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**GOOD GOVERNANCE**

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## GOOD GOVERNANCE

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### 1 Introduction

This issue of the Potchefstroom Electronic Law Journal (PELJ) is entirely dedicated to the concept of good governance. It is the outcome of the first Summer/Winter school on Good Governance which was held at North-West University, Potchefstroom (SA) in January 2006 and at Tilburg University, Tilburg (NL) in January 2007. This Summer/Winter school has now become a yearly event with a bi-annual theme. Academic staff from both universities collaborate in teaching this course. Students from the two universities who participate in the Summer/Winter school have the unique possibility to deepen their knowledge on a particular subject while enjoying a cross-cultural learning environment. The subject of good governance was not selected by chance but was chosen because of its impact in many fields and the many ways in which the concept is used. It was time for a deeper insight into this multiple role of the concept of good governance. The contributions to this journal are the analytical outcome of the research done in preparation for the lectures given during the Summer/Winter school. As the contributions directly apply the good governance concept to various specific fields of expertise, this introduction will be used to give a short reflection on the concept as such.

### 2 The concept of 'good governance' at a glance

The concept of 'good governance' is broadly applied to international organisations, national governments and even private non-state actors as well. The content of the concept of good governance largely depends on the aims for

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which it is used; financial institutions tend to focus more on economic reforms, whereas for the more political organisations the content of the concept finds its angle in human rights law.<sup>1</sup> Within the development community a division is made between the more technical/economic interpretation of good governance and the more political/social interpretation of good governance; capacity, effectiveness and efficiency are seen as elements of the former and human rights, democracy, responsiveness and accountability elements of the latter. The question here is how these two approaches relate?

The concept of good governance was originally invented as an answer to the lack of sustainable economic growth in some areas of the world and therefore originally had a strong economic and technical aspect. It was introduced by development organisations when it was discovered that financial aid was able to balance macro-economic relations in the first instance but that it was more difficult to reach sustainable growth. It was discovered that other conditions had to be present before such growth could be established. The debate on good governance started in reaction to the inefficient and corrupt administrative structures of developing countries eligible for financial loans. Because of the weak governmental structures in these countries structural adjustment programmes of the World Bank and IMF had failed.<sup>2</sup> The World Bank report of 1989 reflected on why structural adjustment programmes had failed to create economic growth. The authors considered the economic crisis in Africa as a 'crisis of governance' – governance meaning "the manner in which power is exercised in the management of a country's economic and social resources for development". This became apparent in the following practices:

- officials serving their own interests without being held accountable;
- reliance on personal networks for survival rather than on holding the state accountable;
- personalised politics and patronage;
- illegitimate leadership;

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1 Wouters and Ryngaert Good Governance 69-70.

2 World Bank *Sub-Saharan Africa*.

- excessive control of information and of associations.

Consequently these financial institutions introduced good governance requirements as borrowing conditions. For this purpose, the concept of good governance had to be shaped in an economic fashion. The institutions further developed their comments into criteria and conditions for sustainable growth. They adopted them in the form of four principal components of governance namely: Public Sector Management, Legal Framework for Development, Accountability, and Transparency and Information.<sup>3</sup> Meanwhile, over the same period, the concept of good governance was used as a condition for investment in countries in transition to a new democratic and independent state.

Within the European Union the economic interpretation was also important. In this regard Hancher and others have identified the following principles of good market governance: transparency, accountability, proportionality, consistency, predictability, flexible powers, clear legal mandate, independence and respect for competition law and policy.<sup>4</sup>

Those who favour a more social approach to good governance state that good governance involves ideas and values about how a state should act towards individuals. In their view human rights are seen as a way to set minimum standards on how a state should govern. According to them, good governance should primarily be defined by human rights standards and only secondarily by economic and managerial criteria. This view is not new, since the early nineties already saw the term of good governance being used in relation to human rights. The Organisation for Security and Cooperation in Europe (OSCE) applies the concept of good governance in accordance with its aim which means in the sphere of post-conflict institution-building with a strong emphasis on democratic governance with full respect for civil and political rights.<sup>5</sup>

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3 Kjoer and Kinnerup Human Rights 1-18.

4 Hancher *et al* 2004 *Tijdschrift voor Economie en Management* 342 ff.

5 Wouters and Ryngaert *supra* n 1 at 76.

However, World Bank policy has made clear that the approaches to economic and to social good governance are not two entirely different worlds but two points of view that supplement each other. Despite the economic aims of the World Bank, it did not hesitate to also demand accountability, the rule of law, transparency, anticorruption and respect for human rights from the borrowing states as evident from its reports. In doing so they integrated both approaches and upgraded these aspects to become the core principles of good governance.<sup>6</sup> In this sense these principles of good governance reflect important aspects of human rights law which are and must also be applied by non-state actors.

