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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

STOCKTAKING

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

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I. Introduction

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

2. Mr Oliver Kask acted as rapporteur and examined the different existing concepts of the notion of "good governance" as well as the notion of "good administration". Mr Asbjørn Eide, expert from Norway, was asked to examine the relation between "good governance" and human rights (Annex I). Ms Gret Haller submitted her reflections on this topic (Annex II, CDL(2009)052).

3. A preliminary version of this report (CDL(2008)091) was prepared on the basis of comments by Messrs Kask and Eide and considered by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008).

4. The Venice Commission has taken note of the diverging views that exist, even among its own members, about the usefulness and the democratic legitimacy of the notion of good governance, and does not intend to carry out an exhaustive study on it. This document only purports to provide some elements of reflection which can be used in further discussions. The Venice Commission took note of it at its 86th Plenary Session (Venice, 25-26 March 2011).

II. The origins of the notion of "good governance"

5. The concept of governance is a very old one; it can be traced in the works of Aristotle, who referred to good governance to describe a state ruled by an ethical and just governor¹.

6. In recent times, "governance" has been used increasingly to define the process of decision-making and implementation of decisions in a variety of contexts, such as corporate governance, international governance, national governance and local governance.

7. At the end of the 1990s, the World Bank established a link between the quality of a country's governance system and its ability to pursue sustainable economic and social development. According to World Bank, governance encompasses the form of political regime; the process by which authority is exercised in the management of a country's economic and social resources for development; and the capacity of governments to design, formulate and implement policies and discharge functions (World Bank 1991 1992 1994; World Bank 2000a). The WB thus endorsed "good governance" as a core element of its development strategy. However, while recognizing the importance of the political dimensions of governance, the Bank interpreted the concept restrictively, arguing that the first aspect – whether a government is democratic or not - falls outside its mandate. As a result, it focused on the economic dimensions of good governance, which has been equated with 'sound development management'². It avoided on purpose the use of the term "government"³ so as not to infringe upon state sovereignty.

¹ The aim of this document is to clarify the present-day meaning of the notions of good administration and good governance, as used by the international organisations and at the national level. An exposé of the different philosophical ideas and theories behind these notions goes beyond this aim and will therefore not be included.

² C. Santiso, Good Governance and Aid Effectiveness: The World Bank and Conditionality, http://www.sti.ch/fileadmin/user_upload/Pdfs/swap/swap108.pdf

8. The assessment of good governance aimed at measuring the economic performance of the states and their institutions from outside, without a direct involvement of those concerned in the country. The assessment was marked by largely informal monitoring procedures, as well as the treatment of private actors on an equal footing with governments. It was exclusively based on economic factors and focused on the output, both of private entities and public institutions.

9. The concept of good governance developed by the World Bank thus largely neglected some important aspects of democracy. This was inherent to its very nature and main features, which hardly made it possible to oppose, even through a democratic process in the country concerned, an assessment based on economic efficiency. It has been argued that through the promotion of good governance by the World Bank, some governments have been affected in their capacity to strike a fair balance between private interests and public interests, which may have contributed to a certain weakening of democratic principles.

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

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

III. “Good governance” at the international level

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

A. The Council of Europe

a) The 2005 Warsaw Summit

13. At the Warsaw Summit in 2005 the Heads of State and Government of the member States declared that “democracy and good governance at all levels are essential for preventing conflicts, promoting stability, facilitating economic and social progress, and hence for creating sustainable communities where people want to live and work, now and in the future”.⁴

³ Government is one of the actors in governance. Other actors involved in governance vary depending on the level of government that is under discussion. See UNESCAP, What is good governance, <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>.

⁴ Warsaw Declaration adopted at the Third Summit of Heads of State and Government of the Council of Europe, point 3, available at: [http://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2005\)79&Language=lanEnglish&Ver=final](http://wcd.coe.int/ViewDoc.jsp?Ref=CM(2005)79&Language=lanEnglish&Ver=final) (last visited on 28 August 2008).

b) The Committee of Ministers

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

- democratic structures for non-governmental sports organisations based on clear and regular electoral procedures open to the whole membership;
- organisation and management of a professional standard, with an appropriate code of ethics and procedures for dealing with conflicts of interest;
- accountability and transparency for decision-making and financial operations, including the open publication of yearly financial accounts duly audited;
- fairness in dealing with membership, including gender equality and solidarity.⁵

c) The Parliamentary Assembly

15. In Parliamentary Assembly Resolution 1060(1995) good governance was explained as including “democracy and human rights, the absence of corruption, social reform favouring the disadvantaged, economic reform in the direction of market principles, adequate protection of the environment, and more open trade including trade with other developing countries”.⁶

16. In two recommendations of 2005 and 2006 the Parliamentary Assembly stressed the Council of Europe’s important role in improving good governance, without however defining it. Good governance was mentioned alongside democracy, the rule of law and human rights standards.⁷

17. In Parliamentary Assembly Resolution 1547(2007) on the state of human rights and democracy, the principles of subsidiarity and proportionality were considered necessary to achieve good governance, which in turn is said to be essential for strengthening democracy.⁸ In the same resolution the role of good governance in preventing corruption is stressed.⁹

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

18. The Conference of European Ministers responsible for local and regional government adopted at their fifteenth session in October 2007 the “Council of Europe Strategy on Innovation and Good Governance at Local Level”. It states that good governance has become a model for giving real effect to democracy, the protection of human rights and the rule of law. The strategy lists twelve principles of good democratic governance which draw on the Council of Europe’s *acquis* in the field of democracy, the rule of law and the protection of human rights. Those principles encompass the rule of law, the protection of human rights and democracy. Among others, they also include effectiveness and efficiency, openness and transparency, accountability and responsiveness.¹⁰

⁵ Recommendation Rec(2005)8 of the Committee of Ministers to member States on the principles of good governance in sport, adopted on 20 April 2005.

⁶ Parliamentary Assembly Resolution 1060(1995) on development co-operation policies, point 8.

⁷ Parliamentary Assembly Recommendation 1708(2005): Current situation in Kosovo, adopted on 21 June 2005, point 1; Parliamentary Assembly Recommendation 1771(2006): The establishment of a stability pact for the South Caucasus, adopted on 17 November 2006, point 1.

