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THE LEGAL AND REGULATORY FRAMEWORK OF PUBLIC ADMINISTRATION*

CONTENTS

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INTRODUCTION: LAW AND PUBLIC ADMINISTRATION

1. Writings on public administration usually ignore law, whereas lawyers usually ignore the problems faced by public administration. Only a small part of the literature tries to address the conflict between the rule of law and efficiency.

2. Most writings on public administration are aimed at modernization and efficiency; the core issues are which type of organization and which management methods are best appropriate to the tasks to be performed. The answer must be based on observation and an analysis of how administration works. It is evident that the law - which is based on rules and compliance, will come into conflict with the logic of management, which organizes collective action by a combination of means and goals. This criticism of law has been used frequently to legitimize administrative science and management as opposed to a legal and formal approach of public administration, which is given as obsolete and inadequate.

3. As a matter of fact the purpose of law is neither knowledge nor understanding but to shape actuality by regulating relations between subjects; it is not to achieve goals, but rather to set out specific conditions or constraints that have to be complied with in pursuing the goals or in gaining access to the rights established by law. To express it otherwise, perhaps too sharply, the legal rule has a purpose, not a goal or a target. The legal rule lays down what ought to be, not what is in fact; it prescribes the conduct of the legal subjects to which the law is applicable, but it does not determine the conduct, which is determined by many social factors, not only - or only to a lesser extent - by the risk of a judiciary sanction or penalty. The legal rule, or a better implementation of the legal rule, may be part of a public policy programme, but once it is in force the legal life of the rule is based on interpretation, a process that is necessary in order to determine whether a particular action or situation is in accordance with the rule or not. Interpretation is not only issued by the judge, it belongs also in the practical application of the rule, in which all social actors concerned, as legal subjects, are involved. Conversely, the authorities responsible for a public policy cannot ignore the legal life of the rule, because part of its efficiency will depend on interpretation.

4. Law and management, law and efficiency, must not be set in opposition. Any thinking about the legal and regulatory framework of public administration, especially for development, has to overcome the conflict between these terms. In fact, in so far as the legal system is substantial, law is closely related to management.

5. The main assumption of this paper is that there is no efficiency without an appropriate legal regulation of the organization or of public administration activities. In its relationship to management, law has to be considered simultaneously as framework, object and tool.

6. Law is first of all a framework of paramount importance for public management. In very general terms, it is possible to affirm that any

institution is both a source of law and subject to the law, in so far as it is part of a wider (higher) legal order. This is also true for public administration. But the qualification "public" signifies that public administration is vested with public powers specifically exercised by authorities designated by the law. Since public administration is public, the law regarding it is not only to determine a number of rights and duties in its relations with other legal subjects within the limits of public order, but also to make public interest prevail for the common good. As opposed to private organizations, public administration does not act for its own benefit, but for the benefit of the community, and it is therefore subject to the rules and goals determined by the political body of that community. Institutions of public administration are established by law, their competences and powers are defined by law, their duties regarding the rights guaranteed to legal subjects are regulated by law. This function of law as a framework for public management is essential: it determines what kind of relationships will exist between the various public authorities, and consequently the conditions subject to which they must pursue their own goals and efficiently perform their tasks. For legal subjects it is also a matter of the legal security, which is quite necessary for their own activities, as well as making it possible for them to claim their rights. In other words, the function of law, as a framework for public management, is necessary both for the organization of public administration and for respect of the rights guaranteed by the law. It is quite possible that a conflict might occur between the requirement of efficiency (from the viewpoint of the organization) and the guarantee of rights, but if the rule of law (or the state of law) is recognized as a value by the political body, the guarantee of rights is paramount and would have to prevail. The principle of legality has been historically the first and most important form of this value, but it may be necessary nowadays to refer to the guarantee of human rights since legality might not be sufficient to enforce them.

7. Secondly, law is also a tool with which some specific goals can be achieved by public administration. As said earlier, most public policies require rule-making; the allocation of rights and duties is expected to orient behaviours and individual choices in order to achieve the goals pursued. It is well known that some policy programmes are "law intensive" (e.g. labour relations, labour safety, and environmental protection), whereas others are rather "money intensive" (social welfare programmes - although they usually require numerous regulations too), or "money and labour intensive" (e.g., education and health), or "medium-high in money and employment". But, more generally, law can provide a basis of legitimacy to public policies, since it is assumed to reflect the broad agreement of society on the rules according to which society is governed. Acting within the law implies acting within this agreement, and accepting the possibility of being contested on a question of law, e.g. when a person uses remedies provided by the law to enforce his rights. Acting within the law favours acceptance of public policies even if the merits are contested; it is all the more so if the rule-making procedure is open enough to assure that all interests concerned have been considered.

8. Thirdly, the law can in several respects be an object of public policy. Compliance with the law is not assured by the law itself, and can never be reduced to a matter of police or penalties. However, compliance matters if the law is to work. Various actions can be undertaken in order to enforce the law

beyond the means of the judiciary, such as information, persuasion, incentives, the training of public officials etc. Enforcing compliance can be part of a policy programme, just as rule-making. Furthermore, law-making and law implementation can give rise to specific public policies by an appraisal of the need for rule-making; by simulation or experimentation; by setting time-limits for the validity of the rule (so-called "sunset legislation"); by improving the implementation of new rules; or by evaluating the impact of the rules, which is nowadays frequently provided for by the laws themselves.

9. The present report will focus, in fact, on the first of these three functions: law as a framework for public administration and management. For further discussions the following subjects have been selected, but they are not exhaustive:

Capacity for legal system development and promulgation

Model of a legal system

Integration of legislative framework

Legal provisions for more efficient public sector

Transparency and accountability

Looking into the twenty-first century

10. The difficulty of the matter is that the development of any legal system is not a matter of legal engineering, and the (apparently) best technical solutions will not be successful if several contexts are ignored, all the more so if these solutions are imported from a foreign legal system. Owing to the extreme diversity of situations, it is better to elaborate an approach rather than try to draw some kind of ready-made receipt about what should be the legal and regulatory framework of public administration. The proposed subjects will be therefore addressed following three steps. The first, an appraisal of the starting situation regarding law and administration in developing countries, changes going on in industrialized countries on this subject since they have an impact on the latter, and resources for reforms. The second step will be to set out the agenda for development of the legal system in the form of a broad guideline, subject to adaptations and variations according to the country. The third step is to identify and articulate the various means to be involved in order to achieve progress in the legal and regulatory framework of public administration. Lastly, the conclusion will look into the twenty-first century.

I. THE STARTING SITUATION: LAW AND ADMINISTRATION TODAY

11. Submission of public administration to law in developing countries today is generally not considered to be satisfactory. However, the situations are in fact very diverse. Mutations under way in public law systems of industrialized countries have to be considered too, since they have an impact in developing countries, either because they give the lead or because they are responses to deep social changes that also affect developing countries. In each country, the resources available for reform have to be identified and appraised.

