

THE RIGHT TO GOOD ADMINISTRATION WITHIN THE EUROPEAN SYSTEM OF HUMAN RIGHTS PROTECTION SET UP BY THE COUNCIL OF EUROPE

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Abstract

*In the vision of the Council of Europe, **good administration** has the meaning of ensuring quality legislation, quality services rendered based on a proper evaluation of the society needs, an efficient public management, efficiency and effectiveness, corruption exclusion and recruitment, and training a quality staff. But, first of all, by **good administration** is understood the observance of individuals' rights, openness and transparency in public activity. And the activity carried out by the European Court of Human Rights, based on the provisions of the European Convention on Human Rights and Fundamental Freedoms, ensures the observance of human rights and has supported the development of European democracies, and, implicitly, achievement of a better governance and administration in the European countries.*

Keywords: good administration, the Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Code of good administration

1. Brief introduction

The Council of Europe was established with the purpose to achieve a higher unity among the Member States and to facilitate their economic and social progress. This purpose was to be achieved by discussing matters of common interest, concluding agreements and adopting common actions in the economic, social, cultural, scientific, legal and administrative areas, but also by promoting and observing human rights and fundamental freedoms. Following the changes occurred in the late 80s in Central and Eastern Europe, the Council of Europe provided support to countries on their path of democratization and human rights observance. More than 200 European conventions and treaties, compulsory documents once they have been signed or ratified, have been replenished with a set of recommendations and assistance programs for the European states interested in implementing reforms in the constitutional, legislative and administrative areas (Duculescu 2008: 77-78). The generally binding rules established through conventions and treaties, as well as the recommendations approved for assisting in the implementation of mandatory documents have caused a strengthening of the European

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national legal systems, democracy consolidation, **increase in the quality of governance and administration at the European states level**. Also, the activity of the European Court of Human Rights, consisting in checking the manner in which the member states of the Council of Europe ensure human rights observance, backed up, beyond all doubt, the development of older and newer European democracies, and, implicitly, accomplishment of **better governance and administration** in the European countries.

2. The right to good administration in the *European Convention on Human Rights and Fundamental Freedoms*¹¹

The European Convention on Human Rights and Fundamental Freedoms, subsequently supplemented by 16 protocols, is the core of the complex system of promotion and protection of human rights and freedoms, a system improved over time so as to ensure an attainment of the purpose and objectives proposed at the establishment of the Council of Europe. The Convention provisions and the decisions of the European Court of Human Rights (ECHR) contributed in time to consolidating the European system of human rights protection.

Article 6 the Convention proclaims the "right of each person to a fair trial", stipulating in paragraph 1 that "every person has the right to a **fair trial**, publicly and within a reasonable period of his/her case, by an independent and impartial court established by law, which will decide either on the breach of his/her rights and obligations of civil nature, or on the proofs of any criminal charge against him/her. The decision should be "pronounced publicly", but the access to courtroom may be prohibited to the press and the public during the entire trial or a part of it in the interest of morality, public order or national security in a democratic society, where the minors' interests or protection of the parties' private life require this, or to the extent considered absolutely necessary by the court when, in special circumstances, the publicity is likely to prejudice the interests of justice ...".

This fundamental right is an essential element of the **principle of ensuring the rule of law in a democratic society**, specifying at the same time the guarantees necessary for carrying out any trial: fairness of the proceedings, public debate of the case and the trials to last a "reasonable time" (Birsan, 2005: 394-399).

The provisions of this article are closely related to the provisions of **Article 13** which states that "any person, whose rights and freedoms recognized by the Convention have been breached, has the right to actually come before a national court, even when that violation would be committed by persons acting in exercising their official duties". This text guarantees a subjective right of every person to be able to appeal before the

¹¹ Adopted in Rome on November 4, 1950.

national courts violation of the rights provided by the Convention, and also implicitly assumes the states' obligation to regulate such a possibility in the domestic legislation (Bîrsan 2005: 867).

