GOOD GOVERNANCE IN THE HANDS OF THE JUDICIARY: LESSONS FROM THE EUROPEAN EXAMPLE

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1 Introduction

It is certainly well observed that the subject matter of good governance, by its mere terminology, constitutes a fairly recent evolution which has been, notably in the 1990's, closely linked to the idea of giving a new impetus to development policy, in particular in Sub-Saharan Africa. The new terminology has received widespread interest which has made the political call for good governance a central feature of development policy[1] ever since it has been put on the international agenda by a World Bank study in 1989.[2] Despite a rising number of critics claiming this concept to be without any substance and asking whether it would be new after all,[3] the idea of good governance has flourished ever since and has certainly evolved into a transnational concept of political leadership, a real leitmotiv for a common approach to the way how our global village should be governed.[4] The incredible success story of the striving for good governance is, in my view, due to three cumulative aspects which certainly contributed a great deal to the general agreement that good governance is a concept without proper alternative: Firstly, the concept of good governance is self-evident. It needs nothing else but common sense[5] to be understood: Entrepreneurs will not invest in unstable countries and people, whether entrepreneurs or not, will not wish to live there, if they can afford to go

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1 Graf Vitzthum *Völkerrecht* 6.part points 33 *et seq*.

2 The World Bank *Sub-Saharan Africa* 60.

3 See De Waal 2002 *International Affairs* 463.

4 See Dolzer 2004 *ZaöRV* 535.

5 Dolzer 2004 *ZaöRV* 536.

elsewhere.[6] Secondly, the concept of good governance is sufficiently vague to absorb a great variety of political preferences as well as substantive differences. Its flexibility is most certainly the reason why it has met so little resistance and found so much support. And thirdly, it was issued at the right point in time when public opinion was profoundly marked by the experience of the revolutionary force of glasnost and the general inability of corrupt regimes around the world to meet today's challenges.[7]

But beyond all characteristics of our modern understanding of good governance, we should not forget the fundamental insight that the striving for good governance exists as long as mankind is reflecting on ways and means to deal with public matters and notably to govern the polity on local, regional, national and international levels. Therefore the quest for good governance is universal and certainly not specific to our times. As in Africa, we are well aware in Europe that good governance is an important element to foster democracy and to ensure the general acceptance of public policies. And in particular the fundamental nature of the requirements of the rule of law may not be subordinated to consideration of mere political or economic opportunity. But I found the most convincing proof for this insight when I was, as it is always the case, not looking for it but on a tourist visit with my family admiring the neo-classical building of the Supreme Court of New York in lower Manhattan erected in the late 18th century. When reading the inscription in the frieze I suddenly realized the general importance of the subject matter under discussion. The inscription reads as simple and as fundamental as this: "The true administration of justice is the firmest pillar of good government".

This insight will be this contribution's manifesto. It will be dealing with what the Europeans have been able to realise in this field over the past 10 years. I will start out with describing the legal concepts and practical consequences of the

6 See Squires 2004 *Cov L J* 45 and 54.
7 See Cygan 2002 *MLR* 229.

quest for good governance in the European Union (sub II.) before concentrating my remarks on the role of the judiciary in this process (sub III.) and drawing a general conclusion (sub IV.).

2 Legal concepts and practical consequences

Already in 2001, the European Commission issued a White paper on European governance to cope with the challenge arising from the lack of acceptance which the European integration is facing in a number of countries and the additional problems arising from the enlargement of the Union up to 27 countries today.[8] For many European countries which are looking back on some centuries of a powerful national history it is not self-evident to accept that major political decisions, directly affecting the life of every ordinary citizen, are taken jointly with other nations on the European level. According to the institutional and procedural structure of the European Union in major fields of politics decisions are taken by qualified majority, so that the consent of every Member State is not needed. The same difficulty to accept this "intrusion" by European institutions into national affairs arises in European countries which have, for historical reasons, not been able to enjoy much of their sovereignty in post-World War II history. Additionally, increasing distrust in institutions and their policies is also noted for national parliaments and governments but is particularly acute for European institutions. The Union is often experienced as being too remote and too intrusive at the same time.[9] The poor turnout in general elections to the European Parliament is often considered as proving this general discontent. In any event, it is increasingly calling the legitimacy of the European Parliament and the European integration as such into question.

8 European Commission, *European Governance, A White Paper*.
9 European Commission, *European Governance, A White Paper* 3.

