

Good Governance: A Norm for the Administration or a Citizen's, Right?

Henk Addink

Institute of Constitutional, Administrative Law and Legal Theory

Utrecht University School of Law, The Netherlands

Email: g.h.addink@uu.nl

I. INTRODUCTION

The subject of Prof. ten Berge's farewell speech 'Citizen's obligations towards the government'¹ created a new topic in administrative law, which has remained underexposed until now. This subject matter as it addresses one of the legal elements that determine the legal relationship between citizens and government. It also shows that legal relations pertaining to public law are not only about rights but about obligations too. It is a subject that fits very well into the broad range of administrative law subjects that occupied ten Berge in the course of time and were always changing. Initially, also as a result of his thesis, his work focussed on the organisational aspects of administrative law, but soon he expanded the scope of his work by addressing the broad field of the protection of the citizen against the government. The introduction of the Arob (Act on the Administration of Administrative Justice with respect to Administrative Decisions) in 1976 certainly contributed to that considering the large number of publications he wrote on this subject. Within the theme of legal protection, he devoted special attention to the administrative law on procedures and the law on the ombudsman. Subsequently, he also paid attention later on to the general substantive administrative law, the administration by the government. His well-written and well-organized handbooks in the field of administrative law appeared in that order, anyway, as *Bescherming tegen de overheid* ('Protection against the government') appeared first and after that *Besturen door de overheid*. ('Administration by the government') During the last few years his attention, as evidenced in his publications, was more focussed on the definition of administrative law norms and then in particular the norms with a cross-border character, such as integrity² and corruption.³ Both of these are subjects that are closely connected to the subject of this article *Good governance: a norm for the administration or a citizen's right?*

The dichotomy in administrative law: administration by and protection against the government

For a long time, we have been familiar with the dichotomy in administrative law: the administration by and protection against the government. There is a division into two not-overlapping elements of concepts and norms. The word, which is derived from the Greek 'dichotomia' meaning split, is also used outside the field of law, such as in philosophy, sociology and biology. Medical science uses it to denote a gaff like split that ends in two equivalent parts. This equivalence is of importance in administrative law. The twoness is there because this is how the equivalent character of both parts is expressed, providing a link with the division discussed here between administration by and protection against the government. Other terms that place a stronger emphasis on the distinction between the two are 'dualism' and 'equivocality'. The element of equivalence is not clearly evident in these concepts and that is why we prefer to use the word 'dichotomy'.

The norms to which both these equivalent but distinctive parts of administrative law give rise play an important part with respect to the relation between government and citizens, albeit not always the same part. The framework that is the playing field of the administrative norm must be distinguished from but, at the same time, be regarded in relation to each other. The principles of good governance, inclusive of the principles of proper administration, went through separate developments in both frameworks and play a crucial part in both of them. It may look as if it has always been this way and that is because of the General Administrative Law Act (after this: the GALA), which has been extraordinarily apt in uniting the law. However, there is more of administration law than in the GALA, and we find this in the interdisciplinary and international context.

All the same, it seems as if Dutch jurisprudence on administrative law is devoted to the GALA only and that is really is not enough. The development of administrative law has only just begun and there will be many renewals. The development of administrative law is still rather new when compared to other classic fields of law. At the same time there is an increasing entanglement between administrative law, private law and criminal law, respectively, whereby it is not always easy to establish

¹ J.B.J.M. ten Berge, *Burgerplichten jegens de overheid. Tussen normaal en abnormaal*. Alphen aan den Rijn: Kluwer 2007.

² J.B.J.M. ten Berge, 'Verankering van het integriteitsbeginsel in het bestuursrecht', *NTB* 2006, nr. 7, p. 211- 218.

³ G.H. Addink & J.B.J.M. ten Berge, 'Study on Innovation of Legal Means for Eliminating Corruption in the Public Service in the Netherlands', in: J.H.M. van Erp & L.P.W. van Vliet (eds.), *Netherlands reports to the seventeenth international congress of comparative law*, Antwerpen-Oxford: Intersentia 2006, p. 379- 419.

what can be assigned to which separate field of law.⁴ Or should we drop the idea of having separate fields of law? In short, developments in administrative law as such as well as in administrative law in relation to the other fields of law require looking past the confinements of the GALA. Furthermore, Europeanization and, more in general, the internationalization of administrative law increasingly requires a more cross-border approach of administrative issues, certainly not just with law comparative aspects but by addressing carry-over effects or- to put it more broadly- continued effect issues. The previous certainly applies to the issue of administrative requirements in relation to the administrative actions.

II. SUBJECT OF STUDY AND THE OUTLINE OF THIS ARTICLE

This publication goes beyond the GALA as it addresses the administrative requirements to which the acts of government bodies are subjected to. Part of this study is the fundamental question whether these requirements must be considered as the norm's government actions must comply with or as citizen's rights. We are addressing this question because there is a development at the national level, and even more so on the European level, towards codification of a subjective right, or elements of it, to good governance. Hence, the codification took place on the level of subjective rights on good governance which also includes elements of these subjective rights. Does this mean that we no longer need any requirements of good governance to be observed by the administration and that a subjective right to (parts of) good governance will suffice? The fundamental aspect of this issue is also determined by the underlying issue on the level of law theory with respect to the relation or tension between legal certainty laid down in legal rules on the one hand, and, on the other hand, justice by way of safeguarding subjective rights.⁵ We will return to this in the course of this article.

Subject of study: administrative norms or citizen's, right?

The central issue of our article is: can principles of good governance be regarded as norms for the administration or is it a citizen's, right? The underlying issue is the mutual relation between both types of requirements regarding good governance and whether we will be able to express our preference for a particular development after the weighing of the pros and cons. After all, administrative norms as well as human rights are legal norms. In both cases the question of enforceability is an issue and so is the question into the *de iure* relevant legal relationship. These fundamental legal issues will be illustrated below by looking at the development of law over the past few years.

⁴ F.A.M. Stroink, *De groei en bloei van het bestuursrecht*, Den Haag: Sdu 2006, p.6 et seq.

