THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Concept of Appropriateness in Issuing Administrative Acts

Iulian Nedelcu[1], Silviu Catalin Dragan[2], Paul – Iulian Nedelcu[3]

[1]*University of Craiova, Faculty of Law and Administrative Sciences, avocatnedelcu@yahoo.com*

[2]*University of Craiova, Faculty of Law and Administrative Sciences, silviucdragan @yahoo.fr*

[3]*University of Craiova, Faculty of Social Sciences, paul_iulyan@yahoo.com*

Abstract: Administrative acts are a legal way of organizing the execution and enforcement of the law. Law can not and should not establish all cases and all the ways, by means of which public administration bodies interfere with administrative actions, therefore administrative public bodies must have some initiative and ought to be able to assess the situations in which they will issue these acts and to appreciate their appropriateness. The appropriateness principle of administrative acts must be correlated with the legality principle. It can be concluded that the appropriateness principle underscores the power conferred by public administration, permitted in accordance with which it has the right and duty to judge when issuing an administrative compliance of the state of lawand facts, an appreciation that public administration is based on a single criterion: the interests of the community that they represent. Also, the very organization of the state as a state of law leads to the conclusion that the law – which is the materialization of the idea of justice – should be the standard on which the activity of human individuals report both to the quality of beneficiaries of the provisions and benefits of public administration and on the other hand as officials, public servants or ordinary employees in public administration system.

Keywords: Administrative acts; public administration; public servants

Taking into consideration the fact that the principle of legality is considered a characteristic of the state of law, the concern of the Romanian constitutive legislator to expressly govern this principle was natural. Professor Paul Negulescu asserts that the state of law governed by law, "where nothing is born at random, the arbitrary: the law is a force factor, a motion factor and a social transformation factor and within the modern state no one is outside or above the laws" (Negulescu, 1903-1904, p. 2). The state of law is ensured by mandatory law; the legality is of the essence of the state of law requirements. In order to make the public legal rights and obligations acquire a concrete shape the manifestation of will of the administrative authorities is needed, oscillating from the minimum limit of competence where the law prescribes the administrative conduct, until the maximum of the power of discretion, where the law leaves freedom of choice among several options to pursue (Nedelcu & Nicu, 2005, p. 133).

The main legal mechanisms of making the state of law are: the control of constitutionality of laws, jurisdictional control, and equity of administrative acts and organization of an independent justice (Dragan, 1977, p. 291). The key character of the state of law is the judge. He is called upon to decide whether the authority acted on the basis of a legal status and within the limits of authority acknowledged by law, and if the physical and moral persons grounded their action based subjective rights or on legitimate protected concerns (Deleanu, 1993, p. 8). Generally, the doctrine considers that, the more the

methods of control of exercise of the public governance are well thought and clued up, the more the risk of the administration to act abusively is diminished (Apostol Tofan, 1999, p. 18). A topical theme regarding the issuance of administrative documents is the relationship between legality and appropriateness. Legal-appropriateness theory within administrative law has two meanings, corresponding to the two major trends of the doctrine of administrative law in Romania.

Firstly, the legality notion refers to the compliance of the administrative document with the legal provisions of the judicial acts legally superior in the generic sense "with the law". On the contrary, the appropriateness regards the conformity of the "administrative" act with the requirements of society that are continuously changing. We face a right to assess the public authority, for example, when it comes to issuing a permit or when after a contest a winner can not be chosen based on predetermined criteria.

