Applying the Legal Security Principle in Administrative Law

European and International Law

Vasilica NEGRUȚ[1]

Abstract: The objective of the paper is founded on a very current topic and of real interest. Using content analysis, through a descriptive study research, this study aims at identifying the content of the legal security principle and the way in which the courts in Romania, the public authorities achieve a proper application of this European principle. For this purpose, it was achieved an analysis of specific objectives aiming at, in particular, the requirements of legal security principle and the way in which they manifest in the national law. We appreciate that, although it does not beneficiate of an express assignment in the Romanian legislation, being a creation of jurisprudence, the legal security principle is in the current context, a fundamental principle of state law, which should give every citizen the opportunity to evolve into a secured, predictable legal environment.

Keywords: clarity; European Law; jurisprudence; principle; legal security

I. The concerns of ensuring a legal security in Romania have increased with the rise of law complexity, which is determined mainly by developing new sources of law, particularly the European and the international ones.

Having no express assignment in the Romanian legislation, being a creation of jurisprudence, the legal security principle is in the current context, a fundamental principle of state law, an assessed state, as described in the specialized literature, depending on the quality of its laws. (Popescu, Ciora & Țăndăreanu, 2008, p. 7)

According to article 1 line (5) of the Fundamental Law, "*in Romania, respecting the Constitution, its supremacy and laws is mandatory*." But, for this general

[1] Professor, PhD, Dean of Faculty of Law, "Danubius" University of Galati, 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: vasilicanegrut@univ-danubius.ro.

obligation to be applied, the law must be known and understood, and in order to be understood, it must be precise and predictable, so as to provide legal security of its recipients.

In essence, what characterizes this principle is that it must protect the citizen "*against a threat that even comes from the law, against an insecurity that the law created or it may create*." (Brad, 2009, p. 122)

Moreover, in the doctrine it is emphasized that, particularly because of the European law influence and European Convention of Human Rights law, the states' legal systems have started more and more to pay attention to this new principle of law, a principle[1] that comprises a wide range of requirements. (Brad, 2009, p. 123)

The principle of legal security can be defined broadly as "*every citizen has the opportunity to evolve into a secure legal environment, protected from the blur and unexpected changes affecting the legal norms*" (Calmes, 2001, pp. 155-162)

Considered one of the fundamental principles of the European legal system, the legal security principle is recognized in the various legal systems of European Union countries. [2]

In establishing the principle of legal security as a principle of European law, ECJ was inspired by the German law, a system where the principle of legal security is considered a natural consequence of the constitutional principle of state law. (Brad, 2009, p. 131)

The first reference to this principle is found in a case of 1961, where the ECJ pointed out that "*the principle of respecting the legal security, as important as it may be, should not be applied in an absolute manner, but its application must be combined with that of the principle of legality*".[3]

The explanation for consistent application of legal security principle lies in the specificity of European construction, a construction which amplifies the need for legal security for the following reasons (Brad, 2009, p. 132):

[1] Everything starts from shifting the focus from the state towards the individual. Therefore, the legal systems become deeper, from the rigid legal systems based on the principle of legality, into more flexible legal system, ordered around the principle of legal security. (Brad, 2009, p. 122)

[2] The German law is considered the source of this principle being adopted by other systems as well. The principle of legal security is inserted in some states, even in the constitution (article 9 of the Spanish Constitution, article 282-4 of the Constitution of Portugal).

[3] Cause 42 and 49/59, S.N.U.P.A.T. vs. High Authority, Reports 1961, p. 103.

- European law is above all an economic law, the legislation in this area is subject to constant changes imposed by the market's needs, which could add, in some cases, a certain insecurity of the European law;
- the supranational feature of the European legal order, which, by the many structures (national and European), may be an element of insecurity;
- the obligation to harmonize the Member States national laws with the EU legislation requires that the European rules are clear, precise, predictable.

