The Europeanization of Public Administration through the General Principles of Good Administration

Vasilica NEGRUȚ[1]

Abstract: The general objective of the paper is based on an extremely present theme of real interest. Using the content analysis, through a descriptive documentary research, the present study aims at identifying the dimensions of the general principles of good administration, in the context of changes at European an implicitly at national level. To this purpose, an analysis of the specific objectives will be made: the concept of good administration, the national dimensions of the right to be heard, the right to access personal files as well as the motivation of administrative acts and the general principles regulated by the European Code of Good Administration will be underlined, in the context of institutional change determined by the Lisbon Treaty. Good administration defines the way in which institutions function, this being possible by ensuring the right to access information, a more efficient protection of fundamental rights as well as the right to defense, publication of acts and their motivation. Good administration is strongly connected to good government, the relation being in our opinion, from part to whole. The final purpose of good government and implicitly of good administration aims at accomplishing the general interest. The two concepts need a higher degree of transparency and responsibility in the public process. If governing represents the modality of exerting power, good government entails the imperative of the consensus of those governed regarding the objectives and methods of government, the responsibility of those governing, the efficiency of governing and the citizens' right to be informed regarding the use and the distribution of the financial resources in the governing process. This new concept takes into account the implication of the citizens in the decision - making process, allowing a more efficient use of material, human, and financial resources. We assert thus that by applying the general principles of good administration, essential changes will be made, leading to the Europeanization of public administration.

Keywords: government; administration; Europeanization; principles

1. Introduction

The academic debates on Europeanizing the public administration began after 1990 and they are taking into account the aspects related to the convergences and divergences between the administrative systems of the Member States of the

[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.

European Union. (Bălan, Varia, Iftene, Troanţă, & Văcărelu, 2010, p. 21 and the next)

Anne Stevens defined Europeanization as "*the development or expansion of competences to European level and the impact of the Community action on the Member States*". (Stevens, 2002, p. 26)

Another author, J. Schwartz, reveals in his study "The Europeanization of National Administrative Law," the differences between systems of administrative law, concluding that the different administrative structures exhibit the resistance to European influence. (Bălan, Varia, Iftene, Troanţă, & Văcărelu, 2010, p. 23) The difficulties encountered by the Member States regarding the European legislation have led to the application and the use of common standards and practices for public administration developed at the level of the Member States. Meanwhile, through its decisions, the European Court of Justice sets out general administrative principles applicable to all Member States, thus establishing standards that not only regard the organization of public administration, but also the relations between the administration and citizens.[1]

By good administration, according to the specialized literature, (Renucci, 2009, p. 788) it is understood the way in which the institutions work, this being achieved by ensuring the right of access to information, more efficient protection of fundamental rights and the right of defense, publication of papers and their motivation.

At European level the interpretation of the principle of good administration varies depending on the type of legal systems, between four European traditions of administrative law. (Bălan, Varia, Iftene, Troanţă, & Văcărelu, 2011, p. 242)

Although we find references to the content of the principle of good administration in the EU Charter of Fundamental Rights and the European Code of Good Administrative Behavior, the most relevant interpretations of this concept we find in the jurisprudence of the European court – the European Court of Justice and European Court of Human Rights. (Croci Angelini, 2011, pp. 4-12).

[1] For details, see Alina Nicu (2008).”*Contribution of the European Court of Justice to defining the European administrative area as standard of the Europeanization of public administration*” paper presented at the International Conference “The Impact of Europeanization on the Public Administration”, Bucharest, 25-26 of May 2007, paper published in the homonym volume, Economic Publishing, Bucharest, 2008, pp. 431-439.

Good administration is closely linked to good governance, the relation being from our point of view, from part to whole. If the governance represents the way to exercise power, *good governance* presupposes "*the imperative of consensus of those governed towards the objectives and methods of governance, government responsibility and effectiveness and the right of citizens to be informed primarily on the use and allocation of government financial resources*" (Ionescu, 21-22 November 2005)

Moreover, according to the Recommendation (2007) 7 the member states governments of the Council of Europe are encouraged to promote good administration "within the principle of state law and democracy."

This new concept takes into account the citizens' involvement in decision-making, allowing the use of material, human, and financial resources more efficiently.

The ultimate goal of good governance and implicitly of a good administration, regards the achievement of general interests. Both concepts require a high degree of transparency and accountability in the public process.

