

In the administrative system that existed in Moldova until 1994-1997, similar norms represented extrajudicial resolution by the central government of part of the problems of local communities. Thus, the central government bodies substantially controlled actions of local authorities. This did not always coincide with the interests of local communities and the right of citizens to free and independent management of their local affairs.

After the adoption of the new Constitution of the Republic Moldova (29 July 1994), new principles were laid down in the organisation and functioning of the administrative system of local public authorities. Therefore, article 109 of the Constitution provides that public administration in territorial units is based on the principles *of local autonomy*, *decentralisation of public services, election of local authorities and consultation of citizens on major questions of local interest.*

In view of these principles, the Constitutional Court of the Republic of Moldova recognised as unconstitutional some positions envisaged in the *Law on local self-government* of 1994 and the *Law on local elections* of 1994. It has been confirmed that elected authorities of administrative and territorial units are not subordinated to hierarchical authority and are independent of the central bodies of State.

The Constitutional Court also confirmed the right of citizens to freely operate, within the framework of the law, local communities by means of local authorities. This right results from Article 2 of the Constitution, which provides for realisation of national sovereignty only by the people of Moldova.

These and other events between 1991 and 2001, since when the central public administration bodies of Moldova, with the Council of Europe's assistance, have undertaken a number of measures with the purpose of putting into effect the transition from the old administration system to a new system that would meet the requirements of the market economy and respect for human rights.

In this context it is necessary to note the adoption in June 1994 *of the Concept of reforming the judicial - legal system in the Republic of Moldova*. The goal of this reform is to guarantee independent, impartial and fair justice in Moldova. Reforming the judicial system is an important step towards the improvement of mutual relations between administrative bodies and citizens, and also maintenance of the right to qualitative management by judicial control over the activities of local public

authorities. Since the adoption in 2000 of the *Law on administrative courts,* anyone who considers that any of his/her rights have been infringed, has the right to address a specialised judicial body – the administrative court.

The judicial system on three levels (courts, appeal chambers and the Supreme appellate court) and the entry into force in June 2003 of the Civil and Civil Procedure Codes and the Criminal and Criminal Procedure Codes also assisted in creating a legal basis for the promotion and protection of the rights and freedoms of citizens, including participation in the administration of economic and political processes of the Moldovan State and society.

The Concept of reform of territorial organisation was approved in 1997. Consolidation of an administrative system in Moldova was reflected in changes to the administrative organisation of the country. In 1991, 1994, 1998 and at the end of 2001 laws were passed concerning local public administration and the territorial organisation of the country. The normal functioning of local authority is one of the basic components for the proper functioning of an administrative system. The *Law on bases of local self-management* of 10 July 1991 proclaimed the following principles for the functioning of local public self-governance: maintenance of legality, democracy and transparency, protection of the rights and legitimate interests of citizens, maintenance of economic self-financing, autonomy and contractual relations between administrative and territorial units[195] both different legal and physical persons.

The Parliament of Moldova in approving the *Law on local public administration* and the *Law on the administrative-territorial organisation* in November 1998 considered provisions of the Moldovan Constitution and of the European Charter of Local Self-Government.[196]

The concept of reforming local public administration provided for the creation of an operational system concerning real decentralisation of public services in the fields of education, youth, public health services, social assistance, culture, finance and other local services.

As a result of the administrative-territorial reform of 1998, 40 larger regional administrative formations were created – 10 districts (intermediary level) have been established. Administrative and territorial units of the first level (village, a commune) have also been consolidated. It was supposed that larger regional centres and communes would be economically more effective and qualitative and services duly delivered to the population. However, a succession of events has shown that there was a distance between the local administrative authority and the population. Citizens had to travel great distances to resolve certain questions under the competence of district authorities. Besides, *subsidiary* and *economic* principles were not completely reflected in accordance with the provisions of the European Charter of Local Self-Government.

[195] Administrative and territorial units have legal persons in public law since 1998.
[196] The European Charter of Self-Government of 15 October 1985 has been in force in Moldova since 1 February 1998.

In 2001-2003 Moldova made the transition to a regional administrative State structure (32 regions – intermediary level). The *Law on the administrative-territorial division of the Republic of Moldova* of 27 December 2001 and the *Law on local public administration* of 18 March 2003 confirmed, that village (commune), city (town), region and territorial autonomous unit *Gagauzia* were legal persons under public law.

These laws have established the right of local authorities to own property, to financial autonomy and the right to take the initiative in all matters concerning administration of local public affairs.

The important achievement of these laws is the stipulation of provisions under which the central and local authorities must organise consultations of the population on questions of interest to the local community. For example, formation, abolition and change of the status of an administrative and territorial unit are carried out by the Moldovan Parliament after consultation of citizens. In this way account is taken of the provisions of Article 5 of the European Charter of Local Self-Government.

Another significant event was the establishment of administrative supervision of the activities of local authorities aimed at ensuring compliance with the law and with constitutional principles. Under the *Law on local public administration* (18 March 2003) this supervision will be carried out by a specialised body – a territorial Bureau of the State Chancellery of the Republic of Moldova. In cases where the Territorial Bureau of the State Chancellery considers that an act of a local authority is illegal, the Territorial Bureau submits to this authority notice of the illegality of the act and requires its modification or cancellation. If the local authority which issued the act does not consider it necessary to change it, the Territorial Bureau can request an administrative court to cancel the act.

One form of realising citizens' rights to administration by local public authorities is the supervision of authorities' acts over application to physical and legal persons. Anyone who considers his or her rights have been violated by the issue of an administrative act can appeal before a territorial Bureau of the State Chancellery to have the legality of the act checked. Realisation of this right does not deprive the applicant of the right to address directly an administrative court (as has been mentioned above).

The above-mentioned provisions of the legislation concerning judicial, elective, administrative-territorial systems allow citizens of the Republic of Moldova to enjoy the opportunity to influence local management, which means, finally, the right of inhabitants to participate and influence qualitatively administration both at local and central levels.

THE NETHERLANDS

1) Constitutional basis of the right to good administration

Article 107 paragraph 2 of the Dutch Constitution reads as follows:

"The general rules of administrative law shall be laid down by Act of Parliament".

This article was inserted in the 1983 revision of the Constitution. The obligation following from this article led to the General Administrative Law Act, which entered into force on 1 January 1994 (see section 2 below).

The Constitution contains certain rights that can be deemed to form part of the right to good administration, for example:

Article 5: "Everyone shall have the right to submit petitions in writing to the competent authorities".
Article 110: "In the exercise of their duties government bodies shall observe the right of public access to information in accordance with rules to be prescribed by Act of Parliament".

2) General Administrative Law Act

The General Administrative Law Act (AWB) came into force on 1 January 1994 and contains general rules in the field of administrative law. It harmonises different rules from a number of specific acts: for example, it prescribes a deadline of six weeks for submitting a notice of objection or appeal against a decision made by an administrative authority (section 6:7).

The AWB also codifies administrative case law, especially certain principles of the right to good administration that have been developed by the courts in the course of about 50 years (see below).

The AWB also contains the main features of the system of legal protection from the government. It prescribes uniform rules for citizens who want to dispute decisions by an administrative authority.

The AWB is still under construction. In 1998 sections were added governing grants, policy rules, mandate, delegation and approval[197] and in 1999 the AWB acquired general rules for administrative authorities on how to deal with complaints lodged by members of the public. Several new sections are under preparation, governing matters such as the handling of electronic applications and decisions, rules on money owed to and by the government, and rules on administrative penalties.

[197] According to Section 10:25 of the AWB, "approval" means the consent of another administrative authority required for the entry into force of an order made by an administrative authority.

The AWB contains certain principles of good administration.

Chapter 2 of the AWB prescribes general rules for the relations between individuals and administrative authorities, such as the right to be assisted or represented by a legal representative (section 2:1), the obligation for an administrative authority to perform its duties without prejudice (section 2:4) and the duty of confidentiality that applies to anyone involved in fulfilling the responsibilities of an administrative authority (section 2:5).

Chapter 3 of the AWB contains general rules concerning orders (*besluiten*).[198] Section 3:2 contains the duty of careful preparation: "When preparing an order an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed".

Section 3:3 prohibits the misuse of power (in French *détournement de pouvoir*): "An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred".

Section 3:4 contains the obligation to balance interests (subsection 1) and the principle of proportionality (subsection 2): "1. When making an order the administrative authority shall weigh the interests directly involved insofar as there is no limitation on this duty deriving from a statutory regulation or from the nature of the power being exercised. 2. The adverse consequences of an order for one or more interested parties may not be disproportionate to the purposes to be served by the order".

