On the Right to Good Administration: European developments and national administrative practice

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ABSTRACT

The present paper presents in brief the evolutions related to the right to good administration since it was listed as a fundamental right in the EU Charter of Fundamental Rights and stressing also the more recent work of the ReNEUAL on Model Rules on Administrative Procedure. We also try bringing examples from the national level, from the Romanian administrative practice on the right to be heard, the right of access to your own file and the obligation of the administration to give reasons for its decisions.

KEYWORDS: *good administration, standardization, rule of law, equitable treatment, procedural rights.*

1. Introduction

The article tries to analyse the major role played by the standards of good administration in a society that becomes more and more diversified and complex, where the political leadership needs to reach the main goals of the governance through accepted democratic means that were also recognized by the social body. Public administration involves bureaucratic systems and procedures which are used by a specialized body, that allow governors to enact their policies.

Good administration, in relation to protection and promotion of human rights, is fundamentally linked to societies where the principles of rule of law are observed and where the power granted to public administration is unequivocally stated by the Constitution and by the law. But if the legal delegation represents an essential condition of the legitimacy in the exercises of the public administration's prerogatives, this condition is not sufficiently. There is the need to address other principles to make the administrative process ensure citizens an adequate and equitable treatment. Setting up the conditions to ensure a sustainable development of the community requires a good administration, seen in opposition to maladministration, a concept

considered to be broader than illegality[1)], which could prove itself to be indifferent to the citizen's needs or even hostile.

In order to create the possibility for the citizen's involvement in the decision-making process, it is necessary that they can formulate proposals and they can follow the evolution of the debates which will influence their lives, increasing also the transparency of the regulation mechanisms. Transparency allows citizens to examine in detail the activities of the public authorities, to evaluate their outcomes and it also attracts, if case, the liability of the authorities. The concept of "good administration" concerns both the observance of the human rights of the citizens in the framework of the rule of law and the good functioning of the public administration as a system, the observance of rules which are clear, predictable, easy to understand and to apply by the citizens and public administration, setting public objectives that match the needs and expectations of the citizens. Charles Debbasch stated that administrative law must answer to two fundamental requirements: on the one hand, it has to ensure the internal discipline of the public administration, to make it as good as possible, and, on the other hand, to guarantee citizens the functioning of the public administration according to the exigencies imposed by the rule of law[2)]. Each state of the European Union should be concerned with identifying and promoting the most adequate measures to ensure good administration, identifying and then applying at national level the principles that govern EU's activity. In the field literature there are different mentions on the national administrative autonomy and its limitations in every state, in the context of adapting it to the necessity of the harmonization of law[3)]. When implementing EU law, national authorities are subject to the duty of loyal cooperation, and national administrative authorities are subject to the European principles of equivalence and effectiveness, being obliged to adopt all the general or specific measures in order to provide legal remedies. The procedural means appliable in this context belong to the internal juridical order of each state on the basis of the procedural autonomy of the Member States, under the condition that they are not less favourable than the ones applying to domestic situation, as far as equivalence is concerned, and they do not make it excessively difficult or even impossible in practice the exercise of the rights conferred by EU law, as far as the principle of effectiveness is concerned. Moreover, the European Union has the competence to harmonize national administrative law, which is strengthened by Art. 197 TFUE that promotes administrative cooperation among the Member States and between them and the Union. ECJ, European Parliament and European Commission have tried to adopt minimal standards that govern European administrative procedure.

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1) Vogiatzis, N., 2018*, The European Ombudsman and Good Administration in the European Union*, London, United Kingdom: Palgrave Macmillan, p. 9.

2) Debbasch, C., 2002, *Droit administratif*, 6e édition, Paris, France: Economica Publishing House, p. 3.

3) Slabu, E., 2018, *Buna administrare în spațiul administrativ european*, Bucharest, Romania: C.H. Beck Publishing House, p. 13.

2. The right to good administration at European level and the role of the Research Network on EU Administrative Law

During its early days, the European Union's decisions were aiming at an economic development of the Member States, but, as time passed and the EU enlarged, it was more and more obvious that economic welfare needs to be linked to the rule of law principles, with fundamental human rights and liberties, with a good administration of the public affairs. In this context, the national administrative convergence has led to introducing into the *Acquis Communautaire* of two important elements: the right to good administration, and the administrative cooperation between Member States as a matter of common interest, that promotes the improvement of administrative capacity.