A. Law and administration in developing countries

12. It seems essential to take into account the extreme diversity of situations with respect to the submission of public administration to law, and the specificity of public administration in the development of legal systems. But in general, there exists a striking deficiency in implementation of law, especially regarding public administration.

Diversity of situations in developing countries

13. In almost all developing countries, in so far as there is a constitution, there exists a legal and regulatory framework of public administration, as well as a number of laws organizing government and the public service and usually more or less extensive judicial remedies. But that does not mean that public administration is in fact subject to the law. The scope of public law, its place in the legal system as a whole and the intensity of its regulations differ greatly from one country to another, and even more its efficiency, i.e. compliance with its provisions.

14. Differences in the scope of public law and its place in the whole legal system are the result to a large extent of history and tradition. That is why most Latin American countries have an extensive administrative law influenced by the French model, as well as do French-speaking African countries. For the latter it is part of the colonial legacy; long after independence, continuity in the legal system is supported by continuity in administrative institutions, and even more in legal education, because the new rules will be devised upon the basic legal concepts of the legal system in force. This is not true specifically of countries from the former French colonies, but also of Commonwealth countries, which are deeply embedded in the common law tradition. In Latin American countries, the influence of the French administrative law is the result of the particular political and cultural influence of France at the end of the nineteenth century on the ruling class (among the influences of other European countries on various aspects of politics, culture and the military). Nowadays the basic concepts of administrative law are still alive, and in Colombia, French law remains a source of inspiration. However, some important differences demonstrate an autonomous evolution: the codification of administrative procedure for litigation, the result of which is a much smaller role of the notion of "public service" as a criterion to determine the competence either of the administrative or of the judicial judiciary. A general law on contracts passed by public administration, and contracts subject to administrative law are only those determined by the law.

15. But differences in the intensity of legal regulations and in efficiency must be ascribed to other factors. In many Latin American countries, the paradox of overabundant legislation and overemphasized democracy contrasting with the fragmentation of society, deep economic inequalities and the low level of political participation suggests that the ruling élite is attempting to overcome the weak integration of society by developing the legal framework of a democratic state of law addressing the whole people. The lack of efficiency can be analysed by means of the model proposed 30 years ago by Fred Riggs: the "prismatic society". Many developing countries are still characterized by a low level of functional differentiation and a lack of integration, so that progress in differentiation can be accompanied by aggravated "disintegration". In a weakly integrated society, several social groups or communities coexist, the structures of which, although informal, often prevail in reality on the formal institutional rules when their members are vested with official functions; and conversely, a number of functions which tend to be differentiated in the society as a whole are taken over informally within the group or community. Consequently, the law may not be consistently enforced by the State and its institutions in so far as it is in conflict with the norms adhered to by the members of the said groups or communities, especially the ruling ones. This can explain the contrast between a sophisticated legal system and its low level of efficiency in respect of the submission of public administration to the law (in a number of Latin American countries), or the lack of a consistent system of legal rules applicable to public administration (in a number of Pacific region Asian countries). Nepotism in public offices, which is frequently observed, can be analysed as a particular case when it occurs in such societies, but it can also occur in industrialized countries, whereas, the case of the "prismatic society" offers a more pervasive approach to the situation of developing countries. The merit of Fred Riggs has been to highlight the fact that public administration in developing countries is subject to a specific societal context, and that modernization will not result simply from the transposition of well-known practices and models of industrialized countries. He points out that it is necessary to take this context into account if progress is to be expected, and that is especially true if the goal is to make efficient the legal framework of public administration.

Specificity of public administration

16. The previous hypothesis concerning the lack of efficiency of the legal framework of public administration has already illustrated the specificity of public administration. However two other elements have to be put forward.

17. First, public administration is part of government; it is subordinated to the political power. It means that a legal framework submitting public administration to the law can only be developed in a context where the political power is ready to accept that public administration might be limited by the law, and indirectly its own action. To that extent, the progress of the state of law in the field of public administration is conditioned by the progress of democracy.

18. Secondly, the existing system of public law is in almost all developing countries characterized by two features: its modernity and its unity. It is a modern system of law because its formation is linked with institution and State-

building. In countries having suffered colonization the generally accepted standard of a State seemed to imply maintaining or importing rules and institutions in accordance with this standard without sufficient regard to societal conditions. In all States, public law has been developed as a voluntary process by legislation, and to that extent by the bureaucratic élite. The unity of public law is in sharp contrast with the pluralism or the mixed law that is characteristic of the legal systems of most developing countries. In the field of private law the coexistence of modern legislation with customary and religious sources is very usual, especially in family or property law. There is said to be legal pluralism when several legal orders reflect the heterogeneity of a society, each social component tending to generate its own legal order; there is said to be a mixed system of law when interactions between legal systems existing in a society tend to form a consistent system of law. Public law has usually only modern and foreign sources and there is no influence of custom or of religion (in most cases), and no interaction with pre-modern sources of law. This is quite easy to understand: State-building takes place in a differentiation process, securing the autonomy of the State with respect to religion or tradition.

The implementation deficit and its consequences on legal consciousness

19. Implementation is a crucial issue for policy programmes and legislation in any country, but most developing countries suffer a general implementation deficit of laws, especially regarding public administration or the guarantee of rights. This situation creates a gap between the reality and the rules advertised by the laws. This can be observed with overdemocratic procedures in a number of Latin American countries; the procedures or guarantees are hardly practised, or they are ignored or sometimes diverted from their goals. This can be observed in the case of civil service regulations in a number of French-speaking African countries. These regulations are directly transposed from French law, but hierarchy, recruitment and rights are distorted by behaviours and customs, which deviate from the principles underlying the laws.

20. This situation has dramatic consequences on legal consciousness; many people in various functions and ranks habitually behave according to formal and informal rules depending upon the circumstances in which they are involved. When such behaviours prevail, law can no longer fulfil its function, since only the circumstance will decide whether or not a rule will be enforced. It is impossible to develop a legal and regulatory framework of public administration without a strategy to overcome the implementation deficit. The difficulty resides in the fact that the source of the deficit is not in the implementation, but rather in the law itself, when law does not address the real norms underlying the behaviour of social actors.

B. Mutations in industrialized countries

21. It is necessary to deal very briefly with mutations in the legal framework of public administration in industrialized countries, since these countries generally give the lead, provide models to other countries, and influence international organizations which give assistance to the latter. By mutations

is meant here changes in the structure of the legal systems, not simply changes in the substance of legal rules.

22. In all industrialized countries, there exists an extensive legal framework for public administration, and it is generally recognized that public administration is working according to legal rules. A main division among these countries still exists between countries with a legal system based on common law, and countries with a legal system based on Roman law; only in the latter, is administrative law an autonomous branch of the legal system. Nevertheless, it is certainly possible to discern very general principles common to all these countries, and some major trends, although they might not be observed, in all of them. It would be useful to be able to appraise how far these principles and trends might inspire reforms in developing countries, depending on the particular conditions in each of them.