The above-mentioned aspects represent the core of another fundamental principle of human rights, the legality of public authorities' activity - a defining element of good administration. The right of a person injured by an action or a failure to act of a public administration authority to approach the court about complying with the law and recovering the prejudice is considered a highlight of democracy and a means of preventing and combating corruption. It can even be a possibility to improve the public administration activity, given the fact that the decisions made by the courts concerning the observance of people's fundamental rights would be known by politicians and civil servants. But unfortunately, in Romania, the trials pending before the courts last long enough, which determines and justifies citizens' lack of trust in justice and do not lead to restoration of truth within a reasonable time.

A number of other four articles protect rights that represent social respect owed to individual (Bîrsan 2005: 593), as follows:

- ✓ **Article 8** stipulates that "every individual has the right to respect for his/her private and family life, his/her home and correspondence"
- ✓ **Article 9** provides that "every person has the right to freedom of thought, conscience and religion";
- ✓ **Article 10** stipulates that "every individual has the right to freedom of expression. This right includes freedom of opinion and freedom to receive or communicate information or ideas without immixture by public authorities";
- ✓ **Article 11** establishes the right to freedom of assembly and association.

These provisions ensure the individual protection against arbitrary intromission of public power in the exercise of its prerogatives by imposing both a number of negative obligations from the state (to do nothing that would prejudice the rights exercise) and a number of positive obligations for the actual guaranteeing of all components of those rights (the state is obliged to adopt a series of legal instruments that would have as result the accomplishment of these rights). However, there are also established certain conditions in which the exercise of these rights may be subject to some restrictions necessary in a democratic society to protect national security, public order or for prevention of committing criminal offences. The states have an "obligation to set up adequate and sufficient guarantees in order to exclude any abuse that might be committed by public authorities in this field" (Bîrsan 2005:595).

It should also be mentioned that in April 2009, the European Court of Human Rights announced that the "access to official information" is a

right protected by Article 10 of the European Convention on Human Rights.

In the same line of thought, it should be highlighted once more that among the objectives of the Council of Europe is "citizen participation in the life of local and regional communities and protection and consolidation of local and regional democracy, and freedom of expression and information, including freedom of the media, are essential for a real democracy and democratic processes". When these freedoms are not protected, the state subject to the rule of law may be compromised. "The right to peaceful assembly", as provided by Article 11, is a fundamental right in the democratic society, an essential element of public life, guaranteed for any subject of law intending to organize such a manifestation. The states have the obligation "to do nothing likely to hinder the exercise of this freedom and even the adoption of positive measures to ensure the possibility of its accomplishment, such as the measures of protection and security likely to provide efficacy and substance to the exercise of freedom of assembly" (Birsan 2005:808).

All these rights, promoted through a mandatory legal instrument and protected by the ECHR case law, in its turn binding on all member states of the Council of Europe, have underlain and are still underlying the principle of good administration, at present a principle promoted and protected by the EU legislation and CJEU case law.

The principle of non-discrimination, entered in all treaties and international instruments for the protection of human rights, is regulated by the Convention, in **Article 14**, as follows: "Exercise of the rights and freedoms acknowledged by ... the Convention has to be ensured without any discrimination based, especially on gender, race, color, language, religion, political or other opinion, national or social origin, membership of a national minority, wealth, birth or any other situation". It appears as a modern and refined form of **the principle of equality before the law**, as it has been provided in Article 7 of the *Universal Declaration of Human Rights of 1948* and is supplemented by the provisions of Protocol No. 12 to Convention concerning the general forbiddance of all forms of discrimination. In the literature is stated that the "right to non-discrimination" can be also labeled as "a right to equality, since equality and non-discrimination are equivalent notions" (Velu, Ergec 1990: 138), being pursued the protection of persons in similar situations against applying a different treatment.