2.1 Conceptual foundations

In order to cope with these major challenges, the European Union is pursuing a strategy based on the principles of increased openness to and enhanced participation of the civil society, a high degree of accountability as well as effectiveness and coherence of European policies and actions.[10] Therefore, institutions like the EU Ombudsman and the Petitions' Committee of the European Parliament play a valuable role in the institutional setting designed to reinforce administrative openness, democratic participation and political responsibility.[11] But moreover, the European Union law has to be understood as an integral part of the national legal order and must be enforced as such.

The European Union has been conceived as a community of law and is based on the rule of law. Monitoring closely the application of Community law is without any doubt essential to enhance the visibility of the European Union and its actions in the daily life of citizens.[12] In the context of the European integration, the rule of law has a quite specific significance: The rule of law is the finally found answer to racism, violence, oppression, war and destruction. It is the sad course of European history notably in the 19th and 20th century which constitutes the fundamental reason why the Europeans remain so attached to the idea of the rule of law being a peaceful means of balancing diverging interests of member states, big corporations, trade unions, non-governmental organizations and private individuals. Under these circumstances, law-making and law-enforcement, the recognition of fundamental rights and the implementation of a strict non-discrimination policy are eventually peace-building measures which have indeed brought about so much prosperity in the past five decades. If Europeans do think that their experience could be shared

10 European Commission, *European Governance, A White Paper* 10.
11 On the introduction of the Ombudsman institution in Botswana see Fombad 2001 *JSAS* 57.
12 Fombad 2001 *JSAS* 25.

with other parts of the world and the EU could make a valuable contribution to global governance,[13] this is the reason why.

2.2 Normative consequences

The Treaty of Lisbon contains quite a number of rules and obligations in respect of the concept of good governance. In that sense, the principle of transparency has found its symbolic expression in the most prominent place of Article 1 paragraph 2 EU. Equally fundamental is the acknowledgement of the principles of political participation embodied in Article 11 EU. Notably the obligation of the European institutions to hold public hearings with representative associations and to communicate with civil society on a transparent and regular basis are among these principles. The right of access to documents of the Union's institutions has now been recognised as a fundamental rule in Article 15 EU. Furthermore, according to Article 16 paragraph 8 EU the European Council of ministers has to meet in public when acting as a legislator.

These Treaty rules are complemented by the Charter of Fundamental Rights of the European Union which will enter into force with the final ratification of the Lisbon Treaty. The chapter on citizen's rights contains an impressive declaration of rights, such as the right to vote and to stand as a candidate at elections to the European Parliament and at municipal elections in Articles 39 and 40. The right to good administration can be found in Article 41 and the right of access to documents is embodied in Article 42. This list is completed by the right to refer cases of maladministration to the European Ombudsman in Article 43 and by the right to petition guaranteed by Article 44. In particular, the right to good administration is worth noting. It gives every person the right to have his or her affairs handled impartially, fairly and within reasonable time by the institutions of the Union. This includes the right of every person to be heard

13 Fombad 2001 *JSAS* 26 and further.

before any individual measure is taken which would entail adverse effects, the right of a person to have access to his or her file while respecting the legitimate interests of confidentiality and of professional and business secrecy and, finally, the obligation of the administration to give reasons for its decisions. In addition, the institutions are under the obligation to compensate for damages caused by their action. Finally everyone has the right to write to the institutions of the Union in any official language and to receive an answer in the same language.

In search for a better quality of administrative proceedings, a code on good administrative practise, a soft law instrument based on the logic of best practise has ultimately been adopted. Thus it has to be noted that the code has so far not been able to develop a relevant impact on the administrative decision-making in the European institutions.

3 The role of the judiciary

It is quite self-evident that the above cited provisions of the Treaty of Lisbon and of the Charter of Fundamental Rights have so far not been able to play a significant role in judicial findings of the European Court of Justice. But the Court has already been confronted with a great number of cases dealing with the application of the transparency principle in environmental matters[14] as well

