

THE PRINCIPLE OF PROPORTIONALITY – AN ELEMENT OF LEGAL CONSTRAINT IN ADMINISTRATIVE PROCEDURE

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Abstract: *This article contains some considerations regarding the content of the principle of proportionality in the administrative procedure, as well as some reflections on judicial control over such administrative decisions.*

Proportionality in the administrative procedure - comes up against abuses of power or abuses of law, it is created and developed in order to restrict and constrain certain freedoms of participants in relation to the public authority or the state in sensu lato

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Introduction

Proportionality, as it is enshrined, would in itself represent a “unit of measure”, representing the active element, having philosophical roots and interfering in all areas of social relations.

This “unit of measure” is present even in moral theology, especially when a certain form of action is envisaged, an expression of vindictive justice - when there is a will to restore justice that has been violated, through a punishment proportionate to the guilt. This expression

of morality has as its objective only the common good and good morality.

Proportionality as a “unit of measure” has been reconfigured into a principle, which is not just a state of fact or a theoretical, scientific state of affairs, but a legal instrument created and developed by case law, which has been taken up by legal systems and introduced into national law, specifically in order to react to any excess of public power.

This force of the principle of proportionality governs the activity of public administration bodies, being propelled for the satisfaction of a public interest, applying from the initiation of the procedure for issuing the administrative act, during the period of its adoption, as well as the verification of the legality of the act's issuance.

Considering that the principle of proportionality stands out as a remedy for reviewing the discretionary power of public administration, and essentially – as a phenomenon applicable to any public institution, it becomes a necessary balance to scrutinize any excess or potential abuse of power. Measures taken by public authorities within the scope of their legally recognized competences and responsibilities are initiated, subsequently adopted, and reassessed when they are guided by the need for the public interest or individual interest – especially when the administrative procedure is directed towards a specific individual subject. Indeed, the recipient of an individual administrative act is only the person to whom the act is directed, while third parties, whose rights are affected by the individual administrative act, are not its recipients¹.

The principle of proportionality

The principle of the rule of law (enshrined in Article 1 of the Constitution of the Republic of Moldova) requires that the executive's authority to adopt administrative acts in any given domain be sufficiently determined and limited by law, in terms of content, object, and purpose,

¹Enshrined by Art. 2 of the Administrative Code of the Republic of Moldova, no.116 of 19.07.2018 in force since 01.04.2019.

so that its interventions are predictable and quantifiable for the citizen, even when they impose new obligations on him. The individual must know to what extent the administration can intervene in the sphere of his rights. In accordance with the principle of the rule of law, it is necessary to ensure, as much as possible, the protection of individuals against interventions by public authorities (Tănase, Secrieru, Strulea, Rusu, & Vîlcu-Bajurean, 2017, p. 361).

This condition aims to impose a legal constraint, stemming from the principle of the rule of law, related to the activity of the public authority in relation to the will and freedom of the individual.

The restriction of public activity, dressed in the form of constraint, does not have a harmful effect on the individual as the holder of rights and obligations, but is aimed at protecting the individual from abuse of rights by the public authority.

In this regard, it could be said that a form of censorship is established regarding the powers and competences of public authorities, without affecting the principle of discretion in substance and the discretionary right of the public authority *in concreto*.

Any activity of the administration can be described as a public one, aimed at ensuring social stability through the regulation of the most important social relations, but not because the "*common good*" is the true purpose of its existence. Maintaining peace and social harmony through the regulation of social relations is a guarantee of the durability of the entire state system, as any state that cannot reconcile social interests cannot exist (Tanase, 2022, p. 8).

Therefore, the official measure taken by the authority must be adapted and aligned with the objectives of the Law. This observation highlights the principle of proportionality, which derives from the principle of the rule of law and involves: "*an interference of the public administration in the course of a specific activity, in the rights and freedoms of the individual, but with the respect of a justified balance in its substance*"

Being enshrined in the rule of law¹, any measure taken by public authorities which infringes rights or freedoms provided for by law must comply with the principle of proportionality.

Given that the activity of the public authority is circumscribed to the administrative procedure, initiated at the request of the person or *ex officio*, proportionality is that unit of measurement for verifying the legitimacy of the actions taken by the public authority or its abstention, which applies *ab initio* to the administrative procedure.

Therefore, the public authority as defined by law², has “freedom of movement in the decision-making process”, it is recognized “a margin of discretion” in the application of the “triple test” rule.

Without questioning the application of the latter rule, it follows from an analysis of the case law of the European Court of Human Rights, which has found in precise terms the following landmarks with regard to:

- (i) whether an interference is provided for by national law,
- (ii) whether it pursues one or more legitimate aims; and
- (iii) whether it is proportionate to the aims pursued and necessary in a democratic society (Poalelungi, & Rotari, 2023, p. 33).