In another opinion (Petrescu, 2001, p. 277), the appropriateness points the conformity of the administrative act with the purpose of law, which, unless expressly provided, may be inferred by interpretation. The opposite concept of legality is conceived as the sum of all the conditions of validity of an administrative act, the appropriateness being, in this spirit, an element of legality. Supporters of the latter concept consider that once with the legality of the act, the court checks the appropriateness or, better said, its unsuitability. Synthesizing from a holistic perspective these two concepts, we may say that they differ in that the first, to which we rally, the appropriateness may be controlled by administrative courts only when it becomes a matter of legality by means of an express legal or implied provision, while in the second, the appropriateness may be controlled in the absence of express legal provisions or implied provisions, as it is however a matter of legality. The unanimous opinion on the judicial control upon discretionary power of the administration, fundamentally coordinated to this type of control aims in essence, only to the legality, not to the appropriateness of administrative act (Manda, 2005, p. 70).

However, when legally, the appropriateness of issuing an administrative act is a matter of legality, the courts are entitled to administer any kind of evidence to determine the appropriate solution to be adopted. It is true that this way the court substitutes to public when assessing the appropriateness, but it is a defeat of the principle of separation of state powers made exceptional by express provisions of law. Legality is the core element of the legal regime of administrative acts. By legal system we understand a set of background and formal rules, which confer distinctiveness to administrative, namely, validity rules (conditions) of the administrative act that governs the effects produced by this specific act.

Generically, by means of the legality of administrative acts we understand their compliance with the laws adopted by Parliament, and also with the normative acts, having superior legal force. The relationship legality-appropriateness constituted an important concern within the Romanian doctrine, especially in the interwar period. Interwar school dealt with "discretionary power", meaning the discretionary authority of the administrative acts as a natural matter of "executive power", governing activity and administrative activity. The Law for the administrative courts of 23 December 1925 (art. 2) distinguishes between the acts of government and the administrative acts of discretionary authority, although both categories were evoked by the term "arbitrary power of executive "or "the power of appraisal of the executive ". In essence, when considering the discretionary power we have to distinguish between "matters of appropriateness" and "matters of legality".

In case of administrative activities “the Executive” has the discretionary power to express appropriateness, but not the legality of its acts, while in the case of governmental acts “the executive power” had to determine not only the appropriateness issues but also the legality issues.

The French doctrine refers to the right of assessment of public administration in order to evoke the administration issue within a legal frame, which is exceptionally a necessary action but contrary to the law. We notice that within French doctrine, and within German doctrine, the relationship between legality and appropriateness, meaning discretionary power is seen through the judicial practice, reaching so far as to formulate some theoretical solutions by reference to existing law and theoretical solutions reported to law created by the judge. As a general idea, the purpose of public administration, namely the achievement of public interest is always an element of legitimacy, while the means for achieving this goal are aspects related to appropriateness. Administration has no right to commit, on behalf of discretionary power, errors, leaflets or do absurd things, and if these happen, then there are grounds for an appeal for abuse of power. Within German doctrine, traditional discretionary power evoke a certain quantity of freedom of public administration for its decisions and actions, meaning the eventuality to choose among several possible attitudes (to do A, to do B or not do anything). To substantiate the discretionary power in Germany, over the years there have been formulated lots of theses, among which the theory about the foundation of discretionary power occurs in the existence of indeterminate legal concepts: public welfare, public utility, public order etc. The tradition of discretionary power of German administration continued even after 1945, the administrative courts continuing to respect tradition.

The letter and spirit of our Constitution, the necessity to penetrate the democratic European institutions and the practice of administrative courts in our country lead us to argue that, no matter how we perceive appropriateness related to legality, the administrative judge has the right to determine whether the public administration acted abusive, contrary to public interest, as resulting from the law on which the administrative act is based.

Thus the result is that there exist some legal type-conditions as follows:

- the administrative act has to be issued under and in law enforcement;
- the administrative act has to be issued on the basis of all acts of state bodies which are superior to the administrative issuing institution;
- the administrative act has to be issued by the administrative body within the limits of its competence;
- the administrative act has to be in accordance with the aim of law as other normative acts of bodies that are superior to the issuing administrative body;
- the administrative act has to comply with legal requirements relating to its form;
- the administrative act has to be appropriate.