In the content of the legal security principle there can be found more requirements, such as:

a) clarity and precision of law, a requirement according to which the European legal norms must be clear, accurate, so that the person concerned to understand the rule of law, this requirement must be observed not only by the European institutions, but also by the authorities of the Member States, which apply the European law; the Law no. 24/2000 provides for this purpose a set of rules that is "*the legal text should be made clear, fluent, smooth and understandable, no syntax difficulties or obscure or ambiguous passages*. [article 7, line (4)]; "*within the proposed legislative solutions there must be made an explicit configuration of concepts and notions used in the new regulations, which have a different meaning than the common one, so to ensure correct understanding and to avoid misunderstandings*." [article 24]; "*the normative acts must be written in a language and a specific legal style, a concise, sober, clear and precise regulation that would exclude any ambiguity*. [article 34, line (1)]."

b) the unity and coherence of European legal order, through which it is sought not only to preserve the authority of the European standards, but also their harmonious application;

c) the express determining of terms and their mandatory nature; (Calmes, 2001, pp. 135-136)

d) non-retroactivity, however, it is mentioned in the specialized literature, when there is a pressing community motive and when the legitimate trust of those concerned is fully respected, the retroactivity can be exceptionally accepted by the ECJ; (Calmes, 2001, p. 138)

e) the extent of the effects of ECJ decisions, the Court limits, only for future, its scope of legal effect of some of its decisions, in order to protect certain situations

towards the recognitive feature from "ab initio" that they have their decisions in principle, (Brad, 2009, p. 142) giving a broad interpretation of the provisions from article 231 (174) of the EEC Treaty;[1]

f) limiting the conditions for revocation of legal or illegal administrative acts.[2]

II. The legal security principle is manifested in a real way and on national law. The recent developments in jurisprudence of the Constitutional Court confirm the tendency to consecrate the principle of legal security by the way of interpretation. It is worth mentioning in this sense the Decision no. 404/2008, where the Court appreciated that the principle of legal relations stability is derived from the article 1, line 3 of the Constitution.

With reference to administrative law, we consider that the public authorities' activity should be characterized by certainty and legal security. Therefore, from this perspective, the principle of legal security, in addition to the already mentioned requirements, concerns the reasonable term, accessibility and predictability of law, proportionality, professionalism and professional integrity, legal competence, administration by law, procedural fairness and responsibility.

Thus, in terms of reasonable term, this concept has been established in article 6 line 1 of the European Convention on Human Rights, which states that "*Everyone is entitled to a fair and public trial within a reasonable term of its cause*. [...]"

In the specialized literature it has been emphasized that the right to a fair trial is an aspect of the principle of ensuring the rule of law in a democratic society. (Bîrsan, 2010, p. 357) As the Court observed, the signatory states of the Convention have decided to take all measures necessary for effective protection of the rights stated in the Universal Declaration of Human Rights, "because of their sincere attachment to the rule of law". These measures mean organizing the proper administration of

[1] According to the mentioned article, "If the action is founded, the Court of Justice declares the act to be void. However, in terms of regulations, the Court of Justice shall indicate, if necessary, which are the effects of the annulled regulation that needed to be considered as definitive."

[2] In the case 42 and 49/59, S.N.U.P.A.T. vs. High Authority it was stated that "retroactive revocation of a legal act that conferred subjective rights or similar benefits is contrary to general principles of law", and in the case 15/85, Consorzio Cooperative d'Abruzzo against the Commission, "the revocation of an illegal act is allowed if it intervenes in a reasonable time and if the institution making the request keeps into account sufficiently the extent to which the addressee could eventually trust in its legitimacy. If these conditions are not met, the dismissal undermines the principles of legal security and the protection of legitimate expectations and it needs to be annulled".

justice, credible, reliable, impartial and independent to those who appear before judicial institutions. (Bîrsan, 2010, p. 357)

The concept of reasonable time, in the sense of guaranteeing a fair trial, began to be approached in the jurisprudence of the High Court of Cassation and Justice also as an element of the right to good administration, as a fundamental right of European legal system and not only. (Albu, 2011, p. 55)

As shown in the specialized literature, (Vedinaş, 2007, p. 224) the right to good administration is "*the right of every person to see their problems handled impartially, fairly and in a reasonable time, by the community institutions and bodies*".