⁸ Parliamentary Assembly Resolution 1547(2007): State of human rights and democracy in Europe, adopted on 18 April 2007, paragraph 62.

⁹ Id. at paragraph 83.

¹⁰ The Council of Europe Strategy on Innovation and Good Governance at Local Level, MCL-15(2007)8, adopted on 16 October 2007.

e) Committee of Experts on Good Governance in Health Care

19. In September 2007, the new Committee of Experts on Good Governance in Health Care (SP-GHC) started its work. Its mandate is “to help member States to promote value-based governance in health care, based on human rights, equity, transparency, accountability and participation”.¹¹

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

20. In the framework of the Austrian Presidency of the European Union the Association of European Parliamentarians for Africa (AWEPA) and the North-South Centre of the Council of Europe organised a seminar in Cape Town in 2006 for African and European Parliamentarians to discuss the new EU-Strategy for Africa. In the “Recommendations for Action” good governance figures alongside democracy and human rights as the key elements for improving living standards. Furthermore, it is said that good governance requires effective parliamentary action and a consensus on the definition of good governance and its relationship with development.¹²

B. The European Union

a) The European Council

21. In 1991 the European Council adopted a resolution on human rights, democracy and development setting guidelines for the co-operation with developing countries. It was stated that “[a]t the same time, human rights and democracy form part of a larger set of requirements in order to achieve balanced and sustainable development. In this context, account should be taken of the issue of good governance as well as of military spending”. However, no definition of good governance was given.¹³

b) The European Community

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

“In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making

¹¹ http://www.coe.int/t/dg3/health/goodgov_en.asp (last visited on 28 August 2008).

¹² Euro-African Pact for Africa’s development: The role of Parliamentarians, Recommendations for Action, Cape Town, 25 - 26 May, available at:

http://www.coe.int/t/e/north%2Dsouth_centre/programmes/5_europe%2Dafrica_dialogue/b_hr_and_democratic_governance/Declaration_Cape-Town_mai2006.pdf#xml (last visited on 28 August 2008).

¹³ Resolution of the Council and the member States meeting in the Council on human rights, democracy and development, paragraph 2, available at:

http://ec.europa.eu/external_relations/human_rights/doc/cr28_11_91_en.htm (last visited on 28 August 2008).

procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.”¹⁴

c) The European Commission

23. Good governance in the EU is of special relevance to the European Commission, which defines common policies at the European level.¹⁵ In 2001, the European Commission identified five principles of “good governance” in a White Paper on European governance: openness, participation, accountability, effectiveness and coherence.¹⁶

d) The Committee of the Regions

24. On 17 and 18 June 2009, the Committee of the Regions of the European Union adopted a White Paper on multilevel governance¹⁷, stating that “establishing genuine multilevel governance in Europe has become a condition of good European governance” .

C. The United Nations

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

25. In its Resolution adopted at its sixty-third session of 29 October 2008, the General Assembly encouraged further co-operation between the United Nations and the Council of Europe in the area of democracy and good governance, and in particular with regard to the International Day of Democracy, *inter alia* through the Venice Commission and the Forum for the Future of Democracy.¹⁸

b) The “Agenda for Development”

26. The “Agenda for Development” submitted by Secretary General Boutros Boutros-Ghali to the General Assembly in 1994 addressed the importance of development and its basis for peace. The agenda’s purpose was to give a new impetus to the discussion of development building on the United Nations’ experience. The agenda stressed the important role of good governance in development¹⁹ while stating that democracy is “inherently attached to the question of governance.”²⁰ Democracy is described as the only reliable means to achieve improved governance.²¹

¹⁴ Article 9(3) of the Partnership Agreement between the States of the African, Caribbean and Pacific group of States on the one part, and the European Community and its member States on the another part, available at:

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

¹⁵ See Christoph Möllers, European Governance: Meaning and Value of a concept in Common Market Law Review 6/2006, pp. 313-336.

¹⁶ European Commission, European Governance – a White Paper, 25 July 2001, COM(2001) 428 final, p. 10, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf (last visited on 5 September 2008).

¹⁷ <http://web.cor.europa.eu/epp/Ourviews/Documents/White%20Paper%20on%20MLG.pdf> (last visited on 28 March 2011).

¹⁸ UN General Assembly Resolution A/63/L.12 of 29 October 2008, paragraph 7.

¹⁹ An Agenda for Development, Report of the Secretary General, 6 May 1994, A/48/935, paragraph 125; available at: <http://www.globalpolicy.org/reform/initiatives/ghali/1994/0506development.htm> (last visited on 28 August 2008).

²⁰ Id. at paragraph 120.

²¹ Id. at paragraph 128.

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

“In particular however, it means the design and pursuit of a comprehensive national strategy for development. It means ensuring the capacity, reliability and integrity of the core institutions of the modern State. It means improving the ability of government to carry out governmental policies and functions, including the management of implementation systems. It means accountability for actions and transparency in decision-making.”²²

28. The Agenda for Development resulted in General Assembly Resolution 49/126, which took note of the Secretary General’s report and put the item “Agenda for development” on the provisional agenda for its fiftieth session.²³ However, no further action was taken by the General Assembly.²⁴

c) The United Nations Millennium Declaration

29. The Millennium Declaration was adopted by the General Assembly in 2000 to reaffirm the organisation’s role in the new millennium. It mentioned good governance in connection with the eradication of poverty, stressing that its success depended on good governance at the national and the international level.²⁵ Good Governance was also mentioned in the title of Part V called “Human rights, democracy and good governance”, but was not dealt with in the substantial text. The term “good governance” was not defined in any part of the declaration.

d) The United Nations Commission on Human Rights

30. In 2000, 2003 and 2004 the Commission stated that the foundation of good governance is “transparent, responsible, accountable, and participatory government, responsive to the needs and aspirations of the people”. The Commission noted, however, that good governance practices may vary from society to society and that determining and implementing such practices rests with the States concerned.²⁶

e) The United Nations Development Program (UNDP)

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

“Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.”²⁷

²² Id. at paragraph 126.

²³ Resolution adopted by the General Assembly on 20 January 1995, A/RES/49/126.

²⁴ Beate Rudolf, “Is ‘Good Governance’ a Norm of International Law?”, in: Common Values in International Law: Essays in honour of Christian Tomuschat, Pierre-Marie Dupuy et al. (editors), 2006, p. 1010.