The process of modernization of public administrations at European level led to the right to good administration, mentioned for the first time in the Charter of Fundamental Rights of the European Union, which entered into force on the 1st of December 2009, with the Treaty of Lisbon. The content of the Charter is considered "a mixture of fundamental rights, principles and values, and ideas, some of which have clear frames and history of application, whereas other are novel concept that have not yet found their clear space in the *espace juridique Européen* (European legal space)"[4]. In the Romanian field literature, it was shown that the Charter represents a "veritable catalogue of rights all European citizens should benefit before all EU's institutions, and in relation to the Member States when those are applying European legislation"[5].

The emergence of the right to good administration, together with the development of the various procedural legal principles and related obligations, was considered a feature of the judicial globalization process[6]. It was shown in the field literature that the right to good administration is a umbrella concept, encompassing different procedural rights and principles previously recognized by the EC Courts' case law[7], the principles relating to good administration being previously stated not only by the general administrative procedure acts of many western countries, but also by international treaties and by rules and guidelines of many international and global

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4) Kerikmäe, T., 2014, *EU Charter: its Nature, Innovative Character, and Horizontal Effect,* in Kerikmäe, T. (ed.), Protecting Human Rights in the EU. Controversies and Challenges of the Charter of Fundamental Rights, Berlin, Germany: Springer Verlag, p. 8-9.

5) Tănăsescu, E.S., 2010, *Carta drepturilor fundamentale a UE: avantajele și efectele ei pentru cetățenii europeni*, in Revista română de drept european, no. 4, p. 18.

6) Ponce Solé, J., 2011, *EU Law, Global Law and the Right to Good Administration* in Chiti, E.; Mattarella, B.G. (eds.) Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison, New York, USA: Springer, p. 133.

7) Nehl, H.P., 2009, *Good administration as procedural right and/or general principle?* in Hoffman, H.; Türk, A. (eds.), Legal Challenges in EU Administrative Law. Towards an Integrated Administration, Cheltelham, United Kingdom: Edward Elgar, p. 350.

organizations, which either commit themselves to respecting rules based on such principles, or force national administrations to do so, or do both[8].

The right to good administration is enshrined in the fifth title of the Charter, "Citizens' Rights", together with the right to vote and to stand as a candidate at elections to the European Parliament (art. 39), right to vote and to stand as a candidate at municipal elections (art. 40), right of access to documents (art. 42), European Ombudsman (art. 43), right to petition (art. 44), freedom of movement and residence (art. 45) and diplomatic and consular protection (art. 46).

Thus, in relation to Art. 41 on the right to good administration[9], it was showed that the Member States should identify the practical ways that would lead to the actual achievement of this right, the main elements mentioned within in the article representing a starting point for Member States in drafting the domestic regulations that will determine the good administration at national level, since the Treaty provisions underlines that currently the Union has as objectives not only a unitary economic development, but also strengthening the observance of people's fundamental rights and, implicitly, the right to good administration[10].

One important aspect is that the Charter uses the syntagma "every person" and not the one of "European citizen", opening it to citizens belonging to third states, which confers the Charter a global dimension. But, as it has been shown, the Charter is addressed only to EU's institutions, bodies, offices and agencies and not to the Member States[11], the extension of its provisions to the Member States being refused by the ECJ, without leading to significant gaps in the protection of fundamental rights in practice[12].

We can also notice that Article 41, right to good administration, should be read in strong correlation to Article 43, European Ombudsman, which states that in relation

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8) Mattarella, B.G., 2011, *The Influence of European and Global Administrative Law on National Administrative Acts*, in Chiti, E.; Mattarella, B.G. (eds.) Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison, New York, USA: Springer, p. 65.

9) 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

10) Slabu, E., *op. cit.*, p.53.

11) Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), 2019, *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford, United Kingdom: Oxford University Press, p. 2205.

12) *Idem*, p. 2205.

to maladministration in the activities of the institutions, bodies, offices or agencies of the Union, any citizen of the Union and any natural or legal person residing or having its registered office in a Member State, has the right to refer to the European Ombudsman[13)].