In a particular case³, which was the subject of judicial review in the national courts, the public authority in the customs field disregarded the principle of proportionality and ordered the termination of the employment relationship with the customs official, on the grounds that “*a customs check lasting 2-3 minutes was carried out, and no other reprehensible acts in the performance of work or material damage or other damage to the image were found*”. The principle of proportionality is at odds with this margin of discretion of the discretion of the public

¹Provided by Art. 29 paragraph 1 of the Administrative Code of the Republic of Moldova, no.116 of 19.07.2018 in force since 01.04.2019.

²From the text of Article 7 of the Administrative Code of the Republic of Moldova, no. 116 of 19.07.2018 in force since 01.04.2019 - *public authority is considered any organizational structure or body established by law or other normative act, acting under public power in order to achieve a public interest.*

³https://jc.instante.justice.md/ro/court-decisions?pdf_content=rosca%20nicolae&type=Civil&apply_filter=1

authority to apply a particular disciplinary sanction to an employee. From the legal concept of proportionality, we note that the sanction must correspond to the legitimate aim and be appropriate to the act committed by the customs official at fault in disciplinary proceedings.

Concerning the measure taken by the public authority, we note that the interference with the rights and freedoms of the person *must not be* detrimental to the holder of the limited rights, but the administrative procedure of the authority must be kept within the “action limit”, without exceeding the discretionary power and in the absence of an abusive power.

Taking the view that the public authority does not have rights and freedoms, but competences and powers, and in order to assess whether a power is abusive, the principle of proportionality implies, depending on the legitimate aim, the adoption of less restrictive means that would generate the same effects, but all of them must be carried out in a lawful manner. And legality excludes illegality.

This constraint in the promotion of the discretionary right of the public authority - is the possibility for the public authority to choose between several possible solutions corresponding to the purpose of the law, when applying a legal provision (legal definition of discretionary right found in Art. 16 para. 1 of the Administrative Code of the Republic of Moldova, No. 116 of 19.07.2018). However, since the legislator has conferred public authorities to choose, from several legal options, the most suitable one to achieve the public interest, this should not constitute a disregard of individual or group interest, especially when the administrative procedure is initiated at the request of the person or group.

The legal condition for the application of proportionality as an instrument of legal constraint is determined by the fact that:

- *a discretionary right* - which is granted by law, in the sense that the powers and duties of the public authority are established by law, not arbitrary. Consequently, we note that this discretionary power is limited by the law, not being absolute in substance, both in terms of time/period of action, as well as in terms of administrative solution - which is adopted in an administrative procedure *in concreto*.

- *the existence of a margin of appreciation and of the aim pursued* - which implies an appreciation of the facts and administrative operations, compared to a fair balancing test to achieve the objective set by the legislator when adopting the law *stricto sensu*.
- *that it is subject to the law* - “even the law is subject to the law”, as enacted by the principle of legality.
- *that it is applied judicially, when a judicial review of the administrative activity of the public authority is carried out* - the administrative judge verifies whether the means used by the public authority is appropriate and necessary, and consequently whether or not this legality filter is appropriate to the purpose pursued by the law.

In the case law of the European Court of Human Rights on Article 1 Additional Protocol 1 to the European Convention, the application of the so-called “*fair balance test*” has been set out, whereby the Court must determine whether the requirements of the general interest of the community and the protection of individual rights are equal. The European Court also pointed out that it respects the way in which a State “conceives the imperatives of the general interest”, unless they do not have “*a reasonable basis*” (Dinu, 2023, p. 13).

In situations where the principle of proportionality is called into play, either in the preliminary procedure or in the legal action, the control of this principle is determined by the “triple test rule”.

This reasoning is also emphasized by the European Court of Human Rights, stating that the “revocation of the right” has produced prejudicial effects of substance, the measure adopted by the public authority was not of a just proportion¹, the situation in which the court would have the legal duty to analyze the conformity of the individual administrative act with the law, and in the case of the unfavorable individual administrative act - in the case of subjective litigation - the existence of an injury to the plaintiff, in a right or legitimate interest, in

¹The judgment of the European Court of Human Rights, *Stăvilă v. Republic of Moldova*, application no. 25819/12, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-242782%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-242782%22]}).

the absence of which the sanction of annulment of the unfavorable individual administrative act cannot be incurred.

Conclusions

Consequently, we would say that this legal constraint deriving from the principle of proportionality is a genuine legal instrument available to the right holder to protect himself from an excess of power of the public authority, realized in the administrative procedure.

This legal mechanism is compatible with the Preamble of the European Convention and Article 6 of the European Convention, since it confers a “legitimate expectation” that the administrative procedure may be subject to a certain degree of jurisdiction, and the “proportionality test” is the fair balance between the power of the public authority and the rights and freedoms of the individual.

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