²⁵ The United Nations Millennium Declaration, Resolution adopted by the General Assembly on 18 September 2000, A/RES/55/2, paragraph 13.

²⁶ The role of good governance in the promotion of human rights, Commission on Human Rights Resolutions 2000/64, 2003/65 and 2004/70.

²⁷ UNDP, Good Governance – and sustainable human development, available at: <http://mirror.undp.org/magnet/policy/chapter1.htm> (last visited on 28 August 2008).

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

32. The “Brussels Declaration” adopted at this conference in May 2001 considered that good governance at the national and international level was a means to achieve the eradication of poverty. The rule of law, respect for human rights and the promotion of democracy were listed as other means figuring alongside good governance.²⁸ This was repeated in the “Brussels Programme of Action for the Least Developed Countries” adopted on the last day of the conference.²⁹

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

33. The International Conference on Financing for Development in Monterrey in March 2002 was the first United Nations-hosted conference on key financial and development issues.³⁰ In the “Monterrey Consensus” the States committed themselves to good governance in order to achieve, among others, the goals set in the Millennium Declaration.³¹ However, no definition of good governance was provided.

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

34. This plan of September 2002 stressed once again the importance of good governance at the national and international level for sustainable development.³² The need for respect for human rights and democracy figured alongside good governance.³³

i) UNESCAP United Nations Economic and Social Commission for Asia and the Pacific

35. In 2009 UNESCAP, which inter alia monitors progress of, and provides advice to, countries pursuing the UN Millennium Development Goals, produced a paper on “What is good governance”, in which it identified the major characteristics of good governance: it is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.³⁴

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

²⁹ Brussels Programme of Action for the Least Developed Countries for the Decade 2001–2010, A/CONF.191/11, paragraph 25, available at: <http://www.un-documents.net/ac191-11.htm> (last visited on 28 August 2008).

³⁰ <http://www.un.org/esa/ffd/ffdconf/> (last visited on 5 September 2008).

³¹ Monterrey Consensus adopted at the International Conference for Financing for Development, A/CONF.198/3, annex, point 4, available at:

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

³² The Plan of Implementation of the World Summit on Sustainable Development, paragraphs. 4,138 and 141, available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (last visited on 28 August 2008).

³³ Id. at paragraph 62.

³⁴ <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.pdf>

36. UNESCAP describes the cornerstones of good governance as follows:

- Participation

Participation by both men and women is a key cornerstone of good governance. Participation could be either direct or through legitimate intermediate institutions or representatives. It is important to point out that representative democracy does not necessarily mean that the concerns of the most vulnerable in society would be taken into consideration in decision making. Participation needs to be informed and organized. This means freedom of association and expression on the one hand and an organized civil society on the other hand.

- Rule of law

Good governance requires fair legal frameworks that are enforced impartially. It also requires full protection of human rights, particularly those of minorities. Impartial enforcement of laws requires an independent judiciary and an impartial and incorruptible police force.

- Transparency

Transparency means that decisions taken and their enforcement are done in a manner that follows rules and regulations. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media.

- Responsiveness

Good governance requires that institutions and processes try to serve all stakeholders within a reasonable timeframe.

- Consensus oriented

There are several actors and as many view points in a given society. Good governance requires mediation of the different interests in society to reach a broad consensus in society on what is in the best interest of the whole community and how this can be achieved. It also requires a broad and long-term perspective on what is needed for sustainable human development and how to achieve the goals of such development. This can only result from an understanding of the historical, cultural and social contexts of a given society or community.

- Equity and inclusiveness

A society's well being depends on ensuring that all its members feel that they have a stake in it and do not feel excluded from the mainstream of society. This requires all groups, but particularly the most vulnerable, have opportunities to improve or maintain their well being.

- Effectiveness and efficiency

Good governance means that processes and institutions produce results that meet the needs of society while making the best use of resources at their disposal. The concept of efficiency in the context of good governance also covers the sustainable use of natural resources and the protection of the environment.

- Accountability

Accountability is a key requirement of good governance. Not only governmental institutions but also the private sector and civil society organizations must be accountable to the public and to their institutional stakeholders. Who is accountable to whom varies depending on whether decisions or actions taken are internal or external to an organization or institution. In general an organization or an institution is accountable to those who will be affected by its decisions or actions. Accountability cannot be enforced without transparency and the rule of law.

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

37. The OECD lists the principles of good governance as follows: respect for the rule of law; openness, transparency and accountability to democratic institutions; fairness and equity in dealings with citizens, including mechanisms for consultation and participation; efficient, effective services; clear, transparent and applicable laws and regulations; consistency and coherence in policy formation; and high standards of ethical behaviour.³⁵

E. The World Bank

38. In 1989 the World Bank identified “bad governance” as the main obstacle to development, describing “bad governance” as the absence of accountability, transparency and efficient administration combined with corruption in respect of financial spending.³⁶

39. In 1992 the World Bank defined “governance” as “the manner in which power is exercised in the management of a country’s economic and social resources for development”.³⁷

40. In 2007, in the context of the bank’s 2007 governance and anticorruption strategy, the World Bank defined governance as “the manner in which public officials and institutions acquire and exercise the authority to shape public policy and provide public goods and service”.³⁸

41. When granting a loan the World Bank may only take into account economic factors; the consideration of political factors is expressly excluded.³⁹

F. The International Monetary Fund (IMF)

42. The IMF places good governance next to combating corruption as outlined in its 1997 “Guide on the IMF’s Approach to Good Governance and Combating Corruption” and the term

³⁵ OECD: Public Governance and Management, available at:

http://www.oecd.org/about/0,3347,en_2649_37405_1_1_1_1_37405,00.html (last visited on 28 August 2008).

³⁶ Beate Rudolf, “Is ‘Good Governance’ a Norm of International Law?”, in: Common Values in International Law: Essays in honour of Christian Tomuschat, Pierre-Marie Dupuy et al. (editors), 2006, p. 1009.

³⁷ Governance Indicators: Where Are We, Where Should We Be Going? Policy Research Working Paper 4730, Daniel Kaufmann, Aart Kraay, p. 4, available at:

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

³⁸ Id.

