COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 10 January 2008 DA/ba/Conf (2007) 15 *e*

IN PURSUIT OF GOOD ADMINISTRATION

European Conference

organised by the Council of Europe
in co-operation with the Faculty of Law and Administration
University of Warsaw

Warsaw, 29-30 November 2007

GENERAL REPORT

PRESENTED BY

Mr Pierre DELVOLVÉ
Professor
University Panthéon Assas - Paris II
France

1. The conference "In pursuit of good administration" had two organisers and a double impetus.

Organisation was provided by the Council of Europe - in Strasbourg, thanks to the tireless efforts of Ms WIŚNIEWSKA-CAZALS, Secretary to the Project Group on Administrative Law, and in Warsaw by Ms MACHIŃSKA, director of the Council of Europe office in that city, and her staff.

Premises and services were made available by the Faculty of Law, which this year celebrates the bicentenary of its foundation, as the School of Law, by Napoleon on his way through Warsaw, who clearly realised that force should be tempered by law.

2. The impetus was also provided by the Council of Europe, initially in a general sense. The Council now has 47 member states, and its aim – as the Recommendation of 20 June 2007, like its many predecessors, reminds us – is "to achieve a greater unity between its members"; it is particularly active in the human rights field, where it relies on the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, which are its most important texts, and the European Court of Human Rights, which is its most important institution. Neither the Convention nor the Court is directly concerned with administration. However, as Ms MIERZEWSKA and Mr WOŁĄSIEWICZ explained, they can cover it indirectly: administrative authorities must respect the rights and freedoms proclaimed by the Convention (particularly the right to life and physical integrity, freedom and security, private and family life, freedom of thought, conscience, religion and expression, and non-discrimination), and the Court, in cases referred to it, has had occasion to explain their scope, particularly in connection with the right to a fair trial.

3. The human rights process thus extended to administration, and the Council of Europe focused on the latter more directly: after a 1977 Committee of Ministers Resolution on protection of the individual against acts by the administration, ten recommendations were adopted between 1980 and 2004, covering the exercise of discretionary powers by administrative authorities, access to information held by public authorities, public liability, administrative procedures, communication to third parties of personal data held by public bodies, the status of public officials, codes of conduct for public officials, access to official documents, the execution of administrative and judicial decisions in the field of administrative law, and judicial review of administrative acts. All of these are referred to in Recommendation CM/Rec(2007)7, adopted by the Committee of Ministers on 20 June 2007. It was their multiplicity which had prompted the Parliamentary Assembly to ask the Committee, in 2003, to prepare a draft text defining a basic personal right to good administration and containing a model code of good administration. It was felt that a single, comprehensive and consolidated text would be easier to implement in practice.

This text was carefully drafted by a working party which, by considering the issues in depth and looking at existing texts and national experience, was able to reconcile viewpoints and adopt a joint position.

Mr GERBER had played an active part in the work, and so was able to provide a fully informed picture of the document finally adopted by the Committee of Ministers, and highlight its chief distinguishing feature – the fact that it comprises both the recommendation proper and also an appendix. The latter is itself divided into three parts, defining the principles of good administration, the rules governing administrative measures and the

remedies which must be available to individuals.

Mr TANQUEREL contributed an outsider's view, putting the various aspects of the text, and the concepts it employed, in perspective, and noting a certain imbalance between the provisions on individual rights, which reflected a democratic choice, and those on good administration, which itself received far less emphasis.

4. There are other instruments which also help to define good administration.

For example, the EU's Charter of Fundamental Rights contains an Article 41 expressly dealing with the "right to good administration". A European Code of Good Administrative Behaviour, which the Parliamentary Assembly asked the Committee of Ministers to consult in preparing the new recommendation, was adopted for the Community authorities in 2001, and is – as Ms HIRSCH-ZIEMBINSKA explained – applied by the European Ombudsman in examining complaints referred to him.

All the member states also have their own solutions. Mr SCHMIDT spoke of the approach followed in Germany, and specifically the *Land* of Nordrhein-Westfalen. In Belgium, the highly sophisticated system described by Mr RENDERS is a source of hope, at a time when the country is in danger of fragmenting. Many lessons can also be learned from the rules applying to civil servants in Spain, detailed by Ms JUARRANZ DE LA FUENTE. Finally, the work of the British Ombudsman, described by Ms BAINSFAIR, offers another example.

