

PRINCIPLE OF PROPORTIONALITY, CRITERION OF LEGITIMACY IN THE PUBLIC LAW

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Abstract

A problem of essence of the state is the one to delimit the discretionary power, respectively the power abuse in the activity of the state's institutions. The legal behavior of the state's institutions consists in their right to appreciate them and the power excess generates the violation of a subjective right or of the right that is of legitimate interest to the citizen. The application and nonobservance of the principle of lawfulness in the activities of the state is a complex problem because the exercise of the state's functions assumes the discretionary powers with which the states authorities are invested, or otherwise said the "right of appreciation" of the authorities regarding the moment of adopting the contents of the measures proposed. The discretionary power cannot be opposed to the principle of lawfulness, as a dimension of the state de jure. In this study we propose to analyze the concept of discretionary power, respectively the power excess, having as a guidance the legislation, jurisprudence and doctrine in the matter. At the same time we would like to identify the most important criterions that will allow the user, regardless that he is or not an administrator, a public clerk or a judge, to delimit the legal behavior of the state's institutions from the power excess. Within this context, we appreciate that the principle of proportionality represents such a criterion. The proportionality is a legal principle of the law, but at the same time it is a principle of the constitutional law and of other law branches. It expresses clearly the idea of balance, reasonability but also of adjusting the measures ordered by the state's authorities to the situation in fact, respectively to the purpose for which they have been conceived. In our study we choose theoretical and jurisprudence arguments according to which the principle of proportionality can procedurally be determined and used to delimit the discretionary power and power abuse.

Keywords: *discretionary power, power excess, subjective right, principle of lawfulness, principle of proportionality constitutional law*

I. Introduction

The lawfulness, as a feature that needs to characterize the juridical acts of the public authorities, has as a central element the concept of "law". Andre Hauriou defined the law as a written general rule established by the public powers, after the deliberation and involving the direct or indirect acceptance of the governors¹. In a wide meaning, the concept of law includes all juridical acts that contain the law norms. The law in a restricted acceptance is the juridical act of the Parliament elaborated in compliance with the constitution, according to some pre-established proceedings, that regulates the most general and most important social rules. A special place in the administered legislative system is owned by the constitution defined by the fundamental law that is placed on top of the hierarchy of the legislative system which contains juridical norms with a

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¹ André Hauriou, *Droit constitutionnel et institution politiques*, (Paris, Ed. Montchrestien, 1972), p.137.

superior juridical force regulating the fundamental and essential social relationships, mostly those regarding the installing and exercising of the state power.

The lawfulness status in the public authorities' activity is founded on the concept of supremacy of the constitution and supremacy of the law.

The supremacy of the constitution is a quality of the fundamental law which in essence expresses its supreme juridical force in the law system. An important consequence of the supremacy of the fundamental law is the compliance of the entire law with the constitutional norms². The concept of juridical supremacy of the law is defined like "its characteristic that is seeking its expression in the fact that the norms it establishes should not correspond to neither of the norms, except for the constitutional ones, and the other juridical acts issued by the state bodies, are subordinated to it, from the point of view of their juridical efficacy"³.

Therefore, the supremacy of the law, in the above given acceptance is subsequent to the principle of supremacy of constitution. Important is the fact that the lawfulness, as a feature of the juridical acts of the state authorities involves the observance of the principle of supremacy of constitution and supremacy of the law. The observance of the two principles is a fundamental obligation of constitutional nature consecrated by the provisions of item 1 paragraph 5 of the Constitution. The non observance of this obligation results, as the case might be, into sanctions of non-constitutionality or unlawfulness of the juridical acts.

The lawfulness of the juridical acts of the public authorities involves the following requirements: the juridical acts should be issued with the observance of the competence stipulated by the law; the juridical act should respect the superior law norms as a juridical force.

The "legitimacy" is a complex category with multiple significances that forms the search topic for the general theory of the law, philosophy of law, sociology and other branches of instruction. The significances of this concept are multiple. To remind a few: the legitimacy of the power, the legitimacy of the political regime; the legitimacy of a governing, the legitimacy of the political system, etc.

The legitimacy concept can be applied also in the case of the juridical acts issued by the public authorities being linked to the "appreciation margin" recognized to them in the exercising of the duties.