Common principles

23. We can rely here in part on J. Schwarze's work, which is limited to 12 countries of the European Community (EC), but his systematization can certainly be generalized to the United States of America and Canada, owing to the very general character of the common principles that he has found. Following J. Schwarze, it is possible to affirm that the legal framework of public administration in the said countries is based on five broad principles, or groups of principles, which are reflected in the various legal systems in different ways (and sometimes through other principles). These are:

(a) The principle of legality: administrative action is subject to law, and law determines the limits of discretionary powers vested in public authorities, who are liable in case of harm caused by their activities;

(b) The principle of equality before the law, and the prohibition of discrimination: meaning, at least, that arbitrary or unreasonable distinction is unlawful;

(c) The principle of proportionality: the measures taken must be proportioned to the pursued goal. This principle, first expressed in German law and in international law, is accepted as a general principle in all legal systems regarding public administration, but it is usually reflected in specific principles of more or less limited scope;

(d) The principles of legal security (or certainty) and of reliance on legitimate expectations: these two principles are closely related, since they both imply a weighing up with the principle of legality, with which there may be a conflict. A major expression of the reliance on legitimate expectations in common law countries is the equity principle of estoppel;

(e) Principles of administrative procedure based on the rule of law: it is more difficult to establish here really common principles. However, the right to a fair hearing or to present one's defence is widely recognized, and the duty to give the grounds of an individual decision is still widely controversial, and is usually recognized in specific situations.

24. These principles, or some of them, can also be found in the legal systems of a number of developing countries, especially in the administrative law of Latin American countries; compliance with these principles, not their acceptance, is controversial.

25. However, such a synthesis is only possible at a very high level of generality, whereas the efficiency of legal rules usually depends on details and on procedure. Furthermore, a major issue is not taken into consideration: the existence or not of an autonomous administrative law, and the scope of the administrative law. This last question is of paramount importance, because the law applicable to contracts passed by public authorities and the remedies open to the claimants will depend on the solution preferred in each legal system. Lastly, the existence of very broad common principles does not allow an inference that all systems of public law are becoming closer within a general trend towards globalization. Despite some converging tendencies in some groups of countries, and a lot of reciprocal influences, a careful analysis of the nature and causes of main changes that can be observed in administrative law of most EC countries shows that they were brought about rather by endogenous factors than by external factors of the pressure of EC law.

26. Nevertheless, the formulation of such broad principles in a recommendation of the General Assembly would be appropriate to the universalization function of the United Nations, and it could give support to reform trends in a number of countries.

Some major trends

27. These major trends are not major because they can be identified in all industrialized countries, but because of their significance for the legal systems concerned and their influence on other countries. Five major trends are prominent: deregulation, independent agencies, open government, more efficient remedies in administrative litigations and the impact of regional integration. These trends should be appraised with regard to conditions prevailing in developing countries.

(a) Deregulation

28. This trend appeared in the United States in the middle of the 1970s in a very specific context regarding State intervention in the economy: the goal was to reduce the burden of rules issued by numerous federal agencies. Competition and imitation made it an almost unavoidable topic of public policies in most industrialized or developing countries during the last decade. However, its expansion was favoured by its ambiguity. At least three different orientations are covered, which are not incompatible: (a) stopping the inflation of legal rules; (b) reducing the role of government regulation in economy and society; and (c) transferring a number of activities from the public sector to the private sector and the market. They all imply important changes for public administration in the sectors concerned, but they do not mean a retreat of law. Quite on the contrary, they tend (a) to make regulation more efficient; or (b) to diversify the legal instruments involved; or (c) to set up new regulatory instruments and institutions.

29. The result may be a rearrangement of the legal framework for the relationships between government and society, in favour of more encouraging, more market-oriented or more negotiated legal instruments instead of classical coercive regulatory instruments. Transposing such new methods in developing countries requires a preliminary evaluation of the conditions necessary to make them successful; otherwise the result may be less efficiency and less governability.

(b) Independent agencies

30. The American model of independent agencies has become very popular whenever it seems desirable to organize a regulatory function at a distance from party politics in order to secure neutrality and continuity. In European countries, the "deregulation" and privatization policies have given rise to a number of such authorities, established by law outside the traditional ministerial administration in sectors such as public utilities (United Kingdom), television licences (France), or stock exchange regulation (France, Spain and Italy). In fact, the independent agencies are very diversified regarding their real "independence", or autonomy and powers, and of course the activities concerned. Some are actually public authorities, with rule-making and/or adjudication powers; others are advisory or supervisory bodies; some of them are subject to a very protective status, while others have only an organizational autonomy. If the formula of the independent agencies can be useful in neutralizing a controversial area (as evidenced with the case of television in France), it may be submitted to critics for other reasons. Coordination is made difficult for the Government, since a number of departments are removed from its authority and are working according to a pure sectoral logic. Independence from the Government may be replaced by a closer control on agencies by interest groups. This danger is even greater where State structures are weak, and the participation of citizen or consumer groups cannot be expected to form a counterweight. Even in the United States, it must not be forgotten that the first aim of deregulation policies was the regulatory activity of a number of independent agencies or commissions. Developing countries that have followed this model, generally incurred setbacks.

(c) Open government

31. It might be the most promising trend of the last decades, reversing the old tradition of bureaucratic secrecy. Open government, or transparency, means the right of access for citizens to administrative documents and to the rule-making process.

32. Regarding access to administrative documents, which is the greatest challenge for public administration, Sweden is the first country in the world to have introduced legislation establishing this right, and it is now part of its Constitution. But only a small number of countries have really followed this path: among industrialized countries, the United States, France, Spain (Constitution, art. 105), Italy; or some South American countries such as Colombia (Constitution, art. 74) and Brazil (Constitution, art. 5-XXXIII).

33. Open government involves deep changes in attitude towards citizens; it requires new government methods, adequate to the new governance paradigm, which should be part of any empowerment strategy directed towards deprived groups.

(d) Remedies

34. There is a general tendency to reinforce the guarantee of rights by combining judicial and non-judicial remedies; the execution of court decisions has also to be secured. In that respect, the traditional opposition between common law and administrative law systems, between systems based on non-judicial remedies and systems based on judicial remedies have lost part of their significance. Non-judicial remedies are necessary because they can do justice faster, and they give an opportunity for a fair solution even when there is no duty in law for public administration; judicial remedies are necessary in order to submit public administration to the law and to overcome bad faith in public administration, if it is present. Only the plurality of remedies can help to avoid situations where there is a vacuum.

35. Regarding the enforcement of court decisions the common law has always had the advantage that courts have the same powers on public authorities as on other legal subjects, except in cases of immunities. The evolution of administrative law in Germany, Italy and, more recently, France shows that it is also possible to enforce court decisions on public administration in administrative law systems.

(e) Regional integration

36. For Western European countries regional integration has significant consequences on the legal and regulatory framework of public administration. Not only has the EC law a pervasive influence on public administration, which is responsible for its application, but it has favoured some progress of the legality principle. For example, interim injunctions of the administrative judge to a public administration regarding certain categories of public contracts has resulted directly in the duty to implement EC guidelines where they did not exist in domestic law. Not less important is the application of the European Convention for the Protection of Human Rights and Fundamental Liberties, which has implications on administrative procedures and courts.

