

# GOOD CORPORATE GOVERNANCE: MISSION NEVER ACCOMPLISHED!

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## At the dawn of Good Governance

I have decades of experience as an advisor and member of supervisory boards of a variety of organizations. I have faced challenges in terms of organizations not (fully) functioning in accordance with the principles of good corporate governance. As a board advisor and supervisory director, you are by definition bound to secrecy. So, no exciting revelations will follow here, but I can elaborate on the subject that concerned me deeply.

For starters, let's travel back in time a bit. I won't go as far as mankind's earliest days; I'll make a stop in Ancient Greece, to Plato's (427 - 347 B.C.E.) lifetime, to be specific. You may have heard of this philosopher, a *lover of wisdom*.<sup>1</sup> And the man behind the concept of Platonic love, of course.

Plato himself mistrusted and generally advised against physical expressions of love. But you and I are real people, human beings of flesh and blood, not zombies! So, I imagine that Plato would have advised people like us to "*govern yourself, put restrictions on yourself, and do whatever is necessary to control your lust and temptation*".

I would say that those were the earliest days of good governance! We are all familiar with phrases like "*govern yourself*", "*restrain yourself*", "*discipline yourself*", "*control yourself*" and "*show some character*". I can sum up Plato's words with the understanding that good governance truly begins with oneself. It is not about structures, or a perfect institutional context with effective "checks and balances" as we say nowadays, but about the soul of the rulers (i.e., those in charge).

Plato mentioned, with regard to good governance, four cardinal virtues: *prudentia* (prudence), *justitia* (justice), *fortitudo* (courage, strength) and *temperantia* (temperance, self-control). Although these virtues were originally intended for public governance, they are just as relevant to the private sector.

Our current practice shows that these so-called "cardinal virtues" have become endangered in a society characterized by the race for profit and personal success. However, it is also useful to know that during Greco-Roman antiquity, those virtues were "reserved" for the elite, the small upper class of the strict authoritarian society of the day.

Even in first century BC Rome, in which the well-known *Senatus Populusque Romanus* (*SPQR*)—"the Senate of the Roman populace"—was the official name of the Roman Empire (this could be found inscribed on public buildings and triumphal arches), we cannot ignore the fact that governance did not lie in the hands of the Senate nor the population. The Senate itself consisted of the aristocracy, otherwise known as the "distinguished" class, or the socio-economic elite; they held most of the power and thus, the ability to approve resolutions from the representative body of the people.

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<sup>1</sup> Philosopher is the opposite of philodoxer, i.e., the lover of opinions or beliefs.

But enough about the past; let's bring it back to our own time: many politicians—those holding office in particular—appear to be in denial of our own current reality, in which good public governance is in jeopardy. It is because of this that I confess my own skepticism of politicians' uplifting speeches, with talk of being "transparent" and in which they mention the virtues of "hope and trust" and "promoting good governance" and "integrity". Governments and many others spend much of their time reiterating their commitments at conferences and in declarations, working papers and the like. However convincing this rhetoric may be, the reality is quite disappointing, as much of their efforts turn out to be nothing but smoke and mirrors. Of course, there are always exceptions to what I have come to experience as the rule in the various countries within the Kingdom over the past few decades.

### **Why is good corporate governance necessary?**

Let's turn to the subject of good *corporate* governance. Basically, this concerns human behavior as well as the structures and processes that lay the foundation for the management of a company. It is important to emphasize that we should avoid the false impression that sound management in any organization—be it a polis, a state, or a corporation—can be created solely through institutional devices.<sup>2</sup>

Good corporate governance is intended to facilitate responsible, efficient and prudent management of a company, to increase a company's accountability and to preempt and avoid massive disasters. It is understood that good corporate governance helps companies operate more efficiently, improves access to capital, mitigates risk and safeguards against mismanagement.

According to the International Finance Corporation (IFC) of the World Bank Group:

*"Corporate governance is defined as the structures and processes by which companies are directed and controlled. Good corporate governance helps companies operate more efficiently, improve access to capital, mitigate risk and safeguard against mismanagement. It makes companies more accountable and transparent to investors and gives them the tools to respond to stakeholder concerns. Corporate governance also contributes to development. Increased access to capital encourages new investments, boosts economic growth, and provides employment opportunities."*<sup>3</sup>

This of course is equally relevant to state-owned enterprises. The Organization for Economic Co-operation and Development (OECD) has issued guidelines on this matter (2015 Guidelines on Corporate Governance of State-owned Enterprises):

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<sup>2</sup> Even Socrates restrained himself deliberately in this respect. Cf. Dante Germino (Ed.), *The Collected Works of Eric Voegelin*, Volume 16: Order and History, Volume III, Plato and Aristotle, Columbia: University of Missouri Press 2000, p. 141: "The goodness of a polis has its source, not in the paradigm of institutions, but in the psyche of the founder or ruler who will stamp the pattern of his soul on the institutions. It is not the excellence of body that makes the soul good, as Socrates insists in opposition to a much quoted piece of athletic wisdom, but the good soul will by its virtue make the body the best possible."