14 Dir 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26 *et seq*.; Dir 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Dir 85/337/EEC and 96/61/EC – statement of the Commission [2003] OJ L156/17 *et seq*.; see Partsch 1998 *NJW* 2559 *et seq*; similar also Wegener *Umweltinformationsgesetz* § 1 par 14; Kloepfer *Informationsrecht* 404; Worm *Umweltinformationsrichtlinie* 10; *Partsch* 1998 *NJW* 2559; recital 10 of the preamble to the Aarhus Convention; Home Office of the State North Rhine-Westfalia (ed) *Leitfaden zum NWIF*G5; Turiaux *Umweltinformationsgesetz* introduction par 129; Proposal for a Dir of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC, Com (2000) 839 final – 2000/0331 (COD) [2001] OJ C154 E P. 0123 – 0128, p. 2 *et seq*.; Art 7 of Council Directive 90/220/EEC of 23/04/1990 on the deliberate release into the environment of genetically modified organisms [1990] OJ L 117, p. 18; Case C-552/07

as in public procurement cases.[15] In recent years, the right of access to documents has triggered a great deal of litigation before the courts of the European Union. But before entering this topic, let us refer back to the traditional role of the Court of Justice as an administrative judge whose principal mission is to ensure the legality of administrative actions conducted by the institutions of the European Union.

3.1 The traditional role of an administrative judge

Ever since the famous *Algera*-judgement,[16] delivered in 1957, the Court has taken an active role in the evolution of legal principles which are generally perceived as specific expression of the rule of law. Thanks to the Court's case law on procedural rights, the right to be heard, to have access to files and the obligation of the administration to give reasons have already been well established before they were finally codified in Article 41 of the Charter of Fundamental Rights. Already since the early 1970's the right to be heard won recognition in the jurisprudence of the Court by giving effect to the basic Roman law principle of "audiatur et altera pars".[17] The same is true for the right of every

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Opinion of AG Sharpston delivered on 22/12/2008(Commune de Sausheim v Pierre Azelvandre) [2009] ECR 00000.

15 Joined Cases C-285/99 and C-286/99 *Lombardini SpA v ANAS and Mantovani SpA v ANAS* [2001] ECR I-09233 (ECJ); Case C-470/99 *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* [2002] ECR I-11617, 11690, par 93 (ECJ); C-315/01 *GAT v ÖSAG* [2003] ECR I-6351, 6409, par 73 (ECJ); T-345/03 *Evropaiki Dynamiki – Proigmena Systemata Tilepikoinion Pliroforikis kai Tilmatikis AE v Commission* (not reported yet) (CFI); C-275/98 *Unitron Scandinavia v Ministeriet for Fødevarer, Landbrug og Fiskeri* [1999] ECR I-08291 (ECJ); C-324/98 *Telaustria Verlags GmbH v Telekom Austria AG* [2000] ECR I-10745, 10794, par 61 *et seq* (ECJ); Case C-19/00 *SIAC Construction Ltd v County Council of the County of Mayo* [2001] ECR I-7725 (ECJ); Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-8585, 8630, par 49 (ECJ); Case C-231/03 *Coname v Comune di Cingia de' Botti* [2005] ECR I-7287 (ECJ); Case C-324/07 *Coditel Brabant SA v Communie d'Uccle and Région de Bruxelles-Capitale* (not reported yet) (ECJ); Joined Cases C-226/04 and Case C-228/04 *La Cascina Soc. coop. arl and Others and Ministero della Difesa and Others* [2006] ECR E-1347, 1380, par 32 (ECJ).

16 Joined Cases 7/56, 3/57 to 7/57 *Algera v Common Assembly* [1957] ECR 39 (ECJ).

17 Case 41/69 *ACF Chemiefarma NV v Commission* [1970] ECR 00661, 690 par 56/57 (ECJ); Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063, 1080 par 15 (ECJ); Case 85/76 *Hoffmann-La-Roche & Co AG v Commission* [1979] ECR 00461, 511, par 9, 11 (ECJ); Joined Cases 46/87 and 227/88 *Hoechst AG v*

individual to have access to his or her file as a necessary prerequisite for making effective use of the right of defence.[18] The obligation to give reasons, being explicitly embodied in the Treaty, has in addition been recognized by the Court as a general principle of European Community law, hereby obliging the administrations of the Member States to give reasons for all decisions taken in application of Community law. The Court held in particular that the failure to give substantive reasons can result in the annulment of a decision as this duty is seen to be an essential rule of procedure. The statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question as to enable the persons concerned to ascertain the reasons for the measure and to allow Community courts to exercise their power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure or other parties may have in obtaining explanations.[19] In its landmark decision in the *Kadi* case concerning the protection of fundamental rights, the Court has strongly emphasised the direct link between the obligation to give reasons and the fundamental right to an effective judicial remedy.[20]