37. Where politics or interests oppose the development of the legal framework of public administration, regional integration processes, underpinned by economic globalization, may facilitate acceptance of a higher level of legality through the principles involved in the settlement by an international court of matters coming under the treaty.

C. Resources for reform

38. If the development of the legal framework of public administration is considered as progress for developing countries, just as for other countries, for the reasons stated above, three different resources can be mobilized: the legacy of foreign models subject to an appraisal with regard to present conditions and policy goals; the national culture and legal tradition (also

subject to appraisal); and universal values expressed in documents issued by the United Nations.

The legacy of foreign models

39. Much has been said about the inadequacy of the administrative structures and legal systems introduced by colonial rule. It has been emphasized that the deep gap between the spirit, norms, methods and procedure of modern administration on the one hand and, on the other, social, cultural, and human values of traditional and rural societies often provokes the rejection of the former by the population; there is low compliance where there is low acceptance. However, and despite the very wide agreement on this appraisal, a remarkable stability of the colonial legacy can be observed in most developing countries that have been submitted to the colonial rule. The current explanation is that the new ruling élite, educated in the colonial metropole, have been vested with power from these structures and laws and were encouraged by the former colonial ruler to maintain them after independence.

40. Other explanations, however, must not be overlooked. First, the influence of a foreign model has sometimes preceded colonization. In Arab countries, the reformist thought of the nineteenth century tried to reconcile the Shari'a with law based on universal reason, and to develop State structures according to European models, because the State was seen as the source of Western power. For reformist writers, the State was necessary to reform society, and the State had to lay down the legal rules required by the new times; they inspired reforms undertaken in Tunisia and Turkey, around the middle of the century. The first influence of French administrative law is a result of this process of intellectual and political reform. It is comparable to the reforms undertaken from the end of the nineteenth century in a number of Latin American countries, looking for new ways in Europe. Secondly, administrative structures and laws imported from Europe were also, to some extent, instrumental for any State-building in societies that had not fully developed their own statehood during the pre-colonial times. Professor Yadh Ben Achour, from Tunis, analysed the reasons for the success of French law in the Arab countries, although it has always been challenged by scholars representing the tradition, by its inclination for conceptualization, formalism and logic units. This inclination for abstraction made French law particularly capable of covering various legal concepts. In the field of public law, the intimate association of authority and liberalism contributed to the assimilation of French law after independence, even in countries such as Egypt which were not colonized by France. According to Professor Ben Achour, French public law is a weapon for new nation-States in formation with its basic concepts of an autonomous administrative law reflecting the superiority of public interest and public service, whereas its liberal face inspired reformist and nationalist movements demanding the enforcement of revolutionary and republican principles. The reasons for this assimilation of the colonial legacy could be analysed in the same way in other countries. Assimilation means appropriation, and the legacy can be developed later, autonomously, according to local conditions.

41. It must not be overlooked, however, that laws and institutions imposed by the colonial ruler were always downgraded and distorted for the purpose of colonial domination. An excellent example is the introduction of administrative

justice in Tunisia in 1888: claims against public administration had to be lodged at the civil court, but the judge was not entitled to set aside unlawful administrative acts. The reason for this deviation from French law was that "the work accomplished by public administration [should] be not enshackled and made suspicious by thoughtless and careless claims, which could cast discredit on measures dictated by public interest".

Traditional culture and legal tradition

42. Nevertheless the links between modernity and tradition never were properly worked out, and the gap has increased with the persistent underdevelopment of wide areas, making the élite even more distant, in many countries, than it probably was one century ago.

43. Law is part of culture; public law is bound to representations of State and power in society that are more or less shared in all classes; if not, State and public administration, as well as legal rules, will suffer alienation from society, and the lack of acceptance will result in a low level of compliance.

44. At least two aspects of traditional culture are very widespread in developing countries and should be taken into consideration in legal reforms regarding public administration: in an oral society, the importance of personal relations and the importance of the group (the community) for the individual.

45. Modern bureaucracy is based on the written word; however, the unwillingness of many people to face it is well known and has been well documented even in industrialized countries, especially in deprived groups of people, despite submission to the requirements of administrative work. It is even more so in developing countries where a high proportion of the population is illiterate. Writing and computerizing are necessary to guarantee legality, as well as for modernization purposes, but mediation is still required by many ordinary citizens. In practice such mediation has been developed by third parties offering this service for payment, or by public employees themselves. In recent years, the United Nations Educational, Scientific and Cultural Organization (UNESCO) has carried out a programme for a socio-cultural and communicative approach of public administration in developing countries, the results of which have still to be evaluated, but the legal aspects thereof must be considered.

46. The administrative procedure should be regulated in order to:

(a) Provide assisted interviews on written matter;

(b) Facilitate the mediation of third parties giving assistance, subject to conditions to avoid abuses;

(c) Formulate precisely the duties of public employees with regard to citizens;

(d) Establish supervision on the fulfilling of these duties.

The right of access to the writings established by the administration during the procedure must be guaranteed for the parties involved. Simplification of

administrative procedures remains a challenging goal; it can be facilitated by decentralization.

47. Solidarity is also an important value in traditional societies. The first commitment of the individual is to the group; he is therefore especially sensitive to the opinions of the group members and group loyalty usually prevails over other loyalties or is vested in them. This fact is well documented in African societies. Modern State structures and laws have always failed in implementing the values of Western nationwide integrated societies. Communities and communitarian loyalties have been taken into account in numerous development policy programmes supported by international organizations, but hardly ever in legal rules applicable to public administrations and activities. The difficulty resides in the fact that while public law is based on an assumption of individual rights and duties, in reality it is subject to the commitments of individuals to their communities. The integration of these links in the legal system would be in contradiction to the principles and the values underlying the institutions and the legal rules of public administration. Nevertheless the path explored by the reformist Arab writers of the nineteenth century should be pursued and legal principles elaborated capable of bridging the gap between various communities and modern public administration, a step which is needed for participation in the world economy. T. Ould Daddah proposed to revive the concept of "Asabiya", introduced by Ibn Khaldoun in the fourteenth century, which means the consciousness of the good of the community, but it would make sense only if it could be realized in specific institutions or procedures. The African Charta of the Peoples' and Human Rights recognizes the commitment of the individual to his community as well as to the family (arts. 18, 27, 29), but the implications for public administration, and the relationships of individuals or communities to public administration, are still to be elaborated. The balance is difficult to find, since the community may be oppressive for the individual, especially for women; and this has to be prevented too, as in law the rights of the individual prevail (see the International Covenants on Human Rights of 1966 contained in General Assembly resolution 2200 (XXI), annex).

48. The materialization of these values into legal norms applicable to public administration should be on the agenda of reform, either for the formulation of rights and duties or for devising new forms of voluntary administration closer to the people by delegation from public bodies to recognized communities.