The applying and observance of the principle of lawfulness in the activity of state's authorities is a complex problem because the exercise of the state's powers implies also the discretionary power with which the state's bodies are invested, or otherwise said the right of appreciation of the authorities regarding the adopting moment and the contents of the disposed measures. What it is important to underline is the fact that the discretionary power cannot be opposed to the principle of lawfulness, as a dimension of the rightful state.

In our opinion, the lawfulness represents a particular aspect of the legitimacy of the juridical acts of the public authorities. Thus, a legitimate juridical act is a legal juridical act, issued outside the appreciation margin recognized by the public authorities, that does not generate unjustified discriminations, privileges or restraints of the subjective rights and is adequate to the situation in fact, which is determined by the purpose of the law. The legitimacy makes distinction between the discretionary power recognized by the state's authorities, and on the other side, the power excess.

Not all the juridical acts that fulfill the conditions of lawfulness are also legitimate. A juridical act that respects the formal conditions of lawfulness, but which generates discriminations

² For development see Marius Andreescu, Florina Mitrofan, *Constitutional Law. General Theory*, (Pitesti, Printing House of the University of Pitești), p.61-68

³ Tudor Drăganu, *Constitutional Law and Political Institutions. Elementary Treaty*, (Bucharest, Lumina Lex Publishing House, 1999, vol.II,) p.362

or privileges or unjustified restrained to the exercising of the subjective rights or is not adequate to the situation in fact or to the purpose aimed by the law, is an un-legitimate juridical act. The legitimacy, as a feature of the juridical acts of the public administration authorities should be understood and applied in relation to the principle of supremacy of Constitution.

II. THE DISCRETIONARY POWER OF THE POWER EXCESS IN THE ACTIVITY OF STATE INSTITUTIONS

Antonie Iorgovan asserted that a problem of essence of the rightful state is that of answering to the question: “where ends the discretionary power and where begins the law abuse, where ends the legal behavior of the administration, materialized by its right of appreciation and where begins the subjective law or the legitimate interest of the citizen?”⁴

Approaching the same problem, Leon Duguit in 1900 makes an interesting distinction between the “normal powers and the exceptional powers” conferred to the administration by the constitution and the laws, and on the other side the situations in which the state’s authorities act outside the normative framework. The last situations are split into three categories by the author: 1) the power excess (when the state authorities exceed the limits of the legal mandates; 2) the embezzlement of the power (when the state’s authority fulfils an act that enters its competence aiming a different scope, other than the one the law stipulated), 3) the power abuse (when the state’s authorities act outside their competence, but through acts that don’t have a juridical character)⁵.

In the administrative doctrine, that studies mainly the problematic of the discretionary power, it was underlined that the opportunity of the administrative acts cannot be opposed to their lawfulness, and the conditions of lawfulness can be split in general lawfulness conditions and respectively in lawfulness specific conditions on opportunity criterions⁶. As a consequence, the lawfulness is the corollary of the conditions of validity, and the opportunity is a requirement (a dimension) of the lawfulness.⁷ Nevertheless, the right of appreciation is not recognized by the authorities of the state in the exercising of all duties they have. One must remember the difference between the *linked competence* of the state’s authorities that exists when the law imposes them a certain strict decisional behavior, and on the other side the *discretionary competence*, situation in which the state authorities can choose between more decisions, within law limits and its competences. To remember the definition proposed in the literature in specialty to the discretionary power: “it is the margin of liberty that is let to the free appreciation of the authorities, so that in view of fulfilling the purpose indicated by the law maker, to use any means of action within its limits of competence.”⁸

Yet the problematic of the discretionary power is studied mainly in the administrative law, the right for the appreciation in the exercise of some duties represents a reality met in the activity of all state’s authorities.⁹ The Parliament, as a supreme representative organ and with a unique law

⁴ Antonie Iorgovan. *Forward to: Dana Apostol Tofan, Discretionary power and the power excess of the public authorities*, (Bucharest, All Beck Publishing House, 1999).

⁵ Leon Duguit, *Manuel de Droit Constitutionnel*, (Paris, 1907), p.445-446.

⁶ Antonie Iorgovan, *Treaty of administrative law*, .Nemira Publishing House, Bucharest 1996,volI,p.301

⁷ *Ibidem*, p.292.