Commission [1989] ECR 2859, 2932, par 52 (ECJ); Joined cases T-39/92 and 40/92 *Groupement des Cartes Bancaires "CB" and Europay International SA v Commission* [1994] ECR II-49, 73, par 48 (CFI); Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 and T-61/02 OP *Dresdner Bank AG and Others v Commission* [2006] ECR II-3567, 3619, par 155 (CFI); Case 17/74 *Opinion of AG Warner (Transocean Marine Paint Association v Commission)* [1974] ECR 1063,1090 (ECJ); Hegels *EG-Eigenverwaltungsrecht und Gemeinschaftsverwaltungsrecht* 80; Nehl *Europäisches Verwaltungsverfahren* 275; Gornig and Trüe "Die Rechtsprechung des EuGH zum europäischen allgemeinen Verwaltungsrecht"1993 *JZ* 884,886, 893; Kalbe *EUV/EGV* Art. 283 EG par 15, underlines the validity in the sector of public services law , which had already been decided by the ECJ: Case 32/62 *Alvis* v Council [1963] ECR 107,123 (ECJ); Case 35/67 *Van Eick v Commission* [1968] ECR 489,511 (ECJ); Case 25/80 *De Briey v Commission* [1981] ECR 637,646, par 9 (ECJ).

18 Case C-51/92 P. *Hercules Chemicals NV v Commission* [1999] ECR I-04235, Case C-199/99 P. *Corus UK Ltd, formerly British Steel plc v Commission* [2003] ECR I-11177, 11215, para. 125 *et seq* (ECJ).

19 Case C-367/95 *Commission v Sytraval* [1998] ECR I-1719, 1770, par 63 (ECJ).

20 Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council* (not reported yet), par 334 *et seq* 351.

In addition to the evolution of these general principles common to all European administrative law systems, the European Court of First Instance already had the chance to associate the right of every person to have his or her affairs handled within a reasonable time by a European institution with the right to sound administration.[21] Later, the same European Tribunal recognised the need to act within a reasonable time in conducting administrative proceedings relating to competition policy as a general principle of Community law whose infringement would justify the annulment of the respective decision in so far as it also constituted an infringement of the rights of defence.[22] The subjective rights of individuals concerned by administrative proceedings are complemented by the liability of the European institutions guaranteed in accordance with the general principles common to the laws of the Member States[23] for damages caused by the institutions. In a recent judgement delivered on July 16, 2009, the Court held that an infringement of the obligation to act within a reasonable time is also incumbent on the judiciary and may, if established, justify an action for liability against the European Union, even for immaterial damages.[24]

While strengthening the procedural rights of individuals concerned with administrative proceedings, the Court has not neglected its responsibility for the well functioning of the European institutions. But in doing so, the Court never lost sight of its principal objective to guarantee the rationality of all administrative action of the European institutions, which is the utmost objective of the rule of law. Again, this mission is crucial for the supranational action of the European institutions in order to ensure full acceptance of European Union law by the ordinary citizen which remains an indispensable condition for

21 Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313, 48 (CFI).
22 Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, 36, 40 (CFI).
23 See Case C-312/00 P *Commission v Camar Srl and Tico Srl.* [2002] ECR I-11355, 52 *et seq* (ECJ).
24 See Case C-385/07 P. *Der grüne Punkt-Duales System Deutschland GmbH v Commission* [2009] ECR 00000, 195 (ECJ).

respecting the rule of European law to the same extent as it has become self-evident for the respect of national laws.

3.2 The ECJ's jurisprudence on transparency and on the right of access to documents

In recent years the Court has paid particular attention to ensure respect for the obligation to transparency and notably to the right of access to documents. The importance of this issue is reflecting a general tendency in the recent evolution of administrative law in many countries throughout the world. In the European context, the Nordic countries are particularly attached to the objective of administrative transparency and to a general right of access to documents.[25] Their strong impetus has led to a far reaching guarantee of transparency and access to documents in regulation no. 1049/2001 which declares in recital 2 that "openness enables citizens to participate more closely in the decision-making-process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and the respect for fundamental rights as laid down in Article 6 of the EU Treaty and the Charter of Fundamental Rights of the European Union". Therefore the regulation describes its purpose in recital 4 as "to give the fullest possible effect to the right of public access to documents".