49. Legal tradition might be more difficult to integrate in public administration. It is either a customary law immanent in social relationships referring to a stateless society, or a law based on religious principles and faith. Therefore, the legal tradition usually makes no room for public administration; authority is not based on the rule of law or on democratic legitimation, and cannot be subject to review or to citizens' control. As mentioned above, the existing legal framework of public administration is not a mixed law.

Universal values

50. The United Nations has initiated or adopted numerous documents integrating recognized universal values into international law. The two Covenants mentioned

above can provide the starting-point for elaborating new principles regarding public administration.

51. The International Covenant on Economic, Social and Cultural Rights establishes the duty of States to provide the services or the guarantees necessary to enforce these rights. It means that public administration has to be so organized and endowed with the necessary means that it can implement the international obligation of the State to comply with the Covenant.

52. The International Covenant on Civil and Political Rights establishes equality before the law and the right to the equal protection of the law as a universal principle for all human beings. This is also a duty for public administration, and individuals are entitled to due protection against those who infringe this principle.

53. It is possible to develop further the international guarantees of human rights with new provisions or a new instrument concerning public administration specifically.

II. PROPOSED GUIDELINES FOR DEVELOPMENT OF THE LEGAL FRAMEWORK OF PUBLIC ADMINISTRATION

54. Starting from the previous observations, the proposed guidelines come under five basic orientations: (a) enforcing the legality principle; (b) citizens and public administration; (c) personnel management; (d) public services or utilities performed by the public or the private sector; (e) law and governance.

A. Enforcing the legality principle

55. Historically, public administration has been submitted to legality by the judges; therefore the court system should be improved for that purpose. Nowadays, the constitution has a role to play.

Constitutional provisions on public administration

56. Recent constitutions contain provisions on public administration, beyond the usual provisions on the structure and basic principles of local government. Constitutional principles are certainly not sufficient to curb public administration under the law, but it helps to popularize basic principles that will support citizens' claims and open new possibilities of interpretation to the judges. Examples can be quoted of the constitutions of Greece (1975: arts. 20 and 101-104), Spain (1978: arts. 103-107), Portugal (arts. 266-272), Czech Republic (Bill of Rights 1992: art. 36), Romania (1991: art. 48), and also of Colombia (1991: arts. 86-92 and 365-370), or Brazil (1988: various provisions in arts. 5 and 6, arts. 36-38). These provisions differ very much in object and scope. Most important are provisions for remedies against illegalities and harms caused by public administration.

Improving judicial remedies

57. Concerning the court system, the independence of judges should be ensured. Even if it is, main weaknesses to be addressed are the cost of access to the courts, which requires public assistance for deprived claimants, the possibility for judges to issue interim injunctions, the waiting time for judgement, which must be reasonable, and the enforcement of judgements by public authorities. The possibility of bringing grievances before an international court can exert pressure for improvements in these matters, as evidenced by the example of the European Court of Human Rights.

B. Citizens and public administration

58. A good system of guarantee of citizens' rights in matters of public administration makes it possible to achieve a settlement without suing before the court; but the possibility of suing is essential for the efficiency of settlement procedures. Furthermore, participation and information of citizens have to be developed.

Administrative procedure

59. Numerous countries have now regulated and unified administrative procedures for decision-making. It makes it possible for any legal subject affected by the decision to be treated as a party in the procedure, and therefore to be heard, to know the grounds for the decision, and if necessary to appeal to a higher authority. The origin of such administrative procedure codes was in Austria in the last years of the Habsburg Empire. Remarkably, a number of authoritarian regimes have adopted or maintained administrative procedure codes (e.g., Spain under the Franco dictatorship and Poland, Czechoslovakia and Hungary, under the communist regime). Judicial remedies were introduced only later, when democracy was established, giving an opportunity to a judge to review the administrative or appeal decision.

60. These examples suggest also that in countries where democracy is not yet established, or is only on the eve, the situation of citizens with respect to public administration can be improved by a well-codified administrative procedure. Later on, its efficiency will be increased by the introduction of judicial remedies, but it will keep its usefulness. Another good example is given by the case of France, a country with an old tradition of administrative law, where administrative procedure was in general regulated by case-law: a simple decree (28 November 1983) has contributed to changing the balance in favour of citizens by imposing an adversary procedure in decision-making when the rights of a legal subject are to be affected, information on appeals against the decision, an obligation to withdraw at any time a rule which is or has become unlawful, and, on request of the person concerned, any individual decision based on this rule. These new provisions are widely used by the claimants, and if necessary, before the administrative courts.

Value of the ombudsman experience

61. Very few institutions have been as much imitated as the Swedish ombudsman, and in so different political and administrative contexts. This success is quite justified. Compared to appeals within an administrative procedure or judicial remedies, the complaint lodged to an ombudsman is usually submitted in no form at all, the locus standi is assessed much more widely and sometimes is not required, the ombudsman and not the plaintiff has to argue with the public authority, and the ombudsman may search for an arrangement which is fair for the plaintiff even if it is not an obligation for the public authority. Experience has shown that waiting time before a settlement is reached is shorter than in other procedures.

62. Because of its lack of formalism, this institution can be very useful in developing countries, and many of them have already introduced it. But the influence of the ombudsman depends very much on the context: in Sweden the ombudsman is supported by the authority of the parliament, by which he is elected; and by the power given to him to proceed against State officials when they do not comply with his recommendations. In other countries the possibility for the claimant to go before the court is essential, since it gives the public administration the option to comply voluntarily or to be obliged to do so.

Access to information and citizen participation

63. There is no participation without access to relevant information. The new governance paradigm which is now put forward in international discussions requires both and implies new attitudes from officials as well as from citizens. The law must provide the new framework of relationships between public administration and citizens based on information and participation. Four aspects can be distinguished: (a) the right of access to information; (b) duty of public administration to make information available; (c) the Government's information policy; and (d) participation of citizens in decision-making. Only the Government's information policy need not be regulated by the law; it is aimed at gaining support for policies, prevent opposition and avoid obstacles to implementation. It requires allies among interest groups and needs to consider mass media as partners.

64. The right of access is the right of any legal subject to have communication or a copy of any official document, subject to exceptions set out by law, or conditions regarding the author of the request also set out by law, but such conditions will reduce the efficiency of the right. A procedure has to be established to settle litigations, under judicial review, to enforce the right (see the French example of the Commission d'accès aux documents administratifs).

65. The obligation of public administration to make information available means that public administration must publish relevant information permitting citizens to judge management and government choices. Relevance of information is essential and the choice of published information must not be left to the administration concerned, but rather precisely laid down by law. The accountability of officials, elected or not, depends on the relevance of the information released. There are few examples of legal regulations of that kind. The French Territorial Administration Act of February 1992 provided for the kind

of information on local government budgets and on services franchised to the private sector that any local government has to prepare and make available for the public; several decrees have defined each element of information.

66. The issue of citizen participation in decision-making goes far beyond the legal framework of public administration. But it is part of it under several aspects. Participation is necessary: (a) to consider all interests affected by a decision; (b) to legitimatize the policy course; (c) to disclose implementation difficulties in advance; and (d) to inform public administration on needs and problems calling for public intervention. Participation enables public administration to anticipate. Without participation public administration might suffer bureaucratic blindness; this is why public administrations of industrialized countries support a number of associations or groups that can interface with the public they represent.