The principle of non-discrimination or of citizens' equality contributes to achieving a **good administration** by enhancing confidence in the ability of public administration authorities to resolve the problems of all

types of administered persons, not only those belonging to certain social categories.

3. The right to good administration in the case law of the European Court of Human Rights

The European Court of Human Rights (ECHR) has contributed by interpreting the provisions of the European Convention on Human Rights, to the development and clarification of the terms that define the concept of **good administration**.

Thus, the ECHR Decision dated April 14, 2009, in Case 37374/05, Társaság a Szabadságjogokért against Hungary, it is very important for the evolution of the concept of **good administration**, representing practically a recovery in relation to the previous practice of the Court, which considered that Article 10 of the Convention does not impose an obligation to communicate information when the state does not want it. According to the new case law, "the right of access to information already available held by the state is formally recognized as belonging to Article 10, the Court finding that non-disclosure by the state of certain information that would have required a public debate on areas of general importance may lead to a breach of the freedom of expression".

In this case, the ECHR emphasized that "it would be fatal for the freedom of expression in the sphere of politics if public figures could censor the press and public debates invoking their personal rights, claiming the fact that their views on public issues regard their own person and, consequently, are personal data that cannot be disclosed without consent" (Barbu, Bogdan 2009). And since transparency is an essential condition for **good administration**, it should be highlighted once again the ECHR contribution to promoting and protecting the fundamental principles that are **elements of the good administration**.

Also, the European Court of Human Rights showed in Case 17056/06, Micallef versus Malta¹², that **impartiality** means the lack of prejudice or favor, and its existence or absence can be verified in many ways. According to the case law of the Court, "the existence of impartiality is determined based on a **subjective approach**, within which attention is paid to personal conviction and behavior of a judge". The Court decided that the "**personal impartiality of a judge should be assumed until there appear proofs to the contrary**". At the same time, it also takes place an "**objective approach**, within which it is checked whether the court itself shows enough guarantees so as to exclude any legitimate doubt in relation

¹² The ECHR, Case Micallef against Malta, Decision of 15 October 2009, available on page file:///C:/Users/user/Downloads/001-95031.pdf , accessed on 18.11.2016.

to its impartiality, such as the judge's participation in the trial in another stage of the trial".

In most cases having as object the issue of impartiality, the Court has focused on the **objective approach**. Nevertheless, there is not a clear delineation between subjective impartiality and objective impartiality of the judge; in some cases it can be difficult to find any proofs that would invalidate the presumption of subjective impartiality of the judge, the requirement concerning objective impartiality confers an important guarantee (Calin 2013).

The ECHR has also ruled that "in assessing the **objective impartiality**, appearances play a critical role ... since in a democratic society, the courts have to inspire confidence in litigants (Muraru, Tanasescu 2008: 1220). Also, the ECHR considers that **subjective impartiality** is related to the inner forum of the person, convictions, beliefs and behavior of a person and is presumed until the contrary is proved. It is a mental attitude that involves lack of prejudice¹³.

All these interpretations of the ECHR are essential since **they strengthened those concepts that underlie the good administration**, such as that of **impartiality**. The interpretation that the ECHR has provided concerning impartiality as a fundamental principle of law for any national juridical order, has underlain and will underlie any national legal regulations applicable not only to the judicial system, but also to the public administration system, a system that through a **good administration** is bolstered the sustainable development of any nation.

The European Court of Human Rights also stated that "a judicial review procedure is an effective appeal in the meaning of Article 13 of the Convention when courts can effectively control the legality of a decision taken by the administrative authorities in the exercise of their discretionary power, in relation to substantive and procedural rules, being also vested with the prerogative of the possibility to cancel the contested"¹⁴. The appeal to justice is, as a matter of fact, an element essential for the legality protection of the public administration action and, implicitly, for carrying out a **good administration** at national level.