Confirming these fundamental findings, the Court has emphasised in its settled case law that exceptions to the right of widest possible access must be interpreted and applied strictly.[26] Accordingly, the right to access covers all documents in possession of the European institutions, even those emanating

25 See Classen *Gute Verwaltung* 100.

26 Joined cases C-174/98 P and C-189/98 P. *Kingdom of the Netherlands and Gerard van der Wal v Commission* [2000] ECR I-1, 63, par 23 *et seq*, 27 (ECJ); Case C-266/05 P. *Sison v Council* [2007] ECR I-1233, 1283, par 63 (ECJ); Case C-64/05 P *Kingdom of Sweden v Commission* (judgment delivered on 18.12.2007) (not reported yet) par 66 (ECJ).

from Member States or from mixed commissions involved in delegated legislation.[27] This general interpretation rule has led to the conclusion that the institutions do in quite a number of cases not live up to the full extent of the obligation to ensure public access to documents. Even the legal expertise established by a legal service of one of the European institutions in the course of a legislative procedure, is, in principle, covered by the obligation to public access of documents.[28] The particular sensitivity or importance of such a legal expertise might, under given circumstances, justify a refusal of access to documents if an institution is able to demonstrate in a substantive manner that the disclosure would be incompatible with the protection of the legal privilege granted to legal services. Along these lines the Court has held quite recently that a legal expertise having been produced in the course of an election scrutiny procedure does not have to be disclosed in the following judicial procedure, since this would constitute a breach of the principle of equal defence.[29] Finally, it should be noted that the European Court of First Instance already had the chance to judge on the interesting question of how to find a fair balance between conflicting fundamental rights, such as public access of documents in relation to professional and business secrecy or to the right to privacy. Currently the Court of Justice is considering the appeal in these cases.

Considering the case law of the Court it is very difficult to judge whether the public right of access to documents has had a considerable impact to improve the legitimacy of the action taken by the institutions of the European Union and the degree of its acceptance by the European citizens. But, however we may evaluate this impact, it is essential to note that the right of public access to documents constitutes a value in itself which proves how much the European integration is attached to democracy and to the rule of law. In particular, the

27 Accordingly already in relation to Commission Decision 94/90, Case T-188/97 *Rothmans International BV v Commission of the European Communities* [1999] ECR II-2463, 2484, par 60 *et seq* (CFI).

28 Joined Cases C-39/05 P und C-52/05 P *Kingdom of Sweden and Turco v Council* (not reported), par 68 (ECJ).

29 Joined Cases C-393/07 and C-9/08 *Italian Republic and Donnici v Parliament* (30.01.2009) (ECJ).

right of public access to documents simply ensures that the long-standing prejudice of Brussels bureaucracy being alienated from the ordinary citizen, is proven incompatible with the legal reality of the obligation to implement a transparent administration which is devoted to the interest of the European citizens. The quest for transparency makes it perfectly clear that the citizens of the European Union do not have to consider themselves as mere subordinates to the law and the politics of the European Union, but can proudly perceive themselves as active citizens, as real "citoyens" who are confronting the European institutions on equal terms. It is therefore evident that the quest for good governance in Europe constitutes an important subject which will not be of minor importance for the enduring success of the European integration.

3.3 Good governance and the judiciary

My foregoing remarks were certainly placing the judiciary in the classical role of the ultimate guardian of the right to good governance and more generally speaking of fundamental rights. But who is supervising the supervisors? In the first place my question points to the obligation of the judiciary to ensure a good administration of justice. Since judges too hold public offices and have to exercise their duties independently and unbiased, the quality of the administration of justice remains an important element in the quest for good governance. We are well aware that the mere independence of courts and its judges is not enough to avoid maladministration of justice. Sometimes it may even be part of the problem. But how do we make sure that the judiciary is fully respecting the objectives of public welfare? Certainly by good law-making.

Moreover, we have to be aware that the simple historical evidence that administrative discretion without effective scrutiny has turned into tyranny[30] may well become true one day for the judiciary when its well functioning is not maintained. This is why it proved to be necessary in the context of European

30 See Davis *Discretionay Justice* 3.

integration to extend the system of liability for the breach of European Community law to the judiciary[31] and to emphasise that an infringement of the obligation to act within a reasonable time is as well incumbent on the judiciary and may, if established, justify an action for liability against the European Union, even for immaterial damages.[32]