³⁹ Article IV section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD).

has a purely economic meaning. It encompasses the transparency and accountability of public resource management and the financial sector.⁴⁰

G. The African Development Bank

43. In its policy paper on good governance of March 2001 the African Development Bank named five elements of good governance: Accountability, Transparency, Combating corruption, Participation and Legal and Judicial Reform. The Bank stated that “good governance is a necessary condition for the success of the bank’s core interventions to promote economic and social development in its regional member countries”.⁴¹

H. The Inter-American Development Bank

44. In a strategy document of July 2003 the Inter-American Development Bank viewed the requirements of (democratic) governance in light of the general goals of sustainable growth and poverty reduction and focused mainly on strengthening democracy, the rule of law and justice reform.⁴²

I. The Asian Development Bank

45. The Asian Development Bank identifies four elements of good governance: accountability, participation, predictability and transparency.⁴³ Accountability is described as public officials’ responsibility for their behaviour, but also the measuring of their performance. Participation means that people have access to the institutions that promote development, thus participating actively in economic life. Predictability refers to the existence of laws, regulations and policies and their fair and consistent application. Transparency refers to the availability of information to the public and clarity about government rules, regulations and decisions. It is therefore linked to predictability.⁴⁴

IV. Good administration at the international level

A. The Council of Europe

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

⁴⁰ The IMF and good governance – a fact sheet (May 2008):

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

⁴¹ African Development Bank, Operational Guidelines for Bank Group Policy on Good Governance, II., 2.1, March 2001, available at:

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

⁴² Inter-American Development Bank, Modernization of the State (Strategy Document), 4.7, July 2003, available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1441783> (last visited on 28 August 2008).

⁴³ <http://www.adb.org/Documents/Policies/Strategy2020/Strategy2020-print.pdf> (last visited on 28 August 2008).

⁴⁴ <http://www.adb.org/Documents/Policies/Governance/gov310.asp?p=policies> (last visited on 28 August 2008).

Automatic Processing of Personal Data, further contribute to the codification of certain aspects of the right to good administration.

47. The Committee of Ministers of the Council of Europe adopted a number of recommendations related to some aspects of the right to good administration, such as: exercise of discretionary powers by administrative authorities,⁴⁵ access to information held by public authorities,⁴⁶ public liability,⁴⁷ administrative procedures affecting a large number of persons⁴⁸ and communication to third parties of personal data held by public bodies.⁴⁹

48. Drawing on these recommendations, the Committee of Ministers recently adopted a far more comprehensive recommendation on good administration.⁵⁰ In doing so, the Committee of Ministers had regard to Recommendation 1615(2003) of the Parliamentary Assembly, which called on the Committee of Ministers to draft a model text for a basic individual right to good administration and a single, comprehensive, consolidated model code of good administration in order to define the basic right to good administration and, therefore, facilitate its effective implementation in practice. The proclaimed intention is therefore to combine the various recognised rights with regard to the public authorities into a right to good administration and to clarify its content.

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

B. The European Union

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

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

2. This right includes:

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

(b) 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;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union 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.

⁴⁵ Recommendation No. R (80)2 of 11 March 1980.

⁴⁶ Recommendation No. R (81)19 of 25 November 1981.

⁴⁷ Recommendation No. R (84)15 of 18 September 1984.

⁴⁸ Recommendation No. R (87)16 of 17 September 1987.

⁴⁹ Recommendation No. R (91)10 of 9 September 1991.

⁵⁰ Recommendation CM/Rec(2007)7 of 20 June 2007 on good administration.

*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.*⁵¹

51. The adoption of this provision may be seen as a decisive step in the codification of a right to good administration towards the institutions of the EU. It applies not only to EU citizens, but to every person coming into contact with these institutions. The principle of good administration was originated by the case-law of the Court of Justice of the European Communities and the Court of First Instance.⁵² Good administration is based on the existence of a Union governed by the rule of law. The right to good administration arises from a concern for equal treatment, in accordance with the case-law of the Court, and with the right to an effective remedy (Article 47 of the Charter) as well as rights which go with it (right to be heard and right to access one's own file). The EU institutions' obligations arise from the provisions of the Treaties: the general obligation to give reasons for decisions (Article 296 TFEU), making good of damages (Article 340 TFEU) and the possibility of communicating with the institutions of the EU in one of the languages of the Treaty (Article 24 TFEU).

52. The European Code of Good Administration Behaviour,⁵³ which consists of 27 Articles, is a non-legally binding instrument, drafted by the European Ombudsman and approved, with some amendments, by the European Parliament in its Resolution of 6 September 2001. This approval gives a strong legitimacy to the principles contained therein, which can subsequently be considered as applicable to all Union institutions and bodies. The Code contains detailed rules implementing the general principle set out in Article 41 of the Charter, originally proclaimed in 2000. At present, there are at the EU institutions' level the Code of Good Administrative Behaviour and a number of individual codes which the EU institutions, bodies and decentralised agencies have all adopted with various forms and content, some of which are textually the same as the European Code of Good Administrative Behaviour.

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

V. "Good governance" at the national level

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

⁵¹ Article 41 of the Charter of Fundamental Rights of the European Union, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:En:PDF> (last visited on 6 April 2011).

⁵² See CJCE judgment of 31 March 1992, Burban, case C-255/90; CJCE judgment of 15 October 1987, Heylens, case C-222/86; CJCE judgment of 18 October 1989, Orken, case 374/87; Court of First Instance judgments of 18 September 1995, case T-167/94 Nölle [1995] ECR II-2589, and 9 July 1999, case T-231/97 New Europe Consulting and others [1999] ECR II-2403.

⁵³ The code is available at <http://www.ombudsman.europa.eu/resources/code.faces>.

