THE PRINCIPLE OF PROPORTIONALITY, THE IMPLEMENTATION OF EU LAW, THE PUBLIC ADMINISTRATION. GENERAL AND PRELIMINARY ASPECTS

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Abstract

Fundamental principle of EU law is governed, at present, by Article 5 (4) of the EU Treaty, as well as Article 5 from the Protocol no 2 of the Lisbon Treaty, the Protocol on the application of the principle of subsidiarity and proportionality. This principle implies that the content and form of Union action shall not go beyond what is necessary to achieve objectives of the Treaties. Established constitutionally by the provisions of Article 53 (2) of the Romanian Constitution, the principle of proportionality cannot and should not be ignored in public administration, obviously. In our opinion, taken into consideration our national constitutional regulation could come off an erroneous conclusion that the proportionality concerns only the restriction of certain rights, not being necessary to govern the activity of public administration. But such an assertion cannot be supported at EU level where its action, its institutions actions and the Member States action that falls within the sphere of EU law are conditioned on the compliance with this principle. Moreover, even at national level, by the Strategy for consolidation public administration for 2014-2020, adopted by Government Decision no. 909/2014, the principle of proportionality is recognized as one of the general principles underpinning this strategy and, especially, the public administration through its activity. Also, for example, the proportionality was settled as a principle in the draft Code of Administrative Procedure, a relevant issue even if this bill did not become a law until now. In same context, after the ECJ decision in the case C-8/55 Fédération Charbonnière de Belgique v. High Authority of European Coal and Steel Community, the Court of Justice consistently recognized, in its jurisprudence, the existence and the applicability of this principle, such as is revealed by the jurisprudence of the Constitutional Court of Romania.

Good governance, but also the control mechanisms developed to protect and guarantee such governance requires a Member State, such as ours, the implementation of EU law by national authorities by taken into consideration even of the principle of proportionality that will focus on the policies chosen to be applied, the administrative and judicial measures applicable, the recognized, protected and guaranteed rights..

Keywords: *proportionality, principle, public administration, good administration, good governance*

1. Introduction

Nowadays the constitution of any state provides, expressly or not, that the power owned by the people is organized on the basis of the principle of the separation and balance of powers - legislative, executive, and judicial.

Especially the contemporary period has shown and still shows us that there are reciprocal tendencies of some authorities which are exercising one of the three constitutional powers to acquire and even to exercise specific attributions of the other two powers.

In our opinion, certainly, the independence of the judiciary power must not be affected in any way by the actions of the public authorities of the other two powers.

However the increased role of the executive branch compared to that of the legislative power is a reality.

Accelerating the rhythm of everyday life requires that sometimes some attributions of legislative power, such as law-making, even be taken over by the executive branch, unfortunately not just temporarily.

In this context, we are asking ourselves this question – exercising the constitutional powers this way does not affect the balance between the powers, and then even their independence?

Thus, one of the keys to the existence of a democratic state and a state of law is to ensure the balance between the three powers - legislative, executive and judiciary, but especially the balance between the legislative and executive powers.

At the same time, the relationship between governance and administration must be respected. The governing keys belong to the legislative power, which has to determine the limits in which the governance should be accomplish by the executive authorities, including through the administration of public affairs.

Whether we are talking about good governance or good administration, or both of them, those two - governance and administration must be realised only for the benefit of the public interest, but without neglecting the principle of proportionality.

Analysing the principle of proportionality in EU law, it was pointed out that „in any proportionality inquiry the relevant interests must be identified, and there will be some ascription of weight or value of those

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interests, since this is a necessary condition precedent to any balancing operation" [1].

Starting from this statement and extrapolating, we appreciate that this principle of proportionality could and should contribute to ensuring the balance between the three powers - legislative, executive and judicial. This way it would be created an optimal framework for achieving good governance and, implicitly, good administration.

2. Good administration or good governance?

As we mentioned above, these two concepts - good governance and good administration - do not have the same meaning.

In our opinion, the governance should involve taking the most important political decisions to ensure the leadership of a state, and the optimal development of a nation.

In contrast, administration should aim to solve the daily problems of a community or individual person, and the public authorities, through their actions, should ensure the concrete transposition of the decisions taken by governance.