But how can we ensure that the Supreme Courts and Constitutional Courts live up to their respective obligation of good governance? Since constitutions are very difficult to amend, the power of Constitutional Courts is considerable. The same is, *a forteriori*, true for the European Court of Justice since the substance of the Treaties proves to be hardly modifiable in practise. Of course there is an ongoing evolution in Europe and around the world towards an increasing openness for comparative legal reasoning and discourse. I am well aware that the *Constitution of South Africa*, 1996 is particularly advanced in that respect. This growing willingness to enter into a substantial discussion about the own jurisprudence should help a great deal to ensure the quality of a particular judicial solution and, beyond that, even to achieve a certain development towards a common understanding of which elements are fundamental for the rule of law. Naturally, researchers and the legal academia in general form a privileged partner in the debate about the rule of law, pointing at systematic deficiencies or at presumed lacks of coherence. The academic community of legal scholars constitutes furthermore an indispensable forum for discussion in which acceptance, disapproval and the need for continuous refinement should be expressed.

But finally it is eminently important for a judge to have a sound attitude towards the right balance of powers. In the end, the office of a judge requires a

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31 See Case C-224/01 *Köbler v Republik Österreich* [2003] ECR I-10239 (ECR) and Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-1209 (ECR) on the one hand and Case C-385/07 P. *Der grüne Punkt – Duales System Deutschland GmbH v Commission* [2009] ECR 00000 (ECR) on the other.

32 See Case C-385/07 P. *Der grüne Punkt-Duales System Deutschland GmbH v Commission* [2009] ECR 00000, 195.

particular degree of personal humility and of character in order to resist the temptation of always having the last say in a constitutional system, be it national, supranational or international. What I am referring to has best been expressed years ago by Griffith:

> When judges get carried away by their personal convictions of where rightness and justice lie and stray too far from the established rules of the common law or the words of statutes, they create uncertainty. If those convictions are held on issues which are political, broadly or narrowly so, then they will arouse animosity as well as support. And if the political issues are serious and large, as are those of industrial relations, judicial pronouncements begin to lose their authority and their legitimacy.[33]

4 Conclusion

It is generally believed that mankind is constantly continuing its evolution. Many people have little doubt that something new is generally presumed to constitute some progress. And even if a proof to the contrary is permissible, it is not of much use trying since one cannot put the wheel of history into reverse. I have always been fascinated by the question who actually decides which change means progress and which constitutes a setback. That's why I subscribe increasingly to the irony of answering the classical question "Where are we going?" by a simple "I don't know, but anyway, as long as we are moving ahead". But seriously, human evolution has often taken place in a circular manner. To my mind, there is nothing wrong with it, as long as we finally find out where we stand and why we are back where we were some time ago.

In the end I do not think that all our topical discussions about good governance really address a new problem and my personal guess would be that our answers will not differ considerably from those found by the philosophers of the enlightenment, by those who established the rule of law in the first place and by the founding fathers of our modern democratic governments. Of course we

33 Griffith *The Politics of the Judiciary* 205.

have to adjust their findings to the particular challenges of our modern times resulting from the constantly changing technological, social and economic situations in which we live today. If we limit ourselves to this task, there is undoubtedly a great deal to do and this is anyway where we should start. But beyond this mission of which we should be proud, I am afraid, that my conclusion reads as follows: "The true administration of justice is the firmest pillar of good government".

Bibliography

Classen *Gute Verwaltung*

Classen KD *Gute Verwaltung im Recht der Europäischen Union* (2008)

Cygan 2002 *MLR*

Cygan A "The White Paper on European Governance – have Glasnost and Perestroika Finally Arrived to the European Union" 2002 *Modern Law Review* 229

Davis *Discretionary Justice*

Davis K *Discretionay Justice. A Preliminary Inquiry* (Greenwood Press Westport1969)

De Waal 2002 *International Affairs*

De Waal A "What's new in the 'New Partnership for Africa's Development' " 2002 (78) *International Affairs* 463

Dolzer 2004 *ZaöRV*

Dolzer R "Good Governance: Neues transnationales Leitbild der Staatlichkeit?" 2004 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 535

European Commission, *European Governance, A white paper*

European Commission, *European Governance, A white paper*, COM (2001) 428 final

Fombad 2001 *JSAS*

Fombad CM "The Enhancement of Good Governance in Botswana: a Critical Assessment of the *Ombudsman Act* 1995" 2001 (27) *Journal of Southern African Studies* 57

Gornig and Trüe 1993 *JZ*

Gornig G and Trüe C "Die Rechtsprechung des EuGH zum europäischen allgemeinen Verwaltungsrecht" 1993 *Juristenzeitung* 884

