



ANTAL SZERLETICS

THE ROLE OF GOOD GOVERNANCE PRACTICES IN THE PROTECTION OF FUNDAMENTAL RIGHTS*

THE CONCEPT OF GOOD GOVERNANCE

There is no single and exhaustive definition for the notion of 'good governance'. It can be generally understood as 'the responsible use of political authority to manage a nation's affairs'.¹ According to the Office of the United Nations High Commissioner for Human Rights, good governance is 'the exercise of authority through political and institutional processes that are transparent and accountable, and encourage public participation'.² Although the notion of good governance is fairly new in development literature, theorizing about the structure of a fair and just governance dates a long time back in the history of philosophy. In Plato's Republic, for example, good governance is understood as the rule of the philosopher king. For Plato, philosophers make the ideal rulers because they possess the ideal of the 'good' and, unlike other human beings, they are not susceptible to corruption. Aristotle, instead of focusing on the qualities of an idealistic king, examines different governmental forms (the six possible constitutional forms being monarchy, aristocracy, polity, tyranny, oligarchy and democracy) and emphasizes the importance of state institutions to foster civic virtues. Somewhat contrary to the ancient approaches, the modern concept of good governance generally associates good governance with *development*. Beginning from

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¹ Definition mentioned by Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 Harvard Human Rights Journal 1 (2000) p. 16. Original definition in Clarence J. Dias, David Gillies, *Human Rights, Democracy and Development* 10 (1993).

² *Good Governance Practices for the Protection of Human Rights* (UN-OHCHR publication, 2007) p. 2.

the 1980ies, the notion of good governance had started to appear in the policy documents and legal instruments of various international organizations such as the UN, World Bank, IMF, OECD and the European Union. Interestingly, while the term good governance is frequently used at the international level, it appears only rarely in national legal documents.³

THE CONTENT OF GOOD GOVERNANCE

The notion of good governance can be conceived as a basket of many practices, including, for example, professional civil service, anti-corruption policies, transparency and accountability, democratic decision-making, the principle of the rule of law, protection of human rights and independent judiciary.⁴

The constitutive elements of good governance vary according to the particular international organization and the particular document we examine. The 2000/64 Resolution of the UN Commission on Human Rights mentions the following four characteristics of good governance.⁵

(1) *Transparency*: Transparency means that decisions taken and their enforcement are done in a manner that follows rules and regulations. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement.

(2) *Responsibility and accountability*: Responsibility and accountability means that decision-makers in government, the private sector and civil society are accountable to the public and/or to their institutional stakeholders.

(3) *Participation*: It means that the public can participate (either directly or through representatives) in the decision-making and the implementation of public projects or other government activity.

(4) *Responsiveness to the needs of people*: Good governance requires that institutions try to serve all stakeholders within a reasonable timeframe.

³ *Stocktaking – On the Notions of ‘Good Governance’ and ‘Good Administration’* (Venice Commission, Study no. 470/2008, 2011) p. 14-16. No European constitution mentions the principle of good governance. On a statutory level, only the Netherlands and Latvia have incorporated the notion of good governance in their statutory laws.

⁴ Reif (2000) p. 16.

⁵ For a more detailed explanation of these elements, see the UNESCAP document entitled ‘What is Good Governance?’ available at <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp> (06.06.2011). I rely on the explanations of this document in my paper.

These characteristics can be complemented with the following additional elements:⁶

(5) *Effectiveness*: It means that processes and institutions produce results that meet the needs of society while making the best use of resources at their disposal.

(6) Equity and inclusiveness: This principle requires that all groups, but particularly the most vulnerable, have opportunities to improve or maintain their well being.

(7) Rule of law: This principle requires fair legal frameworks that are enforced impartially.

(8) Consensus oriented: Good governance requires mediation of the different interests in society to reach consensus.

