

Good governance in the EU

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Abstract: Considering the EU adhesion, good governance has been analyzed from different perspectives, in the judicial literature being an analytic model or a normative concept. Some authors have wondered if this concept is a fashion, comprising some older ideas and principles, while other authors have asserted that the reasons why different methods of governance appear in the EU are based on “the complexity and the uncertainty of the problems on the agenda, an irreducible, the new approaches on public administration and law, hidden competencies, legitimacy and subsidiarity”. At a normative level, the White Paper of European Governance consecrated five principles on which good governance is based upon: openness, participation, responsibility, efficiency and coherence.”

Keywords: private law, openness, participation, responsibility, efficiency

More than 170 years ago, *governance* was defined as being: ¹

- “The exertion of the most significant form of power over a community”;
- A synonym for the *form of government* or *the Constitution*, meaning that it was presented as “the frame or the disposition of power and authority among the members of a community”, respectively “a free government, a monarchic government or a republican government”;
- *The individual or the group of individuals* who has authority or a certain part of it.

The term “*good governance*” was conceived by Rudolf Weitholter” in a polemic regarding the implementation of official provisions, by applying the classical legislation of private law” which is very often used in the transnational governance.²

Today, the term “governance” relates to the political and administrative processes, such as institutions, without comprising the policies or the results.³

¹ *Civil or political governance* existed when “a group of individuals that is not subjected to any leadership, issue their own orders towards other individuals, who have to fulfill some tasks or not and are threatened with sanctions, in case of insubordination”. See George Cornewall, *Remarks on the use and abuse of some political terms*, edited by B. Fellows, 1832, original from Oxford University, 2006, p. 1-3.

² See Christian Joerges, Renaud Dehousse, *Good governance in Europe's integrated market*, Academy of European Law, Ed. Oxford University Press, 2002, p. 22.

³ L. W. Huberts, Jeroen Maesschalck, Carole L. Jurkiewicz, *Global perspectives on good governance policies and research* in L. W. Huberts, Jeroen Maesschalck, Carole L. Jurkiewicz John Rohr, *Ethics*

Some authors¹ have wondered if this concept is a *fashion* and its appearance in the public scope does nothing more than reveal older principles and ideas, regarding “the citizens’ expectations from the politicians’, the authorities and the public administration institutions’ behavior”.

New governance was received as “a shift in the traditional paradigm of regulating and enactment” that involved different aspects:²

- Passing from hierarchic forms to heter-hierarchic forms of law and policy formulation;
- Passing towards more flexible forms of law (less constraining or un-constraining) and less detailed;
- A new approach towards more reflexive forms of law (auto modification and classification).

The fact is that the appearance of the new term necessitated a demarcation, at least for a certain part of the political class that did not understand that the terms “*government*” and “*governance*” are not the same thing. Thus, the term “*governance*” compared with the term “*government*” represents:³

- A decline in the centrality of national and territorial boundaries and relevant in the transnational context, as well as in other levels;
- Decentralization and dispersion of authority;
- The confusing difference between public and private (involvement of private/social actors as well as the public/official actors).

J.T. Scott and D. Trubeck distinguish the “new forms of action” as being “the new and the old governance” and “open methods of coordination”. They identify as characteristics of the “new governance” the following:

- The participation and division of power;
- The integration at different levels;
- The diversity and decentralization;
- The deliberation;
- The flexibility and the possibility to review;
- Experimenting and creating information or knowledge.⁴

and Integrity of Governance: Perspectives Across Frontiers, Ed. Edward Elgar Publishing, Cheltenham, UK, Northampton, Mass, 2008, p. 255.

¹ Ioan Alexandru, *Reflections on contemporary evolutions of constitutional democracy*, Public Law Magazine, no.3/2006, Ed. C.H. Beck, Bucharest, 2006, p. 5.

² Gráinne De Búrca, *New modes of governances and the protection of human rights* in Philip Alston, Olivier de Schutter, Fundamental Rights Agency (European Union), *Monitoring fundamental rights in the EU: the contribution of the Fundamental Rights Agency*, Ed. Hart Publishing, Oxford and Portland, Oregon, 2005, p. 26.

³ Gráinne De Búrca, *op.cit.*, p. 26.

⁴ J. Scott and D. Trubek, *Mind the Gap: Law and New Approaches to Governance in Europe*, European Law Journal - 8, 2002, pag. 2-6, op. cit. de Norbert Reich, *Understanding EU law: objectives, principles, and methods of community law*, second edition, Ed. Intersentia nv, 2005,

Considering the EU Adhesion, good governance has been analyzed from multiple perspectives, in the judicial literature being analyzed as an analytical model or as a normative concept.