A. Constitutions

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

B. Legislation

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

a) The Netherlands

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

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

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

58. Sections 33 of the Pension Act and 42 of the Pension Fund (Obligatory Participation) Act provide in the first paragraph that a pension scheme administrator must organise him-/ herself in such a way that good governance is guaranteed, which means in any case that a) he/she is accountable to those who may claim a pension or who are eligible for a pension and to employers, and b) that internal supervision is provided for. The second paragraphs of these sections provide for a legal basis for supplementary legislation.

b) Latvia

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

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

C. Case-law

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

a) Albania

61. The Constitutional Court of Albania held that the administration of local territories is an important aspect of good governance, and this includes planning matters, urban management and territorial control.⁵⁴

b) Latvia

62. The Constitutional Court of Latvia held that the principle of good governance may be derived from Articles 1⁵⁵ and 89⁵⁶ of the Constitution. According to the Court it includes *inter alia* the termination of proceedings within a reasonable time and the respect of provisions protecting human rights.⁵⁷

63. In another judgment the Constitutional Court derived the principle of good governance from Article 89 of the Constitution taken together with Section 10(5) of the State Administration Structure Law. It interpreted those provisions as entailing the State's duty to simplify, improve and efficiently organise procedures.⁵⁸

c) The Netherlands

64. Dutch courts have held in the context of administrative proceedings that it was incompatible with the principles of good governance to deviate from policy rules set by the Government in circulars.⁵⁹

VI. "Good administration" at the national level

65. In contrast with good governance, good administration is a concept which is far more used at the national level. Admittedly, only one State has explicitly enshrined good administration in its Constitution.⁶⁰ The requirements of a right to good administration, however, stem from the fundamental principles of the rule of law, such as those of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy and transparency. Today, these principles are already reflected in the constitutions of nearly all European States, which means that interpreting them in combination with each other point to a general requirement of good administration. Consequently, a right to good administration has been recognised in many states by legislation, the judiciary and the legal doctrine. Indeed national case-law frequently deals with alleged violations of the right to good administration as such or, at least, of the various procedural rights which compose it,⁶¹ even those states which have not formally acknowledged a right to good administration.

⁵⁴ Judgment of the Constitutional Court of Albania, 2 February 2009, ALB-2009-3-001

⁵⁵ "Latvia is an independent democratic republic."

⁵⁶ "The State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia".

⁵⁷ Judgment of the Constitutional Court of Latvia, 25 March 2003, paragraph 6, LAT-2003-1-04 (CODICES).

⁵⁸ Judgment of the Constitutional Court of Latvia, 6 April 2005, paragraph 9.3.1., (no. 2004-21-01).

⁵⁹ See the following judgments of the European Court of Human Rights: Ahmut v. The Netherlands, application no. 21702/93, judgment of 28 November 1996, paragraph 35; Nsona v. The Netherlands, application no. 23366/94, judgment of 28 November 1996, paragraph 49.

⁶⁰ This is notably the case of Article 21 of the Constitution of Finland.

⁶¹ For example, the Supreme Court of Estonia held that a right to good administration could be inferred from Article 14 of the Constitution taken together with the principles of administrative law in the European legal space. According to the Court those principles are: legal certainty, legitimate expectation, proportionality, non-

VII. Conclusions

66. As the use of the notion "good governance" at the international and the national level shows, the exact content of this notion remains, at least in some elements, vague and there is only consensus on a definition concerning some key elements, such as transparency and accountability. Even among the bodies of the Council of Europe, there is a different understanding of the concept of "good governance".

67. While the concept of good governance was first used in legal documents by the World Bank at the end of the 1990s and was in that context largely inspired by economic considerations, it has since been borrowed by a range of other international organisations, which have included new elements in it. It is, however, striking that good governance has almost never been used in domestic legal orders, be it the constitutional or legislative level or even in case-law. This bears witness to its non legal-nature and to the fact that it was originally aimed at monitoring from outside, i.e. without a direct involvement of those concerned in the country.

68. Good governance, which is considered to encompass good administration, contains a multitude of elements, often including:

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

discrimination, right to be heard, right to a decision in reasonable time, effectiveness and efficiency. It took also recourse to Article 21(2) of the Finnish constitution, Article 31(2) of the Spanish constitution and Article 41 of the Charter of Fundamental Rights of the European Union. The Court considered the right to good administration to be a fundamental right (Judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003, paragraphs 14-16, EST-2003-2-002 (CODICES). In another judgment, the Supreme Court of Estonia held that the fact that the procedure for the implementation of a substantive obligation had not been supplemented by a procedure allowing for somebody to be coerced into fulfilling the obligation did not give rise to a breach of the right to good administration (judgment of the Constitutional Review Chamber of the Supreme Court of 20 October 2009, EST-2010-1-002). See also the case of Poland, where the Constitutional Tribunal held that the duties of organs of public authority creating the fundament and standard of "good administration" stem from the constitutional rule of law and the principle of legality. However, it does not mean that the individual has the constitutional right to good administration understood as given procedural rights making administrative proceedings similar to court proceedings, in which an individual has wide guarantees (Judgment of the Polish Constitutional Tribunal of 12 March 2007, ref. No. K 54/05). In a number of judgments, the Constitutional Court of Belgium make reference to the principle of good administration in combination with the principle of equality and non-discrimination.

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

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

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

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

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

73. In recent years, new instruments have contributed to the codification of good administration both in the EU and in the Council of Europe. National legislation and case-law have also confirmed this development.

74. Good administration is recognised as a legal principle and even as a right in many contexts. The right to good administration should, however, not be seen as an enforceable right itself since it needs to be specified in a set of rights and obligations that are more concrete. It is only these that have the character of individual rights that every person may claim from the administration.

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

76. In view of the foregoing, the Venice Commission considers that the concept of good governance can offer some guidance especially for States in a transition process provided it is not used to weaken key requirements in terms of democracy, rule of law and human rights. In that sense, good governance can only exist in societies where democratic institutions and

processes including transparency and accountability prevail, and where the authorities respect and comply with the full range of human rights. The lack of consensus of the exact content of the concept of good governance including within the Council of Europe, combined with its non-legal nature and quasi-absence at the domestic level, makes it however difficult to turn it into a workable principle.

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

ANNEX I**HUMAN RIGHTS REQUIREMENTS TO GOOD GOVERNANCE**

**A note by Asbjørn EIDE
Professor emeritus, Norwegian Centre for Human Rights**

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

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

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

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

Wherever there is a right, there must be a duty-holder. Under human rights law the state has the primary responsibility for the implementation of human rights.. Governance must therefore be so constructed as to obtain the optimal realization of human rights for all under the jurisdiction of the state. Additionally, governance should also be such that it facilitates the co-operation by states in respecting, promoting and protecting human rights in other countries and thus in the world community as a whole, as reflected i.a. in the passage quoted above from the Cotonou Partnership Agreement between the States of African, Caribbean and Pacific Group and the European Community, adopted in 2000.