Graf Vitzhum *Völkerrecht*

Graf Vitzthum (ed) *Völkerrecht* 3rd ed (De Gruyter-Recht Berlin 2004)

Griffith *The Politics of the Judiciary*

Griffith JAG *The Politics of the Judiciary* 5th ed (Fontana Press London 1997)

Hegels *EG-Eigenverwaltungsrecht*

Hegels S *EG-Eigenverwaltungsrecht und Gemeinschaftsverwaltungsrecht* (Nomos Verlagsgesellschaft Baden-Baden 2001)

North Rhine-Westfalia *Leitfaden zum NWIFG*5

Home Office of the State North Rhine-Westfalia (ed) 2001 *Leitfaden zum NWIFG*

Kalbe *EUV/EGV*

Kalbe P in von der Groeben and Schwarze (eds) 2003 *EUV/EGV* 6th ed Art. 283 EG

Kloepfer *Informationsrecht*

Kloepfer M *Informationsrecht* (Beck Juristischer Verlag Munich 2002)

Nehl *Europäisches Verwaltungsverfahren*

Nehl HP *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung* (Duncker & Humblot GmbH Berlin 2002)

Partsch *NJW*

Partsch C "Brandenburgs Akteneinsichts- und Informationszugangsgesetz (AIG) - Vorbild für Deutschland?" 1998 *Neue Juristische Wochenschrift* 2559

Squires 2004 *Cov L J*

Squires N "The Commission for Africa: the poor are rich?" 2004 *Coventry Law Journal* 45

The World Bank *Sub-Saharan Africa*

The World Bank *Sub-Saharan Africa: From Crisis to Sustainable Growth, A Long-Term Perspective Study* 1989 60

Turiaux *Umweltinformationsgesetz*

Turiaux A *Umweltinformationsgesetz* (CH Beck München 1995)

Wegener *Umweltinformationsgesetz*

Wegener B in Schomerus/Schrader/Wegener (eds) *Umweltinformationsgesetz* 2nd ed (Nomos Verlagsgesellschaft mbH & Co. KG Baden-Baden 2002)

Worm *Umweltinformationsrichtlinie*

Worm H *Die Umsetzung der Umweltinformationsrichtlinie vom 13.6.1990 in Großbritannien und Deutschland sowie Umweltinformationsansprüche in der Schweiz* (Universität Bonn Berlin 2001)

Register of Cases

Joined cases 7/56, 3/57 to 7/57 *Algera v Common Assembly* [1957] ECR 39 (ECJ)

Case 32/62 *Alvis v Council* [1963] ECR 107 (ECJ)

Case 41/69 *ACF Chemiefarma NV v Commission* [1970] ECR 00661 (ECJ)

C-324/07 *Coditel Brabant SA v Communie d'Uccle and Région de Bruxelles-Capitale* (not reported yet) (ECJ)

Case C-312/00 P *Commission v Camar Srl and Tico Srl.* [2002] ECR I-11355 (ECJ).

Case C-367/95 *Commission v Chambre syndicale nationale des enterprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL* [1998] ECR I-1719

Case C-231/03 *Coname v Comune di Cingia de' Botti* [2005] ECR I-7287 (ECJ)

Case C-199/99 P. *Corus UK Ltd, formerly British Steel plc v Commission* [2003] ECR I-11177 (ECJ)

Case 25/80 *De Briey v Commission* [1981] ECR 637 (ECJ)

Case C-385/07 P. *Der grüne Punkt – Duales System Deutschland GmbH v Commission* [2009] ECR 00000 (ECJ).

Case C-9/08 *Donnici* (30.01.2009) (ECJ)

Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 and T-61/02 OP *Dresdner Bank AG and Others v Commission* [2006] ECR II-3567 (CFI)

Case C-315/01 *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)* [2003] ECR I-6351 (ECJ)

Joined cases T-39/92 and 40/92 *Groupement des Cartes Bancaires "CB" and Europay International SA v Commission* [1994] ECR II-49 (CFI)

Case C-51/92 P. *Hercules Chemicals NV v Commission* [1999] ECR I-04235 (ECJ)

Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859 (ECJ)

Case 85/76 *Hoffmann-La-Roche & Co AG v Commission* [1979] ECR 00461 (ECJ)

