

THE RIGHT TO GOOD ADMINISTRATION: AS A NEW TREND IN PUBLIC ADMINISTRATION

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Abstract

Good administration issues can also be found in legal documents adopted prior to the formation of the European Union. Improving management is an ongoing responsibility of any state. Today's decisions make it possible to identify the correct vector for the further development of the system of state and municipal government. The consistent implementation of the idea of "good administration" is, of course, a priority for the development of states and demonstrates the authorities' desire to establish clear and harmonious relations within the framework of the system of legislative acts. The experience of the constitutional development of European countries shows that the implementation of this idea will enrich human rights with the quality of participation in government, expand the mutual obligations of the parties to create an open and democratic state. The right to good administration set forth in the Charter of Fundamental Rights is a clear and open confirmation of the existence of the obligation of state bodies to be in the best position to make the necessary decisions. Thus, this task provides significant support for procedural issues, which currently occupy a higher position.

Keywords: *good administration, EU Law, no instrumental and instrumental functions, administrative procedure, discretionary powers, the quality of decisions, maladministration, European Ombudsman, Treaty on the European Union.*

The functioning of the mechanism of executive power in a modern state is based on the mandatory recognition of the highest value of the rights and freedoms of man and citizen, understanding of the productivity of managerial activities from the needs of the population and their needs in the realization of rights and legitimate interests.

The indirectness of administrative power clearly determines the focus of modern management science and practice on the development of transparent democratic models of interaction between people and authorities in order to create an effective, fast and affordable way to exercise legislative rights and obtain the necessary public services.

An important component of the openness of the executive branch is not only the normatively secured opportunities for obtaining information about the activities of the authority in relation to the citizen, but also technical communication tools that allow you to quickly monitor the procedure for performing administrative procedures. Such an orientation toward satisfying the needs of man and citizen by executive authorities is justified by the implementation of one of the most important political rights of a modern cultural society - the right to good administration.

For many years, the European Law School of Public Administration has been among the basic principles of administrative activity the principle of "good governance" reflecting such governance that meets the requirements of an open, democratic and fair society. The concept of "good governance" consists of the following

components: participation; the rule of law; transparency; sensitivity; orientation to consent; justice; effectiveness and efficiency; accountability; strategic vision.

For the real realization of these ideas in the Charter of the European Union on Fundamental Rights, the draft Constitution of the European Union enshrines the citizen's right to "good administration", which is as follows. Each person has the right to the consideration of his case by the institutions and bodies of the Union impartially, fairly and within a reasonable time. This right, in particular, covers: 1) the right of every person to be heard before taking individual measures against him that entail adverse consequences for him; 2) the right of each person to access the information dossier affecting him, subject to legal interests in the form of confidentiality, professional and commercial secrets; 3) the obligation of the administration to motivate its decisions. Each person has the right to compensation by the Community for losses incurred by institutions or their employees in the exercise of their duties, in accordance with the general principles inherent in the legal systems of all Member States. The recognition and legislative reflection of the right to good administration in the Charter of the European Union on Fundamental Rights and the draft Constitution of the European Union was the highest achievement in the evolution of the citizen's right to participate in the management of state affairs. It should be noted that the implementation of the idea of "good administration" has certain constitutional traditions; in one form or another, it was embodied in the texts of the existing constitutions of European states.

For example, Art. 10 of the Constitution of the Hellenic Republic of June 11, 1975 establishes a provision according to which each individually or jointly with others has the right, subject to the laws of the state, to contact the authorities in writing, who are obliged to take urgent action on the basis of existing provisions and give the applicant a reasoned written response in accordance with the provisions of the law. Harassment of the applicant for violations contained in the application, if any, is allowed only after the final decision of the authority to which the application is addressed is made public and with his permission. The request for information obliges the relevant authority to provide an answer in the conditions stipulated by law [10, 307].

Analyzing this norm, indicates that "the content of the right to appeal and the corresponding obligation to ensure the realization of this right is expressed in the constitutional norm in a concentrated form - without specifying the subject, order and methods of action of the subjects." Moreover, "its further development and implementation is carried out by the norms of administrative law, and the right to appeal takes on an administrative-legal character".

