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## **IN PURSUIT OF GOOD ADMINISTRATION**

### **European Conference**

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***Good administration at the service of good governance:  
safeguarding individual rights  
and implementing democratic decisions***

### **REPORT PRESENTED BY**

**Mr Thierry TANQUEREL  
Professor  
Department of Administrative and Tax Law  
University of Geneva  
Switzerland**



## I. Background

### A. A difficult concept to grasp

In choosing, as the title of my presentation, "Good administration in pursuit of good governance: safeguarding individual rights and implementing democratic decisions", I wanted to stick as closely as possible to the theme of the first session of our conference, namely the role of good administration in good governance in a democratic society. I have thus included the three key features of the theme: good governance, good administration and democracy.

Although the title was handed to me on a plate by the conference programme, what it actually refers to is much more difficult to grasp. Good administration, and particularly the good governance it is supposed to foster, are elusive, protean and constantly changing concepts. To my mind, the reason for this is the vast diversity of approaches.

A first factor that may be responsible for differing approaches is the epistemological context in which the debate is taking place. Good governance was originally a concept devised by economists, but it has been taken over by political analysts and administrative scientists. Today's discussion centring on a Council of Europe recommendation features legal experts like myself.

Another factor that changes the context is the degree of development of the countries with reference to which good governance and good administration are being discussed. Historically, these concepts were used in connection with co-operation with developing countries, both in international organisations and in the context of bilateral co-operation with industrially developed countries<sup>1</sup>. In the case of the Council of Europe, the context is very different: even though there are still substantial discrepancies between members of the Council, we are talking here of good governance and good administration in a set of countries that are economically much more advanced than the countries of the South. It is striking that there is no mention of economic development in the preamble to Recommendation CM/Rec(2007)7 (referred to below as "the recommendation").

If we now take a look at the content, rather than the context, of the concepts of good governance and good administration, approaches are just as diverse.

First of all, there is a large number of sources: the preamble to the recommendation contains a long list of Council of Europe texts that served as a basis for it. The substantive sources of the principles of good administration are also, however, to be found in the European Union Charter of Fundamental Rights<sup>2</sup>, the European Code of Good Administrative Behaviour<sup>3</sup> and, of course, the domestic law of the Council's member states.

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<sup>1</sup> See in this connection, among the many sources, the website of the OECD Development Co-operation Directorate ([http://www.oecd.org/department/0,3355,en\\_2649\\_33721\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,3355,en_2649_33721_1_1_1_1_1,00.html)) and the Web magazine Capacity.org (<http://www.capacity.org/en>). See also, with regard to the European Union, the Commission's Communication of 20 October 2003 to the Council, the European Parliament and the European Economic and Social Committee on "Governance and Development" ([http://europa.eu/eur-lex/fr/com/cnc/2003/com2003\\_0615en01.pdf](http://europa.eu/eur-lex/fr/com/cnc/2003/com2003_0615en01.pdf)).

<sup>2</sup> Art. 41 of the Charter ([http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm)).

<sup>3</sup> The Code was approved by a European Parliament resolution on a proposal from the European Ombudsman on 6 September 2001 (<http://ombudsman.europa.eu/code/en/default.htm>).

It will also be observed that some of the texts that claim to define the content of good governance or good administration concentrate on the tangible, practical results of government action, while others focus on the procedures to be observed by the government.

Lastly, if we look the relevant legal instruments, we find, particularly in the recommendation, that binding principles and regulations are closely interlinked with mere rules of conduct and examples of model behaviour.

## B. Relationship between governance, democracy and fundamental rights

Quite apart from the diversity of approaches, the difficulty in grasping what we are talking about stems, of course, from the vagueness of the concept of good governance and the way in which account is taken of democratic principles and fundamental rights.

There are many definitions of good governance. HUBERT IZDEBSKI provided a very elaborate and subtle one at the start of our session. Some of the definitions are markedly utilitarian. According to HUTHER and SHAH, for instance, the quality of governance is determined by "the impact of [the] exercise of power on the quality of life enjoyed by [...] citizens"<sup>4</sup>. Other definitions do not resort to one key feature to identify the concept, but set out a series of criteria considered characteristic of good governance. According to the OECD<sup>5</sup>, for example, these criteria are accountability, transparency, efficiency and effectiveness, responsiveness, forward vision and the rule of law<sup>6</sup>. The World Bank list of good governance indicators is: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, the rule of law and control of corruption<sup>7</sup>. The European Union, for its part, puts the emphasis on democratisation, the promotion and protection of human rights, the reinforcement of the rule of law and the administration of justice, the enhancement of the role of civil society, public administration reform and decentralisation<sup>8</sup>.