Division 3.7 of Chapter 3 contains rules on the substantiation of orders, such as the obligation to give proper reasons for an order (section 3:46) and the obligation to give these reasons when notification of the order is given (section 3:47, subsection 1).

Chapter 4 prescribes rules on hearing the member of the public concerned before an administrative decision is taken.[199] Subject to certain conditions, the applicant must be heard before an administrative authority rejects all or part of his application (section 4:7) and the same applies to an interested party who has not applied for the administrative decision and who may be expected to have reservations about it (section 4:8).

There are several other principles of the right to good administration that have been recognised in case law but are not yet codified in the AWB. One is the principle of legitimate expectations. This principle requires that administrative authorities honour legitimate expectations in the fulfilment of which an interested party may reasonably have trusted. The principle of legal certainty is closely related to the principle of legitimate expectations and requires administrative authorities to respect rights that have been secured in the past. This means, for example, that they may not unexpectedly change a set policy, give retroactive effect to a regulation, or withdraw a decision, if such acts would adversely affect members of the public.

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[198] Section 1:3, subsection. 1 AWB reads as follows: "Order" means a written decision of an administrative authority constituting a public law act. (This means that this order is intended to have legal consequences).
[199] Section 1:3, subsection 2 of the AWB reads as follows: "Administrative decision" means an order which is not of a general nature, including the rejection of an application for such an order.

The principle of equality prescribes that equal cases must be treated equally and unequal cases must be dealt with to the degree that they differ. This principle is not found in the AWB, but it is enshrined in Article 1 of the Dutch Constitution as well as in human rights treaties and in European legislation.

Another important piece of legislation governing the right to good administration is the Government Information (Public Access) Act of 1991.

3) International Law

Pursuant to Articles 93 and 94 of the Constitution, provisions of treaties and of resolutions by international institutions which may be binding on all persons ("self-executing") are part of Dutch law. Members of the public can invoke these provisions directly before the national courts, which may decide not to apply a national statutory regulation (even an Act of Parliament), if the latter conflicts with an international obligation. It is for the court to decide in an individual case whether there is a treaty provision at issue that is binding on all persons. In general, the provisions of the European Convention on Human Rights (ECHR) are considered to be binding on all persons. The Supreme Court has even been known to set aside the provisions of an Act of Parliament because of some conflict with provisions of the ECHR (e.g. articles of the Civil Code governing family law, on the grounds of conflict with Articles 8 and 14 of the ECHR).

In this respect, Article 6 of the ECHR, which guarantees the right for everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal, plays an important role. Although this article does not explicitly contain the right to good administration, it certainly contains important aspects of it, such as the right to be heard within a reasonable time, which right must be respected not only by the judiciary but also by administrative authorities. The right to be heard within a reasonable time within the meaning of Article 6 of the ECHR is often invoked in administrative proceedings, such as social security disputes. The Strasbourg Court has found against the Netherlands in several judgments in this field.[200]

EU legislation is also part of Dutch law. Whenever Dutch authorities are called upon to apply EU legislation they are likewise bound by the principles of good administration, as developed in the case law of the European Court of Justice (ECJ) in Luxembourg and codified in Article 41 of the EU Charter of Fundamental Rights.

4) *Access to the courts: the enforcement of the right to good administration*

It is all very well to codify the principles of good administration, but it is obviously essential for members of the public to have the opportunity of enforcing their rights in this regard if the government proves unwilling to respect them voluntarily. Access to the courts is crucial for the enforcement of the right to good administration. The right of access to the courts has not been laid down as a constitutional right as such. Also, the Dutch legal order does not provide for constitutional review. Article 120 of the Constitution denies courts the authority to review the content of Acts of Parliament, or of the procedure leading to their enactment, to examine compatibility with the

[200] See e.g. European Court of Human Rights 29 July 2003, *Beumer v. the Netherlands*.

Constitution (which includes an enumeration of fundamental rights and freedoms) and with fundamental legal principles such as the unwritten principles of good administration. Where fundamental rights or legal principles are embodied in treaties (such as the ECHR), the courts can examine Acts of Parliament for compatibility with these rights and principles.

Over the past hundred years, the regular courts have assumed jurisdiction in cases against administrative authorities on the basis of the law of tort and claims such as undue payment. This case law has finally laid the foundations for a system giving everyone access to the ordinary courts to resolve a dispute involving an administrative authority and/or an administrative act, unless there is an equally effective special judicial procedure in place, which is supported by adequate safeguards.

Strasbourg case law on Article 6 ECHR has greatly influenced access to the courts in Dutch law. With the exception of special courts for administrative disputes, the Dutch legal system had a long tradition of appeal to a higher administrative body, rather than the judiciary, on matters such as environmental permits, local planning, compulsory military service and social security. Unlike Germany, the Netherlands had never made a specific decision, on grounds of principle, in favour of the judiciary. In the twentieth century, the legal protection of members of the public from the government was based partly on tradition and partly on pragmatic considerations. Appeal to a higher administrative body was considered a wholly adequate alternative to proceedings before an independent tribunal. The European Court's *Benthem* judgment in 1985 shook this Dutch concept of legal protection from the government. In this case the Court found the Dutch appeal to a higher administrative body (a Crown appeal) incompatible with the right to a hearing by an independent and impartial tribunal as required by Article 6 ECHR.[201] After interim measures were first put in place to ensure compliance with this Strasbourg judgment, in 1994 the Netherlands finally adopted a system of general protection by the courts against administrative authorities, as laid down in the General Administrative Law Act.

Under the terms of the AWB, an administrative court can annul all or part of the disputed order if it finds the appeal to be well-founded. It may then instruct the administrative authority to make a new order, or it may determine that its judgment shall take the place of the annulled order (section 8:72 AWB). At the request of a party to the proceedings, the court may order the payment of compensation for the damage suffered by that party (section 8:73 AWB).

Another fact that is relevant to access to the courts is the Netherlands' membership of the European Union. In its application of Community law, the ECJ requires "effective judicial control" or an "effective appeal to a competent court" at the national level. In the view of the ECJ, this principle of what it calls "effective legal protection" is the foundation of the common constitutional heritage of the Member States, and is also based on Articles 6 and 13 ECHR. In certain circumstances, the ECJ even gives precedence to the principle of effective legal protection at the expense of national constitutional principles, such as the separation of powers and the sovereignty of

[201] European Court of Human Rights 23 October 1985, Benthem v. the Netherlands, Series A, vol. 97.

parliament. As Community law widens to include more and more subject areas, this ECJ case law is also of increasing significance to the Netherlands.

Finally, the option of requesting the National Ombudsman to investigate the way in which an administrative authority has acted towards a natural person or legal entity (section 12 of the National Ombudsman Act) was created in 1982. The National Ombudsman determines whether or not the administrative authority acted properly in the matter under investigation. Once an investigation has been concluded, the Ombudsman draws up a report containing his findings and his decision. If he deems fit, the Ombudsman notifies the body concerned of any measures that he considers should be taken (sections 26 and 27 of the National Ombudsman Act). Since 1999, the institution of the National Ombudsman has also had a constitutional basis. Article 78a, paragraph 1 of the Dutch Constitution provides: "The National Ombudsman shall investigate, on request or of his own accord, actions taken by administrative authorities of the State and other administrative authorities designated by or pursuant to Act of Parliament." The decisions of the Ombudsman are not legally binding, but in practice they are very effective.

5) Conclusion

It may be concluded that the General Administrative Law Act and the civil courts together make it possible for all persons to have access to the courts in disputes with the government, in which various principles of the right to good administration can be invoked.

Finally, it should be added that this is only a very general survey of Dutch law and the right to good administration. There is much more to be said about this topic, but it may suffice here to end with some suggestions for further reading.

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Gio ten Berge & Rob Widdershoven, *The Principle of Legitimate Expectations in Dutch Constitutional and Administrative Law*, Netherlands Reports to the Fifteenth International Congress of Comparative Law, Bristol 1998, Intersentia Rechtswetenschappen, Antwerpen/Groningen 1998, p. 421-452, also available on the Internet:
http://www.library.uu.nl/publarchief/jb/congres/01809180/15/content.htm

English text of the Constitution:
http://www.bzk.nl/contents/pages/00012485/grondwet_UK_6-02.pdf

English text of the General Administrative Law Act:
http://www.justitie.nl/Images/11_11380.doc

English text of the National Ombudsman Act:
http://www.nationaleombudsman.nl/brochureframe_uk.html

English text of the Public Access Act:
http://www.bzk.nl/contents/pages/00013413/public_access_government_info_10-91.pdf

PORTUGAL

1. "The right to good administration", even when viewed solely from the citizen's perspective, cannot be considered and explored from a purely legal standpoint, whether in strictly constitutional terms or in terms of the rights and guarantees given to private individuals in their dealings with the Administration.