According to some authors, the reasons on which the appearance of new governance methods in the EU is based derive from the complexity and the uncertainty of the problems on the agenda, the new approaches in law and public administration¹, hidden competencies, legitimacy and subsidiarity.²

The Weberian hierarchic types of governance within the European states have been replaced by suitable types of governance for the new democracies that are strongly industrialized. The relevance between public sector and the organizations of the private sector have changed, without diminishing the role of the government, as being the central element in delivering the governance. The new elements brought by the new governance at a state level was the fact that the governments “are no longer dedicated to creating and implementing all the policies, but they use a variety of instruments and different institutions in order to attain the political objectives”.³ What is interesting is the fact that this *new form*⁴ of approach can be more efficient as long as it leads to “a revitalization of the practices of exerting the constitutional democratic power in the lawful state”.⁵

Representative in reinventing governance are the Americans David Osborne and Ted Gaebler who, in 1993, have published “*Reinventing governance: how the entrepreneurial spirit transform the public sector*” which is considered, by the Business Week, to be “the gospel of good governance”. By indicating that privatization is sometimes recommended as being efficient, the authors showed that governance should not be run as a business, as “the democracy would be its first victim”.⁶

The EU was presented as being a “multilevel system of governance”. The policies formulation is divided among the sub national, national supra national level. The person that named this phenomenon as being a multi-governance model was

Antwerpen – Oxford, p. 308.

¹ “The tendency towards new governance was influenced by the evolutions in administrative and law fields.” See Paul Craig, Gráinne De Búrca, *New forms of governance in The Evolution of EU Law*, Ed. Oxford University Press, Oxford, 1999, p. 162-163.

² Paul Craig, Gráinne De Búrca, *op.cit.*, p. 162-163.

³ B.Guy Peters, *Governing in a market era. Alternative models of governing* in Eran Vigoda, Eran Vigoda-Gadot, *Public administration: an interdisciplinary critical analysis*, Ed. CRC Press, 2002, p. 85.

⁴ See J. Scott and D. Trubek, *Mind the Gap: Law and New Approaches to Governance in Europe*, *European Law Journal* - 8, 2002, pag. 2-6, *op.cit.* de Norbert Reich, *Understanding EU law: objectives, principles, and methods of community law*, second edition, Ed. Intersentia nv, 2005, Antwerpen – Oxford, p. 308.

⁵ Ioan Alexandru, *op.cit.*, p. 5.

⁶ See David Osborne, Ted Gaebler, *Reinventing government: how the entrepreneurial spirit is transforming the public sector*, Ed. Addison-Wesley Pub. Co, 1992.

Gary Marks¹ who indicated that the state is not the one that holds the monopole in “creating the EU policies or aggregate the internal interests and a new form of government is being shaped”.

The assertion belonging to Jacques Delors, according to which the EU represents an *unidentified political object*, is correct. In fact the EU is not a state, neither an international organization nor a confederation, but a unique construction that combines intergovernmental features with supra national ones. For example, “the recent growth in the number of agencies within the EU does not represent a shift towards a federal executive system² within the EU but indicates the features of administration interactions in multiple levels” and the term “integrated administration” describes “the realities of the EU structures in administrative governance” in a frame in which the national organs and the supra national ones are related, in order to accomplish the tasks received from the EU”.³

At the EU level, the new types of governance have promoted “the change through persuasion, monitoring and mutual learning, rather than hierarchy, order of sanction” which generated a certain preoccupation towards their efficiency and the responsibility. They strongly contrasted with the *classical community methods* that involve the fact that the legislative initiative belongs to the Commission and the decisional right belongs to the Council and the Parliament.⁴

Given the judicial nature of the EU, that it doesn't represent a state, context in which we can talk about the division of power, is not a federation so that we can speak of a constitution that regulates the relations regarding power in a federation, we ask the obvious question: what is the document that regulates the principles of good governance at the EU level?

According to some authors⁵ even if the EU does not represent a state “in the true meaning of the word it does not mean that certain constitutional principles cannot be applied to it”. In this context, there have been some debates in the

¹ Liesbet Hooghe, Gary Marks, *Multi-level governance and European integration*, Ed. Rowman & Littlefield, Oxford, 2001, p. 4-5.

² Executive federalism was described as a way in which the EU institutions delegate to the national authorities the executive power to execute the decisions imposed at a EU level or will take measures that impose implementing and adopting EU legislation. See K. Lenaerts, *Regulating the regulatory process: "delegation of powers" in the European Community*, *European Law. Rev.*, 1993;

³ “The agencies integrate national and supra national actors in an administrative structure that in unitary and mostly operates in an extended administrative frame, where they follow different purposes”. See Herwig Hofmann, Alexander Türk, *EU administrative governance*, Ed. Edward Elgar Publishing, 2006, p. 575-583.

⁴ Gráinne De Búrca, *op.cit.*, p. 26.

