

THE PUBLIC ADMINISTRATION, LEGITIMATE, COMMON PRINCIPLES AT THE NATIONAL AND EUROPEAN LEVEL

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Abstract

Starting from the drafting of the Treaty establishing a Constitution for Europe and from the policies on a globalized society, we find that it is necessary to secure and legislate common principles of national and international public administration.

The present paper deals with a current topic issue of the community administration, underlining the need to implement some common principles of administrative law, facilitating the creation of a relationship of efficiency of the administrative act through positive, constructive communication between the citizens and the public administration authorities.

The implementation of the specific principles of the public administration revitalizes the civic spirit of the human being and directs the entire activity of the administration to the support of taxpayers, in their interest, trusting the involvement in the public life of the community they are part of.

Keywords: *legitimacy, public administration, principles, administrative act, compulsion*

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1. Introductory considerations

The socio-political changes prefigured in the 21st century require the approach and adaptation of the public administration in accordance with the needs of the community, the interconnection between political sociological, economical sciences, offering the opportunity to analyze the executive component in relation to the individual in a coherent and down-to-earth manner, this relation being the core center of the modern society life.

Having an interconnected character, due to the social-political changes of the twenty-first century, the public administration can be presented in the form of three aspects: managerial, political and the compliant legal one. The managerial approach emphasizes ways of being organized based on efficiency

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and results, the position of the individual within the organization, the relationship with the citizens and the distribution of power.

The political approach of the administration provides an insight which takes into consideration the public interest - the public accountability of the whole administrative apparatus, and the implementation of its representativeness as a fundamental principle of democracy and of pluralistic promotion.

The legality perspective places the public administration as an instrument of state action, responsible for ensuring law and order, in order to protect the fundamental rights and freedoms of the individual. Granting a statute-place to the law, we see it as a way of eliminating any arbitrary action that can damage fundamental rights and freedoms, referring to a relationship of fairness between the citizen and the state.

The legitimacy of the administrative entities is marked by the ensurance of the legitimate expectation, identified with the individual's sense of trust in his or her rights and interests by means of legal provisions, state policies and mechanisms (Moroianu Zlătescu, 2015, p. 25).

Romania's participation as a member state of the European Union implies, on the one hand, the development and implementation of the social and economic *acquis communautaire* and, on the other hand, the need for a common legal and administrative system by sharing the values of democracy and of the public administration principles.

The convergence between the principles of national and European public administration has led to the formation of a European administrative space that operates on the basis of a "set of legal principles, norms and regulations, uniformly observed in a territory covered by a national constitution."

We find that the principles of law are the leading ideas of the content of all legal norms. They have both a constructive and a valorizing role for the legal system in the sense that they comprise the society's objective requirements, requirements with specific manifestations in the process of establishing the law and in the process of its realization (Popa, Eremia & Cristea, 2005, p. 99).

In "European Administrative Law" paper, the author J. Schwarze points out that the European Court of Justice has used the general principles of law in the benefit of Community law, as seen from the point of view of comparative law.

The comparative dimension has become in the current era of globalization, one of the major features of legal thinking, (Zlătescu, 1997, p. 5). This is even more evident, especially since we understand that we all share a single planet, that we are a global community, and that like all the communities, we have to respect a few *reges* so that we can live together (Stiglitz, 2003, p.18).

Thus, the principles of the community law affect the administrative law of the Member States, establishing a balance in the public administration management, in the relations between administrations and citizens.

2. The common principles to be applied to the public administration

Due to the relations established between the citizens and the public administration, we may identify a positive conduct of the public administration authorities regarding the guarantee of the citizens' rights, reported by observing common principles applicable to public administration such as: the principle of legality, the principle of proportionality, the principle of transparency, the principle of motivation.

2.1. The principle of legality

This principle is the foundation of the public administration involvement according to the law as stipulated in the Romanian Constitution in art. 16, paragraph (2): "No one is above the law". The notion of "the rule of law" is also found in the British and French systems after the French Revolution and the abolition of the absolute monarchy.

By studying the two concepts we are able to conclude that the public administration is in a relationship of subordination to the rule of law through a well-structured system of law.

In the context of recalling the principle of legality, the administrative body of the state power acquires the capacity to act legally, these issues usually being a matter of regulation in the first chapters of the administrative procedure codes (Bălan, 2005, p.45).

The European Administrative Doctrine treats the principle of legality as a principle of evoking the rule of law, characterized by the implementation of the law from the perspective of relations with the citizens, but also with various social organizations.

The public administration compliance to the law involves two essential elements of manifestation: the obligation to obey the law and, moreover, the obligation to have an initiative to ensure the enforcement of the law (Braibant, 1988, pp.195-196).

The second element can be identified with a form of freedom manifestation coming from the administrative discretionary power, deciding whether, where, when and how to act.