At the same time, the good administrative behavior Code provides, in article 4-27 the principles of good administration: the legitimacy, which requires the public officials to operate in accordance with the law, applying the rules and procedures provided by the European law; the prohibition of discrimination, which requires to fallow the principle of equality by officials; proportionality,[1] which seeks to ensure a balance between measures taken by the public official and the set objective, and the administrative action must be carried out in proportion to the process, without depriving the citizens of any right that would lead to the achievement of its purpose; no abuse of power, which is achieved through the strict obedience of the competence established by the law for each authority; impartiality and independence, issues that require public officials to refrain from any form of differential treatment; objectivity, involving the exclusion of subjective factors in the activity of public officials; legitimacy, coherence and advice, requirements which impose to the public official consistency in its administrative conduct; fairness involves the impartiality of the public official; politeness, a trait that compels the behavior of civil servants to be opened in its relation with the public, whichever the form it is addressed to (telephone, electronic mail etc.); the

[1] Proportionality principle is established explicitly in article 5 line (3) of the Maastricht Treaty, however, in the specialized literature it is sustained that the origin of this principle is found in article 40 (3) of the Treaty establishing the European Economic Community, signed in Rome on March 25, 1957. A special role in developing the principle of proportionality was the European Court of Justice, which originally went on the German legislation, and then through the European Community legislation it has entered in most of European administrative systems. The court deals with proportionality as a general principle of law, which, along with other general principles of law is meant to control the Community actions where there are no express provisions in the area at European level. (Apostol Tofan, 2006, p. 29) The principle of proportionality is provided by the Constitution, in article 53, on the limitation of exercising some rights and freedoms.

obligation of formulating responses to the letters in the language of the citizen, it is required for the public officials to consider that every citizen or member of the European Union that addresses in writing to the institution, would receive an answer in the same language; the obligation of guiding by the competent officials of the institution this happens when the petition is addressed to a general department, direct and non-competent units; the right to listen and the right of reply, which requires that the defense rights are respected at any stage of decision-making; reasonable time for adopting the decision requires to the public official that the decisions and requests to be solved in a reasonable time, providing for a maximum term that cannot be exceeded; the obligation to motivate and communicate the decisions and also informing on the ways to appeal, these are principles that give consistency to the right to good administration; data protection[1] is for the officials that process personal data; access to information[2] is guaranteed to citizens, the public officials have the obligation to provide people the requested information; the obligation of keeping a register of all the departments within an institution, where there will be provided the entry and the exit of documents and the appropriate action; public access to the European Code of Good Administrative Behavior, the institution is obliged to take measures in informing the public on the rights that they have and to publicize the provisions of this document.

The reasonable term of administrative procedures also aimed at procedural fairness, delays in decision making or the completion of administrative procedures could adversely affect not only the public interest, but also the private interest. (Bălan, Varia, Iftene, Troanță, & Văcărelu, 2010, p. 46)

The accessibility of the law regards mainly its public disclosure, which is done by publishing the normative acts. In internal law, the rules of entry into force of legislative acts are provided by article 78 of the Constitution and article 11 of Law no. 24/2000 on legal technical norms for elaborating normative acts. This takes place according to the category of which the concerned legislative act belong to, at the date of publication in the Official Monitor or at a date subsequent to

[1] The obligation imposed by EC Regulation no. 45/2001 and of the European Parliament and of the Council of 18 December 2000 on protecting the individuals regarding the processing of personal data by community institutions and bodies and the free movement of such data.

[2] The Free access to public information is governed by the following documents: the Universal Declaration of Human Rights, article 19; the European Convention on Human Rights, article 10; the Constitution of Romania, article 31; Law no. 544/2001 on free access to public information; Decision no. 123 of 2002 approving the Methodological Norms for applying the Law no. 544/2001 on free access to public information; Law no. 51 of 1991 on national security, article 12, line 3.

publication, being established either expressly by the constitutional provision, or even in the content of the regarded normative act.

It is contrary to article 15 paragraph (2) and article 78 of the Constitution as a law to provide in its text for the entry into force, an earlier date of the publication in the Official Monitor. In this regard the Constitutional Court ruled, for example, the Decisions no. 7/2002[1] and no. 568/2005.[2]

Similarly, the Court of Justice of European Communities has consistently held that, in general, the legal security principle prohibits that a community measure takes effect before its publication.[3]

The lack of accessibility and predictability of laws is becoming increasingly invoked also at the Constitutional Court, which ruled in several cases, on the violation of these requirements.