In this work, "The Administrative Law and The Elements of Administration Science" from1977, Prof. Ilie Iovănaş considers the following criteria to assess the legality of administrative acts:

- the moment when a law is adopted;
- the place and actual conditions of application of the administrative act;
- the material and spiritual means undertaken by the administrative decision and the length of time that its application requires;
- the compliance of the administrative act with the aim of law.

Bringing forward these considerations, we identify, on one hand, the general conditions of legality, and on the other hand, the specific conditions of legality, based on appropriateness considerations.

General conditions of legality:

a) the administrative act has to be issued in accordance with the letter and spirit of the Constitution;
b) the administrative act has to be issued in letter and spirit of the ordinances;

c) the administrative act has to be issued on the basis of all acts of public administration bodies which are superior to the issuing public administrative body;
d) the administrative act has to be issued by the administrative body within the limits of its composition;
e) the administrative act has to be issued in the form and procedure prescribed by law.

As for the area of legality conditions based on grounds of appropriateness, the aim of the law (ratio legist) is the legal limit of the right to assess (of appropriateness), the limit according to which the administrative judge relates, meaning it all about the excess of power. Failure to accomplish one of the conditions of legality leads to the application of sanctions that are specific to administrative law.

For assessing the appropriate (current) character of administrative we must be aware of the following aspects:

a) the concept of appropriateness.

Law serves its purpose and becomes effective only insofar its provisions are complied with the principle of legality. Administrative acts are legal in nature, but in order to be fully effective they must be adapted to specific conditions, so that they become appropriate or current. The question of appropriateness arises in the case of administrative non-judicial acts, as is the case with all such acts of power, except the law, which is always considered appropriate as long as it is in force. If regarding the legality of administrative acts, the assessment of this quality is made by reference of this act to the legal act having a higher power, including law, as regarding the assessment of the appropriate character, such a criterion lacks. Thus, a legal act may be lawful and appropriate, while an inferior act, although issued under and in compliance with a higher act, may be inappropriate or outdated. The notion of appropriateness is regarded as characteristic for the legal act that defines a specific feature also known actuality. The actuality of a legal document expressing full conformity, within the limit of the law, of the document together with the tasks of the administrative bodies, expresses the correlation between law and the needs of the society that is continuously changing. To the contrary, we consider that act, although legal, and which by the content of its provisions contravenes some specific circumstances and which does not correspond to reality and to which it applies, as being inappropriate. Such an act is always outdated even though it is legal. The problem of the appropriateness of administrative acts is closely related to the right of appreciation of the state administration, which is a faculty recognized by law, such topics when choosing the most appropriate solutions for the effective implementation of the law.

b) the causes that generate appropriateness.

Surrounding reality, within which the decreed law must be applied, is constantly changing and this aspect must be taken into account both by the legislator, through its regulations, and especially by the administrative bodies responsible for applying the law according to practical conditions that are always developing. Starting from the idea that administrative acts are acts of making law, this means that they must be, first of all, according to the supreme legal act and also according to reality. Generally, the more a normative act is on a higher level within the hierarchy of sources of law system, the more its provisions are wider, and that is why further elaboration of regulatory acts in order to ensure uniform application is necessary. Within the frame of detail regulation and along with the issuance of executive acts there exists the possibility that they become outdated by the disparity between the legal provisions and the actual implementation.

The law may grant an appreciation right based on the appropriateness for different cases:

- considerations of place;

- considerations of time;
- consideration of the situation;
- considerations of people;
- considerations of aim.

c) the area of appropriateness.

Relating appropriateness to the stages of the process we encounter the following:

- - within the preparatory stage of issuing the act, if the law provides appropriateness issues for its application, there will be an analysis regarding their sustenance, knowing that such acts are often subject to inappropriateness;
- within the adoption phase there will be an examination whether there were preserved appropriateness reasons for the preparation stage that justify the extent otherwise the act is inappropriate ab initio;
- within the execution stage there will be taken into account the appropriateness considerations of the legal act and the existence of the conditions for the enforcement of the act;
- within the checking stage the appropriateness of the adopted and enforced measures will be appreciated by the controlling body by means of reporting the actuality of the verified measure in regard to the date and conditions of the circumstances of the check.

d) the manner of solving the appropriateness situations

The possibility of action of the administrative bodies on grounds of appropriateness is strictly limited by law.