67. However, if participation is more than pressure politics, the purpose, scope and conditions of participation have to be regulated by the law. Law has to determine whether participation goes as far as devolution of the decision-making power, or if this power is shared through participation of citizens or interests, or if it has only an advisory or supervisory function. This is basically a political problem, but it should be borne in mind that participation may sometimes undermine the accountability of public administration and officials, or blur the allocation of decision-making powers. In that case democratic blindness would replace bureaucratic blindness, but the community would remain in the dark. Therefore, consultative participation has to be preferred in most cases, subject to the obligation of public administration to follow an open and participative decision-making procedure. Only transparency can guarantee that participation will not be, or be not too greatly biased by the power holders.

68. As a result it is not possible to regulate separately one aspect of this matter, because all aspects are too much interdependent and linked by systemic relations; open government can prevail only through a number of institutions among which each is supported by the others, or it will be easily circumvented.

C. Personnel management

69. Personnel management is not primarily a matter of law. But law will reflect the conception of public service vested in the State, and spell out the values that have to prevail in personnel management.

70. Public service systems can still be divided into closed (career) and open (labour law) systems; despite the fact that all systems are mixed to a certain extent, each is dominated by the logic of one or the other system.

71. Career systems have been criticized for their rigidity, and their difficulty in adjusting to economic changes. However, the major defect of such systems being adopted in developing countries is that it is not implemented seriously, so that the merits are missing while the drawbacks are present. The main merit of career systems is of a constitutional nature: more than open systems they are able to guarantee the neutrality of the public service, an

essential virtue from the citizens' point of view, since officials are less dependent on politicians, and are thus better able to maintain the ethical values of the public service. There is no evidence that nepotistic practices are more widespread in career systems than in open systems.

72. Therefore, constitutional provisions on public service are desirable, and can be found in the constitutions of a number of Latin American countries or others. A law should regulate the public service, determine its organization and recruitment procedures, as well as the careers, rights, duties and guarantees of civil servants, and state to which categories of personnel this statute should be applied. Enforcement of the law requires judicial remedies but also the freedom of professional organization or action.

D. Public services or utilities performed by the public or private sector

73. Despite the globalization of the economy, and the general acceptance nowadays of the market economy, different views of the balance of State and market economies continue and will continue to exist, depending on political culture, soundness of State structures, level of economic development and vitality of the private sector in each country. As a result, the same activity can be performed in different countries by a public corporation or by the private sector; it can be considered as a public utility or public service subject to extensive public regulation or, on the contrary, left to pure market economy, only subject (for example) to the law of competition and public order. This broad field of paramount importance, therefore, cannot be a matter for international recommendations of general scope.

74. However, regarding the legal framework of public administration, several situations have to be considered as far as public interest is concerned, that are not carried out by the public administration itself.

75. In a first category of situations, the public interest has given rise to a public mission that should be carried out under public responsibility. It can be carried out, however, by a public corporation or by a private firm which are, in both cases, vested with public powers or privileges required by the mission. The relationship between the public authority and the enterprise can be regulated by administrative regulation and practice or by contracts. The contract gives the opportunity for negotiation and determination of conditions for the service delivery and management responsibility. While in the case of a public corporation the contract makes it possible to delineate the scope of the management autonomy subject to the mission to be performed, in the case of a private firm the contract is aimed at establishing long-lasting cooperation, or partnership, with public administration and securing supervision of the public authority on performance. French law has developed a diversified array of contractual arrangements for these situations. Concession agreements are used with private firms; there exist several types that differ in investment funding and risk-sharing; they are now subject to a number of common rules to ensure greater transparency and open competition in passing contracts. With public corporations, are used both terms of reference (cahiers des charges), which set

out the mission to be performed and the conditions according to which the service has to be delivered to the users, and plan conventions which determine financial and managerial conditions, including the amount of budgetary support justified by the conditions of the public service.

76. Concession agreements (in general terms) do not seem very different from licensing practised in a number of countries, such as the United States or the United Kingdom in various sectors, which is devolved upon either a government authority or an independent agency. In such cases, the regulatory authority can impose with the license a number of obligations concerning the service to be delivered, pricing or competition; disputes are settled by the regulatory authority subject to judicial review. Nevertheless, this kind of instrument is based on a clear-cut separation between public and private giving less opportunities for partnerships when public goals justify that government bears part of the risk or part of the costs (capital outlay or running costs). In legal terms it is possible to say that it is based on a logic of police rather than on a logic of service, even if the purpose is service delivery.

77. Privatization policies have resulted in the transfer to the private sector of a number of public utilities, which are from now more or less extensively submitted to market laws, and the creation of specific regulatory authorities. The British experience in this field is especially interesting, because of its scope over the last 15 years, and the number of public utilities concerned. It demonstrates that the balance between public interest and private economy requires in such sectors extensive and sophisticated regulation. It has proved difficult, and not always successful, to enforce competition in sectors dominated by monopolies, such as gas or electricity supply, even more so when heavily characterized as natural monopolies and sometimes requiring the involvement of the Monopolies and Mergers Commission (MMC). It brought more information and transparency in matters such as pricing. The regulatory structure is based in all cases on an independent regulatory agency, and government supervision exercised by the competent Secretary of State; wider powers were given to the Secretary of State in the case of electricity, and powers given to the four regulators (gas, telecommunications, water supply, electricity) have been brought into line by the Competition and Service (Utilities) Act 1992. In fact it seems that the government influence can be rather pervasive, but the Secretary of State has no power to amend a licence once it has been granted. As Professor McEldowney points out, this regulatory structure is reminiscent of what existed in the nineteenth century, for example for railways.

78. Remarkably such a dual regulatory structure has never been practised in France, even at times when similar sectors belonged to the private sector. In sectors subject to EC directives, which imposed competition, but which did not give rise to privatizations, the minister remained the regulatory authority (see for telecommunications, Act of 2 July 1990, and for railways Decree of 9 May 1995).

79. What is suggested in this too brief comparison between France and the United Kingdom is that, whatever solutions are preferred, accountability must be ensured. As far as an activity is considered to be a public utility or service,

the responsibility for it is ascribed to government, which has therefore to keep the regulation of such activities under control.

80. It is a quite different matter if after privatization the company is no longer considered to be in charge of a public utility or service but simply a commercial activity subject to market laws and to compliance with the economic public order as it results, primarily, from competition law. In that case no regulatory agency is needed, except in matters of public order. In many countries independent agencies or commissions for competition and mergers now exist for the stock exchange, or even for TV programmes. A good example can be found again in the United Kingdom, after the privatization of British Airways: the Civil Aviation Authority is responsible for safety, not for the regulation of air services, which are carried out on a purely commercial basis.