I would like to make two remarks at this point. On the one hand, it is important to emphasize that 'mere' democratic government is not the same as good governance. In a certain sense, good governance is a wider category because its scope extends beyond the public sector to non-state actors as well (i.e. members of the civil society and market actors). On the other hand, good governance has not always been associated with democratic governments. Historically, when the term 'good governance' was coined by the World Bank in the 1980ies, the Bank argued - due to its political neutrality - that the examination of whether a government is democratic or not falls outside its mandate. As a result, it focused only on the economic dimensions of good governance and avoided on purpose the use of the term 'government' so as not to infringe upon state sovereignty.⁷

GOOD GOVERNANCE, DEVELOPMENT AND THE HUMAN RIGHTS AGENDA

In the 1960ies and 1970ies, development policies were state led within a planning framework.⁸ The role of governance was to help the implementation of state-led development plans.

From the 1980ies, the role of governance was increasingly to assist the implementation of economic reform programmes that aimed at market liberalization, privatization and stabilization and wanted to move away from centrally planned devel-

⁶ Ibid.

⁷ *Stocktaking – On the Notions of 'Good Governance' and 'Good Administration'* (Venice Commission, Study no. 470/2008, 2011) p. 3.

⁸ Mandira Kala, *Democratizing Policy Making in India: Role of Participatory and Deliberative Governance in Advancing Human Capabilities and Freedoms* (paper presented at the conference of the Human Development and Capability Association, 17-20 September 2007, New York) p. 3.

opment (*cf.* India, China). Thus, the initial 'good governance' agenda of the World Bank focused on creating efficient institutions and rules that aided development by creating market- and investor friendly environment.⁹ Development focused on economic growth and correspondingly, good governance focused on the rule of law, anti-corruption measures, transparency and efficiency. Human rights were not mentioned initially in these documents – a more practical reason for this being the World Bank's already mentioned political neutrality towards different governmental structures.

However, it has soon become clear that mere economic development will not lead to a better realization of human rights (not even to a better realization of economic or social rights as one normally would expect) and that the notion of good governance has to encompass fundamental rights as well. Sustainable development necessarily entails respect for human rights and democratic values.

Henry Shue argues that the realization of basic rights (and in particular the realisation of subsistence rights) is not strictly related to the level of economic development of a country.¹⁰ In Shue's framework, basic rights are those rights that are essential to the enjoyment of other rights. Non-basic rights may be sacrificed, if necessary, in order to secure the enjoyment of basic rights.¹¹ This does not work the other way around. Basic rights shall not be sacrificed to secure other rights simply because such a sacrifice does not make 'sense'. By sacrificing the basic right, the very enjoyment of the non-basic right becomes impossible. Thus, the notion of human rights, generally understood, seems to encompass both basic and non-basic rights, which distinction cuts through the traditional 'generation-based' categorisation of fundamental rights. It is important to emphasize that basic rights are not intrinsically more valuable than other non-basic human rights. In fact, it can be plausibly argued that the enjoyment of the right to education (a non-basic right) constitutes a richer (i.e. more valuable) experience than 'merely going through life without ever being assaulted' which corresponds to the enjoyment of the basic right to security.¹² The priority of basic rights is based only on 'pragmatic' or 'instrumental' reasons namely that basic rights are necessary for the enjoyment of other rights.

Shue distinguishes between three categories of basic rights: subsistence, security and liberty rights. It is not hard to see why the right to physical security qualifies as basic right; being physically secure (i.e. not to be subjected to or threatened with murder, torture, rape, beating, etc.) is a necessary condition for the enjoyment of any other right.¹³ Some liberty rights are also essential for other rights, most notably the right to participation (in the control of the economic and political institutions and

⁹ *Ibid.*

¹⁰ His seminal book on the topic is Henry Shue, *Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, NJ: Princeton University Press, 1980, 1996).

¹¹ *Ibid.* p. 19.

¹² *Ibid.* p. 20.

¹³ *Ibid.* p. 21.

policies)¹⁴ and the right to free movement. Finally, subsistence rights aim to provide a basic level of economic security that includes, for instance, access to adequate food, shelter, clothing or minimal public health care.¹⁵ Shue rejects the traditional view that there is a hierarchy between basic rights. The traditional prioritisation of security rights over subsistence rights “rests on the claims that (a) security rights are negative in the sense that they involve only ‘refrainings’; (b) subsistence rights are positive – requiring positive actions and the allocation of resources [...]”¹⁶, with the underlying assumption that positive rights are somewhat morally ‘less obligatory’ or ‘less urgent’ than negative obligations since they demand more resources from the state.