The existence of the discretionary powers is not in contradiction with the principle of legality. It is defined in relation to the requirements of legality, in the sense that it begins where they stop. When the administration acts in a discretionary manner, it does not act against legality because, by definition, its freedom exists due to the fact that legality does not impose anything on it.

The measure of discretionary power is therefore, for each act, inversely proportional to the exigencies of legality to that act (Apostol Tofan, 1999, p. 44).

The principle of legality along with the principle of the separation of powers in the state is the guarantee of the respect for the citizens through the exercise of the law, but also the guarantee of their freedom against the power abuse of the executive.

In other words, the public authorities are obliged to act only in good faith, to pursue the public interest in a reasonable manner, to follow the correct procedures, to observe the requirements of non-discrimination and proportionality (Apostol Tofan, 2006, p. 37).

The administration's obligation to treat the citizen equitably results from three requirements of the implementation of the principle of legality: all public administration authorities are created by law, which also determines their competencies; these authorities have to comply with the law in the exercise of their duties, any exceeding of its limits triggering the lack of the decisions and administrative acts involvement; the legality of an administrative act must be capable of being the subject of judicial review by an independent court, at the request of a person or group of persons having an interest in the decision taken or the act performed and, in certain circumstances, at the request of an official; of the ombudsman, for example, empowered by law to act on behalf of the public interest, (Balan, 2005, p. 30).

In the Treaty establishing a Constitution for Europe, for the first time, the rights of the citizen and the right to "good administration" are discussed, thus suggesting the supremacy of the rule of law as an attribute of the state law reflected in the principle of legality

2.2. The proportionality principle

Being increasingly present in the national and the international jurisprudence, the principle of proportionality appears as a principle of positive law, with a normative value that appreciates the legitimacy of the interference of the state power in the exercise of fundamental rights and freedoms.

Applied in more and more branches of the law, this principle has a universal character being explicitly and implicitly found in the constitutional and administrative norms. From the perspective of the constitutional law this principle is regulated by the Romanian Constitution in art. 53 paragraph (2), being treated as an effective criterion for assessing the legitimacy of the intervention of state authorities in the situation of limiting the exercise of certain rights.

Moreover, the Constitutional Court of Romania has, through several decisions, determined that proportionality is a constitutional principle (Decision no. 139/1994, published in the Official Gazette, Part I, no. 353/1994, Decision

no. Monitorul Oficial, Part I, no. 3/1999; Decision no. 161/1998, published in the Official Gazette, Part I, no. 3/1999).

Our Constitutional Court has stated the need to establish objective, by law, principles of proportionality: "it is necessary for the legislature to establish objective criteria that reflect the requirements of the principle of proportionality".¹ From the perspective of administrative law, this principle is presented as a criterion limiting the discretionary power of the executive, (Apostol Tofan, 1994, p. 47).

In this context, the proportionality has three defining elements: the decision taken, its purpose and the situation to which it applies. By invoking the three aspects, it is necessary to maintain and respect a fair balance between the means used by the administration and the legitimate purpose; ie the correlation between the case, the purpose and the measures taken - the decision.

Perceived by the legal doctrine, as a form of expression of the principle of justice and justice, the proportionality harmonizes through a balanced relationship the public interest, without discriminating the private one: "the mildest intervention using the lightest means", (Iorgovan, 2005, p.275).

Enforced as a shield of the excess power, the principle of proportionality appears to be a fundamental value of the rule of law, preventing the action being taken to degrade the relations between the state and the citizens.

2.3. The principle of transparency

A democratic society based on values that promote equality, justice, freedom from the perspective of human rights and fundamental freedoms observance preforms a good relationship of the citizen with the public administration by introducing a principle that brings openness, clear light in the information, the performance of the public administration activity in decision making, namely the principle of transparency.

The transparency in public administration determines three priority issues in order to maintain the social balance: on the one hand, respect for the individual's rights and freedoms, non-discrimination, and on the other hand respect for the public interest.

Non-discrimination is ensured by special laws and Government Ordinances with specific references to discrimination: GEO 137/2000 approved by Law 48/2002², which states that there is a direct discrimination both if a person is treated in good faith compared to other persons in the same situation, and whether such person is in one of the situations considered by the international regulations to be grounds for discrimination, (Moroianu Zlătescu, 2014, p. 14).

¹ Decision no. 71/1996, published in Off. M., part I, no. 13/1996 .

² Off. M. Part I, no. 431 din 2 September 2000, republished in Off. M. no. 99 from 8 February 2007.

The effective participation of the citizens in the decision-making process in matters of national interest, of legislative and executive representativeness enshrines respect for human dignity and for the sustainable development of the society.

The Romanian doctrine sees this principle as a conception of the state of modern law, as the father of the Romanian constitutionalism says after 1990: "a modern public administration (...) can only be a transparent administration, and transparency is not conceived without as much as possible clear, unitarian norms, known by everyone ", (Iorgovan, 2005, p.148).