⁵ P.J. Boon, J.M. Reintjes & J.G.J. Rinkes (eds.), *Van Apeldoorns Inleiding tot de studie van het Nederlandse Recht*, Deventer: Kluwer 2003, pp. 6 et seq., in particular p.13.

Two basic ideas: norms for administrative actions and the subjective rights of the citizen

Here we will pay more attention to the basic ideas of the principles of good governance, namely as norms for administrative actions such as subjective rights of citizens. Furthermore, these principles will be further elaborated on within other frameworks, such as the so-called fourth power institutions⁶ and as assessment norms used by several supervising bodies. But as we said before, we will mainly restrict ourselves to these two basic ideas.

The first basic idea is that principles develop as (un)written norms for the different forms of government actions. Sometimes it is the court and then it is the legislator that turns these norms into something concrete, though the common denominator remains that the principle is a norm directly aimed at the government body. The government body must comply with it and it will usually do so.

A second, more recent basic idea is that the principles are laid down in the law as one or more subjective rights for the citizens or have been recognized as such by the courts. Though the standards developed in these cases are related to government actions, they have been described as subjective rights of citizens.

Outline of this article

After a brief discussion of the development of the principles of proper administration into principles of good governance, we will discuss the European developments related to this topic, which are of direct importance to Dutch administrative law. We will set off with a description of recent European developments in the field of good governance as norms for administrative actions and link these to Dutch developments in this area. After that, we will address the subjective right to good governance in the European context, together with the developments on this issue that can be detected in the Netherlands. The pros and cons of both lines will be discussed and weighed, and this will lead to an outline of desirable future developments. When we make the final choice for what we see as the desirable outcome, we will also briefly address the underlying tension in respect of law theory between law security and justice.

III. THE ADMINISTRATIVE LAW CONTEST OF THE ISSUE

More than just principles of proper administration

Initially, the general principles of proper administration were unwritten law developed by the courts. Later on, the legislator's codification of these norms regarding administrative acts became more emphasised. As a result,

⁶ G.H. Addink, 'The Ombudsman as the fourth power. On the foundations of Ombudsmanlaw from a comparative perspective', in: E.C.H.J. van der Linden & F.A.M. Stroink (eds.), *Judicial Lawmaking and Administrative Law*, Antwerp en-Oxford: Intersentia 2005, pp. 251- 273.

two aspects have stood out for a long time, but we will mention them here anyway for completeness. Firstly, there are more principles of proper administration than the ones developed by the courts in the course of the years as unwritten law and of which several elements are codified in the GALA. Some of the proper administration principles had been laid down by the legislator before. Secondly, after the codification in the GALA and other laws, there are still elements of the proper administration principles that have remained unwritten, or, in other words: the unwritten law is still important. Generally, the following eight main groups of (un)written principles of proper administration⁷ are distinguished: the principle of fairness, the prohibition of abuse of power (*détournement de pouvoir*), the principle of legal certainty, the confidence principle, the legitimate and justified expectations, the principle of equality, the principle of proportionality, the principle of due care, and the motivation principle. We distinguish several sub-principles or aspects of principles within these separate main groups.

Principles applied by different government bodies: legislator, administration, courts and supervising bodies

Another relevant aspect is that these principles are incorporated in different places in administrative law, where they have become more specified. Traditionally, a citizen could rely on the unwritten grounds. Later on, the principles started to become part of the law as grounds of appeal and later still, in this context in particular, they served as grounds for judicial review. Today, they only have the function of annulment grounds as far as the GALA is concerned. In short, in this respect the principles of proper administration have decreased in importance.

Over the past few years, we have seen a shift in the use of the principles, not always under the same name, by other supervising government bodies, which applied these principles as part of a judicial review. An example of this is the (National and decentralized) ombudsman but other fourth power institutions,⁸ such as the Court of Audit, do the same. In short, institutions play an important part in the maintenance of the balance between the three known powers. This also applies to other supervising bodies⁹ that carry out the supervision of the administration or other (independent) supervisory duties. In a word, these principles, which can be found in different places in the law, are now an important feature of the administrative goings on regarding the protection of the citizen as well as the supervision of administrative behaviour. The legislator and administration have 'discovered' the principles and laid down some of them as administrative norms in legislation and policy rules. As a result, these principles are applied by a broad range of government bodies with an emphasis today on the application of the principles outside of the administrative law process.

⁷ G.H. Addink, *Algemene beginselen van behoorlijk bestuur*, Deventer: Kluwer 1999.

⁸ Supra note 6.

⁹ The concept of a supervisory body is used here in a very broad sense: a government body that is occupied with supervisory activities.

Written principles of proper administration also outside of the GALA

Principles of proper administration as a statutory norm for administrative behaviour have become very important. The first five chapters of the GALA are abundant with (parts of) them, but outside of that we can find principles of proper administration in different other statutes as legal norms for administrative behaviour. They can be found in all kinds of organic laws and various general and special administrative laws that contain aspects of proper administration principles.

Principles of proper administration: intrinsic extension of the standard

Furthermore, there is the development in administrative law from principles of proper administration into principles of good administration and that is more than a question of semantics.¹⁰ There is much more at stake here than putting new wine into old wineskins, as some have suggested.¹¹ As it happens, this concerns an intrinsic extension of the standard regarding administrative behaviour. Principles of good administration are not yet commonplace in Dutch jurisprudence on administrative law. Besides, some Dutch authors and Dutch members of the linguists group of European institutions have also insisted with respect to the extensive group of principles of good administration that these principles must be qualified as proper administration principles.¹² Law comparative studies¹³ at a national level have shown that these concepts have become established outside of the Netherlands as well as on a European level and they are expressed as such in jurisprudence;¹⁴ the former is evidenced by the Swedish article and the latter will be addressed in this article. Good administration principles are laid down in six groups: proper administration, transparent administration, participatory administration, accountable administration, effective administration in relation to human rights and administration. These principles do not all have their pointers in the same direction, there are issues about their mutual relationship, and they do not have a univocal meaning yet. After this we will show that the principles have been given a more coherent approach at a European level and that it is recommended that Dutch administrative law seeks to do the same.