The European Parliament Resolution of 15 January 2013 shows that citizens are increasingly and directly confronted with the Union's administration, without always having the corresponding procedural rights, and calls for guaranteeing the right to good administration by means of an open, efficient and independent administration based on a European Law of Administrative Procedure, and also for the codification the fundamental principles of good administration. Those principles should regulate the procedure to be followed by the Union's administration when handling individual cases to which a natural or legal person is a party, and other situations where an individual has direct or personal contact with the Union's administration[14)]. The more recent European Parliament Resolution of 9 June 2016, for an open, efficient and independent European Union administration[15)], was adopted for guaranteeing the right to good administration and is applicable to without prejudice to other legal acts of the Union providing for specific administrative rules. According to Art. 3 of the resolution, it will also supplement such legal acts of the Union, which shall be interpreted in coherence with its relevant provisions.

In this context, the Research Network on EU Administrative Law developed a set of model rules between 2009 and 2014, in order to reinforce general principles of EU law and to identify – on the basis of comparative research – best practices in different specific policies of the EU.

According to Article 41 of the EU Charter of Fundamental Rights, the right to good administration appears to include the following: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions.

On these three aspects concerning procedural fairness, the ReNEUAL Model Rules on EU Administrative Procedure has elaborated the following developments in the Book III concerning Single-Case Decision Making:

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13) Art. 43 Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

14) European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)) available at https://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0004&language=EN

15) European Parliament resolution of 9 June 2016 for an open, efficient and indepent European Union Administration (2016/2610(RSP), available at https://www.europarl.europa.eu/doceo/document/TA-8-2016-0279_EN.html

3.1 The right to be heard:

(1) Every party has the right to be heard by a public authority before a decision, which would affect him or her adversely, is taken.

(2) The hearing prior to the taking of the individual decision may be omitted when an immediate decision is strictly necessary in the public interest or because of the serious risk involved in delay, but a hearing shall be provided after the decision was taken, unless there are very compelling reasons to the contrary. The public authority shall provide reasons as to why these conditions are applicable and has the burden of proof in relation to showing that the evidence supports the reasons given.

(3) Every party has the right to notice of the central issues that are to be decided by the public authority and the core arguments that inform its reasoning, in order that the party can effectively make known its views on the matter and can exercise its rights of defence.

(4) Every party must have adequate time in which to respond after notice in accord with paragraph 3 has been provided. The public authority should set clear time-limits within which the response is to occur.

(5) The public authority has discretion as to the form and content of the hearing. This includes the choice as to whether the hearing should be written or oral, whether to allow cross-examination and the nature of the evidence. In choosing how to exercise this discretion the public authority should take into account the objectives of the legislation, the legislative provisions, the importance of the person's interests, the importance of the additional process right for protection of the person's interest, and the costs of granting such rights.

3. Short considerations on the Romanian administrative practice

For a better understanding of the multiple dimensions of the right to good administration at national level, we will make a short survey on some cases of maladministration, that occurred in the last years' Romanian administrative practice, and if case, the steps taken by the Romanian Ombudsman to tackle them[16)].

3.1. The right to be heard

Here we are going to refer to the administrative and fiscal matter the dispositions of the article 9 of the Law no. 207/2015 Code of Fiscal Procedure. When analyzing the content of the disposition, it results that the legislator only affirms the right to be heard, establishing after numerous exceptions and limitations, without offering sufficient guarantees that the hearing is only a formality, since there is a lack of

16) For more details on the Romanian Ombudsman, see Berceanu, I.B., 2016. *The characteristics of the Romanian Ombudsman as an autonomous administrative institution*, in Manda, C.C.; Nicolescu, C.E.; Rădulescu, C.R. Probleme actuale ale spațiului politico-juridic al UE, Supliment al Revistei Române de Drept European, Bucharest, Romania: Wolters Kluwer Romania, pp. 19-25.

information concerning informing the heard person on the case and on the arguments of the fiscal organ, and also on granting a reasonable period of time for preparation of the hearing.

3.2. The right of access to your own file

The Romanian administrative practice reveals the situation concerning the access of a person to his/hers file concerning the pension according to the Law no. 263/2010 on the way of determining the incomes taken into account for the calculus of the pension, points, annual average etc. As explicit procedures lack, the person is limited in the exercise of the right to access his/her file, although being indicated the means for legal contestation, the access to probation means is limited. This aspect could be linked to the right to an equitable trail that involves the requirement that the parties have sufficient possibilities, equivalent and adequate to sustain their position on the legal and factual matters, and that none of the parties becomes disadvantaged in relation to the other.