⁵ Luc Verhey, *Good governance: lessons from constitutional law* in Deirdre Curtin, Ramses A. Wessel, *Good governance and the European Union: reflections on concepts, institutions and substance*, Ed. Intersentia nv, 2005, pag. 51-52; in the same time, De Burca states that „it is not necessary that a state's constitutions constrains the institutions, but the constitution of any legal entity that exerts a political power, through referring to good governance rules and in the same time they have to be accessible and responsible for the ones that use them”. See Gráinne De Búrca, *op.cit.*, p. 65.

literature, regarding the principles of good governance regulated by the European Commission in the White Paper, as it is not sufficient that these principles of good governance to be regulated as being abstract values in a certain document, but they “should be shaped in a well defined constitutional frame” so that *the structure* (regulation at a constitutional level¹) precedes *the values* and not the other way around. As the EU Treaty underlines the fact that the principles on which the EU is based are found in all the member states, we have to admit the fact that in virtue of this *parallelism* the interpretation of these principles will be made according to the constitutional common traditions² of the member states.³

The European Commission has arrogated the right⁴ in virtue of the rights offered by treaties, but reasserted in this document as well, to attain these objectives, together with sustaining the other European institutions, member states, present and future, central administrations, regions and cities within the civil society.

Despite the recognition of member states’ constitutional traditions at a legislative level, neither in the White Paper nor in the other documents that refer to good governance at the EU level, “the Commission didn’t recognize in any way the possible relevance of national experience at the EU level” which for some skeptics has been a feeding of the Commission’s distrust in the member states and the existence of the risk of isolating the EU from the national traditions.⁵

This attitude would be easy to understand if the we take into account the fact

¹ For example, in the Treaty Establishing a Constitution for Europe, there aren’t any general mentions regarding the concept of *good governance*. Thus, in article I.50 of the Treaty, the concept of good governance represents the objective to be attained through promoting the principle of transparency and article III-292, al.2 (h) mentions only *good global governance*. In the meaning offered by the UN for Global Governance, “the governance is the sum of many institutions and individuals, public and private that coordinate their common business. It is a continuous process in which the conflict between different interests has to be adapted and certain cooperation activities has to be applied. It includes official institutions and regimes empowered to apply respect and conformation as well as unofficial arrangements that individuals and institutions have agreed upon and consider to be in their interest”. See Report of the Commission on Global Governance- *Our Global Neighborhood*, Ed. Oxford University Press, Oxford, 1995, p. 2.

² In the Court of Justice’s opinion, *the common constitutional traditions of the member states*, stipulated in article 6, al.2 of the EU Treaty, represent sources that determine “the construction of fundamental rights and judicial institutions in community law” so that their place in the hierarchy of administrative European law would have a *constitutional source*. See Susana de la Sierra, *Les sources des principes du droit administratif européen* in Jean Bernard Auby, Jacqueline Dutheil de la Rochère, *Droit administratif européen*, ed. Bruylant, Bruxelles, 2007, p. 345.

³ Luc Verhey, *op. cit.*, p. 52.

⁴ The White Paper on European Governance underlined the right of initiative and application of policies as well as the guardian of the Treaty and international representative. See Paul Magnette, *European Governance and Civic Participation: Can the European Union be politicised?*, lucrare prezentata in cadrul simpozionului *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper, nr. 6/2001, <http://www.jeanmonnetprogram.org/papers>.

⁵ See Luc Verhey, *op.cit.*, pag. 50.

that in many member states, especially within the last two waves of adhesion, there weren't any traditions regarding good governance or at least they existed at a theoretical level in the constitutional texts, as a consequence of adapting national legislations to the existent values and principles of the older member states or the consecrated ones at a community level. Thus, at the community level "the court and the secondary legislation have made considerable efforts to impose governance on community institutions, through transparency, suitable efforts and responsibility", liability rather being a "last instance mean, in case of serious and obvious power abuse than an instrument of control of the daily behavior of the community institutions".¹

Thus, the White Paper on European Governance consecrated five principles on which good governance is based: *openness, participation, responsibility, efficiency and coherence*. The purpose of adopting the White Paper was to encourage the citizens and their organizations to participate in the elaboration and application process of EU policies, through which the "citizens will have a better view of the member states' positions by collaborating within the EU and the ability to respond in a more efficient way to their preoccupations."²

A first principle is that of *openness*, that imposes a more open way of working in what concerns the EU institutions, the Commission having the duty to regularly provide on-line updated information on the elaboration of its policies and all the stages of the decisional process. Taking into account the way in which the change was interpreted regarding the administrative openness, this is the reason why it was repeatedly asserted that by adopting the White Paper, the Commission has insignificant measures "reflecting a public administration which is confronted with the necessity of offering more information in an accessible digital form, as well as a bigger possibility for inter-activity".³

In the context of the White Paper, *the public participation* imposed the intensification of interaction with the regional and local collectivities as well as with the civil society. "The Commission's vision to shape the principle of participation in the EU governance was marked by a top-bottom approach used to order and organize the civil society"⁴. In this context, the accent was on the policy quality, whose efficiency was found in an intense frame of participation in the decision making process, especially in the elaboration stage, and the EU- *the top* that had to have an active role in its relations with the regional and local collectivities- *the bottom* through national and European associations. An intense collaboration among

¹ Norbert Reich, *Understanding EU law: objectives, principles, and methods of community law*, second edition, Ed. Intersentia nv, 2005, Antwerpen – Oxford, p. 321.