¹⁰ G.H. Addink, *Algemene beginselen van goed bestuur en de toepassing door de Algemene Rekenkamer*, *Nederlands Tijdschrift voor Bestuursrecht* 2005, no.6, p.169-183.

¹¹ See R.J.N. Schlössels, 'Kroniek Beginselen behoorlijk bestuur', *Nederlands Tijdschrift voor Bestuursrecht* 2005, no 7, p. 254, with respect to a rhetorical question raised by me.

¹² E.M.H. Hirsch Ballin, 'Een grondrecht op behoorlijk bestuur', *Nederlands Tijdschrift voor Bestuursrecht* 2000, no 10, pp. 305-308.

¹³ *Principles of Good Administration in the Member States of the European Union*. Stockholm 2004. A study commissioned by the Swedish government into the question if, and if so, to what extent, binding statutory principles regarding principles of good administration are included.

¹⁴ J. Wakefield, *The Right to Good Administration*, Alphen aan den Rijn: Kluwer Law International 2007.

IV. EUROPEAN DEVELOPMENTS REGARDING THE NORMS FOR ADMINISTRATIVE BEHAVIOUR

The course of time saw the development of the necessary principles of good administration in the European context. We do not intend to name all those norms here; we will only mention the most important sources and then address the most recent and detailed norms laid down in a recommendation on good administration from the Council of Europe.

Codes of good administration European Union

Practice as well as jurisprudence on European administrative law has pleaded for the creation of European regulation with general provisions regarding European administrative law, a kind of European GALA. We have supported this view earlier.¹⁵ There is even more reason to do so now as most European institutions have developed their own code of good administration with significant differences between them. In short, we are in dire need of harmonisation of European rules. Before this will happen, we will have to make do with the codes of good administration that have been established so far. In this context it is also relevant to note that every institution must evaluate its use of the code every two years and report on this to the European Ombudsman.¹⁶

The European Union has produced a number of documents in which the principles of good administration have been specified. The Council of Ministers, too, has paid attention to the subject in different statements.

Code of Good Administrative Behaviour

The duty of the European Ombudsman, who was created as a result of the Maastricht Treaty, is to combat bad administration by communal institutions and organisations. Before the creation of the Ombudsman the Committee on Petitions.¹⁷ received complaints from the public. The Committee still exists but its prominence in the development of principles of good administration has diminished. The European Ombudsman frequently argued in the past in favour of a general law regarding good administration in order to prevent 'maladministration' by the administration. The end result was that the Ombudsman created the 'Code of Good Administrative Behaviour'¹⁸ at the request of European Parliament. It has 27 articles that govern good administration.

The idea for the code was first launched by EMP Roy Perry in 1998. The European Ombudsman responded with a text for the code reflecting research done on his own initiative. This Code was presented to the European Parliament as a special report on 6 September 2001 and was approved in a resolution by the European Parliament. The European Parliament's resolution was based on the proposal from the Ombudsman with a few amendments by the Committee on Petitions of the European Parliament. The Ombudsman Code has been developed, according to the explanation, by looking at the principles of European administrative law as they have been laid down in the case law of the European Court of Justice. It also took its inspiration from national laws.

After the Code's approval, it was sent to all institutions and organisations of the European Union with the request to these departments and their civil servants to create their own code based on this one and to enforce it. The result is that different European departments have their own separate code of good administration. By his promotion of good administration, the Ombudsman will help to improve the relations between the European Union and its citizens. The substantial differences between the codes of the various European institutions are striking. Furthermore, provisions from these codes can be detected in case law and statements by the European Ombudsman.¹⁹

On the approval of the Code, the European Parliament called on the Commission to come forward with a proposal for a regulation with the same substantial content as the present code. The idea behind this is that a regulation will emphasize the binding character of the rules and principles it embodies and, as a result, will be equally applicable to EU institutes and bodies. It must promote the openness and consistency of the European administrative behaviour. This goal is best implemented by a proposal by the European Commission on good administration. Until now the Commission has failed to heed this as article 308 requires the Council's unanimity. Furthermore, some member states entertain principle objections against article 308 as it is seen as a way to extend the Union's powers.

As a result, European courts have had, until now, experience with codes established and implemented by different European institutions. The European Code of Good Administration, the European Ombudsman Code, is an essential instrument for the ombudsman in the exercise of his double role. The ombudsman applies the code to his examinations of alleged cases of maladministration by European institutions. But the Code also serves as a useful guide and aid for civil servants and encourages them to apply the best practice to the administrative actions in order to prevent maladministration. Here we can catch a

¹⁵ G.H. Addink, 'Principles of Good Governance: Lessons from Administrative Law', in: D.M. Curtin & R.A. Wessel (eds.), *Good Governance and the European Union*, Antwerpen-Oxford-New York: Intersentia 2005, p. 48.

¹⁶ See article 27 of the Code of Good Administration.

¹⁷ This Committee hears about a thousand petitions annually. See for a recent report of the discussion on its annual report 2006 (2007/2132INI): 15 October 2007, A6-0392/2007.

¹⁸ K.Kanska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', *European Law Journal* 2004, no 3, p. 296-326.

¹⁹ See for a systematic overview of statements by the European Ombudsman with respect to the Ombudsman Code: K. Fennel, 'The European Ombudsman and the Principles of Good Administration. Development and Application of the European Code of Good Administrative Behaviour', in: *Principles of Good Governance II*, Utrecht 2007, and pp. 5.1-5.34. Id. The recent speech by the European Ombudsman P. Nikiforos Diamandouros, *The principle of good administration in the recommendations of the European Ombudsman*, Sofia, 17 September 2007.

first glimpse of the dichotomy mentioned earlier in the European administrative law in the context of the European Ombudsman.

The right to good governance by European institutions and bodies can be qualified as a fundamental right and as such it is laid down in article 41 of the EU Charter of Fundamental Rights. The Code informs citizens what the right means in practice and what they may expect, practically speaking, from the European administration. As the Treaty of Lisbon includes a reference to the Charter, we can be sure that this right will increase in importance over the coming years. Citizens and civil servants have shown a great deal of interest in the Code since its adoption by the European Parliament in September 2001. Its impact has not been restricted to EU institutions and bodies. It has also been adopted by a number of (candidate) member states. It is of importance for the promotion of the awareness of the rights and obligations laid down in it.