2. Theoretical Aspects

In 2000, at Nice it was adopted the Charter of Fundamental Rights of the European Union. Among the rights mentioned in the Charter there were also found the right to a good administration and the right to inform the Ombudsman in case of maladministration. The consecration of these rights led to the adoption in 2001 by a resolution of the European Parliament of a Code of Good Administration, that the European institutions and bodies, administrative authorities and officials are required to follow in their relations with the citizens. The purpose of the Code was to explain in detail the content of the right to good administration contained in the Charter.

As shown in the specialized literature, (Vedinaş, 2007, p. 224) the right to good administration represents the "right of every person to see handled impartially, fairly and within a reasonable time their issues, by the Community institutions and bodies." At the same time, the 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 a balance between the public official and the set objective, and the administrative action must arise in proportion to the process, without depriving the citizens of any right that would achieve its purpose; *no abuse of power*, which is achieved through 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 the public official; *legitimacy*, *coherence and advice*, requirements which impose to the public official the consistency in the administrative conduct; *fairness* involves the impartiality of the public official; *politeness*, a trait that compels the behavior of civil servants to be opened in their relation with the public, whichever the form it is addressed to (telephone, electronic mail etc.); *the 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, a direct and non-competent unit; *the right to listen and the right of reply*, which requires that the defense rights to be respected at any stage of decision-making; *reasonable time* for adopting the decision requires 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 issues we will develop more in another part of the paper); these are principles that give consistency to the right to good administration; *data protection*[2] is for the officials that process

[1]Proportionality principle is stated specifically in article 5, line (3) of the Maastricht Treaty, however, the specialized literature sustains 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 had the European Court of Justice, which originally went on the direction of the German law, and then, by the European Community legislation entered in most 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 action where there are no express regulations in the field at European level. (Tofan, 2006, p. 29) The principle of proportionality is required by the Constitution, article 53 on the limitation of exercising some rights and freedoms.

[2]The obligation imposed by EC Regulation no. 45/2001and 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.

personal data; *access to information*[1] is guaranteed to citizens, the public officials have the obligation to provide people the requested information; *the obligation to keep 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. If the Code is not respected by some European institutions or by public officials, the citizens have the right to refer to the European Ombudsman.[2] The European Ombudsman uses the Code in its investigations as a result of the complaints of the EU citizens, where there are reported cases of maladministration.

3. Scientific Research

Article 41 of the Charter of Fundamental Rights provides for the first time, expressly among the civil rights, the right to good administration, stating in paragraph (1) that any person is "*entitled to benefit in terms of its problems, of an impartially and fairly treatment, within a reasonable time from the institutions, bodies, offices and agencies.*" According to paragraph (2), the right to good administration includes the right of every person *to be heard* before taking any individual measure that would affect him; *everyone's right of access to his file*, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to *motivate the decisions*.

[1]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, line3.

[2]The motivation of the European Parliament resolution on the annual report on European Ombudsman's activities in 2009 there are listed the most common types of alleged maladministration: the lack of transparency, including the refusal of right to information (36% of surveys), injustice and abuse of power (14%), avoidable delays (13%), procedural defects (13%), negligence (6%) non-compliance by the Commission to exercise its role as guardian of the Treaties (6%), errors of law (6%) and discrimination (5%). The document shows that the term “maladministration” should be interpreted in a broad sense so that it would include not only violations of legal norms or general principles of European administrative law, such as objectivity, proportionality and equality, non-discrimination and the respect of human rights and fundamental freedoms, but also cases where an institution fails to act consistently and in good faith or disregard the legitimate expectations of citizens, including when the institution has committed itself to respect certain rules and standards, without being obliged by the Treaties or secondary legislation.

Also the article 42 of the Charter of EU Fundamental Rights establishes the right of access to the institutions, bodies, offices, and agencies of the Union documents, for any citizen of the Union and any natural or legal person residing or established in a Member State.

As regards *the right to be heard*, article 66, line (2), paragraph 5 of the ECSC Treaty provides the possibility for the parties to present their position before the High Authority establishes certain measures. Similar provisions are also found in article 88, line (1) of the ECSC Treaty. The jurisprudence of ECJ on *the right to be heard* is constant, meaning that this right must be respected *"in all proceedings initiated against a person liable to lead to a charged act of prejudices represents a fundamental principle of EU law and it must be provided even in the absence of any rule on the procedure in question*".[1]

Being considered as one of the most important principles of the administrative procedure, the right to be heard is reflected ever since 1962 in the Court of Justice in Case M. Maurice Alvis, the European Economic Community Council.[2] Given this case, the Court considers that the right to be heard is a rule that meets the necessary requirements of a clear justice and good administration, being obligatory for the Community institutions as well.