⁸ Dana Apostol Tofan, *quoted works*. p. 22.

⁹ In the doctrine, Jellinek and Fleiner sustained the thesis according to which the discretionary power is not specific only to the administrative function, but also it appears in the activity of the other functions of the state, under the form of a liberty of appreciation upon the content, on the opportunity and the extent of the juridical act. (see Dana Apostol Tofan, *quoted works*. p. 26)

making authority, disposes of the largest limits in order to show its discretionary power, which is identified by the characterization of the legislative act. The discretionary power exists in the activity of the law courts. The judge is obliged to decide only when it is noticed for, within this notification limit. Beyond these it is manifested the sovereign *right of appreciating* the facts, the right to interpret the law, the right to fix a minimum punishment or a maximum one, to grant or not extenuating circumstances, to establish the quantum of the compensations etc. The exercising of such competences means nothing else but the discretionary power.

Exceeding the limits of the discretionary power signifies the violation of the principle of lawfulness and of legitimacy or, of what in legislation, doctrine or jurisprudence is named to be the “excess of power”.

The power excess in the activity of state’s organs is equivalent with the law abuse because it signifies the exercising of the legal competences without the existence of a reasonable motivation or without the existence of an adequate relation between the disposed measures, the situation in fact and the legitimate purpose aimed at.

The law of the Romanian administrative prosecution¹⁰ uses the concept of “power excess of the administrative authorities” which is defined to be the “exercising of the right of appreciation belonging to the public administration, by the violation of the fundamental rights and liberties of the citizens stipulated by the Constitution or by the law” (item 2, paragraph 1, letter m). For the first time the Romanian law maker uses and defines the concept of power excess and at the same time acknowledges the competence of the administrative prosecution instances to sanction the exceeding of the discretionary power limits throughout the administrative acts.

The exceptional situations represent a particular case in which the Romanian authorities, and mainly the administrative ones, can exercise the discretionary power, obviously existing the danger of the power excess.

Certainly, the power excess is not a phenomenon that manifests itself only in the practice of the executive organs it can be seen in the Parliament activity or in the activity of the law courts.

We appreciate that the discretionary power acknowledged by the state’s authorities is exceeded, and the measures disposed represent a power excess, anytime it is ascertained the existence of the following situations:

1. The measures disposed do not aim to a legitimate purpose;
2. The decisions of the public authorities are not adequate to the situation in fact or to the legitimate purpose aimed, in the meaning that everything that is needed in order to reach the aimed purpose, is exceeded;
3. There is no rational justification of the measures disposed, included the situations in which it is established a juridical treatment that is different for identical situations, or a juridical treatment identical for different situations;
4. By the measures disposed the state’s authorities limit the exercise of some fundamental rights and liberties, without the existence of a rational justification that would represent, mainly, the existence of an adequate relationship between those measures, the situation in fact and the legitimate purpose aimed at.

III. THE PRINCIPLE OF PROPORTIONALITY, CRITERION DELIMITING THE DISCRETIONARY POWER FROM POWER EXCESS

The essential problem remains that for the identification of criterions through which are to be established the limits of the discretionary power of state’s authorities and to differentiate them

¹⁰ Law no.554/2004, published in the Official Gazette no.1154/2004.

from the power excess, that should be sanctioned. Of course there is the problem of using some criterions in the practice of the law courts or in the constitutional prosecution.

In connection to these aspects, in the literature in specialty it is expressed the opinion according to which the “purpose of the law will be then the legal limit of the right to appreciate (the opportunity). Therefore the discretionary power does not mean a liberty outside the law but one allowed by the law.”¹¹

Of course, “the purpose of the law” represents a condition of lawfulness or, as the case may be, of constitutionality of the juridical acts of the state bodies and that’s why it can be considered as a criterion to delimit the discretionary power from the power excess.

Such as results from the jurisprudence of some national and international law courts, in relation to our search topic, the purpose of the law cannot be the only criterion to delimit the discretionary power (synonymous with the margin of appreciation, term used by C.E.D.O.), because a juridical act of the state can represent a power excess not only in the situation in which the measures adopted do not aim to a legitimate purpose, but also in the hypothesis in which the measures disposed are not adequate to the purpose of the law and are not necessary in relation to the situation in fact and with the legitimate purpose aimed at.