As regards the right to respect private life, as an element of the good administration, the European Convention on Human Rights does not define **family life**, this being an **autonomous notion**, interpreted by the ECHR independently of the significance it has in the Member States' national law. Ordinarily, the existence of family life is determined by a

¹³ See the ECHR Decision in Case Kyprianou versus Cyprus dated 15 December 2005.

¹⁴ The ECHR, Decision dated 23.01.2002, Case Slivenko against Latvia.

biological and/ or legal connection (kinship, marriage, adoption, etc.) **in the presence of a real and effective personal relation**. However, there are exceptional situations, when either the biological and/or legal connection or an actual personal relation is enough to illustrate the concept of "family life".

The **principle of respect for private life** requires that in the public administration activity to be respected the individuals' private life and, in particular, the personal data to which public authorities have access (Albu 2007: 71), and the ECHR judges extended the scope of Article 8 of the Convention in order to include in the private life **data of public nature registered by public authorities** (Renucci 2009: 250).

Thus, in Case Rotaru against Romania¹⁵, the ECHR decided that "some data of public nature can come under the private life when they are systematically gathered and entered in files held by public authorities". The Court reminds that "both the registration by a public authority of data on an individual's private life, and their use and refusal to give the possibility that these be challenged is a violation of the right to respect private life guaranteed by Article 8 par. (1) of the Convention". And the violation of this right also assumes non-observing the **right to good administration**.

Also, the ECHR case law states that the principle of legal certainty involves a **predictable regulatory framework**, the rules of domestic law needing to be formulated with sufficient precision so as to enable the persons to whom they are addressed to be able to foresee, at a reasonable level, taking into account the concrete circumstances of the de facto situation, the consequences that could arise from a determined act¹⁶. Still from the case law of the ECHR we draw the conclusion that "**a legal certainty factor**" represents the need to establish a time limit for bringing legal action (de Salvia 2002: 188). Also, the **right to a fair trial** has been often associated with the notion of **legal certainty**, the ECHR considering that "in any litigation, the order pronounced by the court as the final solution ... cannot be disputed any longer ..."¹⁷.

Thus, in Case Beian against Romania¹⁸, the ECHR pointed out that "uncertainty, be it legislative, administrative or judicial, is an important factor that should be taken into account for evaluating the state's behavior ... and the **principle of legal certainty** is one of the fundamental elements of the state subject to the rule of law".

¹⁵ The ECHR, Decision of 29/03/2000, published in the Official Journal of Romania, Part I, no. 19/11.01.2001.

¹⁶ The ECHR, Case Goodwin against Great Britain, 1996, paragraph 31.

¹⁷ The ECHR, Case Brumărescu against Romania, 1999, paragraph 61.

¹⁸ The ECHR decision of 06.12.2007, published in the Official Journal of Romania, Part I, No. 616/21.08.2008.

In conclusion, we can add up that **legal uncertainty leads to a maladministration**, an aspect which may entail breach of fundamental rights of the European citizens and cause various consequences: from sanctions established by the ECHR decisions for states, until a decrease of citizens' confidence in the ability of states to ensure a coherent legal framework and to effectively protect the rights of all persons carrying out the activity within their legal area.

4. The provisions and importance of the Code of good administration

The Council of Europe continued to adopt documents through which strengthened the concept of **transparency** and, implicitly, that of **good administration**, and in 2007, 6 years following the adoption of the Charter of Fundamental Rights of the European Union, the Committee of Ministers adopted **Recommendation R (2007) 7 on good administration**, a background paper for the Council of Europe Member States as concerns the attainment of **the right to good administration** European states citizens.

Taking into account that the **right to good administration** is based on the fundamental principles of the state subject to the rule of law, such as: **legality, equality, impartiality, proportionality, legal certainty, respect for private life, transparency**, as well as the fact that the state should regulate the ways to protect the rights and interests of individuals, to inform and enable them to participate in adopting administrative decisions, **the member states of the Council of Europe are proposed to promote good administration as a principle of the state subject to the rule of law** and to ensure the efficient organization and functioning of public authorities, by adopting, where appropriate, the standards set in the code pattern annexed to this recommendation, also ensuring their effective implementation by office holders.