The implementation of the transparency principle of public administration results from the provisions of the national legal instruments: the Romanian Constitution, Law no. 544/2001 on free access to information of public interest, Law no. 52/2003 on decisional transparency in public administration, Law no. 281/2013 for amending and completing, the Law no. 52/2003 on decisional transparency in public administration.

At the same time, the principle of transparency creates the legal framework for respecting the right to non-discrimination, as a fundamental human right, being one of the main objectives of the legislator and of the institutions, as shown in the World Economic Forum.¹

Referring to the democratic state, this principle gives us the framework of manifesting the proportionality between the quality and the amount of information on administrative public policies.

The methodological norms for the application of the Law no. 544/2001 regarding the free access to the public interest information, approved by the Government Decision no. 123 of 7 February 2002, as well as the international ones - the Treaty establishing a Constitution for Europe, which provides citizens and civil society with the opportunity to publicize their views / exchange of views in order to maintain a transparent dialogue, an effective collaboration in the process administrative decisions. At the same time, this principle can embody several forms of affirmation:

- the decisional transparency informing citizens, as taxpayers and beneficiaries of public administration, about the activity carried out in their service;
- the citizens' asked for opinion for the organization and functioning of the public administration, stipulated in the provisions of art. 2 of the Law no. 215/2001, supplemented by the provisions of article no. 43 which details the situations in which the representative of the local public administration can propose the citizens' consultation by local referendum: the local budget, the administration of the public and

¹ Forumul Economic Mondial, The Global Gender Gap Report 2013, p. 11.

private domain of the respective territorial administrative unit, the participation in county, regional, regional or cross-border development programs, the organization and the development of the town planning and territorial planning, the association or the cooperation with other public authorities, non-governmental organizations.

- the access to the administrative documents denotes the opening of public administration activity and of its decisions to citizens, an opportunity to capitalize on their rights.

In Romania, the institutions responsible for drafting regulations in line with international anti-discrimination standards and operating under the authority and control of the government are the National Agency for Equal Opportunities, the National Authority for Disabled Persons. It is worth mentioning the independent institution of state actors, the Ombudsman, with attributions regarding the problems of discrimination in the administration-citizen relationship, (Moroianu Zlătescu, 2016, p. 34).

The fructification of the principle of transparency is supported by a series of methods that serve the citizen and the development of his/her cooperative and cooperative realities with the central and local public administration as it follows: the information access, consultation to identify citizens' needs and dissatisfaction, the public meeting and hearing, the lobbying activities to influence public policies, the organization of focus groups and of civic associations, (Ciubotaru, 2008, p.6).

Referring to the democratic state, this principle gives us the framework of manifesting the proportionality between the quality and the amount of information on administrative public policies.

2.4. The principle of motivation

An essential element of the legitimacy of the administrative act, the principle of motivation makes decisions on the issues of the acts, on the decisions of the public administration in a democratic aspect. In this respect, motivation gives citizens the safety and the transparency of the administrative issues.

The present Romanian doctrine appreciates the necessity of the mandatory nature of the administrative acts motivations, diminishing the risk that the administration makes arbitrary, abusive (...) which are factors of progress in the administration, (Vedinaș, 2002, p. 98).

The factual and legal reasoning ensures that the discretionary power of the public administration should not be regarded as an absolute, unlimited power, since the right to appreciate by violating the fundamental rights and freedoms of citizens provided for by the Constitution or by law constitutes an excess of power, in the context of which the Constitution of Romania provides

in art. 31 par. (2) the obligation of the public authorities to ensure the correct information of the citizen on the public affairs, as well as on the issues of personal interest.

Any decision having effects on fundamental rights and freedoms must therefore be motivated not only from the point of view of the power to issue that act but also from the point of view of the individual and society's ability to assess the legality of the measure or the observance of the boundaries between power discretion and arbitrariness, because accepting the thesis that the authority does not have to motivate its decisions is equivalent to emptying the content of the essence of democracy and the rule of law based on the principle of legality.¹

We find that the principle of reasoning involves knowing the elements of fact and of law which make it possible to understand and appreciate its legality, in other words, the statement must be effective, complete, precise and circumspect. Only in this way can it have positive effects on the citizen's profile, but also on the manifestation of legal status.

Conclusions

This article presents public administration as a subsystem of the global social system, which serves society, more precisely the citizen, who actively and responsibly participates in the public interest decision making process.

We are aware of the need for an efficient organization of public administration, where social, political, economic barriers should be replaced by the principles of the rule of law, principles that are common to the national and international public administration. We find that a mature society needs a direct participation in the "governing act of its own communities" through a transparent, fair design of the government-governed relationship provided by the principles mentioned above.

Beyond the choice of political nature, we observe that the national and European doctrine in the field of public administration emphasizes the necessity to approach the principle of legality, proportionality, transparency and motivation, as a unitary, complex one, a key that opens the moral-juridical conduct of the public administration authorities in relation to citizens, guaranteeing rights and freedoms to the administration.

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