The suitability of the measures disposed by the state authorities to the aimed legitimate purposes represents a particular aspect of the principle of proportionality. Significant is the opinion expressed by Antonie Iorgovan which considers that the limits of the discretionary power are established by the: “written positive rules, the general law principles subscribed, the principle of equality, the principle of non retroactivity of the administrative acts, the right to defense and the principle of contradictorality , *the principle of proportionality*” (s.n.).¹²

Therefore, the principle of proportionality is an essential criterion that allows the delimiting of the discretionary power from the power excess in the activity of state’s authorities.

This principle is consecrated explicitly and implicitly in the international¹³ juridical instruments or by the majority of the constitutions of the democratic¹⁴ countries. Romania’s Constitution regulates explicitly this principle in item 53, but there are other constitutional dispositions that imply it.

In the constitutional law, the principle of proportionality finds its use mainly in the field of protection of human fundamental rights and liberties. It is considered as an efficient criterion of appreciation of legitimacy of the interventions of the state authorities in a situation limiting the exercise of some rights.

Much more, even if the principle of proportionality is not consecrated expressly in the constitution of a state, the doctrine and jurisprudence considers it as being a part of the notion of a rightful state¹⁵.

¹¹ Rozalia Ana Lazăr, *The Lawfulness of the administrative act. Romanian law and the compared law, quoted works* p. 165.

¹² Antonie Iorgovan, *quoted works* vol. I, p.296.

¹³ To remind on this topic item.29, paragraphs.2 and 3 of the Universal Declaration of Human Rights items 4 and 5 of the International Pact regarding the economical, social and cultural rights, item 5, paragraph 1, item 12 paragraph 3, item 18, item 19 paragraph 3 and item 12 paragraph 2 of the International pact regarding the protection of the national minorities; item G Part V of the European Social Chart – revised; items 8, 9, 10, 11 and 18 of the European Convention for the defense of human rights and the fundamental liberties or item B13 of the Treaty regarding the European Economical Community.

¹⁴ For example, item 20, point.4; item 31 and item 55 of Spain Constitution; items 11,13.14,18,19 and 20 of the German Constitution or the provisions of items.13,14,15,44 and 53 of Italy Constitution.

¹⁵ For the development see Petru Miculescu, *The Lawful State,* (Lumina Lex Publishing House, Bucharest, 1998) pg.87-88 and Dana Apostol Tofan *quoted works.*, p.49.

This principle is applied in many branches of the law. Thus, in the administrative law it is a limit of the discretionary¹⁶ power of the public authorities and represents a criterion in the exercising the jurisdictional control of the discretionary administrative acts. Applications of the principle of proportionality exist in the criminal law¹⁷ or in the civil law¹⁸.

The principle of proportionality is found also in the community law, in the meaning that the lawfulness of the community rules is subject to the condition that the means used to be adequate to the aimed objective and not to exceed what it is necessary to reach this objective.

The jurisprudence has an important role in the analysis of the principle of proportionality, applied in concrete cases. Thus, in the jurisprudence of the European Court of the Human Rights, the proportionality is conceived as a just, equitable ratio, between the situation in fact, the restraining means of the exercise of some rights and the aimed legitimate purpose, or as an equitable ratio between the individual interest and the public interest. The proportionality is a criterion that determines the legitimacy of state interference of the contracting states in the exercising of the rights protected by the Convention.

In the same meaning, the Constitutional Court of Romania, by several decisions established that the proportionality is a constitutional principle¹⁹. Our constitutional instance asserted the necessity to establish some objective criterions, by the law, for the principle of proportionality: "it is necessary that the legislative institutes objective criterions that should reflect the exigencies of the principle of proportionality"²⁰.

Therefore, the principle of proportionality is imposed more and more as a universal principle consecrated by the majority of the contemporary law systems, to be found explicitly or implicitly in constitutional norms and acknowledged by the national and international jurisdictions²¹.

In the literature in specialty were identified three jurisdictional levels of the administrative acts: "a) the minimum control of the procedure rules (form); b) normal control of the juridical appreciation of the facts; c) the maximal control, when the judge asserts upon the necessity and proportionality of the administrative measures"²².