As inherently stated in the doctrine, "the adoption of Recommendation R (2007)7 was the final point of some endeavors undertaken by the Council of Europe bodies with the purpose of establishing at the level of Member States uniform principles and standards that would govern the relations between public authorities and the administered "(Vlaicu 2012: 291-292), considering that **good administration determines an even better social and economic development of states**.

As seen even since the Preamble of this document, some of **the fundamental elements of the right to good administration** are emphasized: legality, transparency, effectiveness and efficiency of public administration activity, the existence of administrative procedures coherent and known by citizens, corruption decrease etc.

The Code of good administration, an Annex to Recommendation No. 7 (2007) concerning good administration develops the principles of

legality, equality, impartiality, proportionality, legal certainty, reasonable time limit, participation, respect for private life and transparency; presents **the regimen of administrative acts**, from their way of drafting until enforcement, as well as the **remedies at law** and the **possibilities of compensation** in the case of damages caused as a result of their issuance.

Thus, pursuant to Article 2 of the Code, the public administration authorities **must act according to the legal provisions**, both domestic and international, and to comply with the rules of procedure and competence which regulate their activity (*principle of legality*). The public administration authorities must treat **equally and impartially** all natural and legal persons who apply to their services (*principle of equality and impartiality*), according to Article 3 and 4 of the Code, maintaining an adequate **balance** between the measures that should be adopted in the exercise of their responsibilities and prejudices that will be caused to the private persons' interests (*principle of proportionality*), according to Article 5 of the Code. Also, in accordance with Article 6 of the Code, the authorities of public administration have to observe the *principle of legal certainty*, which stipulates that "measures should not be taken retroactively but in cases provided expressly by law, so as not to affect the rights won except in urgent cases of public interest". In addition, all decisions must be made by the public administration authorities, according to Article 7 of the Code, within a *reasonable time limit*, correlated with the complexity of the problem.

The same document sets out also the fact that the state has to provide procedures in order to protect the rights and interests of individuals, *to inform citizens and to enable their participation in adopting administrative decisions*. Thus, for the purpose of carrying out a **good administration**, excepting the case when action must be taken urgently, the public authorities should give individuals the possibility that through adequate means *to take part in the preparation and implementation of administrative decisions* that affect their rights or interests, pursuant to Article 8 of the Code.

Code of good administration establishes in Article 10 that the public authorities have to act in accordance with the *principle of transparency* by complying with several rules, as follows:

- "- **private persons should be informed** by appropriate means, regarding the public authorities' actions and decisions, including through the publication of official documents;
- **public authorities should observe the right of access to official documents**, in compliance with the rules on the protection of personal data;
- principle of transparency should not prejudice the secrets protected by law;

- administrative decisions can be taken by public authorities either on their own initiative, or at the request of private persons;
- public authorities should establish procedures enabling the participation of the community members in the decisions making process through written comments, hearings, representation in a social consultative body, consultations and public inquiries."

5. Conclusions

In the Committee of Ministers' vision, **good administration** means *to ensure a legislation of quality, coherent, clear, and accessible*. Also, **good administration** means *services of quality provided on the basis of a correct evaluation of the needs of society*. It represents an aspect of the *good administration* and is not limited only to juridical manifestations, but it also means *an efficient public management, efficiency and effectiveness, corruption exclusion and recruiting and training a quality staff*. Also, by **good administration** is also understood *observing the rights of individuals, openness and transparency in the public activity*¹⁹.

Adopting this Code proves that **the two European legal systems - of the EU and of the Council of Europe - are interacting and influencing each other**. Although the Code of good administration is adopted by a recommendation of the Committee of Ministers, an act of soft-law nature, non-binding, its contents can be a resource for the codes of administrative procedure of the European countries and even of the EU institutions.

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