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

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

Institutional requirements

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

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

Requirements of participation

Human rights contain requirements of participation in the exercise of public power at the legislative and the executive branch. The core provisions are found in UDHR Article 21 and ICCPR Article 25, and (with less elaboration) in Protocol 1 Article 3 of ECHR. These provisions are built on the principle of inclusive, popular sovereignty. It is not intended in this Chapter to discuss in general the scope of the right to participation as set out or implicit in international human rights law, but a good reference can be found in a resolution of the United Nations Commission on Human Rights at its 55th session in 1999 which proclaimed a right to democracy as part of human rights, and pointed out that 'the rights of democratic governance include, inter alia, the following: (a) The rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) The right to freedom to seek, receive and impart information and ideas through any media; (c) The rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; (d) The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) The right of political participation, including equal opportunity for all citizens to become candidates; (f) Transparent and accountable government institutions; (g) The right of citizens to choose their governmental system through constitutional or other democratic means; (h) The right to equal access to public service in one's own country; (Commission on Human Rights resolution 1999/57, op.para.2)

The Commission also noted, in the same resolution, that the realization of all human rights - civil, cultural, economic, political and social, including the right to development - are indispensable to human dignity and the full development of human potential and are also integral to democratic society (op. cit. para. 3).

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

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

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

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

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

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

States have also obligations to fulfil the rights of everyone, particularly under economic, social and cultural rights, by way of facilitation or direct provision. The duty to facilitate takes many forms, some of which are spelled out in the relevant instruments. As an example, we can refer to the European Social Charter Article 1 (concerning the right to work) para. 3, whereby states undertake to establish or maintain free employment services for all workers, and under para. 4, to provide or promote appropriate vocational guidance, training and rehabilitation. The implementation of such obligations facilitates the opportunities of the individual to obtain a work freely chosen or accepted.

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

Conclusion.

While it is not the purpose of this note to suggest an exact definition of good governance, the following elements should be included: Good governance exist in societies where democratic institutions and processes including transparency and accountability prevail, and where the authorities respect and comply with the full range of human rights.

ANNEX II

THE CONCEPT OF GOOD GOVERNANCE

Observations by Ms Gret HALLER (Member, Switzerland)

I. Introduction

1. At its 76th Plenary Session, the Commission discussed the draft Report on the concept of good governance (CDL(2008)091 – hereafter “the Report”). Given the lack of time for an extended debate, the Commission members were invited to make succinct statements and to submit written opinions, if they so wished.

2. The present opinion concentrates on the linkage between governance and democracy. It reaches the conclusion that we must scrutinise the expediency of introducing or implementing the good governance concept in internal relations among states because of this concept’s major potential for downgrading democratic standards.

3. This opinion concentrates exclusively on the concept of good governance, even though the introduction to the Report mentions basic documents concerning the difference between good governance and good administration. The latter, namely good administration, is only addressed when elements of both concepts are compared, so that the principal subject of the Report is good governance.

II. Human rights and democracy

4. The first section of the draft Report recapitulates the different uses of the governance concept at the international and national levels. The final part (V) adds the element of human rights to the good governance concept. There is, however, another element that must be linked up with the concept of good governance, namely the democracy concept. We cannot presume that democratic requirements are inherent in the human rights element. The existence of a “human right to democracy” is not unchallenged, and different theories posit that this right must be either completely accepted or rejected out of hand. We shall not go into these theories here.

5. We shall instead endeavour to shed adequate light on the linkage between the concepts of good governance and democracy in order to ascertain how the former concept can be exploited, and to highlight the possible dangers of using it. We shall first of all leave aside the concept of “good governance” and simply refer to “governance”. Although the linkage with democracy is explained in the Report (para. 51), the explanation concentrates on the additional element of human rights.

III. Origin of the governance concept

6. As the Report explains, the governance concept was first developed by the World Bank with a view to finding criteria applicable to the granting of loans. Now that other international organisations have adopted this concept, it is important not to lose sight of the context in which it first emerged.

1. Elements of good governance

7. We shall begin by taking stock of a selection of components of this concept which are important, to varying degrees, for democracy. These are merely presented as examples rather than constituting an exhaustive list.

a) External perspective

8. Basically, the criteria for governance are based on an exclusively external perspective, observing and assessing from the outside. This external perspective of the governance concept is particularly important in terms of the relationship between this concept and that of democracy. Originally, democracy was the exercise of sovereignty by those subject to such sovereignty, which means that democracy embodies the internal perspective. This is an inherent source of tension between democracy and governance.

9. This was why the World Bank devised the artificial notion of governance rather than government. Using the government concept would have been seen as tantamount to interfering in the sovereignty of the states in question. Certain conditions had nevertheless to be imposed on states, including rules on the requisite conduct by the national executive. By using the concept of governance in this case, the World Bank was resorting to a category which was not different from that of government; it designated government without wielding the concept of government. Although the effectiveness of the political institutions was assessed from a purely economic angle, this had potential consequences for the constitutional systems of the states concerned.

b) Informality

10. Since the World Bank has no brief for formal intervention in the states under observation, it has had to devise methods of exerting informal influence. The structures of governance exert an informal influence rather than a formal power. They do not install any formal hierarchy in the form of hard law, but act through soft law. And yet this influence was not meant to be any weaker than formal influence and, like the latter, it could have visible effects on hierarchies. The exertion of influence was based on a combination of a political power that was not legally formalised and a rational (economic) plausibility which was supposed to lead the state concerned to approve, as appropriate, the highly detailed proposals included in the loan contracts.

c) Participation of private operators

11. Under the governance concept, governments were involved on an equal footing alongside other private operators in the countries in question. The governments had no special place in this system but were considered as a mere node in the network, on an equal footing with the other players. The participation of civil society was taken as an initial postulate on the same basis as dialogue with the relevant partners, the aim being to secure the participation of all the milieus concerned. So, in addition to the sovereignty issue there was the additional matter of divergent trends in the conception of democracy. One question that arose fairly early on was that of private players (individuals representing economic or non-economic interests) attempting to claim democratic representative status.