Only in 2019 the Romanian Ombudsman had to deal with 461 petitions concerning the rights of the retired citizens which specifically asked for information and explanations concerning the legal conditions for granting pensions, calculus, legislation in the field of social insurances and how pension authorities understand to apply this legislation[17)]. The Romanian Ombudsman is noticing an increased critical attitude of the insured citizens and of the retired ones towards the specific regulations into force, citizens asking clarifications on how Law no. 263/2010 concerning the unitary system of public pensions is applied[18)]. The previous year, in 2018, the Romanian Ombudsman received 388 petitions concerning the rights of the retired citizens and in 2017 a number of 464 such petitions.

3.3. The obligation of the administration to give reasons for its decisions

From the Romanian administrative practice concerning contraventions, we mention the situation of the insufficient motivation of the minutes written by the police agents. Not allowing the offender now which are the legal grounds that conducted to the issuing of the administrative act infringes the procedural guarantees instituted in his/her favor, the administrative act making it almost impossible for the offender to carry the burden the contrary proof. The observance of the procedural rights of the citizens requires public administration to give reasons for all its decisions, to present the arguments on which they are based, especially in the situations of rejecting recognition of rights.

In the exercise of the constitutional attributions of bringing cases before the Constitutional Court, the Romanian Ombudsman has raised the exception of

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17) Annual Report of the Romanian Ombudsman for the year 2019, p. 16, available at http://avp.ro/rapoarte-anuale/raport_2019_avp.pdf.

18) Law no. 263/2010 concerning unitary system of public pension, published in the Official Journal of Romania no. 852/22.12.2010.

unconstitutionality of the provisions of the Emergency Ordinance no.195/2002[19] which do not ensure the equality of juridical treatment because of a legislative omission, regarding the application of a complementary sanction, for the drivers who exceed the maximum road speed limit. The case is pending before the Constitutional Court.

3.4. The right to have his/her affairs handled within a reasonable time

The Romanian Ombudsman has effectuated in 2019 an inquiry at the Direction of Public Finances of Bucharest on the matter of the restitution of the environmental tax (pollution) for vehicles, which has been applied with the breach of European regulations. The Romanian Ombudsman found out that the Direction did not observe the regulations of the Emergency Ordinance no. 52/2017[20].

Acting according to its legal competencies, the Romanian Ombudsman issued a recommendation of the Ministry of Finances, asking for the urgent finalization of the procedures concerning the communication of the decisions concerning the requests for the restitution of the environmental tax, ensuring an adequate behavior of the public administration in relation to the citizens.

In a democratic society, the exercise of the public power that public administration is effectuating in order to accomplish its public missions cannot be compatible with the abuse of power or with over-delayed terms, without becoming maladministration. The open, participative character and the procedural fairness represent the foundations of a dialogue between citizens and public administration.

4. Conclusions

The good administration implies the right to equitable treatment from the public authorities. Into the right to equitable treatment we can include the obligation of the public administration to observe the requirements of the principle of legality in its letter and spirit according to Art. 1 paragraph 5 of the Constitution of Romania and to ensure the procedural rights of the citizen, as veritable guarantees of the equity. As the European Ombudsman was stating when discussing aspects concerning the activity of the European Anti-Fraud Office, "the concept of good administration is, however, broader that the concept of legality. By subjecting its findings to scrutiny and challenge, OLAF can enhance their certainty and validity"[21].

Public authorities exercise considerable prerogatives in relation to citizens, so when imposing obligations, public administration prove an equitable treatment for every person; in a society based on the rule of law it is important that all those

[19] Emergency Ordinance no. 195/2002 concerning the circulation on the public roads, republished in the Official Journal of Romania no. 670/2006.

[20] Published in the Official Journal of Romania no. 644/2017.

[21] Good administration in practice: The European Ombudsman's decisions in 2013, available for download at https://www.ombudsman.europa.eu/ro/publication/en/56331.

powers conferred to public administration have a legal basis, but they also respect the principle of good administration.

The procedural fairness involves the right of the citizen to a treatment based on truth, non-discrimination, an equitable treatment. The citizen must be able to use a series of instruments guaranteed by law, by enshrining it in rules and methodologies, validated by good practices, that allow him to defend his/her rights against public administration. The exercise in good faith of the procedural rights both by the public administration and by the citizens, could constitute the premise of avoiding that the decisional act becomes a formality that empties the right to an equitable treatment.

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