The fact is that the changing role and function of administrations over the past few decades and the fundamental shift in social values and priorities in general have created the need for a new public management culture, one driven by concepts, organic-functional models and innovative management systems.

The "right to good administration" therefore needs to be examined as part of a wider picture of values, which, as well as focusing on the normal development of traditional civic rights and safeguards, also looks at the reforms introduced in the Administration and civil service to put them into practice. In addressing the issue submitted to Council of Europe member States for consideration, Portugal has accordingly chosen to list:

a) The principal administrative and civil service reforms under way in the country, with the focus on aspects relating to the protection of citizens' interests;

b) The principles aimed at promoting openness of government and access to information;

c) The organisational and procedural measures introduced with a view to improving relations between the Administration and the public.

2. The main administrative and civil service reforms, which are in the process of being approved, are aimed at:

- Defining the basic framework for the organisation and functioning of the integrating services of the Direct State Administration;
- Establishing outline legislation on the organisation and functioning of the Indirect State Administration (public institutions);
- Revising the Statute governing Managerial Staff of the Public Administration;
- Implementing an integrated system for evaluating Public Administration performance, including departments, middle-ranking managers and public officials;
- Determining the legal status of contracts of employment applicable to public entities.

2.1 All this is designed in particular to:

- Improve the effectiveness and efficiency of public services;
- Make qualitative and quantitative improvements to the services provided by the Administration;
- Streamline administrative structures and the process whereby they are established, and make them more flexible;
- Increase the core competences of managerial staff;
- Speed up the decision-making process, by minimising the number of hierarchical levels involved;
- Bring services closer to the community and ensure that the public is involved in the decision-making process;
- Foster the idea of systematic collaboration between departments, with the emphasis on task-sharing and networking;
- Make administrative activities and procedures less bureaucratic;
- Foster a new public management culture based mainly on management by objectives, with the focus on quality and a system of ongoing evaluation of the Administration and civil service.

2.2 The following ongoing measures are of particular relevance where the "right to good administration" is concerned:

2.2.1 Organisational structure and functioning of the various departments of the Direct State Administration:

- Definition of the principles which should govern the organisation and functioning of these departments (unity and efficiency of action, greater accessibility, reduction of red tape, rationalisation and efficient use of public resources, improved service provision and guaranteed citizen participation);
- Definition of the type of departments and organisational and operational models to be adopted, by reducing the number of hierarchical levels, relaxing the way in which structures are established (nuclear structure determined by government decision and flexible structures by decision of the Director General) and by calling for greater use of flexible structures (matrix structures, project-based structures and task-based structures);

- Introduction of a system of regular appraisals, to be carried out by the Administration's own inspection and audit staff and by outside bodies.

2.2.2 Outline legislation on public institutions

- Definition of the various types of public institutions;
- Definition of the management principles to be observed in their activities (and which are central to the provision of high-quality public services, economic efficiency in terms of the costs incurred and the solutions adopted to provide these services, management by duly quantified objectives and regular appraisals based on the results obtained);
- Determination of the criteria and requirements which should govern the creation of public institutions and the system for evaluating their work;
- Definition of the nature, powers and responsibilities of the respective bodies, and of the way their structure is determined;
- The staff regime to be adopted (possibility of using individual contracts of employment) and the basic principles to be followed when recruiting staff, even if they do not come under this regime;
- Development of a database on public institutions and evaluation of existing institutions to determine whether they should retain this status.

2.2.3 Status of managerial staff

- Definition of the management principles that should govern their activities (in particular, quality, effectiveness, efficiency and accessibility);
- Recruitment of middle-ranking managers by the Director General and requirement for specific training in order to hold these posts;
- Widening of the Director General's core competences, in particular as regards determining the structure of departments and appointing middle-ranking managers.

2.2.4 Integrated system for evaluating Public Administration performance

- Compulsory, regular appraisals of departments, middle-ranking managers and staff;

- Appraisals centred on objectives (set by the appraisers and appraisees), behavioural factors and personal attitude;

- Introduction of maximum quotas for merit and excellence;

- More responsibility for managers in the appraisal process;

- Development of a database on the appraisal system and disclosure of the overall results of the appraisal process.

3. As regards the legal framework in matters relating to openness of government, access to the Administration, administrative proceedings, the separation between the Administration and the political authorities and to the rights, duties and responsibilities of public servants, this is enshrined:

a) In Articles 3º to 12º and 44º of the Code of Administrative Procedure (C.P.A.) which set out the general principles that must govern the activities of Public Administration departments and bodies (legality, public interest, protection of citizens' rights and interests, equality and proportionality, justice and impartiality, good faith, co-operation with individuals and participation in the decision-making process);

b) Articles 7º and 8º of the CPA, which set out the principles governing co-operation between the Administration and individuals and individuals' participation in the making of decisions which affect them;

c) Article 266º of the Constitution, which states that "administrative bodies and officials shall be subject to the Constitution and the law, and shall perform their duties in accordance with the principles of equality, proportionality, fairness, impartiality and good faith";

d) Article 3º of the Disciplinary Statute governing Public Officials and Staff of the Administration, Legislative Decree no. 184/89, of 2 June, Legislative Decree no. 353-A/89 of 16 October, Legislative Decree no. 84/99 of 19 March, Act no. 23/98 of 26 March, and Legislative Decree no. 48051 of 21 November 1967, which spell out the duties (exemption, conscientiousness, obedience, loyalty, discretion, propriety, good attendance and punctuality), rights (remuneration, social security, professional development and participation in trade union activities and collective bargaining) and responsibilities of public officials and staff of the Administration.

4. As regards the third area of concern – organisational and procedural measures implemented with a view to improving relations between the Administration and the public – the law lays down a number of rules to be observed:

- When receiving members of the public, in particular as regards opening hours, the physical requirements to be met by information centres, the information to be provided, the priorities to be pursued in terms of user care and support and staff training;

- In administrative communication, in particular as regards channelling users and their correspondence, the way this correspondence is processed, the time-limits to be observed when answering queries and methods of administrative communication, including e-mail;

- In terms of user consultation and participation, through the use of suggestion schemes and the requirement that all departments keep a complaints book in the reception area.

Finally, in order to make it easier to satisfy the everyday needs of members of the public and economic operators in terms of information, goods and services, the Portuguese Public Administration has developed:

- the concept of a one-stop-shop to provide members of the local community with swift, personalised access to a range of services. The success of the first outlet in Lisbon has led to the opening of other outlets in various towns across Portugal.

- The concept of the Citizen's Information Point (PAC) by concluding agreements with local authorities to set up an information point, either at their headquarters or at other sites to be specified by them. So far, some 50 PACs have been set up in 44 mayor's offices.

- A programme of action for e-government, which includes various strands such as:

    - The provision of public services based on citizens' needs, with the aim of gradually improving the performance of the Public Administration. Priorities to be pursued: develop and provide interactive public services, adapt back-office public services to the new channels of communication and create a citizen's portal.

    - Make the Public Administration more modern and effective, and harness the potential of information technology. Priorities to be pursued: make public management more responsive, make better use of Public Administration staff and introduce e-government on a wide scale.

    - Bring services closer to the community, so that the e-government programme is gradually extended to local government.

SERBIA AND MONTENEGRO

MONTENEGRO

1. Introduction

The Montenegro Government has adopted the 2002 – 2009 Strategy on Public Administration Reform in Montenegro, and thereby has established the foundations, political guidelines, main objectives and the measures intended for reform processes within the fields of public administration, local self-government and public services, as well as the functional component parts of the administration system – the protection of individuals against the administration. In an operative sense, the Strategy has identified the reasons for reform and the importance of measures which should be undertaken and go further than time limits and financial indicators.

It is important to note that the Strategy has established activities that should enable the creation of an efficient, competent and cost-effective public administration overall, and lead public administration to the status of a legal State, and to the rule of law, strengthening its economy and enlarging the exercise and protection of human rights and freedoms as well.

The introduction of changes into the Montenegro administrative system is a very complex process, and we see it as the road rather than a destination. We believe that the changes must be neither excessively broad nor radical, nor must they be of a cosmetic or shallow character. The basic activities relate to:

- the harmonisation of the existing and the adoption of new legislation;
- the introduction of new functions;
- the reorganisation or the change of organisational structure in the whole administrative system, which implies new "institutionalisation", i.e. the dissolution of unnecessary and the establishment of new administrative institutions; and
- the qualifying and the advanced training of civil servants, and of all public servants as regards new functions and new ways of administrative system functioning.