We cannot but be struck by how different the criteria for "good governance" are. They are not all of the same nature or on the same plane, they do not serve the same purpose and they do not necessarily concern the same parties. Some, like respect for human rights, transparency and the rule of law, are clearly standard-setting, while others, for example those concerning efficiency and effectiveness, civil society and public administration, are more descriptive, establishing aspects to be analysed. Some of the features mentioned may be considered as ends, while others are merely means. This heterogeneity is probably accounted for by the diversity of contexts in which the criteria for good governance have been established.

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<sup>4</sup> Jeff Huther, Anwar Shah, "A Simple Measure of Good Governance", in *Public Service Delivery*, Anwar Shah ed., World Bank, Washington D.C., 2005, p. 39 ff, p. 40.

<sup>5</sup> [http://www.oecd.org/document/32/0,3343,en\\_2649\\_33735\\_1814560\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/32/0,3343,en_2649_33735_1814560_1_1_1_1,00.html).

<sup>6</sup> For the relationship between the French concepts of "*primauté du droit*" and "*Etat de droit*" and the English expression "rule of law", see the report by Erik Jurgens of 4 July 2007 to the Council of Europe Parliamentary Assembly on the principle of the Rule of Law (<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11343.htm>) and the resulting Resolution 1594 of 23 November 2007

(<http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/ta07/fres1594.htm>).

<sup>7</sup> <http://info.worldbank.org/governance/wgi2007/>.

<sup>8</sup> *Draft Handbook on Promoting Good Governance in EC Development and Co-operation*, European Commission, 2003 ([http://ec.europa.eu/europeaid/what/governance-democracy/documents/final\\_draft\\_handbook\\_gg\\_en.pdf](http://ec.europa.eu/europeaid/what/governance-democracy/documents/final_draft_handbook_gg_en.pdf)).

It will be observed that fundamental rights and democracy are not included in all the definitions of good governance and, where they are, they may simply be hinted at. Even in the European Union definition, where these concepts come first, they are, curiously, put on the same plane as public administration reform and decentralisation.

This levelling of values raises problems. Human rights, the rule of law and democracy are superior, structural principles, more fundamental than the other criteria referred to in connection with good governance. Indeed, they are the three essential values at the heart of the London Statute establishing the Council of Europe<sup>9</sup>. To take just one example, we cannot reduce democracy, under the banner of "participation", to a mere means of reaching better decisions or just one of many factors in citizens' quality of life. It should, however, be pointed out straight away that the recommendation we are now considering is far removed from the very technocratic conception of good governance criticised here.

One last comment is called for at this point. The malleability of the definitions to which I have just referred and the fact that they are exploited for political or economic ends that are not self-evident may well explain why good governance has, on occasion, been violently criticised as being the opposite of good government, its purpose being, it is argued, not the enhancement of the democratic participation of individuals and peoples in decision-making processes or respect for their right to development, but solely market deregulation<sup>10</sup>.

C. The contribution of good administration from the perspective of Recommendation CM/Rec(2007)7

A good means of getting a foothold on this shaky ground is to concentrate on the recommendation and look at the actual text.

This rightly distinguishes administration – calling for good administration – from governance in general. The administrative authorities are only one type of political institution, and must be distinguished from parliament, the government as such and the judiciary. Good administration, according to the recommendation, is "an aspect of good governance"<sup>11</sup>.

That aside, it seems to me that the recommendation affords democracy, the rule of law and fundamental rights their rightful place. Indeed, the first recommendation is that the governments of member states promote good administration "within the framework of the principles of the rule of law and democracy". The recommendation is therefore clearly based on upholding the principles relating to these concepts, by means of two approaches: safeguarding individual rights and implementing democratic choices.

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<sup>9</sup> The preamble to the London Statute of 5 May 1949 establishing the Council of Europe refers to the principles of "individual freedom, political liberty and the rule of law, [...] which form the basis of all genuine democracy" (<http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>). See also the resolution mentioned in footnote 6 above, paragraph 1 of which refers to these three values.

<sup>10</sup> This argument is taken from a written statement from Centre Europe – Tiers Monde (CETIM) to the Commission on Human Rights, 2004 ([http://www.cetim.ch/en/interventions\\_details.php?iid=46](http://www.cetim.ch/en/interventions_details.php?iid=46)).

<sup>11</sup> CM/Rec(2007)7, paragraph 21 of the preamble.

## **II. The right to good administration**

### **A. A broad approach?**

It is clear from the preamble to the recommendation that the concept of good administration it conveys is very broad in scope. The preamble states, for instance, that "good administration implies that services must meet the basic needs of society" and that it is therefore "not just concerned with legal arrangements" but "depends on the quality of organisation and management". This broad approach to administration is also found in the body of the recommendation, which calls for efficiency, effectiveness and value for money and refers to a model code designed to safeguard a wide range of individual rights in dealings with the authorities.