Wouters and Ryngaert distinguish three prongs of good governance in which the developments mentioned above are reflected:

1. Good governance as the organisation of collective action through institutions defining means, aims and rules.
2. Good governance with the aim of establishing a legal order in which societal development can thrive, with a focus on human rights, the rule of law and the trias politica.
3. Introduction of corporate governance based on the idea that also citizens and large corporations govern because their decisions may affect stakeholders and the society.

Looking at these three prongs it is clear that the significance of the concept of good governance has grown and that its impact has increased and broadened to other fields.

### 3 Definitions

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<sup>6</sup> World Bank *Governance and Development*, World Bank *Governance*, World Bank *Development and Human Rights*.

The concept of good governance serves as a basket term from which you can pick and choose at will. There seem to be as many definitions of good governance as there are users of the concept. Much of the confusion about the concept stems from its usage on different levels: it is used by donors for practical purposes, it is used by academics as an analytical concept and it is used by others as a normative ideal. Yet substantively, there is a considerable overlap. To give an exhaustive overview of the many definitions of the concept here will not necessarily contribute to the understanding of the concept. However, below some descriptions of the concept at UN level will be given which seem to cover the various aspects of the concept. Furthermore, these are definitions adopted on the international level and therefore broadly applied. The UN, through the United Nations Commission for Global Governance has defined governance as:

the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interests.<sup>7</sup>

According to the Secretary General of the UN good governance means:

creating well-functioning and accountable institutions – political, juridical and administrative – that citizens regard as legitimate, through which they participate in decisions that affect their lives, and by which they are empowered. Good governance also entails a respect for human rights and the rule of law generally.<sup>8</sup>

From these definitions the core principles of good governance can be extracted namely, accountability, participation, legitimacy, rule of law, and respect for human rights. Within the EU the Commission has identified five principles of good governance namely: openness, participation, accountability, effectiveness and coherence.<sup>9</sup> A considerable overlap with the principles identified in the

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7 CGG *Our Global Neighbourhood* 2.

8 UN Doc A/53/1 par 114.

9 European Commission *European Governance. A White Paper* at 10.

definition of the SG of the UN is visible. There is at least agreement about the following core principles of good governance: transparency, accountability, participation, the rule of law, effectiveness, efficiency, proportionality, consistency and coherence. Although many definitions and interpretations of good governance exist they seem to represent the following common idea:

Good governance refers to the realization of the fundamental values of democracy, rule of law, human rights and social justice by all governmental or non-governmental authorities whose legal acts or activities affect the position of citizens in the process of the formulation, the creation and the implementation of binding and non-binding legal norms.<sup>10</sup>

#### **4 Operationalisation of the concept of good governance**

According to these core principles of good governance, the application of the concept, as well as the definition used by several organisations it seems that at least the principles of transparency, accountability and participation must be upheld before one can speak of good governance. In an attempt to give content to these principles and to get a grasp of what good governance entails for states and governments, the state obligations following from these three principles will be outlined below.<sup>11</sup>

##### **4.1 Transparency**

The principle of transparency makes the following demands of the legislator: comprehensive and clear legislation, access to documents concerning the legislative process, clear legal mandate of national administrative authorities, clear division of responsibilities. For the administrations it includes 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. It furthermore requires that decisions be clear and well reasoned, and that they

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<sup>10</sup> Lavrijssen-Heijmans "What is Good Governance?".

<sup>11</sup> This explication is based on a presentation of Lavrijssen-Heijmans *ibid.*

be public. The openness of documents also applies to policy documents, annual reports, work programs, *et cetera*.

#### **4.2 Participation**

With regard to the principle of participation a broad range of measures need to be taken before this is achieved, including, representative democracy, the right to vote and to be elected, but also deliberation with civil society and stakeholders in the establishment of laws and regulations. As regards the administration it prescribes the right of every person to be heard before any individual measure which would adversely affect him or her is taken, and, for instance, transparent stakeholder consultations in administrative rule-making procedures.

#### **4.3 Accountability**

Another important and rather new principle in the realm of good governance is the principle of accountability which includes at the least democratic control of the administration (for example attribute supervisory powers to a minister) and the right to effective legal protection. For non-state actors it includes stakeholder accountability by explaining policy-decisions, evaluating the impact of new rules and decisions and accounting for the results.

As follows from the above, when operationalising the concept of good governance many of the obligations are in fact formulated as rights for the individuals. The content of good governance seems to find its basis in human rights law. Therefore, hereafter the relationship between good governance and human rights will be touched upon briefly in order to clarify the interaction between the two.