Shue, in opposition to the traditional view, argues that subsistence rights are not as ‘expensive’ and security rights are not as ‘cheap’ as they are normally thought to be. This is because both groups of rights invoke three correlative duties (and not only one, such as refraining from intervention or actual positive intervention): (1) duties to avoid depriving; (2) duties to protect from deprivation; and (3) duties to aid the deprived.¹⁷ The right to security primarily requires refraining from offensive actions to avoid depriving. However, it is impossible to protect security rights without taking a wide range of costly actions such as setting up and running a set of social institutions including police forces, criminal courts, prisons or schools for training police, lawyers and guards.¹⁸

In the case of subsistence rights, the second duty (i.e. duty to protect from deprivation) is often underestimated. It is clear that a governmental system that focuses only on its negative obligations to refrain from human rights violations (i.e. duty to avoid depriving) is insufficient because deprivation of subsistence rights can occur without anyone malevolently violating these rights. Deprivation of subsistence rights can occur, for example, as a by-product of unregulated economic development. On the other hand, the fulfilment of subsistence rights does not always require the provision of grants of commodities (i.e. duty to aid the deprived) but can merely entail the provision of some opportunity for supporting oneself. People often do not request to be supported but rather to ‘be allowed to be self-supporting on the basis of one’s own hard work’.¹⁹ Thus, the costs of subsistence rights can be substantially lower than usually expected.

Shue’s hypothetical example describes a relatively isolated village in a developing country that relies on growing black beans to feed its own population.²⁰ The

¹⁴ This claim is not uncontroversial. For Shue’s reasoning, see Shue (1996) pp. 67-74.

¹⁵ Ibid. p. 23.

¹⁶ Judith Lichtenberg, *Are There Any Basic Rights?*, in Charles R. Beitz, Robert E. Goodin (eds.), *Global Basic Rights* (Oxford: Oxford University Press, 2009) pp. 71-72.

¹⁷ As Thomas Pogge remarks, this tripartite typology of duties has laid the foundation for the ‘respect, protect, fulfill’ mantra in human rights discourse. Thomas Pogge, *Shue on Rights and Duties*, in Charles R. Beitz, Robert E. Goodin (eds.), *Global Basic Rights* (Oxford: Oxford University Press, 2009) pp. 124-25.

¹⁸ Shue (1996) pp. 37-38.

¹⁹ Ibid. 40.

²⁰ Ibid. 42.

main landowner of the village produces about a quarter of the beans marketed in the village and employs seasonal workers during the harvest period. One day the landowner receives a lucrative offer to grow flowers instead of beans. The investor from the capital does not only offer him salary and annual payment for the lease on his land but also provides him with modern equipments which allow the landowner to hire less workers. However, changing his production of black beans to flowers causes a shortage of food and unemployment in the village. This particularly affects poor families who relied on seasonal work and the local market to supplement their own modest resources. Famine and malnutrition appears among these families and their basic subsistence rights are being violated. It is important to point out that no one actually or maliciously violates these rights;²¹ the violations are simply the results of unregulated economic activity. Shue argues that the duty of the state would be to provide adequate protection from these indirect but harmful consequences of the market. This could be reached by setting up and managing an adequate institutional and regulatory framework (i.e. on agricultural investments by making similar contracts void) and the scope of good governance shall extend to this as well. It is not only a market or investor friendly environment that good governance has to ensure. It must also protect from deprivation and, adhering to this second duty of the state, good governance can ensure the realization of subsistence rights without having to resort to actual and expensive aid interventions. Shue's conclusion seems to correspond with Amartya Sen's opinion on famine and hunger. He once reportedly said: 'I don't think it [i.e. famine] is a question of economics, but of public policy. There is need for more explicit analysis of the effects of public policies on different classes, particularly the extreme underdogs of society. Good governance can make all the difference.'²²

THE CAPABILITY APPROACH OF AMARTYA SEN

Besides Shue's theory, the capability-based approach of Amartya Sen also had an important role in connecting development with human rights and good governance. One of Sen's central ideas is that the degree of human development cannot be measured with sheer economic growth. Traditionally, poverty had been associated with a low level of income or consumption. In opposition to this, Sen argues that 'poverty must be seen as the deprivation of basic capabilities rather than merely as lowness of incomes, which is the standard criterion of identification of poverty.'²³

²¹ It is not the intention of the investor or the landowner to violate the rights of other villagers. They simply follow their own economic interests.