81. To summarize, we reach the conclusion that public services or utilities, managed by a private or public entity, have to be performed under public responsibility. The Government remains accountable for the service provided, since it is a matter of public policy and goals; therefore it cannot leave control to an independent commission or agency in totality. The question is to determine whether a given activity, just privatized, should be considered as a public service or utility, and which powers, if not all, must be retained by the Government. There is no other way to maintain accountability. On the other hand, actually independent agencies or commissions may be a good alternative to ministerial administration if they are created in areas or for purposes concerning public order, in general or in specific matters, and have to take quasi-judicial decisions, e.g. following an adversary and open procedure, and have for this reason to be protected from politics: good examples are in France (as in the United Kingdom data protection law), competition law and TV, and in the United Kingdom the Racial Equality and Equal Opportunities Commission. In such cases there is no substantial public policy goal pursued by these commissions, but the enforcement of law.

82. This distinction can help developing countries facing such issues in the organization of their public administration to determine which tasks have to be maintained in the hands of ministerial departments and which will preferably devolve upon an independent commission or agency.

83. However, a crucial problem for numerous developing countries, and also for countries in transition, will be that they need to call for foreign companies to perform a number of services but will suffer an imbalance with their partners in financial power, expertise and opportunities. To redress this situation, transparency would certainly contribute to fairness. Beyond this recommendation, some steps could be taken, in order to guarantee fairness in the settlement of disputes, by way of international assistance offered by the United Nations to the courts of a State wishing such an assistance. Alternatively, the Washington convention of 18 March 1965 on the settlement of disputes between a State and a foreign legal subject on investments could be extended to contracts for the operation of services. Another arbitration tribunal could also be proposed within the United Nations for disputes on contracts or licences for the operation of services or works.

E. Law and governance

84. The concept of governance has been worked out first as an analytical tool, to describe the various social forces or actors involved in governing interactions at work in a given society; it is both the outcome of a social process and the medium through which the actors can act in the governance pattern, pursuing their own goals. Distinct from governance, the concept of governability is applied to the balance between governing needs and governing capacities. But a normative interpretation of governance can be derived from the latter aspect: which governance pattern is desired and for which purpose? The legal system has then to be reformed in order to promote this desired governance pattern. The governance approach of public administration should result in more responsiveness.

85. It is possible to describe only in very broad terms what developments are required to adapt the legal framework of public administration to the needs of a desired governance pattern. They can be summarized in three words: information, participation and contracts. The first two directions have been presented above (paras. 63-68). The focus here will be therefore on contracts. But, to avoid any misunderstanding, it must be emphasized that it is neither contemplated nor expected that the legal framework be based on contracts instead of laws. On the contrary, public administration is subject to the constitution and to statute laws; the role of contracts is considered here for policy formulation and implementation only. Public administration itself is still and has to remain based on rule-making and decision-making; participation of citizens or groups has to be secured in the rule or decision-making procedure.

86. Within this framework, contracts can be practised in two kinds of relationships: intergovernmental relations and partnerships with social actors involved in public policies.

87. The development of intergovernmental relations is one of the most common features of modern government. It has given rise to new legal developments in a number of countries with very different traditions, such as Belgium, France, Italy, the Netherlands, Spain, Switzerland and the United Kingdom. In these countries, covenants or contracts have been introduced in the last decade to regulate relationships between public authorities and between government levels; in the United Kingdom, there is no contract, but procedures of project tendering in the field of urban policy, which is also a privileged area of experience for the development of these instruments in several among the countries quoted. Covenants or contracts are used for policy harmonization, for cooperative policy formulation and for joint investment planning. The actual legal nature and the legal force of these instruments are not always clear, but laws have sometimes expressed their nature of contracts binding in law (France in most important cases, and Italy). The main value of the contract is the negotiation that precedes signing, which gives rise to interactive elaboration of policies and actions for the near future. A major incentive to compliance is the reciprocal interest in relying on anticipated actions of the partners.

88. Contracts can be used similarly for partnerships with various actors involved in public policies. This is obvious and already widespread as regards public-private partnerships for development or infrastructure projects.

Following the French experience, planning conventions have been recommended by the World Bank to work out new relations between Governments and public enterprises, in an effort to reconcile management autonomy and government control. Partnerships can also be worked out by agreements with the social sector, local communities or non-governmental organizations.

89. This can be qualified as a realm of soft law, but it belongs to the legal system too, despite the fact that judicial remedies are seldom used in cases of breach of contract. However, since governance is based on social processes and interactions, it cannot be imprisoned in too many rigid and fixed rules, but it is the duty of government to show the direction and to create the instruments necessary to organize and take advantage of these processes and interactions.

III. WAYS FOR CHANGE

90. To achieve results in the directions proposed, four ways can be distinguished, but are closely interdependent: (a) codification; (b) law reform; (c) legal information and empowerment; and (d) international support.

A. Codification

91. A basic condition for the efficiency of the legal and regulatory framework of public administration is that the law be known by those who need to claim its respect. Since law cannot be simplified greatly, codification remains the best way to clarify the law in force and to facilitate citizens' access to law.

92. According to present experience it is certainly preferable to separate codification and law reform. In the past, both were two sides of the same coin; nowadays, some countries (Germany is an excellent example) continue to consider codification as the way to go for major law reform. In France, the Higher Commission of Codification, chaired by the prime minister, is in charge of codification, and since 1987 the Government has decided to proceed to the codification of all French laws. Codification is not law reform, it is replacing the bulk of scattered statute laws of a branch of law by a unique and ordered collection of norms classified logically. The goal is to make access to law easier, and to facilitate updating when amendments occur. The French conception of legislation, which is in fact common to most continental European countries, is appropriate to this kind of work, since it is based on a deductive logic of the law, general principles being set out first.

93. Paradoxically, it has never come to codify administrative procedure: the reason is that it is based on case-law, and codification would be in reality a law reform, not a codification in the present meaning. However, administrative procedure is codified or is going to be codified in some specific branches of law: for example, the Town Planning Code, or the Environment Code which is actually under process.

94. The separation between codification and law reform makes it possible to achieve a major clarification of the law in the areas concerned in a relatively short time.

B. Law reform

95. Law reform is changing law in substance, not simply its presentation. When concerning a whole branch of law, it is also a politically very sensitive process, and a lengthy one. In the United Kingdom, the Law Commission is an independent body charged with providing assessments of various chapters of the British law and proposing changes. Administrative law has been subject to such an assessment. In Germany, when a codification is initiated by the Government, the first stage is a scientific work, a sort of audit of the law in force oriented to modernization; the code will introduce a new law. As a whole, the next Environment Code will have required around 20 years of work and procedure.

96. However, it is possible to achieve results by incremental legal changes. Big reforms can mobilize opposition and never come out, whereas small changes can affect the practices deeply if the crucial provisions have been well identified. Therefore, the analytic part of the reform process is very important; it will help to determine which changes are needed in order to achieve the most effective results. It is also important to distinguish what has to be fixed and enforced in the whole country, and what can be left to be regulated locally according to local conditions. In developing countries this may be particularly relevant because of the gap between cities, especially large metropolises, and rural areas. The problem of the relation between public administration and the population has to be approached differently in rural and urban areas.