2. New legal solutions

The normative part of the Strategy, intended for the period covering 2002 - 2004, has defined the obligations both within the field of public administration and within the field of the protection of the rights of individuals in relation to administration, such as:
- The Law on Public Administration
- The Law on Inspection Control,
- The Law on Civil Servants and State Employees,
- The Law on the Payment System,
- The Law on the Protection of Human Rights and Freedoms,
- The Law on General Administrative Procedure, and
- The Law on Administrative Disputes,

should be prepared and adopted, as well as the by-laws for their enforcement.

1. The law on Public Administration was introduced in June of the current year, and it now represents the set of fundamental solutions relating to the organisation, functioning, supervision, and the manner of work, co-operation and other issues of importance for the functioning of public administration in Montenegro.
   The most significant innovations are reflected in the concept of modern, professional, effective and efficient - in short - competent public administration, which was shaped by this Law. Ministries shall perform the jobs of proposing internal and external policies and they shall govern development policies, normative activities and administrative control, and in relation to that, they shall be obliged to define development strategies and to foster economic, social, cultural, ecological and general development. Other administrative authorities shall be founded for the tasks of enforcing laws and other legislation and performing administrative and professional tasks.

   In relation to citizens, the Law has provided for founding qualitatively new public administration authorities, especially with regard to access to information, proceedings in line with laws, analyzing citizens' claims regarding the functioning and the publicity of public administration authorities' functioning in general.

2. The Law on Inspection Control has been defined as one of the priority law projects intended for the regulation of the public administration system and it was also introduced in June this year. Inspection control has been deified as the administrative authority task that implies direct inspection of the work and procedures of institutions, legal entities, municipal, principal city, capital and republican authorities and of other authorities and citizens in relation to consistency with law, other legislation and general acts. It has also provided for the undertaking of administrative and other measures and activities to harmonise the findings with legislation.

3. The Law on the Protector of Human Rights and Freedoms (Ombudsman) was passed in July this year, with the basic mission of the Protector to safeguard human rights and freedoms guaranteed by the Constitution, laws, ratified international agreements on human rights and by generally accepted rules of international law. What is significant, from the point of view of reform processes within the field of public administration, is that this Law is to provide one of the basic targets of more complete control and responsibility for the work of public administration authorities. Thereby, the achievement of a new service-related character of public administration and its new relations with citizens, the users of its services, should be accomplished.

4. The Law on General Administrative Procedure and the Law on Administrative Disputes were passed in October this year. It is about procedural laws, which follow a new conception of public administration and of the judiciary, and that ensures solutions and principles corresponding to the necessary changes that have been made in the administrative structure and the judiciary, with regard to decision-making and the protection of human rights and freedoms as well. More efficient and more cost-effective proceedings of public authorities, local

self-government authorities and organisations carrying out public authority have been ensured for the procedures for solving / regulating rights, obligations and legal interests of citizens, legal entities and of other personalities in administrative matters; the application of procedural rules to a broader scope of "government personalities", which decide on the rights, obligations and legal interests of parties to administrative matters; and a more complete judicial control of the legality of acts passed by public authorities, local self-government authorities and by organisations performing public powers.

5. Furthermore, we should issue normative regulations for the system of civil servants and officials and their payment. This task implies normative regulation for: professional status; defining titles of civil servants and officials; identifying their rights, obligations and responsibilities; assessing, improving and checking their capabilities; the issues on staff management , which together implies the new structuring and central performance of those tasks. In addition, the issues of regular payment should be regulated by introducing and elaborating a system of salary scales, and by defining criteria and the basis for the application of a "merit system". In line with the laws mentioned above, very competent, responsible and citizen-oriented officials should have permanent civil service status and the possibility of career promotion depending exclusively on work and work performance.

3. Further steps

The first and most important steps, which represent the basis for introducing organisational and functional measures, are those related to preparing the analysis of the circumstances. This analysis will serve as the grounds for: enforcement of legislation and other measures necessary for administrative reform; the preparation of by-laws (which has already started) that should provide for more complete elaboration of legal solutions and the creation of conditions required for their enforcement; the realisation of an important segment, such as the professional advanced training, required for legal and regular enforcement of legislation; and the adoption of other skills necessary for the new work procedures such as the use of computers, knowledge of foreign languages, etc. One of the significant phases ahead is the change in the structure of the administrative system at central level, or the change of the macro structure of the central administrative system. The deadline for this activity is estimated to be the first semester of 2004. The high-quality analysis of the rationalisation and the downsizing of the number of ministries and other administrative authorities should also be prepared for this activity. In addition, the status of functions should be fully constructed in order to replace those of a non-administrative character at central level, or more appropriately performed outside the central system, which implies that some of these functions may be transferred to non-public personalities, i.e. they may be privatised.

All the above requires comprehensively harmonised and carefully conceived measures and acts intended to develop the administration and establish new administrative and institutional ways of performing the corresponding tasks. Only well-organised co-ordination and harmonised steps can enable adequate functioning of the whole system. Special attention should be paid to the issues of staff management - the establishing of

a corresponding central and independent authority that would have the task of providing appropriate professional training of cadres, in addition to other tasks.

4. Conclusion

We feel free to conclude that, at present, there are favourable conditions and preconditions for the completion of administrative reform in Montenegro. The political support of the Government, expressed by the adoption of the strategic document relating to this area at the very beginning of its term of office, is of great importance. It has unambiguously defined clear directions, scope and the manner of achieving the necessary changes and it has put those commitments into full operation. The problems which do exist are primarily of a material character, and they could partly be overcome by means of better organisation and rationalisation of the administrative system and through the support of the international community that is being given now. This support is primarily related to professional and technical assistance, delivering expert advice and opinions in the preparatory phase of drafting legislation, organisation of round tables and engaging all relevant personalities in the procedures intended for legislation and other relevant projects and programmes.

SPAIN

The Spanish Constitution stresses that Spain is a social and democratic State subject to the rule of law which advocates liberty, justice, equality and political pluralism as the superior values of its legal order.

The 1978 Constitution transferred significant powers from the central government to the autonomous communities. For this reason, Spain has become one of the most decentralised countries in Europe.

There are three levels of administration in Spain:

- the central government
- the governments of the autonomous communities
- local government (authorities)

Objectivity, impartiality and efficiency of the activities of the public administration are guaranteed by the Spanish Constitution and implemented through the generally applicable law of administrative procedures. This law governs the activities of the administration, including the admissibility of the use of computers and data communication methods in its dealings with the public. It also sets out the formal conditions of administrative action and the various procedures in all organs of public administration.

Article 103 of the Constitution provides as follows: "(1) The public administration serves the public interest with objectivity and acts in accordance with the principles of efficiency, hierarchy, decentralisation, deconcentration and co-ordination, while fully complying with the law.
(2) The organs of the State administration are created, governed and co-ordinated in accordance with the law.
(3) The law shall regulate the status of public officials, access to the civil service in accordance with the principles of merit and ability, the system under which they may exercise their right to form unions, the system of incompatibilities and the safeguards for impartiality in the discharge of their duties."

The Constitution (C) and the law guarantee a code of good administration:

- Legality (Article 103 C): The application of rules and procedures is guaranteed.

- Non-discrimination and equal treatment: Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance (Article 14 C).

- Objectivity and impartiality (Article 103 C). The conduct of staff is never guided by personal interests or political pressure.

- Efficiency (Article 103 C)

- Information about administrative procedures. (Law 30/92, RJPAC)

- Hearing of all parties directly concerned. (Law 30/92, RJPAC)

- Obligation to indicate possible remedies. (Law 30/92, RJPAC)

- Obligation to give reasoned decisions. (Law 30/92, RJPAC)

- Protection of the rights of honour, personal and family privacy, and identity (Article 18.1 C).

- Right to damages. Private individuals shall, in accordance with the law, have the right to be indemnified for any harm done to their property and rights, except in cases of *force majeure*, whenever such harm is the result of the functioning of the public services (Article 106.2 C).

- Right of access to documents (essential expression of the principle of transparency). The law regulates:

The right of citizens to be heard, directly or through organisations and associations recognised by the law, in the process of the drafting of the administrative provisions which affect them.

Access for citizens to the administrative archives and registers, except in matters affecting the security and defence of the State, the investigation of crimes and the privacy of persons.

The procedure for administrative actions and for guaranteeing, when appropriate, the right of interested persons to be heard (Article 105 C).
- Judicial control of the administration. The courts control the regulatory power and the legality of administrative acts as well as their compliance with the objectives that justify them (Article 106.1 C).

- Protection of personal data and confidential information (Article 18.2,3 C). Secrecy of communications, particularly that of postal, telegraphic and telephone communications, is guaranteed, except by judicial order. The law shall limit the use of information technology to safeguard the honour and the personal and family privacy of citizens and guarantee the full exercise of their rights.