d) Asymmetrical responsibilities

12. Subsequently, the governance concept was further developed with a view to exerting influence inside states vis-à-vis very specific fields of distinct economic importance. From this angle, the functioning of the political community was laid to one side to the extent that it was deemed to play no role in the economy. Yet governments shoulder general responsibility for all political domains, even those which have no predominantly economic role to play. The implementation of the governance concept produced a dichotomy between the action and the responsibility for the action. It created an asymmetrical apportionment of competences in which national governments were responsible for striking a balance among various individual

interests, whereas some of these interests had powerful spokespersons, via the action of the World Bank, who set limits on the exercise of the government's responsibilities.

e) Output rationale

13. The governance concept as devised by the World Bank is based on a very particular view of public institutions and of the state in particular, ie it is based on an output rationale. Evaluations must attain measurable results. However, only the output of an organisation and its activity were considered measurable. This criterion, which was developed in the context of studying institutions from the economics angle, starting with private-sector institutions before moving on to the public institutions, is exclusively based on the economic rationale, as the World Bank itself explicitly stated (see para. 30 of the Report).

2. Relationship with the democracy concept

14. The World Bank devised the governance concept partly in order to help those states which has not yet established differentiated institutions. The creation of institutions should reinforce democracy, but it cannot be based on processes which are already functioning in a fully democratic manner.

15. The fact is that the governance concept devised by the World Bank has largely overlooked, and indeed curbed, some important aspects of democracy, a fact which was only possible using the external approach mentioned above. The informality of the influence exerted from the outside prevented any democratic influence in internal relations. Whole swathes of legislation were transferred from the public sphere, where democratic influence is possible, to the private contractual area: the combination of a legally non-formalised political power with a form of economic plausibility was to lead governments into contractual channels, even in the face of a possible democratically based opposition.

16. The weakening of democratic influence was also facilitated by the revaluation of private players. Asymmetrical responsibilities helped restrict the governments' capacity for conducting their work of balancing individual interests, which is tantamount to restricting the democratic side of things.

17. Lastly, the fact that the concept of basing good governance on an output rationale very clearly illustrates the uneasy linkage between democracy and good governance. When evaluations are based on output criteria, these criteria legitimate legislation which is virtually impossible to oppose by democratic means. "Statistical objectivity" precludes the public debate on the proposed legislation which is necessary for the exercise of democracy.

18. The OECD's PISA studies provide a good example of this phenomenon in the European context: the conclusions which are drawn generally concern laws and other lower-level legislative texts relating to education policy. However, the constitutional system, and particularly the attribution of competences, have also felt the effects of the result-oriented influence exerted by the World Bank in the states being evaluated, whereby the informality and exteriority of this intervention impedes any democratic supervision of these matters.

IV. Developing different governance concepts

19. As the Report explains, the governance concept devised by the World Bank has long since been adopted by other international organisations and players, which have tailored it to their needs. In particular, many attempts have been made to modify this concept by explicitly incorporating the democratic aspect, as shown by the many examples set out in Chapter II of the Report. Nevertheless, the governance concept is currently always used in its original form, which takes insufficient account of the democratic aspect.

1. The EU governance concept

20. The governance concept used by the EU (as mentioned in paras. 12 ff. of the Report) was not devised with the Member States in mind, but rather was intended for institutionalised procedures which have no direct parallel in the Member States. The governance concept referred in particular to the action of the European Commission, which is in fact governmental action since it consists in defining the major policy thrusts, despite having no democratic basis.

21. The only parallel with the World Bank approach is that the “government” concept was avoided because it would have raised the question of Member State sovereignty. Otherwise, the context is the exact opposite of that in which the World Bank devised the concept.

22. Where the World Bank’s concept of governance is concerned, we have already described the process by which whole swathes of legislation were removed from the democratically influenced public sphere to be absorbed into the private contractual area. Although this phenomenon of excluding whole swathes of legislation from the national democratically influenced public sphere can happen in EU Member States, the context is very different. For one thing, Member States have highly developed democratic structures which are empowered, at the domestic level, to effect democratic supervision of government action and Community-level administration. But the fact is that the EU governance concept is just not incompatible with such supervision.

23. Secondly, there is heavy pressure to broaden the competences of the European Parliament. Some of its powers have in fact been extended since the adoption of the White Paper on European Governance, and the entry into force of the European Constitution has apparently reinforced them. Again, the EU governance concept is not incompatible with such a process.

24. Basically, therefore, the governance concept as devised by the EU is tending to approximate to the traditional concept of governmental action subject to democratic supervision, even if this approximation process is very slow (see Christoph Möllers, *European Governance: Meaning and Value of a Concept*, *Common Market Law Review* 6/2006, pp. 313-336).

2. Governance concepts as applied to transnational juridicisation

25. Transnational juridicisation, a phenomenon which can no longer be ignored today, covers a wide spectrum. Inter-state treaties have established formal international or supranational law, which is being further developed by the international organisations and agencies. Transnational juridicisation also derives from the work of the international courts of law and arbitration, as well as from informal agreements concluded by groups of experts. Lastly, international juridicisation is being fuelled by inter-personal agreements, which may be drawn up in co-operation with experts appointed by international bodies (to quote just the more important examples). Transnational juridicisation is a precondition for global governance, but it is also the result of the process designated by the global governance concept.

26. Unlike the governance concepts developed by the World Bank and the European Union, governance in the transnational context is not tantamount to government. As compared with the criteria set out by the World Bank when it originally devised the concept, it lacks the dimension of a purely external perspective. This aspect is not, however, completely absent: when the international communities talk about governance, they adhere to their rationale of institutionalising structures in order to secure an outside assessment of their own performances or those of other states.

27. The involvement of private players is a further characteristic of governance structures in the transnational juridicisation context. This presents an enormous risk of private players securing democratic representative status. In the young democracies and states which are still creating their democratic institutions, asymmetrical responsibilities are heightened in the context of transnational juridicisation: these states do not have sufficiently sound democratic foundations to counter the pressure exerted, informally but nonetheless vigorously, from the outside with their own internal pressure. Lastly, the central importance ascribed to output also plays a role in the transnational juridicisation process, as shown by the criteria applied by the WTO or the OECD, for instance.