C. Legal information and empowerment

97. If the Government is really willing to develop public administration on the basis of governance and communication, the legal rules and procedures laid down for that purpose have to be popularized; changes are unlikely to occur without any demand from citizens. Reform laws should include provisions committing the Government to report to the parliament and/or the president on legal information for the public. Non-governmental organizations must be involved and supported for their contribution to such campaigns.

98. In developing countries even more than in industrialized countries the rights given to the individuals must not be considered separately from collective action. Not only by tradition, which is usually based on the community, but also because of social and cultural conditions (a high percentage of illiteracy may exist, especially among women, and economic deprivation) most people are simply not in a situation to take advantage of their rights. It can therefore be suggested that non-governmental organizations as well as communities should be entitled to assist or represent their members, or those who mandate them, in administrative procedures. Non-governmental organizations and communities should be financially supported to carry out this function and if necessary hire a lawyer and they should be entitled by law to lodge appeals to the higher authority, or to the court as the case may be, against administrative decisions or rules as far as their statutory interests are affected directly or indirectly. A wide _locus standi_ is necessary to empower these organizations; it will help also to prevent disputes.

99. Lastly, the development of the legal and regulatory framework of public administration requires changes in the legal and administrative culture of the élite. In reality the situation is very much diversified; some countries have inherited an administrative tradition based on law, others have an administrative tradition where law is only instrumental and reserved to specialists. Nevertheless, all officials must be educated or trained in a culture of rights, rather than a culture of law. For public administration, the legality principle should not be a matter of authority but rather a matter of rights.

100. It is possible to influence the development of the administrative culture by new programmes of competitive examinations for the recruitment of public servants at different levels; by imposing the obligation to serve in different positions at various stages of a career in order that experience be gained of relations with the public (such an obligation is easier to impose in a career system) before promotion to some higher positions; and by changing the criteria applied in the personal assessment. Such methods have been introduced in some countries; their outcomes have to be evaluated.

D. International support

101. The international support that the United Nations could provide should use the outcomes of other branches of the United Nations system to devise its own programme. It should focus on assistance and on the development of new principles at the level of international law. It should give support to regional integration.

Using other experiences of United Nations organizations in the area of public administration

102. During the last decade the World Bank has been very much involved in administrative reforms required, in numerous developing countries, by structural adjustment programmes. The legal framework of public administration was not at issue so much as the impact of these programmes, on personnel management. In a broader perspective, changes in organization should have implications for the legal regulation of public administration. World Bank programmes would probably contain useful information if they were analysed from the viewpoint of assessing the existing legal framework and the implications of these programmes.

103. The United Nations could turn also to the International Labour Organization (ILO), which has adopted several recommendations or conventions on the rights of employees in the public service, and to UNESCO, which has implemented a programme for a communicative approach of public administration based on the socio-cultural context.

Assistance for reform

104. The United Nations could provide assistance to countries willing to reform the legal framework of public administration by programmes directed towards:

(a) Codification: in the French meaning, i.e. with the aim of facilitating access to law;

(b) Law reform: the specific agenda for reform is, of course, particular to each country, but improvements concerning information (right of access to it and the duty to provide it), the codification of administrative procedure (at least in part), including provisions for citizen participation and consultations, and legal remedies. Legal rights of non-governmental organizations and communities in administrative procedures, should be on the agenda, the support of the United Nations should embrace the assessment of the existing rules as well as identification of priorities for reform;

(c) Coordination of support programmes for the development of the legal framework of public administration with programmes oriented towards the development of the governance approach, in order to help introduce institutions and practices able to support this approach;

(d) Legal information, and support to programmes carried out by non-governmental organizations for legal information;

(e) Training higher public officials to improve the consideration of rights in administrative action, and assistance to personnel management reform.

New international law principles on public administration

105. The United Nations can promote, by recommendations or by international convention, the development of the legal framework of public administration. The International Covenant on Civil and Political Rights provides for equal access to the public service, and ILO documents have supported guarantees of rights for public employees. The General Assembly of the United Nations could also promote the guarantee of citizens' rights with regard to public administration.

106. The following principles could be put forward:

(a) The right to a fair hearing before any decision is taken affecting the rights of the person;

(b) The right to participate in administrative procedure on the basis of widely defined locus standi;

(c) Judicial review of administrative decisions;

(d) The right of access to official documents subject to conditions and exceptions provided by the law;

(e) The obligation to provide relevant information to citizens;

(f) Liability of public administration in case of harm caused by its activity.

107. The grounds of the document should emphasize that these rights have to be enforced to change the relationships between public administration and citizens, as it is necessary to promote a new model of public administration for development. The support could be by means of a resolution of the General Assembly, or a supplementary covenant on human rights proposed.

Regional integration

108. The experience of the European Community and of the European Convention on Human Rights and Fundamental Freedoms shows that regional integration can support progress in the respect of law by public administration. It can be easier for the Governments of States that share the same cultural values and are confronted with similar economic and development problems to accept at that level the generalization of a number of fundamental principles regarding public administration and, eventually, judicial review on limited matters or cases by an international court established by a treaty. The United Nations could give assistance to existing regional organizations to develop such provisions and institutions.

IV. CONCLUSION. LOOKING INTO THE TWENTY-FIRST CENTURY

109. The end of the twentieth century saw scepticism of the State as a political body and as a vehicle providing services to the population. The market was considered the best way to assess whether an activity was needed and to impose efficiency in management. The twenty-first century will probably see a return of confidence in the State, since it has proved to be necessary for the solidarity function and to permit the exercise of political leadership.

110. Experience has revealed new market failures, not only that essential solidarity functions cannot be performed by the economic agents on the market, but the solidarity dimension of many activities is sacrificed if it is abandoned to the market only. The public sector, or regulation by the State, makes it possible to maintain this solidarity dimension when it is required. Determining whether or not an economic activity has to be considered as a public utility or service remains an essential duty of the State.

111. The State is also the institutional and legal expression of the political body as a whole, and political leadership has to be vested in State institutions. It makes possible for the political body to form its will, and there is no political democracy without a political body able to express its collective preferences on some basic issues. But there is no political body, or only a rump political body, in a society where solidarity functions are not fulfilled. The social link and the acceptance of institutions vanishes when people can no longer see the benefits for them of the society they belong to.

112. Solidarity is at the core of the missions of public administrations in modern States. Therefore no decline of public administration can be foreseen. However, the State of the twenty-first century, and public administration too, will differ from those prevailing at the end of the twentieth. Authoritarian features inherited from the colonial times or from obsolete development ideologies will wither away. The State must be fair, efficient, closer to the

people, transparent and more responsive. The substance of public administration must change with the expectations of society and its organization and rules must change in consequence. Functions that have become obsolete and institutions that were in charge of these functions must be excised. The main difficulty then, will be to recognize in each case what are the solidarity functions that must be preserved, and those that must be abandoned. It will be the task of the political body to express it through the institutions of State.