Status of the Code of Good Administrative Behaviour

As regards the status of the Code, we would like to remark the following. The EU Charter of Fundamental Rights was adopted during the European summit in Nice in December 2000.²⁰ The Treaty of Lisbon has, as we stated earlier, a reference to the EU Charter of Fundamental Rights. This reference has the same legal status as the incorporation of the Charter itself in the Treaty. The explanation says that the creation of the reference means that citizens cannot demand the enforcement of all kinds of rights.²¹ This probably means that the words and the character of the Charter have not changed at all. This explanation ignores, however, all kinds of developments that have taken place in European rules and case law.²² Furthermore, the Charter shows that a fundamental choice was made in favour of the continental model and rejected the Anglo-Saxon one such as the Bill of Rights. The continental model not only grants negative but also positive rights towards the government. The remarks made at the time with respect to the Charter also apply to the reference in the Treaty of Lisbon. Even this reference to a non-binding Charter is still meaningful. It makes the rights more visible, gives an ideological basis and serves as a guide for the activities of the legislative power. Until now references were only made by the Advocates General and the Courts of First Instance. We have to state though that no court in the European Union has ever used it as an argument, but

often either as one of the main arguments or as an additional one.²³

The explanation also says that the EU Charter of Fundamental Rights does not confer any new powers. At the same time, however, the Treaty of Lisbon grants the power to the European Union to join the European Convention on Human Rights (ECHR).

The Charter provides the Union and its member states with a list of fundamental rights binding on the signatories. The Charter makes these rights more visible for all citizens as a result of which they will be better informed of their rights. In addition to this, the Charter creates rights that are not protected by the ECHR, which is restricted to the protection of civil and political rights. It is devoted, in particular, to social rights of employees and the protection of data and the right to good governance. The rights in the Charter apply to EU citizens in their dealings with the EU government.

The fundamental rights of the EU citizen in the Charter are the right to good governance (article 41)²⁴ and the right to complain about maladministration by institutions and bodies of the Union with the European Ombudsman (article 43). This Code is meant to give details of the practical meaning of the right to good governance incorporated in the Charter.

Any citizen of the Union and any natural or legal person residing or having its registered office in a member state has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

The European Ombudsman examines alleged cases of maladministration by Union institutions and bodies as referred to in article 195 EU Treaty and the Ombudsman Statute. The definition of maladministration given by the European Ombudsman in his annual report of 1997 is as follows: 'a case of maladministration occurs if a government body fails to act in accordance with the rules and principles that are binding upon it'. This definition was approved by the European Parliament.

Besides the approval of the Code, the European Parliament has also adopted a resolution inviting the European Ombudsman to apply the Code to the

²⁰ For a discussion of the different aspects of the EU Charter of Fundamental Rights: *NJCM-bulletin* 2000, pp. 924-962, with contributions by, amongst others, R.A. Lawson & A.W. Heringa and an account of the discussion during the NJCM general meeting on 14 April 2000.

²¹ That is what appears to be the Dutch point of view. For a viewpoint in us country with fewer constraints, see S.C. van Bijsterveld & E.M.H. Hirsch Ballin, *De Integratie van het Handvest van de Grondrechten van de Europese Unie in de Constitutie van de Europese Unie*, The Hague: WRR 2003.

²² T. Tridimas, *The General Principles of EU Law*, Oxford: Oxford University Press 2006, section. 7.6 'The Charter of Fundamental Rights', pp. 356-369.

²³ T. Tridimas, *The General Principles of EU Law*, Oxford: Oxford University Press 2006, section. 7.6 'The Charter of Fundamental Rights', pp. 360-361.

²⁴ 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes: (1) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (2) 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; (3) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community 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.
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.

examinations of maladministration and as such elaborate the citizen's right to good governance as laid down in article 41 of the Charter. The ombudsman will have to take into account the rules and principles laid down in the Code when he examines alleged cases of maladministration.

In future, the ombudsman will continue to emphasize the added value of the conversion of the Code into a European law.²⁵ This will help remove the confusion as a result of the different codes of most EU institutions and bodies. Hence, it will guarantee that the institutions and bodies will apply the same principles in their relations with citizens and it will, for citizens as well as for civil servants, underline the importance of these principles.

Principles of Good Governance in European Case Law

European courts confirmed the importance of procedural safeguards as a counterweight to the increased discretionary powers of the administration. The courts have recognized the following principles:

- 1) the general principle of administration through law,
- 2) the principle of non-discrimination,
- 3) the principle of proportionality,
- 4) the principle of legal certainty,
- 5) the protection of legitimate expectations,
- 6) the right to a hearing before an adverse decision is taken by a public authority.

Tridimas sees the principle of good administration in his *The General Principles of EU Law* as part of the principle of defence. He shows that the European Court has paid attention to the principle of good governance since 1976, but more systematically since the nineties. His explanation for this: 'Its elevation to a general principle coincides with the growth and increasing diversity of Community administrative action which led the Community Courts to elaborate standards of good governance and accountability'.

Tridimas gives an overview of the principle of good administration in European case law²⁶ and he distinguishes different components within this principle. He shows that, originally, case law mentioned 'proper' and 'sound' administration but that more recent case law uses the principle of 'good administration'. He then goes on to say that he does not think it is a fundamental constitutional principle of law as the legislator is not bound by it, though the Union's administration is. Furthermore, his view is that the principle did not primarily originate in the law systems of the member states. And finally, he qualifies the principle as subsidiary: its violation may lead to a liability for damage, though it cannot be relied on as an annulment ground before the court.

Another important document is the European Commission's White Paper²⁷ from the same year. It has a description of the principles of good governance, which has been elaborated in proposed policy plans. Now it was the elaboration in particular which attracted quite some criticism,²⁸ though the descriptions of the principles of good governance given by the Commission remained unscathed. It means that at a European level, not only the legislator, the court and the ombudsman are working with these principles but that the administration does so too.