The principle of motivation requires the need for the authority issue an administrative act to would show explicitly the facts and law elements that determine the adoption of that decision. (Apostol Tofan, 2006, p. 46) Motivation is an essential element for the formation of people's conviction on the legality and appropriateness of the administrative act, representing also a guarantee of having chosen the optimal solution by the decision-making body. (Apostol Tofan, 2006, p. 46)

The obligation of motivation considers the decisions that could affect the individual rights and freedom, having as finality the reduction of discretionary

[1]See for more details, the doctoral thesis (2011) entitled "Coordonatele integrării administraţiei româneşti în spaţiul administrativ european/Integration coordinates of the Romanian administration in the European Administrative Space/", author Gina Livioara Goga, to be published.

[2]In this case, the plaintiff, Maurice Alvis, challenged his dismissal without being given the possibility to defend themselves, without being informed of the reasons for his dismissal. In its decision from July 4, 1963, the Court emphasizes the obligation of the administration to enable officials to respond to allegations before taking any disciplinary decisions that could affect them. The Court considers that this obligation is a general principle of administrative law in the Member States of the European Union (Court of Justice, Case 36/62 Alvis vs. Council, 1963).

power of those who have decision-making rights, thus eliminating the abuses and illegalities from the administration. (Vedinaş, 2007, p. 228)

The scale and detailing the motivation depend on the nature of the adopted act, and the requirements that the motivation should meet depend on the circumstances of every case, as decided on the Court of Justice. (Manolache, 2003, p. 620)

Motivation provides transparency to the act, individuals being able to check if the document is properly grounded, allowing the judicial review exercised by the Court. (Manolache, 2003, pp. 621-622) At the same time, it allows also the monitoring prescribed by the protocols concluded regarding the respecting the principles of subsidiarity and proportionality.[1]

The Court jurisprudence refers to how motivation should be done or how large it should be. Thus, in one of the case[2] the Court accepts the possibility that, in the situation where there is a similar case with others, the solution is motivated summary, referring to previous decisions. But when that decision exceeds the set framework, the concerned Community authority must give an explanation of its reasoning.

The introduction of the obligatory feature of motivating the administrative acts, it is assessed in the current Romanian doctrine, that it would reduce the risk that the administration would take arbitrary, abusive decisions and it would become, finally, a factor of progress for the administration." (Vedinaş, 2002, p. 98)

According to another author, (Oroveanu, 1994, p. 88) the utility of motivating the decisions has a triple interest. Thus, disclosure of the reasons explains the made decision and thus it avoids possible conflicts between the administration and its officials. On the other hand, the obligation of motivating the decisions determines

[1]The Lisbon Treaty replaces the 1997 protocol on the appliance of subsidiarity and proportionality principle by a new Protocol with the same title, whose main novelty refers to the new role of national parliaments in controlling the compliance of the principle of subsidiarity (Protocol 2). According to the Protocol, each EU institution shall ensure constant compliance with the principles of subsidiarity and proportionality as defined in the Treaty on European Union. The Consecration of the two principles, separately, in the Treaty on European Union, demonstrates their role and functions on the organization and reorganization of European construction. If according to the principle of proportionality, the means used by authorities must be proportionate to their purpose, the subsidiarity is a way of organizing the political proximity, which combines the need to the sovereignty with the respect of autonomy, being the only one that can take European Union diversities and it aims to expand and deepen simultaneously the integration and preservation process of the sovereignty of Member States. For details see (Velişcu, 2004, p. 174).

[2]Court of Justice, Case 73/74*Groupement des fabricants of papiers peints/Group of manufacturers of wallpaper* and Others v. Commission, 1975.

the administration not make decisions based on reasons that cannot be disclosed to the public, thus the administration should be guided in its work by moral norms. Also, the motivation enables an effective control of the superior on the content of the decision, and a rigorous judicial control of the courts of administrative contentious. At the level of the EU Member States it is found the general tendency of requiring public authorities to motivate their documents. In the preamble of the EU Charter of Fundamental Rights it is stated that the reunited Europe intends to deepen the democratic and transparent feature in its life. Therefore, one can say that the participatory position to the social position of the citizen is obligatory linked to the principle of transparency, and most important way to give viability to these principles is the establishment of compulsoriness in motivating the acts of public authorities. (Lazăr, 2004, p. 144)