An organic law regulates the institution of the Defender of the People as the High Commissioner of the Parliament, appointed by the latter for the protection of the rights contained in Title I of the Constitution, for which purpose he may supervise the activity of the administration, reporting thereon to the Parliament (Congress and Senate).

Citizens' rights are guaranteed in "service charters" produced by the various administrative departments and organs.

"THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

1. The role of a modern administration in a State governed by rule of law

The dynamic changes in the constitution-legal sphere in the Republic of Macedonia saw the start of a process of change in the position and role of its State administration and an up-do-date tendency in its democratic and modern choice.

The Republic of Macedonia started the process of public administration reform in late 1998. This process is seen as a precondition for the further development of the country in face of the ongoing processes of change and integration both within Europe and in the wider international community.

The Government of the Republic of Macedonia adopted a Strategy on Public Administration Reform in May 1999 and it represents a basic defining of goals, objectives, approach, areas and priorities in the reform.

The first normative step in the sphere of public administration reform was the adoption of the Law on Organisation and Operation of State Administrative Bodies, the Law on the Government of the Republic of Macedonia, the Law on Civil Service by the Assembly of the Republic of Macedonia in July 2000.

The basic principles for the functioning of the new public administration system are:

- decentralisation and deconcentration at the central level;
- openness and transparency of the decision-making process;
- continuous enhancement of efficiency and effectiveness;
- development of new citizen-oriented services;
- depoliticisation, professionalism and sustainable development of the civil service.

The achievement of a professional, merit-based, service-oriented, politically neutral and professionally managed civil service is a basic requisite for the effective formulation and delivery of national objectives in terms of policy development and service delivery. It is also a specific requirement for EU membership.

The initiation of a comprehensive operation of simplification of legislation would be of great importance to the process of changing the role of the State by stressing its regulatory function and increasing its efficiency; this would bring benefits both to citizens and business entities by bringing about faster, better achievement of their rights. This would help relieve the burden of the State, improve transparency of the legal system, and increase the freedom of action of citizens and entrepreneurs.

The Framework Agreement of August 2001 included a commitment to accelerating the process of decentralisation. The project team has worked closely with the Ministry of Local Self-Government to support this process. The transfer of responsibilities to municipalities is being assisted by the work undertaken in ministries to analyse the functions that they undertake.

The basic function of the administration is to improve the quality of life of all citizens. In that sense, citizens need administration which satisfies their needs and which is easily accessible or, in short, efficient and effective administration. The current regulations in the field of State Administration are in principle of good quality. However, there is without any doubt a need for further changes which relates to all issues above with regard to the harmonisation of our legislation with international standards and to ensuring the best possible implementation of regulations.

2. Principles governing good administration
- Transparency in administrative action-access to the administration
- Effective and clear administrative procedures

In most European countries, administrative transparency and access to information are recognised as principles of administrative law and instruments for citizens' control over public administration and prevention of corruption.

As a democratic State, the Republic of Macedonia within its Constitution guarantees free access to information and freedom to receive and transmit information.

Therefore, in addition to the need for approximation of the national legislation to that of the EU countries, preparation and adoption of a Law on Free Access to Administrative Documents, which will set forth the procedure for access by the citizens to the appropriate administrative documents, is part of the Programme of the Government of the Republic of Macedonia, and a Working Group has been established to draft the law.

The Republic of Macedonia pursues a global programme aimed at developing an IT system in government institutions. The main objective of the Government is to create and promote adequate prerequisites for the development of an IT system enabling easier communication and exchange of information among administrative bodies, public services and citizens. An important element in the Government strategy is facilitating easier access to the public administration; this means reforming the public administration to make in into a service for the citizens.

Therefore, the general framework for administrative transparency and access to information has been established, based on the following principles:

- secrecy is limited to information connected with particular interests determined by law (public safety, crime prevention, protection of the currency and credit, privacy)
- budget and financial documents, in particular, should be always be available to the public;
- time limits are set for officials replies to requests for information;
- when an administrative procedure begins, the person in charge is specified;
- subject to limitations justified by the need to protect personal data, special access to information is provided for certain individuals or bodies (ombudsman, press);
- administrative archives and files are kept in such way as to facilitate public access to them

- as far as possible, public information is available on the Internet.

Among the objectives of public administration reform is the design of a public administration system based on the principles of equal treatment in the process of the exercise and protection of citizens' rights. Awareness of the administration as a provider of services to citizens, businesses and other legal entities should be emphasised.

A principal task is to establish a legal framework guaranteeing protection of citizens' rights. It is therefore necessary to adopt a new Law on General Administrative Procedure and Law on Administrative Disputes. The Law on General Administrative Procedure will set up the legal framework for operation of the administration when it decides upon citizens' rights. The Law will be based on the principles of equal treatment of citizens and foreseeability in the operation of the State administration, that is, protection of citizens against arbitrary action in State bodies that decide upon their rights.

A very important issue, which is also regulated in the Constitution of the Republic of Macedonia, is the right to appeal against separate legal documents decided upon in the first instance by an administrative body, organisation or institution holding public authority. Depending on the organisation and the competencies of the administrative body, there are cases where the highest body in the specific area decides upon a legal document in the first instance. In such case the recourse available is a completely inadequate legal instrument.

The existing solution for deciding administrative matters at second instance is inadequate from another aspect too. This is that commissions deciding on appeals are inadequate both from organisational and procedural aspects; firstly because often the commissions include the same persons who made the decision at first instance and, secondly, because the procedure is too long. Hence, adequate mechanisms should be provided to ensure the integrity of commissions hearing appeals, and efficiency in the decision-making process.

When drafting the Law on Administrative Disputes, special attention should be given to shortening the terms, reducing administrative handling of cases, and modernising the methods of operation of State bodies, all with a view to improving efficiency of the protection of citizens' rights.

Of particular importance for this Law is finding the right formula for establishing a competent body that will decide on administrative disputes. Under current practices, the Supreme Court - the highest body within the judicial branch - has jurisdiction over administrative disputes. Establishing an Administrative Court is one of the options in the working version of the new Law on Administrative Disputes.
The central authorities establish the general framework for administrative procedures according to the following principles:

- as a general rule administrative decisions of authorities state the reasons for them and specify what preliminary inquiries have been made and the criteria used to make the choice which is the subject of the decision;

- there are time limits for responding to any request made by a private individual or enterprise;
- reasons are given for their decisions.
- the time limit for the conclusion of the procedure and communication of the same to the interested parties should be determined with general provisions, for each kind of procedure;
- in the procedures connected to the conclusion of contracts with private parties, the private party should select in competitive ways (the Law on public procurement sets forth the manner and procedure of carrying out public procurements for beneficiaries and individual beneficiaries of the funds of the Budget of the Republic of Macedonia, the local self-government budget, the republic and municipal non-budgetary funds, as well as of the public procurements of agencies and public institutions, and other bodies and organisations established by the State. The announcement for procurement in a procedure of an open or restrictive announcement, shall be obligatory published in the "Official Gazette of the Republic of Macedonia" and in all other media for public information at the same time.

3. The position of the public official with regard to politics (The separation of administration and political power)

In conclusion: the administration, taken up in political pluralism, should distance itself as much possible from politics and should, as far as possible, be trained and made as professional as possible for performing the numerous social duties incumbent upon it as a service for citizens and society as a whole. Many authors have currently underlined that taking the political element out of the administration necessarily leads to making it more professional.

The basic principle of the separation of the administration and political power is set out in Article 95 of the Constitution of the Republic of Macedonia, which establishes that political organisation and activities within bodies of State administration are prohibited.

The Law on Civil Servants also states that civil servants are obliged to carry out their duties impartially and without influence by political parties. The law establishes the restriction that no one can be appointed as a public servant if he or she holds a leading role in a political party.

Recruitment to employment in the public administration is regulated by the Law on Civil Servants, which is one way to restrict the influence of political power over civil servants. The Law requires that any vacancy is announced publicly and guarantees equal access possibilities of any citizen to any vacant position in the public sector. The process of job application and the selection of candidates in the public administration is conducted and based on merit, not on the career system. The announcement must be published in the newspaper. In principle, therefore, the most numerous significant basic category of administration staff who carry out the work of the administration are civil servants who work as permanent professionals in the administration. Nevertheless, senior positions in the public administration are not subject to the requirement of public announcement, but are filled through political discretion.

At the head of the administrative bodies are officials who are responsible for and manage their work. The political functionaries (ministers) at the head of ministries are functionaries of the highest rank. At the same time, they are also members of the Government. Apart from the ministers, there are other officials in the administration who manage other administrative bodies (for instance, director). Within the hierarchical rank in the administration bodies themselves there are deputy-minister or State secretary. Ministers and deputy-ministers are appointed by the Assembly of the Republic of Macedonia; directors and States secretaries are pointed by the Government of the Republic of Macedonia.