Code Good Governance Council of Europe

The European Union and the Council of Europe both pay attention to good governance. The Committee of Ministers adopted a recommendation regarding good governance on 20 June 2007. This recommendation is the implementation of a request from the Parliamentary Assembly to make a draft for a model on the fundamental right to good governance in the form of a Code of Good Governance. This Code is based on earlier recommendations from the Committee of Ministers and on the European 'Code of Good Administrative Behaviour'.

The Code of the Council of Europe is based on a Swedish survey into the present rules in the member states of the European Union with respect to good governance. The results of the survey were:

- 1) there are series of central principles of good governance that have been generally accepted in the separate member states;
- 2) most of these principles are of a general nature and they are laid down in legally binding rules in constitutions and administrative laws;
- 3) the differences between the purpose and content of these rules are substantial;
- 4) the interpretation of these principles shows the differences of at least four different administrative law traditions in Europe.

The view of the Swedish government is that this inventory should lead to European rules regarding good governance: one could say that the idea is to develop a European GALA. This idea has also been floated in jurisprudence, but until now that seems to be a step too far. That is why the introduction of a Code of Good Governance designed by the Council of Europe is even more important and so is the recommendation²⁹ to member states to incorporate it in their legislation in order to implement good governance at a national level.

The Code is based on a broad definition of the administrative body that must comply with the principles. The following principles can be found in the Code: the principle of legality, the equality principle, the impartiality principle, the proportionality principle, the legal certainty

²⁵ Look at i.e., the speech held by the European Ombudsman, P. Nikiforos Diamandouros, *Legality and good administration: is there a difference?* Straatsburg, 15 October 2007.

²⁶ T. Tridimas, *The General Principles of EU Law*, Oxford: Oxford University Press 2006, section 8.12 'Principles of good administration', pp. 410-417.

²⁷ *European Governance, A White Paper*, Brussels, 25 July 2001, COM (2001) 428 final.

²⁸ D. Curtin & I. Dekker, 'Good Governance: The Concept and its Application by the European Union', in D.M. Curtin & R.A. Wessel (eds.), *Good Governance and the European Union*, Antwerp-Oxford-New York: Intersentia 2005, p. 10-20.

²⁹ The Recommendation of the Committee of Ministers to member states on good administration, June 20, 2007, CM/Rec (2007)7.

principle, principle of timeliness (due care), the principle of participation, the principle of the protection of personal privacy and the principle of transparency. Furthermore, there is a separate section devoted to rules on administrative decisions, such as on whose initiative decisions are made, applications for decisions by citizens, the citizen's right to be heard, the citizen's right to be involved in other decisions of a general nature, the payment of reasonable cost by the citizen only, the requirements to be met by the decisions, the publication of decisions, coming into force of decisions, implementation of decisions, and the amendments of decisions. The last section is devoted to appeal facilities and the administrative body's occasional obligation to pay damages.

Comparison of the European Ombudsman Code and the Council of Europe Code

First of all, it must be stated that the Ombudsman Code is meant to be applied at the European level and by civil servants in particular, whereas the Council of Europe Code is aimed at administrative bodies at national level. This raises the general question whether administrative bodies must be subjected to a set of norms that differ from those that apply to the civil servants who work for these administrative bodies. Our view is that this is not desirable and that therefore it makes sense to compare both codes. Furthermore, the internal relations between the administrative bodies and civil servants are excluded in the Ombudsman Code, while this is not the case within the Council of Europe Code.

A striking feature of the Ombudsman Code is the description of the legality requirement, which is much stricter than the one in the Code of the Council of Europe. The latter's description of the lawfulness requirement is broader as it also covers rules of law (national and international) and legal principles. With respect to the principle of equality the Ombudsman Code puts more emphasis on non-discrimination, while the Code of the Council of Europe takes the principle of equality as the point of departure within which non-discrimination is placed. The Code of the European Council has a broad explanation to the principle of proportionality, while the Ombudsman Code favours a more restricted version. It is striking that the Ombudsman Code codifies the principle concerning justified legitimate expectations and that the Council of Europe Code has laid down a broadly worded principle of law security. The principle of due care in the sense of a reasonable term for making decisions is incorporated in both codes. The Code of the Council of Europe has recorded the principle of participation, which does not occur in the Ombudsman Code. The principle of personal privacy (as part of the principle of due care) is more detailed in the Code of the Council of Europe than in the Ombudsman Code. The transparency principle has been given a broad definition in the Code of the Council of Europe, whereas the Ombudsman Code has a more restrictive description.

It is also striking that the Code of the Council of Europe makes a distinction between section I, in which the principles of good governance have been placed, and section II which is devoted to provisions on the decision-making process. The section last mentioned, however, also includes, in essence, principles of good governance but its scope is restricted to decisions. It seems as if, wrongly in my view, that the Council of Europe applies a stricter definition of the principle of good governance.

Section II starts off with a definition of administrative decisions. It then proceeds by stating that a decision may be initiated by the administration itself, but that a citizen may also ask for a decision to be made. Requests by citizens to take a decision are then subjected to a number of requirements, which are purely clerical provisions. The following provisions, however, are mainly focussed on the principle of due care. The citizen's right to be heard can be found in both codes, whereby the scope of the citizen's right granted by the Ombudsman Code is broader. This right is restricted in the Code of the Council of Europe to individual decisions as well as other decisions. The Code of the Council of Europe allows a demand for payment of reasonable expenses by the citizen to be asked. The principle of motivation appears in both codes, as well as the principle of due care by means of publication. Furthermore, it is interesting that the Code of the Council of Europe also devotes provisions to the way the rules are enforced and related powers of enforcement, which are completely absent in the Ombudsman Code.

The third section of the Code of the Council of Europe lays down the right of appeal and the right to damages; both subjects are not covered by the Ombudsman Code. It does contain, however, the right to complain with the European Ombudsman.

Interim Conclusion

The previous shows that there are remarkable differences between both codes and that, furthermore, the principles of good governance in the Netherlands are very different too.

Firstly, the specifics of the Code of the Council of Europe are striking, whereas the Ombudsman Code also assumes a rather broad concept of good governance. The establishment of the Ombudsman Code was hailed as an important piece of codification, but that applies even more to the Code of the Council of Europe. The principles of good governance in the Code of the Council of Europe are far more detailed than the principles of good governance that were developed so far in the European Union.