5. These reports, and the contributions which preceded or followed them, show that finding good administration might well be a necessary prelude to recognising a right to it, but that the quest itself was as difficult as Marcel Proust's, when he went "in search of time lost" – even though "time found again" was his ultimate reward.

They also showed that the quest for good administration cannot be separated from the far broader issue of governance.

Our own quest has thus led us "from good governance to good administration" (I) and then "from the law of good administration to the right to good administration» (II). Indeed, our work can be summarised in terms of those two themes.

I. From good governance to good administration

6. The recommendation of 20 June 2007 itself expressly says that "good administration is an aspect of good governance". At the very start of the Conference, the links between governance and administration were also emphasised by Dean TOMASZEWSKI and Ms WIŚNIEWSKA-CAZALS. Professor IZDEBSKI considered this question in particular detail, making connections with the concepts of management, and even "republic" as that term is used in English. He referred to the work of authors like Max Weber and Fayol, and to the changes advocated by institutions like the OECD, the World Bank and the IMF. All of this shows that administration is part of governance, and good administration is only one aspect of good governance. However, although one can accept generalisations like this, one has to go further and pin concepts down more precisely to arrive at practical solutions. This means trying to define, first, governance (A) and then administration (B).

A. Governance

7. This term is not entirely new. In the old days, some towns in the Netherlands applied it to the tribunal headed by the governor, and, in a functional sense, to the guidance provided for individuals or the rules applying to them (e.g. governance of children).

It has returned to modern usage from the English, and is now the fashionable term for the way in which things are run and managed. Its present meaning, as Professor IZDEBSKI pointed out, is a method or system of government.

Governance applies to firms and, more generally, the economy. From there, it extends into the political sphere, and so comes to mean government – but government in a new and broader sense of that term.

It is closely connected with another modish term, management. Etymologically, this means to have a situation or institution "in hand", and the *Littré* defines it as "all the methods used to direct, organise and run a business or project". It is, in other words, geared to the future.

It involves both an organisation ("corporate governance" is the English term) and a strategy based on choice of goals to be achieved and means of achieving them.

Progressing from firms to the economy and politics, the concept eventually applies to government, both because government is an extension of political institutions, and has links with the economy, and because government is itself organised and engages in action, as we shall see later.

This may suggest a question, however: the concept of governance is the product of a liberal, market-economy vision; governance itself is totally geared to growth of firms. Can the same vision and the same methods be applied to public institutions and, through them, government?

8. If they can, then public institutions, like firms, need good governance.

The problem here is that governance is already a vague concept, and the defining characteristics of "good" governance are equally vague. The latter is itself the object of an ongoing quest: there is fixed and final model. Firms are trying all the time to find ever-better solutions – they almost seem scared of standing still.

In fact, this is essentially a process of constant adjustment, since there are no perfect solutions.

The same thing happens with public institutions. There are various examples. In the United Kingdom, as a result of the emphasis on maximum value for money, all aspects of public authority have been scrutinised, with a view to finding the best and cheapest solutions. In France, the finance laws were radically overhauled in 2001, and the sums earmarked for items on the state budget grouped under projects, with each project comprising a number of programmes, collectively aimed at implementing a specific public policy. At present, all public policies are rigorously scrutinised to determine their utility, effectiveness and cost –

and painful adjustments sometimes follow.

In their method and aim, these practices are wholly congruent with good governance.

They necessarily extend to administration.

B. Administration

9. "Administration" is almost as hard to define as "governance", even though the term is older and more familiar, and most people have a slightly less confused idea of its meaning. One could say, however - being a bit provocative – that it has no existence in law, since the law has no formula which identifies it exactly. And yet it works!

It can be seen as comprising three elements.

10. The first is organisation – and this gives the word "administration" an organic sense.

This is the element focused on by Article 1 of the Code of Good Administration, when it explains what "public authorities" are. We may note that it adds the adjective "public" to remove any ambiguity, since genuine administration does exist outside public systems. Firms, for example, have departments which may correspond to the organic aspect of administration. In our own work, even when this is not specified, we have always used "authorities" to mean public authorities.