The maximal control, to which the quoted author refers to, represents the correlation between the legality and the opportunity, otherwise said, between the exigencies of the principle of lawfulness and the right of appreciation of the public authorities, the proportionality couldn't be considered as a super legality criterion, but as a principle of law, whose main finality is to represent the delimiting between the discretionary power and the power excess in the activity of the public authorities.

There are situations in which the Constitutional Court used a "proportionality reasoning" as an instrument for the interpretation of the correlation between the legal contested dispositions and on the other side the constitutional dispositions, and in situations in which the proportionality, as a

¹⁶ On this meaning see Dana Apostol Tofan, *quoted works* pg.46-50; Iulian Teodoroiu, Simona Maya Teodoroiu, *Lawfulness of opportunities and the constitutional principle of proportionality* in: Law no. 7/1996, p.39-42.

¹⁷ The provisions of item 72 of the Criminal Code refer to the proportionality as a general criterion of judicial individualization of the punishments or the provisions of item 44, paragraph 3 of the Criminal Code considers the proportionality as a condition of legitimate defense.

¹⁸ The provisions of items 951 and 1157 of the Civil Code, allow the cancellation of a contract for the obvious disproportion of the service conscriptions (lesion).

¹⁹ The Decision no 139/1994, published in the Official Gazette no 353/1994, decision no.157/1998, published in the Official Gazette no 3 /1999; the decision no. 161/1988 published in the Official Gazette no 3 / 1999.

²⁰ The decision no. 71/1996, published in the Official Gazette no.13/1996

²¹ For development see Marius Andreescu, *Principle of proportionality in the constitutional law*, (Publishing House C.H. Beck, Bucharest, 2007)

²² Antonie Iorgovan, *quoted works*. vol.I, p. 296.

principle, is not explicitly expressed by the constitutional texts. Self evident in this meaning are two aspects: invoking in the Constitutional Court's jurisprudence of C.E.D.O. jurisprudence, which, in the matter of restraining the exercise of some rights, analyzes also the proportionality conditions, and the second aspect, the use of such a principle in situations in which it is raised the question of respecting the principle of equality.

Declaring as non constitutional a normative disposition on the ground of non observance of the principle of proportionality, applied in this matter, signifies in essence the sanctioning of the power excess, manifested in the activity of the Parliament or of the Government. Also excess of power, sanctioned by the Constitutional Court, using the criterion of proportionality, are the situations in which the principle of equality and non discrimination are violated, if by the law or by the Government ordinance it is applied a differentiated treatment to equal cases, without the existence of a reasonable justification or if exists a disproportion between the aimed purpose and the means used.

IV. Conclusions

There are two most important finalities of the constitutional principle of proportionality: the control and the limiting of the discretionary power of the public authorities and respectively the granting of the fundamental rights and liberties in situations in which their exercising could be conditioned or restricted.

The proportionality is a constitutional principle, but in several cases there is no explicit normative consecration, the principle being deducted by different methods of interpretation from the normative texts. This situation creates some difficulties in the application of the principle of proportionality.

In relation to these considerations we propose that in the perspective of a reviewing of Romania's Constitution, that at item 1 having as a side denomination "Romanian state" to be added a new paragraph that will stipulate that :*"the exercising of the state power must be proportional and non discriminatory"*.

In such a manner many of requirements have been answered:

a) The proportionality is consecrated expressly as a general constitutional principle and not only with a restrained application in case of restraining of the exercise of fundamental rights and liberties, such as it may be considered presently, when having into consideration the provisions of item 53 in the Constitution:

b) This new constitutional provision corresponds to some similar regulations contained in the "Treaty instituted by the European Community" or in the draft for the Treaty for the establishment of a Constitution for Europe, which is very important in the perspective of Romania's adhering to European Union.

c) This new regulation would represent a genuine constitutional obligation for all state authorities to exercise their duties in such a way that the measures adopted, to subscribe within the limits of the discretionary power limits acknowledged by the law and not to represent a power excess;

d) To create the possibility for the Constitutional Court to sanction, by the means of control of constitutionality of the laws and ordinances, the power excess in the activity of the Parliament and the Government, using as criterion the principle of proportionality;

e) To make a better correlation between the principle of proportionality and the principle of equality.

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