28. The informality which pervades the governance concepts used in the transnational juridicisation process is the main source of the problems, as we shall see from a number of examples. The European Union never used to have jurisdiction for standardising university diplomas, and so the experts delegated by the European states to represent them in the Bologna process concluded an informal agreement on standardisation, thus partially bypassing the democratic opinion-forming process. The UN is not empowered to prosecute persons suspected of complicity in terrorism, and it therefore includes their names on informal lists which are circulated to Member States. As a final example, noting their lack of formal competences, the national authorities responsible for supervising banks have been meeting for years within a transnational co-ordinating body which has never actually been democratically approved.

3. The concept of democratic governance

29. In the context of the efforts to democratise the governance concept, we sometimes hear of an “emerging right to democratic governance”. As mentioned above, we cannot go into the question here whether or not it would be advisable to define the concept of democratic governance in the form of a fundamental right. However, the very concept of democratic governance is disputed. Its supporters see it as an opportunity for developing democratic processes worldwide, whereas its detractors highlight the anti-democratic elements which have been inherent in this concept ever since its emergence and which they consider cannot be offset by granting it new democratic attributes.

30. When we consider the concept of “democratic governance”, we must also ask ourselves why we do not simply use the concept of “democracy”. In other words, what is the difference between democratic governance and democracy? We have seen how different players have used the concept of governance to avoid using that of government because it would have raised tricky questions about state or member state sovereignty. The government concept is bound up with state sovereignty, and in democratic states, with the sovereignty of the people. If governance is a kind of “government without sovereignty”, it can never be associated with the people’s sovereignty. Under these circumstances, we must be wary of appending the adjective “democratic” to the governance concept.

V. Good governance and democracy

31. As the Report clearly states, the concept of “good governance” is impossible to define. This fact is illustrated by the number of concepts listed in the report, the list being far from exhaustive. A legal comparison of this concept with that of democracy brings in the concept of democracy understood as the exercise of sovereignty by those who are subject to it. In this connection, the expression “good governance” raises, *per se*, the question of what “good” actually means.

1. How can we define what is “good”?

32. For centuries, indeed millennia, people have been arguing about such concepts as “living well” and “the public good”. With the advent of democratic debate, we realised that we had to regularly redefine, as an ongoing, open and democratic process, what could be described as “good” in the *res publica*.

33. Conversely, the concept of good governance would seem to be based on an *a priori* clear conception of what is good: this conception gives rise to a consensus which is shielded from the democratic debate and is therefore pre-political. However, any pre-political conception actually negates the democratic element.

2. Compensatory function

34. To that extent, the fact of defining good governance by means of such concepts as openness, participation, responsibility, efficacy and coherency (as in the EU White Paper on European governance, see para. 16 of the Report) has a compensatory function. The definition may indicate how democratic processes should be managed or highlight elements to which particular attention must be paid in setting up democratic institutions. However, it can never replace the democratic processes themselves. The 2005 Warsaw Summit took account of this fact by dealing with democracy and good governance separately (para. 5 of the Report).

35. This can be illustrated by the example of the participation concept. Participating means taking part in the debate but not in the decision-making. The right to take part in the debate can be granted to a wide variety of players. Deliberation processes can be enlarged at will in order to ensure a hearing for extremely varied interests, even mutually antagonistic ones. However, if no formal decision is taken with the participation of those involved in the deliberation, it is not a democratic process. There can no more be deliberation without democracy than democracy without deliberation.

3. Conclusion

36. Governance structures are indispensable in the transnational context, for without them no progress can be made in juridicising certain fields. Clearly, many future problems will be insoluble without transnational legal structures. However, even if we work with governance concepts and structures and ensure ongoing progress in such concepts and structures, the democracy question must always remain open.

37. Governance concepts are quite possibly inaccessible to democratisation beyond this opening to participation and deliberation. Democracy is a promise whose achievement is a hard-won conquest. It is particularly important that the process of conquering democracy is still wide open. We must consequently designate governance structures as what they really are, rather than presenting them as some kind of fair substitute for democratic processes.

38. The question is posed differently at the national state level. The Report shows that the concept of good governance is rarely used in national constitutions and legislations (pp 8 ff.). This is not surprising in view of the origins of the concept. For all the differences between the World Bank and EU concepts of governance, these two fundamentally different institutions have in common the fact that they have both used this governance concept, which emerged from studying the institutions from the economics angle, for the same reason, namely that the government concept would have raised issues of interference in the national sovereignty of states. Clearly, this problem does not arise in internal state relations. State sovereignty is taken for granted in such internal relations, and in democratic states it is reflected in the sovereignty of the people.

39. So we must carefully consider the advisability of introducing or implementing the good governance concept in internal state relations. Even if good governance has broken away from the concept originally devised by the World Bank, it still comprises a dimension based on informality and “output”; and the principle of involving private interests, which is always inherent in good governance, can spotlight participative deliberation as a valid substitute for democratic processes. Good governance therefore always has a potential for levelling democratic standards down.

40. The real need to devise governance structures at the transnational level has also had knock-on effects on national states. Transnational juridicisation is useful in more than one ways to the citizens of national states, but they will note that democratic supervision of this juridicisation is lagging several years, or indeed decades, behind and is developing very slowly or at a standstill in a number of fields. The further transnational juridicisation progresses, the greater this time-lag will become. Only the European Union is active enough in terms of democratising the transnational or supranational field to face up to incipient democratic erosion and to create the beginnings of a broader trend. This is a further reason for carefully weighing up the pros and cons of introducing the good governance concept into internal state relations.

VI. Implications for the Venice Commission

41. Governance is not a legal concept but an idea which emerged from studying the institutions from the economics angle. This was explicitly stated when the Report was being discussed at the 76th Plenary Session. The governance concept presupposes an institutional framework prioritising specific modes of organisation. Since it is not a legal concept, the Commission might opt for declaring that it has no remit for considering this problem, at least not directly. However, depending on how it is conceived, the governance concept may impact on the conception of administrative structures, on the extent of the influence that can be exerted through the democratic processes and, therefore, on the national constitutional systems. All these questions are central to the Commission’s field of activities.

42. We might discuss the need for the Commission to pronounce on the good governance concept. If it decides to do so, however, its specific commitment to “democracy through law” will require it to highlight the dangers of the levelling down of democratic standards inherent in this concept.