Over the past decades, scientific studies addressing the problems of production at the request of citizens have passed "under the sign" of the need to improve the regulatory framework of the right to appeal. At the same time, scientists unanimously determined the guidelines that should be observed in the legal regulation of production at the request of citizens.

1. The definition of the subject of legislative regulation. The law should regulate the procedure for sending, considering, and resolving citizens' appeals to state authorities, local governments, and organizations of all forms of ownership.

2. Structural content of the law. The law should have a clear internal structure that reflects the content of proceedings on citizens' appeals: preamble, terminology base, principles, procedure for resolving appeals not related to administrative jurisdiction,

procedure for resolving complaints, rights and obligations of subjects of production, enforcement of decisions on appeals, etc.

3. The consolidation of democratic principles that meet the requirements of the Constitution. The proceedings on citizens appeals should be based on the principles of legality, equality, accessibility and many other principles that will allow the formation of a new basis for the "man-state" relationship, based on the recognition and possibility of actual realization of the rights and freedoms enshrined in the legislation, for example, the right to personal participation in consideration of the appeal.

4. Consideration of the federal nature of the state. The formation and development of administrative procedural law should take into account the independence and rights of the regions in the field of regulation of certain aspects of the analyzed production.

5. The need to establish liability measures for violation of the law on citizens appeals.

The adoption of the law should be accompanied by the development and implementation of administrative and, possibly, criminal liability for violation of the requirements of the law on citizens' appeals in order to further guarantee the inviolability of citizens' rights and freedoms. However, none of these provisions was used in the regulation of this social and legal sphere. Many problems requiring a valid legislative resolution remained undetected and unlit.

From the point of view of good administration, the administrative procedures among the most important elements of public administration should be particularly mentioned. Differences between instrumental and non-instrumental functions may also be different:

1. Noninstrumental functions include a) protection of personal dignity; 2) promotion of citizens participation; 3) enhancing transparency and accountability; 4) improvement of legitimacy [6]. 2. Instrumental functions are administrative procedures, which guarantees the precision of the applicable result. Administrative procedure is convenient for: 1) the protection of rights and interests and 2) the promotion of good administration and thus, the worth of concluding decisions [7, 309]. The specific recommendation of the Committee of Ministers is of particular interest to European Union law. In addition to this recommendation, "discretionary powers" are those powers that give the administrative authority a certain degree of freedom to make decisions and allow it to choose one of the few legally acceptable decisions [8].

The essence of discretionary law, that is, the choice between alternatives, is a new line that is different from traditional administrative law. The choice is not a legal issue, but a political one. In the traditional paradigm, administrative law provides, above all, protection for individuals and protection against arbitrary decisions. From this point of view, tyranny begins where laws cease, and judicial review is the only effective way to protect against tyranny. Therefore, traditional administrative law is not interested in good administrative decisions; rather, it is interested in controversial illegal decisions in court and in protecting citizens from public arbitrariness. This is a negative approach in the sense that it is an approach against arbitrariness that does not favor good administration [2].

But from a new point of view, it already exists throughout Europe. This new approach is related with the quality of solutions. We also note that the tradition of good administration has long existed in the United States. Discretionary choice itself is relevant for administrative law, as it is related to the good decisions and with good

administration. It is important that the state administration makes both legal and correct decisions, confirming them with the necessary arguments. G. Braibant mentioned, "even when public authorities are allowed to do what they want, they cannot do whatever" [5, 53], or, the suitable use of discretion is significant to public law. The suitable use of discretion is ordered by the concept of good administration.

But, what does good administration mean? As a first idea, we can say that good administration is the opposite of maladministration. But then what does maladministration mean?