If, therefore, the very concept of good administration is twofold, covering the services provided by the authorities and arrangements for relations between the authorities and the public, the "right" to good administration should, logically, also be twofold and include not only the right to have the authorities obey a number of rules, but also the right to ensure that they produce good results.

It would seem, however, that this very broad conception of the "right to good administration" cannot be interpreted as being equivalent to recognition of an individual, personal right to effective, efficient administration providing value for money: indeed, it is difficult to see how such a right could be enforced. The reference to a "right" in this context is largely rhetorical, and refers to a general duty of administration. HUBERT IZDEBSKI spoke in this connection of third-generation rights<sup>12</sup>. Accordingly, it is a more classic definition of the right to good administration, in the strict sense of the term, that ultimately emerges from an analysis of the recommendation.

### **B. The more classic approach**

It will be observed that the penultimate paragraph of the preamble to the recommendation, which expressly mentions a "right to good administration"<sup>13</sup>, refers to the European Union Charter of Fundamental Rights as an example to be followed. Article 41 of the Charter enshrines just such a right.

The heading to Article 41 of the Charter is simply "Right to good administration": there is no general definition of the concept in the Article. It does, however, set out a list of rights which clearly reflects a traditional conception of good administration, based on a set of rules and principles governing relations between the authorities and the people they administer, in other words the public. This non-exhaustive list includes, in particular, the right to be dealt with impartially, to be heard before any adverse decision is taken, to have access to one's file and to have any damage caused by the authorities made good. The substance which Article 41 of the Charter affords to the right to good administration therefore clearly relates to the relationship between the authorities and the public and not to the performance of the authorities. This is very far removed from the concepts of good governance based primarily on effectiveness, to which I referred earlier<sup>14</sup>.

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<sup>12</sup> Cf. IZDEBSKI, herein.

<sup>13</sup> CM/Rec(2007)7, paragraph 24 of the preamble.

<sup>14</sup> See footnotes 4, 5 and 7 above.

The last paragraph of the actual recommendations clearly reflects this approach, calling on governments to "promote the right to good administration" by adopting standards, in the form of rules of conduct, and ensuring that they are effectively applied by government officials.

This paragraph refers to the appended model code for details of the practical substance of the "right to good administration" thus defined. The Code sums up, as it were, the main principles of "functional" administrative law, the legal source of which is, as stated in the recommendation<sup>15</sup>, to be found in international and European instruments<sup>16</sup>, but also in domestic law, national constitutions and administrative procedural law.

C. The right to good administration as a combination of individual rights

The right to good administration, as embodied in the model Code of administration, would appear to be primarily a combination of individual rights, even though it is not just that.

The Code begins by setting out a number of principles by which the public authorities are objectively required to abide<sup>17</sup>. They must respect them in all circumstances, even if no one is in a position to complain about any breach. Individuals also have a personal right, however, to have these principles respected in their dealings with government bodies. Accordingly, the principles of lawfulness, impartiality, proportionality and legal certainty, to mention but a few, must also be interpreted as individual rights.

The Code goes on to define various forms of "good" administrative practice<sup>18</sup>, which encompass a number of individual rights. Examples are the right to have individual decisions taken (Art. 13), the right to be heard (Arts. 14 and 15), the right to be notified (Art. 18) and the right not to have decisions take effect retroactively (Art. 19).

Lastly, the Code expressly enshrines the right to appeal against administrative decisions (Art. 22) and the right to compensation for unlawful decisions or negligence on the part of the authorities (Art. 23).

It will be noted that the rights set out in Sections II and III of the Code mainly reflect the "individual right" component of the principles set out in Section I. It will also be observed that the model Code sets forth both substantive rules, such as those concerning lawfulness and equal treatment, and procedural rules, such as those relating to the right to be heard and the right of appeal.

This instrument consolidating the various recognised rights with regard to the public authorities (an expression culled from the recommendation itself<sup>19</sup>) has at least three advantages.

Firstly, it is an educational and reference tool, setting out as it does the established principles of the rule of law as a guide to good administrative practice.

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<sup>15</sup> CM/Rec(2007)7, paragraph 15 of the preamble.

<sup>16</sup> See footnotes 2 and 3 above.

<sup>17</sup> Arts. 2 to 10.

<sup>18</sup> Arts. 11 to 21.

<sup>19</sup> CM/Rec(2007)7, paragraph 24 of the preamble.