Both codes go much further than the eight Dutch principles of proper administration (some of which have been laid down in the GALA), which leads to the conclusion that the scope of the principles of good governance in the European context is significantly wider than the eight Dutch principles of proper administration. As a result of this and also in view of the Swedish survey mentioned earlier, it seems that the Netherlands are lagging behind with the administrative development of notions of good governance as mentioned before. It must be noted though, that not all six categories of the principles

of good governance are incorporated in the Code of the Council of Europe. Particularly the principles regarding the accountability of the administration and the principles regarding the effective administration in particular are conspicuously absent. Furthermore, it must be noted that both codes contain subjective rights to institute appeal, to complain and to receive compensation from the government.

And finally, a number of remarks on the effect of both codes. As we stated above, the codes apply, in principle, to different legal relations. The Ombudsman Code focuses primarily on application by the European Ombudsman to complaints on European institutions, whereby their own codes may also become relevant. In addition to that, the Advocates General with the European Court and the Court of First Instance use it, sometimes as the main argument but more often as a minor addition to their line of reasoning.

On the establishment of the Code of the Council of Europe, which took place as late as June 2007, a number of relevant observations were made that we would like to address briefly here. The Code was created at the request of the Parliamentary Assembly of the Council of Europe, which had asked for a description of the right to good governance and the drawing up of a code that enables an effective implementation of that right. The object is that it will lead to more unity between the members of the Council of Europe. Good governance requires good legislation that takes into account the interests of citizens and administration and its implementation must meet the requirements of good governance including several principles of good governance. It is recommended to incorporate them into national legislation, with reference to the link to the right to good governance laid down in the Charter of Nice. The Code is an invitation to the members of the Council of Europe to follow that up.

V. EUROPEAN DEVELOPMENTS REGARDING THE RIGHT TO GOOD GOVERNANCE

The right to good governance is included, as one of the fundamental rights of the European Union, in the so-called Nice Charter that was established on 7 December 2000. Article 41 states the following with respect to good governance:

- 1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies 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 Community 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.
- 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.'

These provisions show that there is no general and subjective right to good governance but that it grants, in essence, a subjective right to good governance which covers several aspects. It is probably better to say that some aspects of good governance are laid down.

The first paragraph gives a kind of umbrella right, which is given more substance by the requirements regarding the way everyone must be treated by the institutions and bodies of the Union: impartially, fair and within a reasonable time. Part of that is the provision of paragraph two which gives the details of the obligation to hear a citizen in case of an adverse decision, to have access to one's own file and the obligation to give reasons for a decision. Furthermore, anyone who suffers damage as a result of Union actions is granted the right to compensation. And finally, everyone has the right to be answered in his or her own language. It is interesting to see that it is particularly the formal and procedural elements that have been laid down in these rules. That is understandable as case law on these issues is well-developed, but it does not alter the fact that the right to good governance also has substantive elements.

The explanation on article 41 shows that the subjective rights it incorporates are based on the case law developed in the European Union.³⁰ The essence is that the Union is subjected to the rule of law, the characteristics of which are laid down in case law,³¹ including the principle of good governance. The specific details, too, have been developed by the courts.³² The principle to give reasons is derived from article 235 of the Treaty.

The right, as it has been laid down in paragraph 3, is guaranteed by article 288 of the Treaty. Paragraph 4 states the right as it is laid down in the third paragraph of article 21 of the Treaty. In accordance with article 52 under 2 of the Charter, these rights are applied subject to the conditions and restrictions of the Treaty. The right to an effective remedy, which is of importance in this context, is guaranteed in article 47 of the Charter. There

³⁰ Charter of Fundamental Rights of the European Union. Explanation to the Complete Text. Brussels, 11 October 2000.

³¹ Such as the following decisions: CoJ EG 31 March 1992, C-255/90P, *Burban* [1992] ECR I-2253, Court of First Instance EG 18 September 1995, T-167/94, *Nolle* [1995] ECR II-2589, 9 July 1999, T-231/97, *New Europe Consulting* [1999] ECR II-2403.

³² The development of the law mentioned in the first two paragraphs is based on case law: ECJ 15 October 1987 re 222/86, *Heylens* [1987] ECR 4097, section 15 of the grounds; ECJ 18 October 1989 re 374/87, *Orkem* [1989] ECR 3283; ECJ 21 November 1991 re C-269/90, *TU München* [1991] ECR I-5469, and Court of First Instance 6 December 1994 re T-450/93, *Lisrestal* [1994] ECR II-1177, Court of First Instance 18 September 1995 re T-167/94, *Nölle* [1995] ECR II-258.

have already been several occasions when this provision was relied on in proceedings before European courts.³³

Furthermore, article 42 states with respect to the access to documents that ‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.’ This right is already guaranteed in article 255 of the Treaty. It applies according to the conditions of the Treaty in agreement with article 52-2 of the Charter.

Article 43 stipulates with respect to the ombudsman: ‘Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.’ This provision also makes a link to the Treaty. This right is embedded in articles 21 and 195 of the Treaty and will also be applied subject to the conditions laid down in the Treaty.

And finally, article 44 that states the following rule with respect to the right of petition: ‘Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament’.

VI. DUTCH DEVELOPMENTS WITH RESPECT TO THE RIGHT OF GOOD GOVERNANCE

The development of good governance in the Netherlands have been fragmentary. We can, however, distinguish the following four general lines in the Dutch democratic rule of law.

Initially, it was the independent courts in particular that provided the specifics of the unwritten principles of good governance. This is the result of the vesting of more and more administrative powers with a discretionary character in administrative bodies. The courts have specified the principles of good governance in Dutch administrative law, taking fairness as their cue. That development was even more encouraged by the introduction of a general administrative court in 1976, but the more specialised administrative courts, too, contributed substantially to the development of the principles of good governance. After the joining of administrative courts to the regular courts and the introduction of the Judicial Division of the Council of State, it seemed as if the courts started to confine themselves to a formal type of judicial review with a strong emphasis on the principle of due care, sometimes in relation with the principle of motivation. The lower courts and specialised administrative courts are the ones that seem to be leading the developments when compared to the Judicial Division of the Council of State

as regards to further developments of the general principles of proper administration.