Joined Cases C-285/99 and C-286/99 *Impresa Lombardini SpA – Impresa Generale di Costruzioni v ANAS – Ente nazionale per le strade, and Società Italiana per Condotte d'Aqua SpA* and *Impresa Ing. Mantovani SpA v ANAS – Ente nazionale per le strade and Ditta Paolo Bregoli* [2001] ECR I-09233 (ECJ)

Joined cases C-174/98 P and C-189/98 P *Kingdom of the Netherlands and Gerard van der Wal v Commission* [2000] ECR I-1

Case C-64/05 P *Kingdom of Sweden v Commission* (judgment delivered on 18/12/2007) (not reported yet)

Joined Cases C-39/05 P und C-52/05 P *Kingdom of Sweden and Turco v Council* (not reported)

Case C-224/01 *Köbler v Republik Österreich* [2003] ECR I-10239 (ECR)

Joined Cases C-226/04 and C-228/04 *La Cascina Soc. coop. arl v Ministero della Difesa* [2006] ECR E-1347 (ECJ)

Case C-552/07 *Opinion of AG Sharpston delivered on 22/12/2008 (Commune de Sausheim v Pierre Azelvandre)* [2009] ECR 00000 (ECJ)

Case 17/74 *Opinion of AG Warner (Transocean Marine Paint Association v Commission)* [1974] ECR 1063,1090

Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-8585 (ECJ)

Case C-19/00 *SIAC Construction Ltd v County Council of the County of Mayo* [2001] ECR I-7725 (ECJ)

Case C-266/05 P. *Sison v Council* [2007] ECR I-1233

Case C-324/98 *Telaustria Verlags GmbH v Telekom Austria AG* [2000] ECR I-10745 (ECJ)

Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-1209 (ECR)

Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063 (ECJ)

Case C-275/98 *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri* [1999] ECR I-08291 (ECJ)

Case C-470/99 *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* [2002] ECR I-11617 (ECJ)

Case 35/67 *Van Eick v Commission* [1968] ECR 489 (ECJ)

Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council* (not reported yet) (ECJ)

Case T-345/03 *Evropaiki Dynamiki – Proigmena Systemata Tilepikoinion Pliroforikis kai Tilmatikis AE v Commission* (not reported yet) (CFI)

Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, 36, 40 (CFI)

Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313 (CFI)

Case T-188/97 *Rothmans International BV v Commission* [1999] ECR II-2463

Register of treaties, instruments and legislation

EU Charter of Fundamental Rights 2000

Treaty on European Union 1992

Treaty of Lisbon 2007

Dir 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26

Dir 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Dir 85/337/EEC and 96/61/EC – statement of the Commission [2003] OJ L156/17

Proposal for a dir of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Dir 85/337/EEC and 96/61/EC, Com (2000) 839 final – 2000/0331 (COD) [2001] OJ C154 E P. 0123 – 0128. 2

Council Dir 90/220/EEC of 23/04/1990 on the deliberate release into the environment of genetically modified organisms [1990] OJ L 117

Reg (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145

List of Abbreviations

CFI	Court of First Instance of the European Communities
Cov L J	Coventry Law Journal
Dir	Directive
ECJ	European Court of Justice
JSAS	Journal of Southern African Studies
JZ	JuristenZeitung
MLR	The Modern Law Review
NJW	Neue Juristische Wochenschrift
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

GOOD GOVERNANCE IN THE HANDS OF THE JUDICIARY: LESSONS FROM THE EUROPEAN EXAMPLE

T Von Danwitz*

SUMMARY

This note is based on the author's guest presentation delivered at the Konrad-Adenauer Foundation/North-West University (Faculty of Law) Colloquium on 21 August 2009. Justice von Danwitz was invited to set the scene for further academic discourse on the broad topic of Good Governance and Sustainable Development. This contribution hence draws on the author's personal views and experience in the European context, and it is shown that the quest for good governance is universal and not specific to our times and that in fact, "(t)he true administration of justice is the firmest pillar of good government". The contribution considers what Europe has been able to realize in this field over the past 10 years by means of a description of the legal concepts and practical consequences of the quest for good governance in the European Union and some comments on the role of the judiciary in this process. The contribution serves to show that good government is a notion of which the meaning transcends geographical and jurisdictional borders and that it is possible for different countries and regions to exchange lessons and learning experiences in relation to good government in operation as well as the role of good government towards the achievement of sustainable development.

Keywords: good government, good governance, role of judiciary in good governance; European Union perspectives

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