Secondly, it lays down minimum standards for respect for individuals by the authorities. In doing so, the recommendation is clearly in keeping with the European Convention on Human Rights, to which, moreover, it expressly refers in the preamble<sup>20</sup>.

Lastly, it is likely to bring about progress in the various Council of Europe member states in spheres where the rights of the public enjoy varying degrees of recognition and are enforced to very different extents. Examples are the right to be heard, the right to transparency, the right of appeal, the right to have a decision taken within a reasonable time and the obligation for the authorities to weigh up the interests at stake when amending administrative decisions. It may be in this last respect that the consolidation of the various rights in the Code will be most worthwhile.

### **III. Implementation of democratic decisions**

#### **A. What place do quality, effectiveness and efficiency have in good administration?**

The recommendation sets great store by the effectiveness and efficiency of the authorities and the quality of their work. As has already been said, it refers to this aspect in the preamble, but it is mainly in the actual body of the recommendation that this facet of good administration is elaborated on. The second recommendation – which is the most elaborate one but is not, admittedly, accompanied by an appendix – is devoted to it.

First of all, the paragraph concerned recommends introducing procedures for monitoring the actions of the authorities by means of a system of objectives and performance indicators. It also calls on member states to pay regular attention to the cost and usefulness of the services provided and, to this end, to "seek the best means to obtain the best results". Lastly, it calls for systems to be introduced to monitor government action.

It will be observed that, while optimisation of results and the search for the best means of achieving this are thus central to the recommendation, it is very open as to the objectives to be set and the choice of means of achieving them. In contrast to the range of criteria for good governance referred to above<sup>21</sup>, the recommendation makes no reference to specific policies or strategies such as fostering action by civil society, decentralisation or combating corruption.

#### **B. Democratic justification for these requirements**

The requirements concerning evaluation, attention to cost and monitoring of the usefulness of services and administrative decisions derive from the more general requirements of quality, effectiveness and efficiency. They are justified by the good results expected "on the ground".

Efforts to achieve these results may be justified by the very quality of the results. This is a completely utilitarian approach, where the justification is the results obtained. Administration is "good" if it helps to enhance the health, security, quality of life and even happiness of the population. Such an approach carries two risks: firstly, the risk that technocrats will decide what is good for the public without taking account of their choices

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<sup>20</sup> CM/Rec(2007)7, paragraph 15 of the preamble.

<sup>21</sup> See section I. B above.



and aspirations and, secondly, that of generating an unduly strong conflict within the recommendation itself between the call for rights and principles to be respected and the call for efficiency above all else.

The need to "seek the best means to obtain the best results" can, however, also be justified by a democratic requirement. In democratic countries, the objectives of public policy do not stem from the wisdom of a despot, even an enlightened one. They are the result of laws, increasingly setting out policies, that are passed by the elected representatives of the people, and sometimes even by the people themselves. Even when these policies are devised by the government or the administrative authorities, they must ultimately have a legal basis. Implementing these legislative choices as effectively and efficiently as possible and ensuring the best possible quality is therefore simply tantamount to respecting the will of the people.

When, therefore, the recommendation calls on member states to promote good administration in this sense, it is clearly seeking to ensure that democratic decisions are implemented.

#### C. Keeping choices open

The interpretation of the recommendation proposed here avoids the pitfall of ideological bias. It keeps the choices of democratic bodies open. The substantive content of administration, namely the objectives to be achieved and the best means of attaining them, is not predetermined. Good administration is not assessed by the yardstick of a predetermined result. It is a process that provides full scope for debate and democratic choices. The recommendation does, however, state that, when such choices are made, the authorities must abide by them.

### **IV. Conclusion**

The Council of Europe recommendation on good administration approaches the issue from the angle of a form of good governance that does not correspond to any predetermined political or economic strategy but is based on the Council's fundamental values, namely respect for fundamental rights, the rule of law and democracy. It seeks to put these principles into practice by asking member states to do two things: firstly, to respect individual rights in the authorities' dealings with individuals – to this end it sets out these rights in consolidated form in a model code of good administration – and, secondly, to ensure that authorities implementing democratically based public policies act effectively and efficiently and obtain quality results.

Structurally speaking, this twofold aim is set forth asymmetrically in the recommendation, for, while the safeguarding of individual rights is the subject of a brief recommendation accompanied by a large appendix, the need for quality action on the part of the authorities is the subject of a much more elaborate recommendation without an appendix. Furthermore, the very concept of good administration varies within the recommendation itself: it is broad when it is used in the actual title of the recommendation, and narrow when it is defined as the subject of a "right".

This asymmetry does not, however, detract in any way from the clarity of the recommendation, or in particular from the fact that, when it comes to substance, it is firmly based on the three fundamental values to which I have just referred.