As defined in the Code, these are primarily "any public law entity of any kind or at any level, including state, local and autonomous authorities, providing a public service or acting in the public interest". The organic aspect may thus be associated with the functional aspect, but it is the main one. It covers all the levels and subdivisions found in the various national systems: these systems may be unitary, federal, decentralised or devolved, and the authority's public law status may correspond to a geographical area or activity. In every case, the system is, organically, the authority's central element.

They are also "any private law entity exercising the prerogatives of a public authority responsible for providing a public service or acting in the public interest". The recommendation wished to allow for the growing number of private law entities to which states entrust administrative tasks which are, functionally, those of government. In such cases, the functional is inseparable from the organic aspect: the latter is obviously present, however, since these entities, although they are private law bodies, are structured and supervised in ways which not only distinguish them from "purely" private entities, but also make them part of the overall system of government.

11. Administration's second distinguishing feature is its functions. As we have just seen, the Code's definition speaks of "public service" or "public interest" functions. This is a general formula, and its duality reflects the diversity of the concepts current in the member states. In its introductory clauses, the recommendation is slightly more exact: "public authorities... are active in numerous spheres"; they "must provide private persons with a certain number of services and issue certain instructions and rulings".

This highlights the two functional aspects of administration: administration is an activity which involves providing those it covers with certain services and also imposing certain rules on them. Maintaining public order may not be expressly mentioned, but it is an integral part of administration's role, and can be exercised both by providing services (e.g. equipment and facilities to ensure safety of persons and property, hygiene) and issuing instructions (e.g. regulations requiring or forbidding individuals to do certain things, road traffic being just one of many typical areas).

12. Finally, administration is characterised by the resources its agencies possess for fulfilment of their tasks.

Human resources come first. Normally, when we speak of administration, we are thinking primarily of the men and women of varying status (civil servants, public service staff on contract or not, and even staff covered by private law), who exercise public service functions. The superficial impression of public authorities which people receive from these staff is one thing, but we need to remember, on a deeper level, that the legal entities which make up the various administrative structures always operate through individuals – which can cause difficult problems in respect of liability for damage caused by their actions or omissions.

These staff may operate on various levels: their distribution depends on the state's structure. A striking example, described by Ms JUARRANZ DE LA FUENTE, is Spain, where 50% of civil servants are employed by the autonomous regions, 22% by the state, and 24% by the municipalities – which shows how important the regions are in the organisation and functioning of that country's public authorities.

Next come financial resources, which are vital for public authorities, since they determine their organisation and the things they do. They are reflected both in expenditure and in receipts, which are ultimately borne, in one way or another, by the public.

13. This is one of the aspects which the search for good administration must allow for. The recommendation says that good administration "must meet the basic needs of society", but it does not define those needs. Probably, indeed, they cannot be defined precisely and strictly. We feel, of course, that society – of which public authorities are the emanation – has a duty to perform those functions which are vital to life in the community and to the life of every individual. But these needs are not everywhere, or always, considered the same: they may vary between places, and between epochs.

There is a subjective element in their assessment and in the choices which derive from that assessment. The decision is a political one, and thus a matter for the political, not the administrative authorities. At this point, the democratic requirement that the solutions chosen must give the public what they want must be respected.

14. Having defined needs, one must decide how to meet them.

On this point, the Recommendation says "that good administration... depends on the quality of organisation and management; that it must meet the requirements of effectiveness, efficiency and relevance to the needs of society... that it must comply with budgetary requirements"; that it is "dependent on adequate human resources..., and on the qualities and appropriate training of public officials".

This brings us back to the essential organisational aspects of administration (see sections 10 et 12). The principles of good governance identified for firms and the economy (see sections 5ff.) may make it necessary to adjust solutions.

The Recommendation's operative part then urges member states to "promote good administration through the organisation and functioning of public authorities ensuring efficiency, effectiveness and value for money". Recommended solutions include setting objectives and devising performance indicators, introducing assessment, seeking the best ways of securing the best results, and setting up monitoring systems.

15. More generally, these solutions must be consistent with "the principles of the rule of law and democracy ".

Once again, democratic requirements are emphasised. Firstly, the people at whom the action taken by the authorities is aimed are not clients, or even quite users, but primarily citizens. Secondly, the agencies and action of the administration are also inseparable from the political institutions, and thus from the democracy with which those institutions are linked: this being so, citizens no longer count as the targets of action, but – directly or indirectly – as decision-makers.