The right to act on grounds of appropriateness is dedicated by legal acts not being applied a priori and unlimited for the administrative bodies:

- in some cases the hypothesis of the legal rule that is relatively fixed, allowing discretion of appreciation of the state body when enforcing rules;
- in other cases, the directive of the rule being relatively fixed allowing the institution to choose between several solutions;
- the sanction of the legal rule may allows the choice between several alternative sanctions (warning or fine) or regarding the penalty fine (between the legal limit and maximum).

The rules governing the right of discretion are permissive because the body can choose the most appropriate measure and only the liability to choose the most appropriate measure is imperative (the breach of this requirement allows upper bodies to abolish the acts of inferior bodies on the grounds of inappropriateness). The right to assess operates within the limits of the competence of the body that can not be exceeded by appropriateness considerations. The right to assess can not lead to violation of subjective rights of persons to whom the act is intended. Exercising the right to assess is done by compliance with the principle of legality because an appropriate act, but illegal can not be valid.

All administrative acts are subject to judicial review and to appropriateness control made by state administration that is superior. In conclusion, the appropriateness can be defined as an element closely linked to the right of assessment of administrative bodies, within the organization and enforcement of law, which ensures the achievement of legal tasks and duties promptly, with minimal expenses and in accordance with the means that correspond to the aim of the law. Within the activity of public authorities, the application of the principle of legality does not mean total trammels and cancellation of options to decide on an actual manner of law enforcement. The action of administration enjoys a certain

margin of freedom, a so-called discretionary power which allows the administration to adapt to specific conditions, therefore, therefore to judge whether his actions and acts are appropriate. Ever since the interwar period there has been formulated the argument according to which "except the cases where the law is imperative, when it definitely orders in all other cases, it leaves the sovereign choice of administrative authority to make or not to make the act for which was authorized by the law under discussion. This authority is given in other words, the power to assess the appropriateness of the act, in one case and another, the circumstance is still legal " (Teodorescu, 1910, p. 406).

This way the distinction between acts of government and administrative acts is made by the discretionary authority. Thus, it was noted that "freedom of appraisal upon appropriateness of the measures to be taken" stands in the power of the administration, which "within its activity is subject to legal order" (Negulescu, 1934, p. 22). This way there was made a distinction between matters of appropriateness and legality.Within the speciality literature (Lazar, 2004, p. 162), examining the relationship between legality and appropriateness, it is noted that the principle of legality can not be perceived as absolute only in the case of principles, because when we talk about its application we necessarily encounter an approach characterized first of all on flexibility.

It is also noted that limiting to the principle of legality in the sense that it only refers to the strict compliance of the administration of law, namely "the regulatory unit" scaled according to the Constitution and in relation to the judicial force of rules of which it is comprised, it would an approach which would be characterized by rigid boundaries because of its primitivism, but could not express the real and flexible feature of the administrative activity and which occurs within the margin of freedom and which imposed the distinction between legal competence and discretionary power, which derives from the relationship legality-appropriateness. In 1910, Prof. Anibal Teodorescu formulated the argument according to which "except the cases where the law is imperative, when it definitely orders in all other cases, it leaves the sovereign choice of administrative authority to make or not to make the act for which was authorized by the law under discussion. This authority is given in other words, the power to assess the appropriateness of the act, in one case and another, the circumstance is still legal "(Teodorescu, 1910, p. 46). Prof. Paul Negulescu showed that "freedom of appraisal on taken measures "stands in the power of government "which is subject to legal order within its activity." (Negulescu, 1934, p. 22) The same author claimed that only the freedom of decision of the administration is discretionary, which may do or not do the act, the court being the one competent to examine whether the conditions and formal procedures required by law are implemented, and the facts found by the administration are accurate or appraised. As shown, in regard of the problem of application of the principle of legality in public administration activities, the relationship between legality and the appropriateness of the administrative act has become a controversial issue in Romanian doctrine, outlining the two distinct schools of thought, namely the School of Cluj and the School of Bucharest.