4. The rights, obligations and liability of public officials

Public officials are subject to certain limitations; for instance they may not organise themselves politically in a party within the administration bodies.

The Law on civil servants was adopted in July 2000 and published in the Official Gazette of the Republic of Macedonia, no.59/2000 of July 2000. Since than there have been seven amendments to the Law.

This Law sets forth status, rights, duties and responsibilities of civil servants.

Chapter III regulates the rights and duties of civil servants.

- Civil servants must perform their activities conscientiously, professionally, efficiently, in an orderly and timely way, in accordance with the Constitution and law;
- Civil servants, in accordance with the law, must provide information upon request of citizens in the exercise of their rights and interests, except information referring to official secrets, in a manner and under conditions stipulated by law and other regulations;
- Civil servants have the right and duty to undertake professional training in accordance with the needs of the entity for which they work;
- In order to exercise their economic and social rights, civil servants may establish trade unions and be members of them under the terms and in a manner defined by a law. When exercising their right to strike, civil servants must ensure a minimum uninterrupted execution of the functions of the entity for which they work;
- Civil servants may be members of political parties and participate in their activities, but they must not put in question their status as civil servants or the performance of the official duties related to that status. Civil servants must not participate directly in election campaigns or in other public events of a similar nature during office hours, and must not wear or display party symbols in the workplace;
- When exercising employments rights, civil servants have a right to seek protection before a competent court, trade union or other competent body in accordance with the law;
- Civil servants must carry out their duties impartially and must not be influenced by political parties, must not be guided by their political beliefs or personal financial interests, must refrain from misuse of

authorisations of civil servants and protect the reputation of the entity for which they work.

(The Code of Ethics for Civil Servants has been adopted)

Chapter V regulates the liability of civil servants.

The civil servant is personally responsible for performing his or her official tasks.

The civil servant is responsible to his or her superiors in cases of violation of his or her professional duties.

Liability for a criminal act does not exclude the disciplinary liability of the civil servant.

The civil servant is responsible to his or her superiors for disciplinary irregularity or disciplinary offence.

The Law sets out the liability to be considered as a disciplinary irregularity and that to be considered as a disciplinary offence. A corresponding measure is set up for each disciplinary liability. The Commission for conducting disciplinary procedures must be established and the disciplinary procedure must be completed within 45 days from the day of its initiation.

5. Monitoring of the performance of the administration's functions by society

In accordance with Article 50 paragraphs 1 and 3 of the Constitution of the Republic of Macedonia (Official Gazette of the Republic of Macedonia, no.52/91), every citizen can claim the protection of the freedoms and rights endorsed within the courts or the Constitutional Court of the Republic of Macedonia in a process based on priority and emergency. Each citizen has the right to have his/her human rights explained to him or her and actively to contribute, as an individual or jointly with others, to their improvement and protection. In addition to the institutions for protection of the rights and freedoms of citizens, the Constitution anticipated the need for a Public Attorney, known as an Ombudsman. In Article 77 of the Constitution provision was made by the Assembly of the Republic of Macedonia for the appointment of a Public Attorney to protect the constitutional and legal rights of citizens when they are violated by State administration bodies and other public organs and agencies. Two fundamental questions for the functioning of the Public Attorney are endorsed in the Constitution and the law. Firstly, that the sphere of action and authority of the Public Attorney is oriented specifically towards the protection of the legal and constitutional rights of the citizen when violated by bodies of State administration and other public organs and agencies. Secondly, the constitutional decision that the position of the Public Attorney is autonomous, independent and the only organ for the public laws related to the institution, functioning, conveying of acts, obligations and responsibilities of the Public Attorney.

The Public Attorney of the Republic of Macedonia - Ombudsman - is a specific, distinct, autonomous, professional and independent organ with the special status of an organ-institution for the protection of the rights of the citizens.

The Public Attorney shall be elected and dismissed by the Assembly of the Republic of Macedonia on a proposal of the Commission for election and nomination of the Assembly of the Republic of Macedonia.

The Public Attorney only acts on complaint, which means that citizens claim as individuals when they believe that their constitutional and legal rights have been violated, usurped, or partially or totally infringed by some administrative body or other public organ or agency.

If the Public Attorney considers that constitutional and legal rights of citizens have been violated, he may: propose that the organ or agency reopen the respective procedure in accordance with the law; submit a request to the competent organ for introducing judicial review; submit a request to the organ or agency to temporarily suspend execution of the act; propose disciplinary action against the official responsible in the organ or agency ; submit a request to the competent public prosecutor to introduce a criminal or minor offence procedure; suggest that organs and agencies improve their work and conduct towards citizens.

6. The right to good administration in the case law of the European Court of Human Rights

The court system and the administration is one of the priority areas for reform and protection of citizens' rights, especially from the point of view of instituting urgent measures to increase the efficiency of courts and to facilitate access to justice for citizens.

These activities also include improvement of the efficiency in the functioning of the court system in terms of the procedures and cases of an administrative nature and improvement of the access to justice for citizens and other legal entities through simplification and amendment the existing legal regulations.

The principal problems relating to the regulation of administrative and court procedures are duration of the procedure and lack of decision.

To date European Court of Human Rights has given no judgments concerning Macedonia. Three cases concerning citizens' claims in relation to pension rights are currently before the Court.

When drafting the Law on Administrative Disputes, special attention should be given to reducing time limits, reducing the administration's role in handling of cases, and modernising the operation methods of operation of State bodies, with a view to improving efficiency in protecting citizens' rights.

The new Draft Law on Administrative Disputes and the Law on Administrative Disputes pay special attention to reducing time limits in order to improve efficiency in protecting citizens' rights.

PROGRAMME

Thursday, 4 December 2003

10.00 – 11.00 Chair of the Opening Session: **Mrs Danuta WIŚNIEWSKA-CAZALS,** Administrative officer, DGI – Legal Affairs, Council of Europe

Opening addresses:

- **Mr Leszek CIEĆWIERZ,** Under-secretary of State, Poland
- **Mr Andrzej ZOLL**, Ombudsman, Poland

11.00 - 13.00 Chair of the Session: **Mr Andrzej MALANOWSKI**, Director of the Legal department, Office of the Ombudsman, Poland

11.00 – 11.30 **Introductory report: the constitutional basis for the right to good administration**

Rapporteur: **Mr Leon KIERES,** President of the Institute of National Remembrance, Professor of Administrative Law, Poland

11.30 – 11.45 *Break*

11.45 – 12.15 **The role of a modern administration in a State governed by the rule of law**

Rapporteur: **Mr Marten OOSTING,** Member of the Council of State, former National Ombudsman, the Netherlands

12.15 – 13.00 Discussion

13.00 – 14.00 *Lunch*

14.00 - 17.45 Chair of the Session: **Mr Zygmunt NIEWIADOMSKI,** Professor of Law, Warsaw School of Economics, Poland

14.00 – 15.30 **Panel discussion : Principles governing good administration**
- transparency in administrative action - access to the administration- effective and clear administrative procedures

- **Mr Theodore FORTSAKIS,** Professor of Public Law, Athens University, Greece (Moderator)
- **Mrs Teresa GÓRZYŃSKA,** Professor, Polish Academy of Sciences, Poland
- **Mr Michał KULESZA,** Professor, Faculty of Law and Administration, Warsaw University, Poland

- **Mr Andrzej MALANOWSKI**, Director of the Legal Department, Office of the Ombudsman, Poland
- **Mr Imre VEREBÉLYI**, Envoy Extraordinary and Minister Plenipotentiary, Permanent Delegation of Hungary to the OECD
- **Mr Marek WIERZBOWSKI,** Professor, Faculty of Law and Administration, Warsaw University, Poland

15.30 – 16.15 Discussion

16.15 – 16.30 *Break*

16.30 – 17.00 **The position of the public official with regard to politics (the separation of administration and political power)**

Rapporteur: **Mr Wolf OKRESEK**, Director General, Constitutional Law Department, Federal Chancellery, Austria

17.00 – 17.45 Discussion

Friday, 5 December 2003

9.30- 13.30 Chair of the Session: **Mr Jacek CZAPUTOWICZ,** Deputy Head of the Civil Service, Poland

9.30 - 10.00 **Introductory report: Reforming civil and local government services in Europe: the issues**

Mr Giovanni PALMIERI, Head of Public Law Department, Council of Europe

10.00-10.30 **The rights, obligations and liability of public officials**

Rapporteur: **Mr Jorge CRESPO GONZÁLEZ,** Professor of Political Science and Public Administration at Complutense University, Madrid, Spain, member of the Scientific Council of the Association "Europa"