²² The original article is available at www.thehinduretailplus.com/thehindu/2003/01/11/stories/2003011108051100.htm (06.06.2011)

²³ Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) p. 87.

To understand the capabilities approach, we need to understand the concepts of 'functionings' and 'capabilities'. The concept of 'functionings' reflects the various things a person may value doing or being.²⁴ Examples of the 'beings' include being well-nourished, being undernourished, being educated, being part of a supportive social network, etc.²⁵ Examples of the 'doings' are travelling, caring for a child, voting in an election, taking part in a debate, etc. Sen explains the notion of capability in the following way:

A person's 'capability' refers to the alternative combinations of functionings that are feasible for her to achieve. Capability is thus a kind of freedom: the substantive freedom to achieve alternative combinations (or, less formally put, the freedom to achieve various lifestyles).²⁶

The difference between capabilities and functionings is a difference between the 'effectively possible' and the 'actually realized'. Travelling is a functioning; the real opportunity to travel is a capability.²⁷ It is clear that the same functionings can be surrounded with different capability-sets. An affluent person who decides to fast for religious reasons and a destitute person who is forced to starve have the same functionings in terms of eating but have very different capability-sets. This example very well shows why it is better to measure well-being with capabilities instead of actually realized functionings.

It is a matter of discussion how to identify the group of relevant capabilities. Martha Nussbaum has famously argued that there is a well-defined list of capabilities which contains 'universal' or 'basic' capabilities and shall be enshrined in every democratic constitution.²⁸ Sen rejects the idea of a definite list, mainly because he thinks that selecting capabilities will have to be an act of public reasoning, through a democratic process that would ensure that the relevant capabilities are in harmony with the specific social context.²⁹ He writes in a recent article:

²⁴ Ibid. p. 75.

²⁵ Ingrid Robeyns, *The Capability Approach*, in Stanford Encyclopedia of Philosophy, accessible at <http://plato.stanford.edu/entries/capability-approach> (23.06.2011)

²⁶ Sen (1999) p. 75.

²⁷ Ingrid Robeyns, *The Capability Approach*, in Stanford Encyclopedia of Philosophy, accessible at <http://plato.stanford.edu/entries/capability-approach> (23.06.2011)

²⁸ The list of basic capabilities is the following: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) other species; (9) play; and (10) control over one's environment. See, e.g. Robeyns (2011). For Nussbaum's own works, see Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2006) and Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

²⁹ Francisco Roquette, *Governance and the Capability Approach: relations and implications for Development* (University of Cambridge, 2003), available at www.capabilityapproach.com (05.06.2011).

To insist on a 'fixed forever' list of capabilities would deny the possibility of progress in social understanding, and also go against the productive role of public discussion, social agitation, and open debates. I have nothing against the listing of capabilities (and take part in that activity often enough), but I have to stand up against any proposal of a grand mausoleum to one fixed and final list of capabilities.³⁰

Irrespective of whether we choose to adopt the approach of Sen or Nussbaum, it is evident that capabilities are intimately linked with human rights – simply put, human rights can be understood as entitlements to capabilities.³¹ But what can be the role of good governance in a capabilities-based framework? I see two main possibilities here.