² http://www.euro-info.ccir.ro/doc_online.htm;

³ Deirdre Curtin, Ige Dekker, *Good governance: The concepts and its application by the European Union* in Deirdre Curtin, Ramses A. Wessel, *Good governance and the European Union: reflections on concepts, institutions and substance*, Ed. Intersentia nv, 2005, p. 16.

⁴ Deirdre Curtin, Ige Dekker, *op. cit.*, p.17-18.

the top and the bottom was meant to provide a faster policy implementation and adoption and to confer more trust on a political level. In the democratic visions, the new governance from a more intense collaboration with the national, regional and local collectivities perspective, as well as with all the social forces, represents “a way for political reconstruction” in which the power won’t be equal with domination but will serve *the general interest*.¹

At the same time, each of the EU’s institutions and the ones at a national level will have to explain and assume *responsibility* for the attributes they have in those institutions. This imposes in the first place the demarcation of clear responsibilities for what happens within the social system.

Efficiency and efficacy condition the exertion of policies in a prompt manner, with clearly defined objectives and an expertise of the policy impact, as well as an evaluation of the previously applied policies. The policies have to be prompt, they have to offer the necessary based on clear objectives, a future impact evaluation and, in case it is possible, an evaluation of the previous experiences. Efficiency depends at the same time on implementing the policies in a proportional manner and on the decisions taken at a competent level. Thus, starting with the conceiving and until de implementation of the policies, choosing the level on which the measures are taken (form the EU level to the local one), together with the instruments used, have to be proportional. This means that the linear pattern of policy distribution form the center has to be replaced by a vicious circle based on feed-back, networks and implication, starting from the formulation until de application of the policies at all levels.²

Within the White Paper on European Governance, *coherence* is found as being one of the main conditions to ensure good governance. In this context, the policies and the actions have to be coherent and easy to understand, given the fact that the problems have extended more and more at the EU level and at the member states’ level the local and regional authorities are getting more and more involved in the EU policies. A coherent frame is the guarantee for judicial security and this is made possible through a healthy management and the institutions’ responsibility.

Even if in the beginning the Commission was preoccupied by the different concepts of governance, the only reason for which the Commission chose the community methods as its own concept of governance was to protect its own interests.³ Thus, in the EU legitimacy context, the Commission’s members asserted the fact that the Commission is legitimate if it produces good policies and “what the citizens are interested in is not who solves the problems, but the fact that the problems have been solved”.⁴ In what concerns the EU policies’ legitimacy¹ the new

¹ Ioan Alexandru, *op.cit*, p. 6.

² Iulian Nedelcu, *The Directions Of Public Administration Reform Due To Romania’s Integration In The European Union*, paper presented at The International Conference “European Integration-Realities and Perspectives”, Danubius University, Galati, May 2009.

³ Deirdre Curtin, Ige Dekker, *op. cit*, p. 11.

⁴ Romano Prodi, discourse presented in the European Commission on July 21st 1999 in Paul Magette, 182

governance seems to have a lot of interest in ensuring it. For example, the problems related to the democratic deficit are being solved through social dialogue.

In what concerns the member states, the Court of Justice had an essential role. It elaborated “a comprehensive theory of member states’ governance in what concerns the fulfillment of their duties according to the community law and protection the other actors’ autonomy, especially the ones directly involved but also the citizens”. Thus, besides the member states’ liability in not complying with the community obligations or applying the non action obligations, in virtue of the Council’s Directive 83/189/CEE on March 28 1983, which establishes a procedure for providing information in technical standards and regulations, the member states have to follow an internal obligation, if the community obligations are respected. At the same time, according to the dispositions of Directive 83/189/CEE, each state will have an observer who will ascertain the cases of non active involvement² in the planned actions.³

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¹ Paul Craig, Gráinne De Búrca, *op.cit*, p. 162-163.

² Article 3 of the Council’s Directive 83/189/CEE March 28th 1983 that establishes a procedure to provide information in technical standards and regulations, modified by Commission’s Decision 96/139/CE (3). See Norbert Reich, *op.cit*, p. 321;

³ Norbert Reich, *op.cit*, p. 321.

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