10.30 – 11.00 Discussion

11.00 – 11.15 *Break*

11.15 - 11.45 **Monitoring of the performance of the administration's functions by society**

Rapporteur: **Mr Cezary BANASIŃSKI,** President of the Office for Competition and Consumer Protection, Poland

11.45 – 12.15 Discussion

12.15 – 13.00	**The right to good administration in the case law of the European Court of Human Rights** Rapporteur: **Mrs Dimitrina LILOVSKA**, Lawyer, Service for the execution of Judgments of the European Court of Human Rights, DGII, Council of Europe
13.00 – 13.30	Discussion
13.30 – 14.30	*Lunch*
14.30 – 15.00	**General report** General Rapporteur: **Mr Pierre DELVOLVÉ**, Professor, Paris Panthéon-Assas University, France
15.00 – 15.15	**Conclusions** Closure of the Conference

LIST OF PARTICIPANTS

ARMENIA
Mrs Margarit HAKOBYAN, Chief of the Section of Development and Integration with Europe, Department of International Legal Relations, Ministry of Justice

AUSTRIA
Mr Wolf OKRESEK (*Cf. Rapporteurs*)

AZERBAIJAN
Mrs Aygun ABDULLAYEVA, Judge, Nizami district Court of Baku City

BELGIUM
Mme Hrisanti PRASMAN, Conseillère Adjointe, Service public fédéral Intérieur, Service de co-ordination et d'appui, Service Juridique

CROATIA
Mr Edmond MILETIC, Assistant Minister, Ministry of Justice, Administration and Local Self Government

CZECH REPUBLIC
Mr Josef VEDRAL, Ministry of the Interior, Legislative Department

ESTONIA
Mrs Nele PARREST, Counsel of Legal Politcs Department, Ministry of Justice

FRANCE
M. Pierre DELVOLVÉ (*Cf. General Rapporteur*)

GERMANY
Mrs Eva BRAUNS, Lawyer, Regierungsdirektorin, Federal Ministry of the Interior (Bundesministerium des Innern)

GREECE
Mr Theodore FORTSAKIS (*Cf. Panellists*)

HUNGARY
Mr Imre VEREBÉLYI (*Cf. Panellists*)

LATVIA
Mrs Solveiga LICE, Deputy Head of Legal Department, State Chancellery

LITHUANIA
Mrs Jurgita DOMEIKIENE, Deputy Director, Public Administration Department, Ministry of the Interior

MOLDOVA
Mr Sergiu TATAROV, Senior adviser, Local Public Administration Department, State Chancellery

NETHERLANDS
Mr Michiel VAN EMMERIK, Legal Adviser, Constitutional Legislative Affairs Division, Ministry of the Interior

POLAND
Mr Waldemar ACHRAMOWICZ, Marshal's Office of Kujawsko-Pomorskie Voivodship

Mr Krzysztof ADAMCZYK, Marshal's Office of Świętokrzyskie Voivodship

Mr Aleksander ANDRYSZKIEWICZ, Ministry of Environment

Mr Cezary BANASIŃSKI, President of the Office of Competition and Consumer Protection (*Cf. Rapporteurs)*

Mrs Bożena BARSKA, Office of Dolnośląskie Voivodship

Mrs Barbara BARTNIK, Ministry of the Interior and of Public Administration

Mr Antoni BASZYŃSKI, Office of Kujawsko - Pomorskie Voivodship

Mrs Małgorzata BEBELSKA, Office of Mazowieckie Voivodship

Mr Adam BERNATOWICZ, Council of the Refugees

Mr Bogusław BIL, Ministry of Agriculture and Rural Development

Mr Andrzej BOCHEŃSKI, Marshal's Office of Lubuskie Voivodship

Mr Stanisław BODYS, President of the Union of Polish Small Towns

Mr Dariusz CHACIŃSKI, Office of the Ombudsman

Mrs Magdalena CHODOR, Marshal's Office of Zachodniopomorskie Voivodship

Mr Leszek CIEĆWIERZ, Under Secretary of State, Ministry of Interior and Public Administration

Mr Zbigniew CIEŚLAK, Law and Administration Faculty, Warsaw University

Mr Jan CISZEWSKI, Ministry of Justice

Mr Krzysztof CWETSCH, Ministry of Culture

Mr Jacek CZAPUTOWICZ, Deputy Head of the Civil Service

Mr Michał CZARSKI, Marshal's Office of Śląskie Voivodship

Mr Cezary DĄBROWSKI, Office of Pomorskie Voivodship

Mr Leszek DEPTUŁA, Marshal's Office of Voivodship

Mr Andrzej DOBROWOLSKI, Office of Dolnośląskie Voivodship

Mrs Kamila DOŁOWSKA, Office of the Ombudsman

Mr Janusz DRACHAL, Supreme Court of Administration

Mrs Maria GALA-WALOCHA, Marshal's Office of Lubelskie Voivodship

Mrs Eleonora GAŁĄZOWSKA, Ministry of Agriculture and Rural Development

Mr Tomasz GELLERT, Office of the Ombudsman

Mrs Mirosława GŁOWACKA, Office of Świętokrzyskie Voivodship

Mr Andrzej GOĆWIŃSKI, Office of Lubuskie Voivodship

Mr Marek GOLASIŃSKI, Office of Łódzkie Voivodship

Mr Jan GOLBA, Office of Małopolskie Voivodship

Mr Henryk GOŁĘBIEWSKI, Marshal's Office of Dolnośląskie Voivodship

Mrs Teresa GÓRZYŃSKA, Polish Academy of Sciences (*Cf. Panellists)*

Mr Ryszard GROBELNY, President of the Association of Polish Cities

Mrs Barbara GRUDZIŃSKA, Ministry of National Education and Sport

Mrs Jolanta HAŁAS, Association of Polish Cities

Mr Dariusz HAUSS, Teletop

Mr Konrad IMIELSKI, Office of Śląskie Voivodship

Mr Jarosław JABŁOŃSKI, International Law Association

Mrs Irena JACKIEWICZ, Government Centre for Strategic Studies

Mr Jacek JAGIELSKI, Law and Administration Faculty, Warsaw University

Mr Jerzy JANKOWSKI, Office of Lubelskie Voivodship

Mr Marek KARPF, Marshal's Office of Dolnośląskie Voivodship

Mrs Elżbieta KASZUBSKA-SOKOŁOWSKA, Warsaw University

Mrs Katarzyna KIENHUIS, Institute of National Remembrance

Mr Leon KIERES, President of the Institute of National Remembrance
(*Cf. Rapporteurs*)

Mr Jerzy KLISZEWSKI, Office of Opolskie Voivodship

Mrs Elżbieta KORCZYŃSKA-SACHS, Office of Zachodniopomorskie Voivodship

Mrs Janina KOZŁOWSKA–RUDNIK, Newspaper "Gazeta Prawna"

Mr Jan KOZŁOWSKI, Marshal's Office of Pomorskie Voivodship

Mr Janusz KRZYŻEWSKI, Marshal's Office of Podlaskie Voivodship

Mr Grzegorz KUBAT, Marshal's Office of Opolskie Voivodship

Mrs Elwira KUCHARSKA, Chancellery of the Prime Minister

Mr Michał KULESZA, Law and Administration Faculty, Warsaw University
(Cf. Panellists)