### **5 Good governance and human rights**

The concept of human rights embodies the idea that there are fundamental principles to which the law must adhere. In this way, there is a parallel to be

drawn between the role of human rights and the ancient ideas of natural law and natural justice.<sup>12</sup>

Human rights are nowadays based on the idea that rights belong to the individuals, that some rights are inalienable and that you possess these rights because you are a human being. However, they have also developed far beyond rights of a private individual to non-interference by a public authority to also include positive obligations for the state in order to act in compliance with human rights. In the years following the adoption of the most important human rights conventions namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights these rights have become more and more important. Although initially addressed to states, they now also apply in horizontal relationships and are a source of inspiration for non-state actors who to a certain extent have to take into account applicable human rights obligations. As we have seen above, the concept of good governance has developed along comparable lines.

The concepts of good governance and human rights can be described as supplementary and in no way oppose one another.<sup>13</sup> As we have seen when operationalising the principles, the overlaps can be easily identified and it seems that these two have more similarities than generally thought, although the aims for which good governance principles are used are more diverse.

Most human rights problems today are not problems of recognition of rights, but have more to do with the difficulty of implementation of rights. Good governance can help states to respect these particular human rights obligations and can in this way be seen as a potentially enabling framework for promoting human rights. It creates an environment that is more commensurate to the implementation of human rights. Rather than considering human rights as a legal corrective to good governance policies the relationship between human rights and good governance may be seen as one affording mutual benefits, in

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12 Van Bijsterveld *Empty Throne* 248.

13 Kjoer and Kinnerup *supra* n 3 at 1-18.

which governance measures strengthen the protection and fulfilment of human rights, because principles of good governance provide a more practical tool for the application of human rights law.

Good governance consists of recommendations while human rights are rights. This means that good governance principles are formulated less pressingly and can be used in a more flexible way.

In view of the above, the different functions in the relationship between human rights and good governance are:

- Good governance as a prerequisite/condition for aid and assistance.
- Good governance as guidance for the execution of Human Rights. Through the principles of good governance the human rights can be made concrete.
- Good governance as a preventive mechanism for the violation of human rights. If principles of good governance are met, violations of human rights occur less easily.

## **6 Content of this issue**

The different functions and applications of the concept of good governance are reflected in the contributions to this issue of the PELJ and the special relationship with human rights law becomes visible. Before we can fully understand the *impact* of the principles of good governance on the national level a more fundamental knowledge on the constitutional foundations of a country is required. For South Africa and the Netherlands this is provided in the article of Van der Schyf. In his piece, the two systems are compared and the differences are discussed and explained. In the contribution of Van Genugten on UN peacekeeping operations in Africa, the initial function of good governance principles, which is good governance as a prerequisite for aid, is revitalised. Good governance in this context can be considered a precondition for sustainable peace. The article of Jägers and Denkers on the WTO and HR

and the role of good governance principles, discusses how good governance principles are a guiding tool for the WTO to meet expectations and obligations which find their basis in human rights. In the words of Jägers and Denkers:

Given the role of principles of good governance in the realisation of human rights, good governance also plays an important role in realising this aim [of sustainable development].<sup>14</sup>

Roos and De la Harpe apply the principles of good governance, with specific reference to accountability, to public procurement in their discussion of the Constitutional Court's decision in *Steenkamp NO v Provincial Tender Board, Eastern Cape*.<sup>15</sup> The provision of adequate remedies in public procurement is put under the spotlight where the court had to consider whether an initially successful tenderer could lodge a delictual claim for damages to compensate for expenses incurred after conclusion of a contract, which was subsequently rendered void on an application for review of the tender award. In her contribution Du Plessis critically assesses, with reference to some international developments, the role that public participation is expected to play in state governments' fulfilment of citizens' environmental rights. She also puts forward some ideas on the relation between public participation, the fulfilment of environmental rights and environmental governance. In conclusion and to bring good governance closer to home (that is, Potchefstroom), Kotze and De la Harpe, in their discussion of using 'Good and Cooperative Governance to Improve Environmental Governance of South African World Heritage Sites', elaborates on the unique problems of governance in the Vredefort Dome World Heritage Site. They provide some thoughts on how to address the challenges of environmental governance, through the principles of good governance, in order to ensure the proper and sustainable governance of the Vredefort Dome World Heritage Site.

## 7 Conclusion

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14 Jägers and Denkers 2008 *PELJ* <http://www.puk.ac.za/> 4.

15 *Steenkamp v Provincial Tender Board, Eastern Cape* 2007(3) SA 121 (CC).

With this first elaboration on the concept of good governance we hope to have provided the necessary background understanding to place the different contributions in this issue in a broader perspective. Once the reader has read the contributions he or she will realise the important role good governance plays in modern society.

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***List of abbreviations***

CGG	Commission for Global Governance
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OSCE	Organisation for Security and Cooperation in Europe
par	paragraph(s)
PELJ	Potchefstroom Electronic Law Journal