In foreign doctrine, the issues of the relationship between legality and appropriateness are revealed by means of the need to respect the separation of powers, the equilibrium and their balance within the constitutional democracy, this fact leading to the variety of theories about the freedom of action of the administration.

We limit ourselves to highlight the great value of comparative studies made by Jurgen Schwarze, who stated that: "A key feature of the state governed by law is the principle of legality of administration, but what seems an absolute obedience of administration to law, can not be achieved. If adaptability and flexibility of the executive have to be ensured (Schwarze, 1992, p. 223); the conclusion is that although lately we witness the extent of the legal restriction upon administration however, each legal system allows the executive to have a certain movement space for decision-making, whether called freedom of

appraisal (France), discretionary power (Germany) or freedom of decision (England) (Schwarze, 1992, p. 274 et seq).

In France, the concept of discretionary power expresses freedom of decision and action within the frame permitted by law; the Administration has, therefore, the power to determine the appropriateness of a particular course of action (Devolve & Vedel, 1990, p. 426). In Germany (Schwarze, 1992, pp. 283-294), a dominant feature of administrative law is exactly the frequency of the topic of freedom of decision is brought into question. This trend is understandable as, during the post war period, existed the wish to build a constitutional state, whose leadership be strictly bound by law, this fact leading to the idea that the Administration's discretionary power is especially a kind of foreign body within the structure of the state of law, an institution built to ensure the flexibility for administration (Ioan, 2003, p. 241). As the "ultra vires" principle operates, the abuse of Administration is considered in Great Britain an illegality, subject to the control of judicial court, being examined, both in relation to "The Common Law - Background, with the jurisprudence and secondary regulations and the "State of Legal Rights and also in relation to "improper purpose". That is why the principles of reasonableness and control is being applied, moreover the balance between public and private aims being also ensured. Finally, within Community law, the concept of manifest error is accepted, although some theorists consider that the concept is not as well established as that of "reasonableness" which limits the control of British courts over administrative acts, but without excluding this control.

References

Apostol Tofan, D. (1999). *Discretionary and excess power of public authorities.* Bucharest: All Beck.

Deleanu, I. (1993). State of law. In *Law Journal no. 7.* Bucharest.

Dragan, T. (1977). *Constitutional law and political institutions. Basic Course vol.I.* Bucharest: Lumina Lex.

Ioan, A. (2003). *Compared Administrative Law.* Bucharest: Lumina Lex.

Lazar, R. A. (2004). *The legality of the Administrative Act.* Bucharest: All Beck.

Manda, C. (2005). *Administrative control in the European legal space.* Bucharest: Lumina Lex.

Nedelcu, I., & Nicu, A. (2005). Legal and Government Power in the European Public Administration. In *Legal sciences magazine no. 3-4.* Bucharest.

Negulescu, P. (1903-1904). *Administrative Romanian Law.* Bucharest: Gutenberg printing, Joseph Gobl.

Negulescu, P. (1934). The Appraisal Power of the Executive in Carrying Out Acts of Public Power. *Weekly pandects.*

Petrescu, R. (2001). *Administrative Law.* Cluj Napoca: Cordial Lex.

Schwarze, J. (1992). European Administrative Law. *The Office of European Union Issues, Sweet and Maxwel.*

Teodorescu, A. (1910). *A New Conception of Government Acts. Theory of Legality Critica Magazine (Law, Legislation and Jurisprudence).* Bucharest: Anuarul General.