We can turn to the British system for to define maladministration. The British Ombudsman has been fighting against it since the 1960s. There is no definition of maladministration in the British legal system, although the so-called Crossman's catalogue is frequently used, which defines maladministration as "prejudice, ignorance, delay, incompetence, confusion and self-discipline." The Ombudsman focused on ensuring that the public administration followed the necessary procedures before exercising his powers. As Greenwood and Wilson note, "in essence, maladministration concerns defects in administrative procedures, not the merits or substance of decisions" [4, 313]. As regards the European Ombudsman, the Treaty on the European Union created this position and defined its responsibility as a fight against maladministration of EU institutions [3, 337]. But there are certain questions. What is maladministration? As we have seen, this is contrary to good administration. But it is not so easy to determine. The Ombudsman of the European Parliament, Jacob Soderman, who was appointed by the European Parliament in 1995, emphasized that "it is not a good idea to define maladministration because one needs flexibility to carry out one's function properly". But there are a number of ideas that can help identify maladministration. The European Ombudsman found that "maladministration occurs when a public authority does not act in a mandatory manner". We can analyze some of the most advanced European legal systems to provide a more detailed explanation of this problem.

The 1947 Italian Constitution establishes⁸ that Italian agencies must be organized so as to achieve administrative impartiality and *buon andamento* [11]. The last words have been considered by many Italian scholars to be a duty of good administration (*buona amministrazione*). The Corte Costituzionale has declared that this duty obliges legislators to design proper administrative structures and procedures to carry out administrative functions. On the other hand, the principle imposes on public administration the duty of making sound decisions by gathering necessary information and balancing the relevant factors in each case before deciding

The current Spanish Constitution of 1978 is especially interesting. It provides in Articles 31 and 103 that public administration must act with objectivity and impartiality, in accordance with the principles of effective action, efficiency, economy and coordination; it also establishes a prohibition of arbitrariness [1, 353-355]. Good administration issues can also be found in legal documents adopted prior to the formation of the European Union.

First, is the Resolution of September 28, 1977 of the Council of Europe, entitled, On the Protection of the Individuals in Relation to the Acts of Administrative Authorities. Although this legal text does not actually use the words "good administration," its spirit may be found therein. This Resolution sets out five principles: (1) the right to be heard, (2) the right to access information, (3) the right of assistance and representation, (4) the

administrative obligation of stating reasons, and (5) the administrative obligation of indicating available remedies.

As far as the European Court of Justice is concerned, it uses the words "good administration" but fails to define them. As General Attorney Simon Rozes's conclusions highlighted in the decision of October 29, 1981, there is a duty of good administration in Community institutions. But what does this mean? The study of case law shows that a general idea exists concerning good administration. Basically, before reaching a decision, Community institutions must follow proper procedure: hearing the people concerned; taking into account all the relevant factors and rejecting the irrelevant; weighing the interests involved; and explaining why they chose one alternative over another.

In this sense, the European Court of First Instance (CFI) has been active in the implementation of a number of procedural obligations, as different European scholars have noted [9, 146]. Actually, the CFI's case law has imposed a set of principles guiding European Institutions: the right of access to information, the right to be heard, the principle of care, and the duty of giving reasons. On the other hand, from a broader and more political point of view, the Commission's White Paper on European Governance was published in July 2001, after an intense process where European, national, and regional actors, as well as academics and European citizens, were consulted. This document identifies five principles of good governance: openness, participation, accountability, effectiveness, and coherence.

This background has finally crystallized in the legal consecration of a right to good administration, now established in Article 41 of the Charter of Fundamental Rights of the European Union, which has been already applied by European case law and even national case law.

Article 41 refers to the right to a diligent performance as part of good administration in the first section, and in the second, specifies a number of rights stemming from this right to good administration. Three of these rights include the right of access to information contained in the file, the right to be heard (the *audi alteram partem* rule), and the duty of giving reasons for the decisions made. The text from Article 41 presents few novelties regarding what is set out in the Treaty, or in case law, and contains a number of loopholes. Another important aspect is the individualistic perspective of Article 41 regarding procedural participation, which boils down to a hearing "before any individual measure which would affect him or her adversely is taken. Thus, public participation-through public hearings or similar devices-in procedures for elaborating general decisions (e.g., regulations) is not considered. This is a disappointing loophole because participation is a sensitive issue with regard to the development of the EC's public policies, which include transparency, equality, objectivity, democracy, and accountability. As some authors have underlined, the European and U.S. trajectories diverge notably in relation to this aspect, and a more detailed regulation should be established.

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