We mentioned in this sense that the Decision no 189/2006, by which the Court found that the provisions of administrative contentious of Law no. 554/2004, according to which the term for declaring the appeal against a court decision flows "from the ruling or from the communication", it is unconstitutional because of their lack of precision. The Court held in this regard that "*the parties do not have a certain landmark of the period within which it may appeal the judgment of the administrative contentious of first trial, which makes their access to justice on the exercise of the appeal under law to be uncertain, or limited*."

According to the proportionality principle the means used by authorities must be proportionate to their purpose. (Manolache, 2006, p. 43) The administrative action must arise in proportion to the process, without depriving the citizens of any right that would reach the goal.

Proportionality has as direct effect the avoidance of abuse of public power, the excessive use of discretionary power. (Bălan, Varia, Iftene, Troanţă, & Văcărelu, 2010, p. 45)

The professionalism and professional integrity in public service are prerequisites leading to greater confidence in public administration and the activity of civil

[1] Official Monitor no. 220 of April 2, 2002.
[2] Official Monitor no. 1060 of November 26, 2005.
[3] Cause C 368/89, Crispoltoni; Collection 1991, p I-3695, par. 17, Cosmin Flavius Costaş, Fiscalitatea.ro.

servants. Moreover, this principle has two other general principles as a basis, namely: impartiality and independence of civil servants.

Conclusions

The connection of the Romanian legal system to European law creates the conditions of its transformations, and the administrative law fully feels the effects of these changes. The specialized doctrine increasingly emphasizes the process of Europeanization of public administration and administrative law, through established lasting links between European law and national administrative law. The Europeanization of administration is seen as "*developing or extending the competencies at European level and the impact of Community action on Member States*". (Stevens, 2002, p. 26)

In this context of profound changes, the principle of legal security, through the complex content of its requirements, outline the necessary organization and operation of an effective administration, open and transparent, an administration that requires the public officials to operate in accordance with law, respecting the principle of legitimate trust of individuals.

Bibliography

Albu, E. (2011). Termenul rezonabil, componentă a dreptului la o bună administrare şi principiu al acţiunii administrative/Reasonable time, part of the right to good administration and principle of administrative action. *Buna administrare de la viziune la acţiune/Good administration from vision to action. (coord.) Emil Bălan, Gabriela Varia, Cristi Iftene, Dragoş Troanţă, Marius Vacarelu*.

Apostol Tofan, D. (2006). *Instituţii administrative europene/European administrative institutions.* Bucharest: C.H. Beck.

Bălan, E., Varia, G., Iftene, C., Troanţă, D., & Văcărelu, M. (2010). *Dreptul la o bună administrare şi impactul său asupra procedurilor administraţiei publice/The right to good administration and its impact on government procedures.* Bucharest: Comunicare.ro.

Bîrsan, C. (2010). *Convenţia europeană a drepturilor omului, Comentariu pe articole/European Convention on Human Rights, Commentary on articles, 2nd Edition.* Bucharest: C.H. Beck.

Brad, I. (2009). *Revocarea actelor administrative/Revocation of administrative acts.* Bucharest: Universul Juridic.

Calmes, S. (2001). *Du principe de protection de la confiance légitime en droit allemand, communautaire et française, Thėse/The principle of protection of legitimate expectations in German, community and French law, Thesis.* Paris: Dalloz.

Manolache, O. (2006). *Tratat de drept comunitar/Treaty of Community law. 5th Edition.* Bucharest: C.H.Beck.

Popescu, S., Ciora, C., & Ţăndăreanu, V. E. (2008). *Aspecte practice de tehnică şi evidenţă legislativă/Practical aspects of technical and legislative records.* Bucharest: Monitorul Oficial.

Stevens, A. (2002). Europenization and the Administration ot the E: Comparative Perspective. *Queens Paper on Europenization*, 26.

Vedinaş, V. (2007). *Deontologia vieţii publice/The deontology of the public life.* Bucharest: Universul Juridic.