Subsequently, we can see not only good governance principles but also several subjective rights in relation with administrative behaviour being developed in international and European treaties. As far as this last point is concerned, it is the European Court of Human Rights in *Staatsburg* that has played a very prominent part, particularly in cases involving punitive sanctions or subjective rights of citizens. Moreover, we have seen the creation of a large number of human rights treaties, as a result of which there has been a substantial increase of the importance of human rights.

As a result of the democratic development in the Netherlands, statutes are put in place that are aimed at the public nature of administrative behaviour and citizen’s participation in administrative behaviour. The sixties and seventies saw the embedding of the public nature of administrative behaviour in the Government Information Act. It details when and subject to which circumstances citizens are entitled to the publication of information. Information and participation are closely related, whereby participation was initially part of the sectorial environmental and town and country legislation, but which became more harmonized in the GALA.

Finally, we see the development of several administrative norms in relation to the Europeanization and internationalization of national administrative law. Internationalization has led to the increased importance of international organisations as well as the standards which have been developed by these organisations in all kinds of fields. The importance of organizations such as the IMF, the World Bank, the United Nations and OECD cannot be overstated in the field of policy as well as with respect to the creation of standards.

Europeanization is the result of the European Union and the Council of Europe. Until recently, specific financial-economic administrative developments were part of the EU’s scope and the general legal administrative development took place within the Council of Europe. Today, this distinction no longer applies, and we can witness a certain mutual influence on both European institutes.

VII. PROS AND CONS OF BOTH LINES OF DEVELOPMENT: A COMPREHENSIVE APPROACH

The Netherlands distinguish, roughly speaking and with variations, two conceptions of fundamental rights: the first conception of fundamental rights gives man pride of place, while the second conception takes a more functional view on fundamental rights.³⁴

Whereas in the first conception, human freedom, a dignified society and human dignity are at the centre stage, the second conception favours a meta-legal

³³ See for a discussion of the legal problems involved: K. Kańska, ‘Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights’, *European Law Journal* 2004, no 3, p. 325.

³⁴ E.A. Alkema, *De reikwijdte van fundamentele rechten. De nationale en internationale dimensies*, preadvies NJV 1995, Zwolle: Tjeenk Willink 1995, p. 14.

foundation based on the individual, but which views fundamental rights as having a social dimension. The exercise of freedom rights can only be done if certain conditions are in place. This is in essence the prevailing line of thought, which is underlying our Constitution.

This leads to the main question of the legality of the fundamental rights. In any case, fundamental rights do not have an absolute meaning in place and time, but they must be considered in their legal meaning. Van der Hoeven observes that fundamental rights must not be distinguished from other legal claims, with the exception that their relation to the view prevailing in society of the realization of the ethical and religious demand with respect to the autonomy of the individual is a more direct one. According to Van der Hoeven this leads to the conclusion that the difference with other subjective rights is important, though only in a gradual sense.³⁵ The following question is then: what guarantee is provided by a fundamental right? The religious-ethical assessment pattern in society has its restrictions, though not in the public's interest per se, which means in his view that the fundamental right must sometimes prevail over the direct general interest.

There is yet another disadvantage of the guarantee of the right to good governance as a fundamental right. Previously, we have seen that a fundamental right is sometimes made more explicit. This is, in itself, necessary, as it is a way for the legislator to give an indication of the content of that fundamental right. A fundamental right to good governance without specifications leads to a vague norm which could turn out to be empty in legal practice. But a specification also defines the restrictions as it is the formal and procedural aspects in particular that are specified, as a result of which the definition of the principle becomes one-sided. In short, the specification must not be limitative and allow discretion for the court to come up with an interpretation on the subject matter. It means that we are yet laying down the restrictions of good governance as a subjective fundamental right.

Furthermore, it is possible that principles of good and proper governance, respectively, can be given a meaning as a subjective right. Such a subjective right can, in any case, be less open and less specific. A clear example of this is the articles on the repeal and amendment of subsidies under the GALA. In other ways, too, rights may be incorporated in laws as a subjective right. Doing so, however, means that such a right must not be given statutory specifications that are too subjective or detailed as these will unnecessarily restrict its application, which means that it will only cover a few cases.

Both types of cases, not too 'open' or too 'specific' lead us, as a matter of course, to the advantages of a code or regulation of good governance such as we discussed above. After all, this is how the different aspects of good governance may be dealt with more systematically and more mutually coherent. The European codes serve as fine examples of a more specified regulation on good

governance with clear descriptions of the norms. These codes show something else, too, namely that it is very well perceivable to choose between a combination of good governance as a subjective right and as a standard for the administration.

This has led us to a more fundamental question regarding good governance: must legal certainty be the prevailing factor in our legislation or should justice in the sense of the protection of the individual be the overriding principle. As far as this issue is concerned, the European codes discussed above are examples of a good distribution of law security and justice.

VIII. CONCLUSIONS AND RECOMMENDATIONS

The previous has led us to the following conclusions and recommendations.

There must be a clear distinction between the principles of proper governance and those of good governance. Outside of the Netherlands, principles of good governance have been more systematically addressed by the legislator at a national level. Codes of good governance were created, more recently, at a European level, and these could serve as an example for the Dutch legislator. There is a good reason to do so as the Council of Europe has recommended its members, and that includes the Netherlands, to incorporate the Code of Good Governance in its legislation.

Good governance as a subjective right may seem attractive, but there are restrictions. Its description will necessarily be rather vague, though this may be partly circumvented by giving an indicative description of its contents. It is recommended that such a right is looked at when the next constitutional amendment is due, also in view of the important conceptions of the rule of law that are related to it.

The present fragmentary character of the rules with respect to good governance could be converted into something more systematic and harmonized as part of the GALA. The European codes we have discussed above may serve as a useful guideline for the incorporation of these aspects into the GALA.

In this way, the combination of good governance as a fundamental right and good governance as a norm for the administration justifies the desired balance between law security and justice.