<sup>3</sup> [https://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/IFC+CG/](https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+CG/)

*“The state should act as an informed and active owner, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with a high degree of professionalism and effectiveness. (...) The government should allow SOEs full operational autonomy to achieve their defined objectives and refrain from intervening in SOE management. The government as a shareholder should avoid redefining SOE objectives in a non-transparent manner. (...) The state should let SOE boards exercise their responsibilities and respect their independence.”*

The OECD believes that sound policies should be formulated so that it is clear how the government should conduct itself as a shareholder. The basic principles of transparency and accountability to the state (the public) should be adhered to, with the government taking a professional and result-oriented approach. The OECD Guidelines are the international benchmark for corporate governance and they establish the minimum standards required for an effective governance. Based on these standards, the government should:

- avoid involvement in the daily management of business operations (day-to-day business), and
- allow the enterprise full operational autonomy.

It is necessary to formulate policies that ensure the following:

- clear guidelines on how the government should behave as shareholder;
- basic principles of transparency and public accountability; and
- requirements for the government to adopt a professional and results-orientated position.

### **The state of affairs in the Dutch Caribbean jurisdictions**

According to Confucius: *"It is not difficult to recognize the good, but difficult to turn it into deeds."*

I will now shift the focus to state-owned companies in (several of) the Dutch Caribbean jurisdictions (referred to as “NVs”), but my argument is just as relevant to local state foundations as it is to those in other parts of the Dutch Caribbean.

Fifteen years ago, corporate governance rules designed to protect companies from politicians (from the government, in particular) came into force in Curaçao, St. Maarten and the BES-islands. The rationale: government-owned companies should be kept out of the political sphere as much as possible, so that they may benefit from commercial, businesslike, and market-oriented management. Thus, they also run a lower risk of being taken advantage of politically.

One would expect the various governments and Members of Parliament to adhere to the rules and, in particular, those principles of good corporate governance as laid out in corporate (governance) legislation and promoted by the OECD.

Unfortunately, this is not always the case. There are politicians who desire more, rather than less, political influence over state-owned entities. They are in favor of appointing friends or

other persons loyal to their party instead of to the public. In various political parties, it is not uncommon for there to be lists of people who should be "rewarded" for one form of loyalty or another.

Being the director or a shareholder of a government-owned company is certainly not always easy. Directors will usually complain that there is too much influence from politicians, while the politicians, in turn, will argue that they have too little influence over government-owned companies. This conflict raises two principal concerns that ought to be considered:

- What are the boundaries between the government and the market?
- How much distance should there be between the government and government-owned companies?

Let us consider the first issue by asking which activities should be considered government duties and which should be left to the market. Generally speaking, there is a consensus that government should regulate public interests through legislation and regulations (for instance, consumer protection). To use the production of bread as an example, the government shouldn't have to nationalize operations to guarantee that the product remains affordable, though it may effectively control affordability through price regulation.

What the government refers to as "policy" usually relates to public duties: those that, by law and through regulations, are to be executed by the government according to public law and not in the capacity of shareholder of a state-owned company.

However, as we have seen with the banking crisis, there are sometimes exceptional situations in which government intervention is necessary (for example, the Dutch government becoming a shareholder of ABN Amro Bank and Fortis Bank Nederland, both of which merged in 2010). In spite of this, even with such intervention, the government will again eventually dispose of these shares. There is no reason to leave them in the hands of the government indefinitely.

To address the second matter of how much distance should exist between the government and government-owned companies, I will put forward an opinion that I have held for many years: that government-owned companies should be excluded from the political sphere as much as possible. In other words, government-owned companies should be managed commercially from a business perspective. This argument can be supported as follows:

- politicians are too busy to concern themselves with business operations
- politicians have no powers of judgment regarding matters of business
- politicians manage from a social perspective and, therefore would not make decisions in the best interest of the company
- politicians' involvement poses the risk of excessive political interference, which can jeopardize the company's integrity

The direct participation of political parties in supervisory boards and on boards of directors increases politicians' influence over government-owned companies. As a result, political parties come to indirectly exert influence on important decisions within the government-owned company, in various capacities, including:

- appointments
- recruitment
- tendering processes

Politicians promote member loyalty by giving positions within government-owned companies, a concerning phenomenon which has been taking place in the Dutch Caribbean jurisdictions for quite some time.