Firstly, good governance can have an instrumental role in creating an open and transparent public sphere which contributes to the determination of paramount human capabilities.³² According to Sen, it is up to the local communities to identify their relevant values and capabilities through democratic public discourse.³³

Secondly, good governance shall not only focus on economic growth but also on the protection and realization of human rights because human rights contribute to well-being and capacity-development. Sen's idea that human development is not merely economic growth is reflected in the Human Development Index³⁴ and shall be reflected, as Roquette argues, in the measurement of good governance as well.³⁵ From a different perspective, we can say that it is impossible to have genuine and sustainable development without endorsing a human rights based model of good governance. It is necessary to recognize that 'societies and markets couldn't function unless government was able to design and implement appropriate public policies, administer resources equitably, transparently and efficiently and respond efficaciously to the social welfare and economic claims of citizens'.³⁶

³⁰ Amartya Sen, *Human Rights and Capabilities*, 6 *Journal of Human Development* 151 (2005) p. 160.

³¹ *Ibid.* p. 152 ff.

³² This argument presupposes the adoption of Sen's approach, namely that selecting capabilities will have to be an act of public reasoning through a democratic process.

³³ Mandira Kala, *Democratizing Policy Making in India: Role of Participatory and Deliberative Governance in Advancing Human Capabilities and Freedoms* (paper presented at the conference of the Human Development and Capability Association, 17-20 September 2007, New York) p. 17.

³⁴ See, e.g. Sakiko Fukuda-Parr, *The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities*, 9 *Feminist Economics* 301 (2003)

³⁵ Roquette (2003) p. 25. ff.

³⁶ Roquette (2003) pp. 24-25.

THE RELATION BETWEEN HUMAN RIGHTS AND GOOD GOVERNANCE

In line with the aforementioned changes in development theory, the concept of good governance started to encompass human rights dimensions from the 1990ies. However, the relation between the two concepts remains somewhat unclear. According to the Office of the United Nations High Commissioner for Human Rights, human rights and good governance are mutually reinforcing.³⁷ This statement has three main implications, explained in the following three paragraphs.

1. Good governance is a prerequisite for the realization of human rights. The role of good governance is to create a conducive and enabling environment for the implementation of human rights.³⁸ This includes appropriate legal frameworks and institutions as well as political, managerial and administrative processes responsible for responding to the rights and needs of the population.³⁹ This function of good governance is reiterated in numerous international documents, including paragraph 23 of the UN Committee on Economic, Social and Cultural Rights General Comment 12 (Right to Adequate Food):

The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.

Good governance can promote human rights in four different ways.⁴⁰ First, good governance based democratic institutions foster public participation in policymaking and promote inclusion in decision-making processes. Second, good governance improves the way state services are being delivered to the citizens because it improves the state's capacity to provide public goods (especially in relation to subsistence rights such as the right to food or right to health). Third, good governance strengthens the rule of law by initiating legal reforms and assisting institutions with better implementation of the law. Finally, good governance aims at reducing corruption and relies on principles such as accountability, transparency and participation to shape anti-corruption measures.

³⁷ *Good Governance Practices for the Protection of Human Rights* (UN-OHCHR publication, 2007) pp. 1-2.

³⁸ Cf. the previous role of good governance to create a conducive environment for economic development.

³⁹ *Good Governance Practices for the Protection of Human Rights* (UN-OHCHR publication, 2007) pp. 2.

⁴⁰ *Ibid.* p. 2.

2. Human rights are prerequisites for good governance. Human rights form part of the notion of good governance and they provide a set of values to inform governmental work, including the development of legislative frameworks, policies and budgetary allocations.⁴¹

3. The realization of human rights is the aim of good governance and the aim of development. Good governance has to respect but also at the same time actively strive for the realization of human rights standards through its institutional framework.

CONCLUSION

Although it appears differently in many international documents, the notion of good governance is deeply interrelated with the idea of human rights. This statement is particularly true nowadays when sustainable development and human rights are intimately linked due to the theoretical 'paradigm shift' induced by the capability approach of Amartya Sen. As the example of Henry Shue highlighted, good governance can be a valuable method to fulfil the state's duty to protect from deprivation of basic rights by creating an institutional framework that protects from financial exploitation and the negative side effects of economic development. Consequently, the relation of good governance and human rights is twofold: while good governance principles reflect the content of human rights, they are also responsible for creating a conducive and enabling environment for their implementation.

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⁴¹ Ibid.

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