16. Thus good administration, as the Recommendation again says, "is not just concerned with legal arrangements". It is concerned with data and solutions which far transcend the law. But it still cannot dispense with law which applies specifically to administration and is designed to secure good administration.

II. From administrative law to the right to good administration

17. Making administration subject to law was already a step forward, and has itself done much to make the rule of law a reality. We need to remember this because it also helps to make good administration a reality (A). It is a further step forward which needs to be taken, and even a change necessary to recognition of a right to good administration. We must now look at the transition from one to the other.

A. Administrative law

18. The very use of the singular (law), not the plural (laws) implies that administration is subject to law. This does not mean that it has no rights. On the contrary, the rights it has are distinctive in embodying certain public authority prerogatives which allow it to impose obligations on other persons without their consent, forbid or order them to do certain things or engage in certain activities, deprive them of their property or levy taxes on them. The extent of its rights makes it particularly important that it should exercise them only in strict compliance with the law – administrative law.

19. The term "administrative law" implies that this is not exactly ordinary law, that it is not identical to the law which applies to everyone.

This special feature of administrative law might seem incompatible with the principle that public authorities are subject to law, or might seem, at all events, to limit the

scope of that principle since, if they were fully subject to law, the law which applied to everyone should logically apply to them. British legal theory has particularly emphasised this view, and liberal and neo-liberal thinkers strongly support it. It is true that common law can be extensively applied to British-type public authorities, and that examples of the application of private law to certain aspects of administration can be found in other countries too.

However, it is also true that, even in systems of this kind, special rules are rendered necessary by the very prerogatives and tasks of public authorities: because they have unusually extensive powers and public-interest functions - both going beyond relationships between private persons – suitable laws must be applied to them. Much has been said about adjusting administration to meet the needs of the community; this involves adjusting the law on administration to those needs, which are also the administration's needs, i.e. introducing special administrative laws.

This does not mean that certain aspects of non-administrative law cannot be applied to public authorities, e.g. when their activities focus on matters covered by such law.

Here, we are thinking particularly of consumer and competition law. Insofar as services are provided for them, the public are no longer subjects of authority, but users, and indeed clients or consumers: consumer law provisions designed to protect consumers against firms must also be applicable to public authorities. Similarly, insofar as action taken by public authorities – regulations adopted, services provided – affect competition, competition law should apply to them: they must not distort competition, either in favour of firms (e.g. by making concessions or creating situations which firms risk abusing) or to their disadvantage (by themselves operating in conditions more favourable than those applying to firms).

In both cases, the special nature of the tasks performed by public authorities must be borne in mind, to ensure a proper balance between service needs and the requirements of consumer or competition law. Thus, even when these two types of law are at issue, administrative law may still retain its special features.

20. Its basic principle is that of lawfulness, i.e. public authorities are required to comply with the law. The Code of Good Administration affirms this as one of the first principles on which good administration depends. In this respect, it coincides with the rule of law. In general, all sources of law are effective against public authorities: at national level, constitutions, laws and regulations; at international level, international conventions and, as in the case of Community law, laws derived from them; on both levels, account must also be taken of the general principles of law which, even when unwritten, are binding on all administrative authorities.

Taken together, the above generate rules, of which some cover external, and others internal, lawfulness.

The first are those which regulate the powers of the various administrative authorities and the procedures they must follow before taking decisions. In this area, the Code of Good Administration lays down rules on administrative measures, on the way they come about, on the hearing of those they affect, on the form they take, on notification of the public, and on their coming into force. All of these rules relate to the laws applying to public authorities and contribute to good administration, before becoming elements in a right to good administration.

The same applies to the second group of rules, which cover the very basis of law. Chief among these are the fundamental rights and freedoms, which are no less important. The Code of Good Administration does not refer to them explicitly, but the Recommendation points out that the activities of public authorities "affect private persons' rights and interests", that "national legislation and various international instruments… offer these persons certain rights... ; and that the European Court of Human Rights has applied the Convention for the Protection of Human Rights and Fundamental Freedoms to the protection of private persons in their relations with the administration".

The principle of equality is expressly stated in the Code of Good Administration, both positively and as prohibiting discrimination.