It is probably true for most government-owned companies that their activities originally fell within the remit of regular government duties. At some point, these activities were grouped together, under a united organization (often some form of legal spin-off), concluding with the creation of a publicly held company (NV) which would then oversee such activities.

In my opinion, the operations of a government-owned company are not part of the government's duties and it is therefore not its responsibility to interfere in the day-to-day management of such companies. These companies—apart from matters regarding concessions, licenses and other issues of public interest—must be safeguarded against political interference and allow to function independently.

The director of a state-owned company—especially one who wishes to operate as an independent professional—has their job cut out for them, conflicted between the following potential scenarios:

- (i) a government usually active as a shareholder and, through Supervisory Directors appointed by the same government (often equally as active)
- (ii) the multi-headed "*interest of the company*" which he/she is supposed to serve, comprising a multi-colored palette of partial interests (continuity of the business, interests of employees, creditors etc.)

As far as I am concerned, a government should make a clear choice: either ensure that activities are carried out as public service, under the direct responsibility of a minister (in which case, everybody is a civil servant) or see to it that activities are carried out as a company (NV or BV), in which case, they must be kept outside the political sphere of influence as much as possible.

The current situation is of a hybrid nature: the company format was indeed chosen but with the retention of as much political influence as possible, creating an unhealthy situation that, at times, leads to considerable tension.

When the role of the Supervisory Board is taken into consideration, one cannot avoid getting the impression that some (former) Board members considerably extended the supervisory duties imposed upon them by law and by the articles of association. They often appear to even sit in the executive director's chair, or they consider the executive director someone who should blindly follow the instructions of the Supervisory Board or even of individual Board members.

Some Board members even go so far as to spend more time in the company office than the executive director himself, or they may make visits to the executive director several times a day to discuss business. This is unhealthy and also impairs the autonomous performance of the executive management.

Moreover, we know that some Board members have informed their political party of their activities. This is not in accordance with corporate governance and is in direct contravention of their duty to secrecy where confidential information is involved. Some years ago, there was even a politician who openly stated that he gave his Board members specific instructions as to what functions they were to carry out. Such practices cannot be allowed.

We do have corporate governance legislation in place in the Dutch Caribbean jurisdictions. Unfortunately, this legislation is primarily concerned with processes and does not cover other aspects of corporate governance. For example, there are no sanctions in the event of a violation of the legislation by government officials. In addition, the National Ordinance concerning corporate governance (*Landsverordening corporate governance*) and the Corporate Governance Code (*Code corporate governance*) do not prevent political appointments from taking place.

According to the law that came into force in 2010, the Curaçao Code of Corporate Governance should be reviewed and, in any case, amended no later than two years after its adoption (and then again after two years and so on), having heard the corporate governance adviser...<sup>4</sup> Some 10 years ago an important evaluation report was published: the very first evaluation.<sup>5</sup> Unfortunately, nothing has been done with the recommendations.

Transparency International stated in its *National Integrity System Assessment: Curaçao 2013*: “Public companies and public foundations face important issues with transparency and accountability, and neither the letter nor the spirit of the corporate governance code in place is yet fully observed.”

There is a growing recognition of the universality of good corporate governance principles, although political realities may express them differently, or with different priorities. Nonetheless, the OECD Guidelines are the international benchmark with regard to corporate governance principles.

One of the central challenges (both in the Dutch Caribbean jurisdictions and overseas) lies in restoring the government’s integrity. Replacing Board members when a new party is elected has become a bad habit, one that persists to this day and must be done away with!

Who owns the state-owned company? In legal terms, the state does, meaning that the government is in control of the voting rights attached to the company’s shares. But who owns the government? We, the people, do; not the other way around. The government does not own the people! On the contrary, it is accountable to the people. Good corporate governance in relation to state-owned companies and good public governance are leaves of the same tree: they are both linked to conscientious behavior, integrity, transparency and accountability.

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<sup>4</sup> Artikel 3 lid 2 Landsverordening corporate governance (P.B. 2014, no. 3 (G.T.)): “De Code Corporate Governance wordt telkens uiterlijk twee jaar na vaststelling, gehoord de adviseur corporate governance, opnieuw gezien en, in ieder geval indien gewijzigde internationaal aanvaarde normen daartoe nopen, aangepast.”

<sup>5</sup> Rapport Commissie Evaluatie Corporate Governance Curaçao (december 2015).

## From Plato to 2025

I conclude with a quote from Plato: *There will be no end to the troubles of states, or of humanity itself, till philosophers become kings in this world, or till those we now call kings and rulers really and truly become philosophers, and political power and philosophy thus come into the same hands.*

It is up to all of us to fulfill Plato's mission!