In Romania, based on the constitutional consecration of the principle of transparency of the administrative proceeding (with the exceptions imposed by article 53 of the Constitution), the Law no. 24/2000 on technical legal rules for drafting normative acts establishes the motivation as a condition of legality of these acts. (Lazăr, 2004, p. 144)

Regarding the motivation of individual administrative acts, this obligation is provided either without distinguishing between the acceptance and refusal of solving the application, or only when the request is not resolved favorably. (Lazăr, 2004, p. 146)

At European Member states level, where a decision of an institution does not meet the legal obligation to motivate, any person or institution, body, office or agency may apply to the Court of Justice by an action of annulment, based on article 263 of TFEU. Also we emphasize the aspect highlighted in the Jurisprudence of Court of Justice according to which there should be a distinction between the obligation of motivating the decisions, which is a fundamental rule of procedure and the problem of reliability of motivation, which is the legality content of an act in litigation. Therefore, the reasons for seeking to challenge the reliability of an act are ineffective, in case it is an act based on the lack of or insufficient motivation.[1]

The right of accessing the personal files is another principle which is a real guarantee for achieving a good administration. According to this principle, the interested parties may examine the documents used by the administration during

[1]ECJ, Legal decision of 22 March 2001, France/Commission C-17/99, Rec., P.I-2481, sections 35-38.

the procedure. However, as shown in article 41 of the Convention, the right of accessing the personal files is conditioned by respecting the legal legitimate interests of confidentiality and professional and business secrecy. It is representative for this principle case 228/83 of 29 January 1985, the Court's decision was subsequently invoked in similar cases. In the complaint, a former official of the European Commission requested the annulment of a Commission decision through which the demand was dismissed against the dismissal decision from April 7, 1983.

The Court decision noted: "*... the principle applicable in procedures as the one before a disciplinary committee, reclaims that an official accused of misbehavior to have knowledge of all the data on which the opinion expressed by the concerned Commission relies on – in enough time to formulate its own observations.*"

The right of defense includes as derivative also the right of the person to access the administration documents in order to present its point of view. Thus, it should be shown, in matters of disciplinary regime of officials, in a case where there was attacked the notification emitted by a discipline Commission, the Court held that such a notification is a prejudicial act, that may be appealed as that notification, although it came from an advisory body, it was issued at the end of an investigation that the disciplinary commission had to perform with full independence and under a special, distinct, contradictory procedure, submitted to the fundamental principle of the right to defense (Case Court of 29 January 1985, F / Commission, 228/83, Rec., p. 275, paragraph 16). A fortiori, such reasoning should apply, by analogy, in the hypothesis of the adopted decisions under the article 10 (2) first sentence of Regulation no. 1073/1999, as these decisions come from an independent Community body and they are also taken within or at the end of an investigation that should be conducted "*in full respect of the people involved […] of the right to express their views on the facts that concern them.*"[1]

[1]Decision of the European Union Civil Service Court of 28 April 2009 in Joined Cases F 5/05 and F 7/ 05, concerning an action brought under Articles 236 E Cand 152 EA.

4. Conclusions

Romania's accession to the European system of protection the rights was a crucial moment for the development and enforcement of law.[1] This assertion rests on the fact that, according to article 20 line (2) of the Constitution, in the event of non-correspondence between pacts and treaties on human rights, to which Romania is party and the internal laws, the international regulations have priority, except in those cases where the Constitution or the national laws comprise more favorable provisions. However, the article 148, line (2) of the Constitution provides: "*Following the accession, the depositions of constituting treaties of the European Union and other EU community regulations having mandatory feature, have priority over the contrary provisions of national laws, respecting the provisions of the Act of Accession.*" According to the Charter of Fundamental Rights, the European Union recognizes the rights, freedoms, and principles mentioned in article 41, being provided the right to good administration. But the Constitution or any other legislation do not provide the right to good administration as a fundamental right of citizens. However, in the recent years, Romania's legislation was supplemented by numerous laws[2] that may sustain the fact that they have created the legal framework for good administration.

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[1]Stelian Valentin Bădescu, first pilot decision in the case Maria Atanasiu and others against Romania, concerning the property nationalized before 1989 and its influence on the right to good administration and its impact on administrative procedures in (Bălan, Varia, Iftene, Troanţă, & Văcărelu, 2011, p. 187).

[2] The Law on free access to public information no. 544/2001, Law of decisional transparency in public administration no. 52/2003, Local Public Administration Law no. 215/2001 etc.

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