The other principles (proportionality, security, reasonable time, transparency) are perhaps more approximate in scope than the earlier ones. But they may also, more than the earlier ones, be not simply elements in administrative law, but conditions of good administration.

They are also among the principles which show that there is a right to good administration.

B. The right to good administration

21. Having reached this point, we may ask ourselves whether such a right exists and, if it does, what its scope may be.

As far as its existence is concerned, it is striking that some of the proposed answers were based far more on a principle than a right. This was particularly true of what Mr RENDERS said concerning Belgium: it is a "principle of good administration" which determines the system adopted, and not a right to good administration which is explicitly recognised. Article 41 of the EU Charter of Fundamental Rights is headed "Right to good administration", but the content of that article, which explains various aspects of the rights enjoyed by individuals in their dealings with public authorities, does not repeat the phrase, whereas many other articles concerned with rights do refer to them both in the headings and the operative text (e.g. Article 2: right to life; Article 3: right to the integrity of the person; Article 6: right to liberty and security, etc.). This at least suggests some hesitation in recognising a right to good administration as such, and also a distinction between a very general formula (the title) and the things it covers (the content of the article).

The Recommendation of 20 June 2007 invites the member states to "promote the right to good administration in the interests of all" – a formula which avoids recognising the existence of an individual right and emphasises its collective aspect.

If that right exists, it would seem to be, if not a general and vague affirmation, at least a substratum, i.e. the basis of more specific rights, without which they could not exist or be understood.

It is hard to see how a member of the public could invoke a personal right to good administration and use it to contest a measure, claim a service or demand an action. But steps could be taken to question the action or conduct of a public authority on the basis of a right to

good administration, as general source of the obligations applying to public authorities.

22. Whether explicit or implicit, the right to good administration cannot be effective unless measures are adopted to implement it in specific cases.

This is certainly what the recommendation is saying: promoting the right to good administration involves adopting norms. The Code of Good Administration, which is appended to it, identifies those norms. In addition to those already noted as being integrally covered by administrative law in application of the principle of lawfulness, there are others which, while also covered by that principle, particularly apply to private persons as such: impartiality, ruling out the adoption of positions which either benefit or harm certain persons; taking the rights or interests of private persons into account in determining the content of measures affecting them; respecting acquired rights and established legal situations; respecting private life; right of access to public documents; the right of private persons, first, to request and secure the taking of certain measures and, secondly, to be heard before measures directly and unfavourably affecting them are taken.

Each of these headings, to which others may be added, should be capable of generating detailed and strict regulations, conferring genuine rights on those to whom they apply.

23. To make this possible, two types of condition must also be satisfied.

The first concerns the regulations themselves: they must be clear and comprehensible, so that those to whom they apply can know exactly what their rights are; and they must be circulated broadly enough for those persons even to know of them. To circulate the laws on good administration is already to implement the right to good administration.

The second concerns implementation of that right.

These conditions apply, first, to the services which public authorities must provide. This brings us back to a question already raised (see section 16), when we noted that administration "is not just concerned with legal arrangements". Public authorities often satisfy the right to good administration, not just by obeying the law, but also by undertaking certain work (e.g. road maintenance) and providing certain services (water, power, transport, education, etc.).

The right to good administration is also implemented by providing remedies. The Code specifies those which must be available to private persons, so that they can oppose action taken by public authorities, or obtain compensation for damage caused by them. Ensuring that the courts are well organised to deal with administrative cases, and effective in doing so, is an important part of implementing the right to good administration: the existence of specialised administrative courts may help to provide a better picture of public authorities, the laws applying to them and their requirements, and of the rights and interests of the public, and also to strike that balance between the two sides which the recommendation and its appendix aim at.

The experience gained with ombudsmen and described at the Conference also shows that they offer a more relaxed approach than court proceedings to reaching solutions. These solutions can also be relevant to good administration and the rights it involves.

24. At the end of our "quest", we may find ourselves wondering whether good administration can ever be attained.

Indeed, Figaro’s words to Count Almaviva can apply to public authorities: do any deserve to be called good?

The quest for good administration can also be seen as the quest for a Grail, which recedes with every step we take.

But we can also take a brighter view: good administration may never be fixed and final, may always be a matter of fresh beginnings – but it is also a matter of constant improvements.