IX. REFERENCES

- [1] J.B.J.M. ten Berge, *Burgerplichten jegens de overheid. Tussen normaal en abnormaal*. Alphen aan den Rijn: Kluwer 2007.
- [2] J.B.J.M. ten Berge, 'Verankering van het integriteitsbeginsel in het bestuursrecht', *NTB* 2006, nr. 7, pp. 211- 218.
- [3] G.H. Addink & J.B.J.M. ten Berge, 'Study on Innovation of Legal Means for Eliminating Corruption in the Public Service in the Netherlands', in: J.H.M. van Erp & L.P.W. van Vliet (eds.), *Netherlands reports to the seventeenth international congress of comparative law*, Antwerpen-Oxford: Intersentia 2006
- [4] F.A.M. Stroink, *De groei en bloei van het bestuursrecht*, Den Haag: Sdu 2006
- [5] P.J. Boon, J.M. Reintjes & J.G.J. Rinkes (eds.), *Van Apeldoorns Inleiding tot de studie van het Nederlandse Recht*, Deventer: Kluwer 2003.

³⁵ J. van der Hoeven, *De plaats van de Grondwet in het constitutionele recht* (dissertation 1958), re-published: Tjeenk Willink 1998, p. 173.

- [6] G.H. Addink, 'The Ombudsman as the fourth power. On the foundations of Ombudsmanlaw from a comparative perspective', in: E.C.H.J. van der Linden & F.A.M. Stroink (eds.), *Judicial Lawmaking and Administrative Law*, Antwerp en-Oxford: Intersentia 2005
- [7] G.H. Addink, *Algemene beginselen van behoorlijk bestuur*, Deventer: Kluwer 1999.
- [8] G.H. Addink, 'Algemene beginselen van goed bestuur en de toepassing door de Algemene Rekenkamer', *Nederlands Tijdschrift voor Bestuursrecht* 2005, No.6, pp.169-183.
- [9] R.J.N. Schlössels, 'Kroniek Beginselen behoorlijk bestuur', *Nederlands Tijdschrift voor Bestuursrecht* 2005, No 7
- [10] E.M.H. Hirsch Ballin, 'Een grondrecht op behoorlijk bestuur', *Nederlands Tijdschrift voor Bestuursrecht* 2000, No 10, pp. 305-308.
- [11] *Principles of Good Administration in the Member States of the European Union*. Stockholm 2004
- [12] J. Wakefield, *The Right to Good Administration*, Alphen aan den Rijn: Kluwer Law International 2007.
- [13] G.H. Addink, 'Principles of Good Governance: Lessons from Administrative Law', in: D.M. Curtin & R.A. Wessel (eds.), *Good Governance and the European Union*, Antwerpen-Oxford-New York: Intersentia 2005 Annual report 2006 (2007/2132IND): 15 October 2007, A6-0392/2007.
- [14] K.Kanska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', *European Law Journal* 2004, No 3, pp. 296-326.
- [15] K. Fennel, 'The European Ombudsman and the Principles of Good Administration. Development and Application of the European Code of Good Administrative Behaviour', in: *Principles of Good Governance II*, Utrecht 2007
- [16] The recent speech by the European Ombudsman P. Nikiforos Diamandouros, *The principle of good administration in the recommendations of the European Ombudsman*, Sofia, 17 September 2007.
- [17] For a discussion of the different aspects of the EU Charter of Fundamental Rights: *NJCM-bulletin* 2000, pp. 924-962, with contributions by, amongst others, R.A. Lawson & A.W. Heringa and an account of the discussion during the NJCM general meeting on 14 April 2000.
- [18] S.C. van Bijsterveld & E.M.H. Hirsch Ballin, *De Integratie van het Handvest van de Grondrechten van de Europese Unie in de Constitutie van de Europese Unie*, The Hague: WRR 2003.
- [19] T. Tridimas, *The General Principles of EU Law*, Oxford: Oxford University Press 2006, section. 7.6 'The Charter of Fundamental Rights'
- [20] Look at i.e., the speech held by the European Ombudsman, P. Nikiforos Diamandouros, *Legality and good administration: is there a difference?* Straatsburg, 15 October 2007.
- [21] T. Tridimas, *The General Principles of EU Law*, Oxford: Oxford University Press 2006, section 8.12 'Principles of good administration', pp. 410-417.
- [22] *European Governance, A White Paper*, Brussels, 25 July 2001, COM (2001) 428 final.
- [23] D. Curtin & I. Dekker, 'Good Governance: The Concept and its Application by the European Union', in D.M. Curtin & R.A. Wessel (eds.), *Good Governance and the European Union*, Antwerp-Oxford-New York: Intersentia 2005
- [24] The Recommendation of the Committee of Ministers to member states on good administration, June 20, 2007, CM/Rec (2007) 7.
- [25] Charter of Fundamental Rights of the European Union. Explanation to the Complete Text. Brussels, 11 October 2000.
- [26] Such as the following decisions: CoJ EG 31 March 1992, C-255/90P, *Burban* [1992] ECR I-2253, Court of First Instance EG 18 September 1995, T-167/94, *Nolle* [1995] ECR II-2589, 9 July 1999, T-231/97, *New Europe Consulting* [1999] ECR II-2403.
- [27] ECJ 15 October 1987 re 222/86, *Heylens* [1987] ECR 4097, section 15 of the grounds
- [28] ECJ 18 October 1989 re 374/87, *Orkem* [1989] ECR 3283
- [29] ECJ 21 November 1991 re C-269/90, *TU München* [1991] ECR I-5469]
- [30] Court of First Instance 6 December 1994 re T-450/93, *Lisrestal* [1994] ECR II-1177, Court of First Instance 18 September 1995 re T-167/94, *Nölle* [1995] ECR II-258.
- [31] K. Kańska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', *European Law Journal* 2004, No 3, p. 325.
- [32] E.A. Alkema, *De reikwijdte van fundamentele rechten. De nationale en internationale dimensies*, preadvies NJV 1995, Zwolle: Tjeenk Willink 1995
- [33] J. van der Hoeven, *De plaats van de Grondwet in het constitutionele recht* (dissertation 1958), re-published: Tjeenk Willink 1998