Mr Waldemar KULIŃSKI, Marshal's Office of Mazowieckie Voivodship

Mrs Agnieszka KUNLH–KINEL, Polish Academy of Sciences

Mr Zbigniew KUŹMIUK, Sejm RP

Mrs Elżbieta LECHOWICZ, Ministry of the Treasury

Mr Adam LESZKIEWICZ, Marshal's Office of Małopolskie Voivodship

Mr Henryk MAKAREWICZ, Marshal's Office of Lubelskie Voivodship

Mr Andrzej MALANOWSKI, Office of the Ombudsman

Mrs Danuta MAŁEK, Office of Kujawsko - Pomorskie Voivodship

Mr Zbigniew MATUSZEWSKI, Ministry of Foreign Affairs

Mr Jerzy MAZUREK, Vice-Minister, Ministry of the Interior and of Administration

Mr Zygmunt MEYER, Marshal's Office of Zachodniopomorskie Voivodship

Mr Piotr MIKIEL, Ministry of the Infrastructure

Mr Stefan MIKOŁAJCZAK, Marshal's Office of Wielkopolskie Voivodship

Mr Józef MIKOSA, Ministry of the Treasury

Mrs Krystyna MILART-SZOSTAK, Office of the Ombudsman

Mrs Małgorzata MOLĘDA-ZDZIECH, Warsaw School of Economics

Mrs Jadwiga MOŁDAWA, Ministry of Economy, Labour and Social Policy

Mr Kazimierz MUSZYŃSKI, Ministry of Finance

Mr Kazimierz NALASKOWSKI, Office of the Ombudsman

Mr Sławomir NEGEBAUER, Office of Świętokrzyskie Voivodship

Mrs Magdalena NETZEL, Office of Competition and Consumer Protection

Mr Zygmunt NIEWIADOMSKI, Warsaw School of Economics

Mr Lesław NOWACKI, Office of the Ombudsman

Mr Janusz OLECH, Office of Podkarpackie Voivodship

Mrs Barbara OLECHNOWICZ, Office of Warmińsko – Mazurskie Voivodship

Mr Maciej OLEJNICZAK, Ministry of National Education and Sport

Mrs Beata PACHUCA, Privat High School of Business and Administration

Mr Jan PAZIEWSKI, Ministry of Justice

Mr Rafał PELC, Office of the Ombudsman

Mr Jerzy PILICH, Office of Mazowieckie Voivodship

Mr Jakub PINKOWSKI, Ministry of National Defence

Mr Zbyszko PIWOŃSKI, Senate RP

Mr Rafał PLACHIMOWICZ, Ministry of Health

Mr Mariusz POZNAŃSKI, President of the Association of Rural Communes of Poland

Mrs Mirosława RADZEWICZ, Ministry of Agriculture and Rural Development

Mrs Agnieszka RATAJCZAK, Ministry of Science and Information Technology

Mr Krzysztof RĄCZKA, Law and Administration Faculty, Warsaw University

Mr Kazimierz RÓWNY, International Law Association

Mrs Halina RUTKOWSKA, Marshal's Office of Podlaskie Voivodship

Mr Andrzej RYŃSKI, Marshal's Office of Warmińsko-Mazurskie Voivodship

Mr Michał RŻANEK, Association of Polish Cities

Mr Janusz SEPIOŁ, Marshal's Office of Małopolskie Voivodship

Mr Michał SITEK, Government Centre for Strategic Studies

Mr Zbigniew SOLARSKI, Office of Podkarpackie Voivodship

Mr Jarosław STEC, Chancellery of the Prime Minister

Mr Adam STRUZIK, Marshal's Office of Mazowieckie Voivodship

Mrs Krystyna SZAJDAKOWSKA, Supreme Chamber of Control

Mrs Urszula SZKODZIŃSKA, Office of the Ombudsman

Mrs Sylwia SZPARKOWSKA, Newspaper "Rzeczpospolita"

Mr Marek SZUBIAKOWSKI, Law and Administration Faculty, Warsaw University

Mr Walerian SZYMAŃSKI, Office of Wielkopolskie Voivodship

Mr Andrzej TANAJEWSKI, Office of Podlaskie Voivodship

Mr Mieczysław TEODORCZYK, Marshal's Office of Łódzkie Voivodship

Mr Stanisław TROCIUK, Office of the Ombudsman

Mr Piotr USZOK, President of the Union of Polish Metropolis

Mr Sławomir WASZCZYŃSKI, Ministry of Health

Mr Krystyn WEREMOWICZ, Ministry of Science and Information Technology

Mr Ludwik WĘGRZYN, President of the Association of Polish Counties

Mr Marek WIERZBOWSKI, Law and Administration Faculty, Warsaw University (*Cf. Panellists*)

Mr Franciszek WOŁODŹKO, Marshal's Office of Voivodship

Mr Stanisław WOŹNIAKOWSKI, Office of Łódzkie Voivodship

Mrs Iga ZACHARIASZ, Union of Polish Metropolis

Mr Jacek ZAKRZEWSKI, Polish Television TVP S.A.

Mr Krzysztof ZAŁĘSKI, Office of the Ombudsman

Mr Ryszard ZELWIAŃSKI, Office of the Ombudsman

Mrs Jolanta ZIENTEK–VARGA, Newspaper "Gazeta Samorządu i Administracji"

Mr Andrzej ZOLL, Ombudsman

PORTUGAL
M. Rui Manuel PESSOA DE AMORIM, Inspecteur Général de l'Administration Publique, Inspection Générale de l'Administration Publique

RUSSIAN FEDERATION
Mr Dimitriy YUZVIKOV, Expert, Main State Legal Directorate of the President of the Russian Federation

SERBIA AND MONTENEGRO
Mr Dragoljub KAVRAN, Chairman, Civil Service Council, Government of Serbia, President, Association for Public Administration of Serbia

Mr Branislav RADULOVIĆ, Deputy Minister of Justice, Ministry of Justice of Montenegro

Mr Vuksan VUKSANOVIĆ, Counselor, Ministry of Justice of Montenegro

SLOVAK REPUBLIC
Mrs Janka DIVINCOVÁ, Chief Counsellor, The Office of Public Defender of Rights

SLOVENIA
Mr Milko DOLINSEK, Counsellor, Embassy of Slovenia

SPAIN
M. Francisco BORRÁS MARRIMÓN, Director, Centro de Estudios Locales y Territoriales, Instituto Nacional de Administración Pública

Mr Jorge CRESPO GONZALEZ (*cf. Rapporteurs*)

"THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"
Mrs Maja MALJANOVSKA, Assistant to the Head of Department, Ministry of Justice

UKRAINE
Mr Petro GOLOVESHKO, II Secretary, HR Head Office, Ministry of Foreign Affairs of Ukraine

GENERAL RAPPORTEUR

M. Pierre DELVOVÉ, Professeur à l'Université de Paris Panthéon-Assas, France

RAPPORTEURS

Mr Cezary BANASIŃSKI, President of the Office for Competition and Consumer Protection, Poland

M. Jorge CRESPO GONZALEZ, Professeur de Science Politique et Administration Publique, membre du Conseil Scientifique de l'Association « Europe », Universidad Complutense de Madrid, Facultad de CC Politicas y Sociologica, Spain

Mr Leon KIERES, Professor, President, Institute of National Remembrance, Poland

Mme Dimitrina LILOVSKA, Juriste au Service de l'exécution des Arrêts de la Cour Européenne des Droits de l'Homme, DGII, Conseil de l'Europe

Mr Wolf OKRESEK, Director General, Constitutional Law Department, Federal Chancellery, Austria

Mr Marten OOSTING, Member of the Council of State, Former National Ombudsman, Netherlands

PANELLISTS

Mr Theodore FORTSAKIS, Professor of Public Law, Athens University, Greece, Moderator

Mme Teresa GÓRZYŃSKA, Professeur, Académie Polonaise des Sciences, Poland

Mr Michał KULESZA, Professor, Faculty of Law and Admnistration, Warsaw University, Poland

Mr Andrzej MALANOWSKI, Office of the Ombusman, Poland

Mr Imre VEREBÉLYI, Envoy Extraordinary and Minister Plenipotentiary, Permanent Delegation of Hungary to the OECD

Mr Marek WIERZBOWSKI, Professor, Faculty of Law and Administration, Warsaw University, Poland

SECRETARIAT

Information Office of the Council of Europe in Warsaw

Mrs Hanna MACHIŃSKA, Director

Mrs Ewa JANUSZEWICZ

Mrs Wiesława KOSTRZEWA-ZORBAS

Mrs Agnieszka MICHALSKA-BULTROWICZ, Assistant

Mrs Magdalena KISS, student

Mr Grzegorz MAJOR, student

Mr Łukasz NEJMAN, student

Council of Europe

Mr Giovanni PALMIERI, Head of the Department of Public Law, DGI – Legal Affairs, Council of Europe

Mrs Danuta WIŚNIEWSKA-CAZALS, Administrative Officer, Department of Public Law, DGI – Legal Affairs, Council of Europe

Mrs Wendy POLVECHE, Assistant, Department of Public Law, DGI – Legal Affairs, Council of Europe

INTERPRETERS

Mrs Catherine Margaret Deirdre GAY

Mrs Barbara GRUT

Participation in the preparation of the Conference and elaboration of the Proceedings

Mrs Danuta WIŚNIEWSKA-CAZALS, Administrative Officer, Department of Public Law, DGI – Legal Affairs, Council of Europe

Mrs Judith LEDOUX, Department of Public Law, DGI – Legal Affairs – Council of Europe

Mrs Marie-Rose PREVOST, Assistant, Department of Public Law, DGI – Legal Affairs – Council of Europe

Mrs Edith LEBEAU, Assistant, Department of Public Law, DGI – Legal Affairs – Council of Europe

Ms Hannah DICKSON, Trainee, Department of Public Law, DGI – Legal Affairs – Council of Europe