Regarding a possible definition for „good governance", it is well known that „there is no single and exhaustive definition ...nor is there a delimitation of its scope, which commands universal acceptance"[2].

This term of good governance „[i]s used with great flexibility" and „depending on the context and the overriding objective sought, good governance has been said at various times to encompass: full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance"[3].

In a draft report on the notion of „good governance"[4], the Venice Commission has noted that the definitions of „good governance", but also of „good administration", vary considerably. However, the Venice Commission could identify a set of similar elements used by these definitions, for example: „ accountability, transparency, responsiveness to the people's needs, efficiency, effectiveness, openness, participation, predictability, rule of law, coherence, equity, ethical behaviour"[5].

The authors of this draft report have concluded that „the present preoccupation with the issue appears to have originated in the World Bank and the other financial institutions, whose primary concern was to ensure that government became a reliable institution for sustainable growth"[6].

At present, we also consider that „the term of governance came to be used to define the reinventing of public administration"[7] to make it more receptive to the needs of the people. Also we agree that "good governance" is referring to a „public service that is efficient, a judicial system that is reliable, and an administration that is accountable to its public"[8].

Thus, when we are talking about good governance, we are referring to the „favourable political framework conditions for social, ecological and market oriented development as well as responsible use of political power and public resources by the state"[9].

Taking into consideration what we have mentioned until now, we could notice that when we are talking about terms like *governance* or *good governance,* theirs definition „range between social and political concerns and those of more technical economic nature"[10]. But it is also possible to distinguish

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[1] P. Craig, G. de Búrca, *EU Law. Text, cases and materials*, fifth edition, Oxford University Press, New York, 2011, p.526.

[2] See United Nations. Human Rights. Office of the High Commissioner, available at https://www.ohchr.org/en/issues/development/goodgovernance/pages/goodgovernanceindex.aspx, accessed on: 04.04.2019

[3] Ibidem

[4] European Commission for Democracy Through Law (Venice Commission), Draft Report on the notion of „good governance", on the bassis of comments by Mr. O. Kask (Member, Estonia), and Mr. A. Eide (Expert, Norway), Study no. 470/2008, CDL(2008)091, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2008)091-e, accessed on: 04.04.2019

[5] Ibidem

[6] Ibidem. In a study, an author has mentioned that „during 1980s under economic reforms, especially under globalization the use of term governance became popular with its emphasis on the process and manner of governing to the notion of sustainable development". He also has mentioned that „meanwhile, organizations such as the IMF, NGOs, the UN and its agencies, the World Bank and international media were quick to pick up the term and use it in a variety of way", and that from then on the term of good governance has appeared especially „in the vocabulary of polity and administrative reform". See: R. Tripathi, *Good Governance: origin, importance and development in India* in *International Journal of Development Research*, Vol. 07, Issue, 11, pp.16968-16970, November, 2017, p. 16968, available at: https://www.journalijdr.com/sites/default/files/issue-pdf/11084.pdf, accessed on: 04.04.2019.

[7] R. Tripathi, *op. cit.*, p. 16968

[8] It is a definition given by former World Bank president Barber Conable in World Bank 1989, p. xii, quoted by N. Maldonado in *The World Bank's evolving concept of good governance and its impact on human rights*, article submitted at Doctoral workshop on development and international organizations, Stockholm, Sweden, May 29-30, 2010, available at: https://warwick.ac.uk/fac/soc/pais/research/.../maldonado_nicole_paper-final_ii.doc, accessed on:04.04.2019, accessed on: 04.04.2019.

[9] F. Bundschuh-Rieseneder, *Good governance: characteristics, methods and the Austrian example* in *Transylvania Reviews of Administrative Sciences*, 24E, p. 27, available at: http://rtsa.ro/train s/index.php/tras/article/view/91/87, accessed on: 04.04.2019. The author underlines that the meaning of good governance „includes the process in which public institutions conduct public affairs, manage public resources and guarantee the realization of human rights", and also „accomplishes this free of abuse and corruption and with due regard for the rule of law". Ibidem

[10] F. Bundschuh-Rieseneder, *op. cit.*, p. 28.

from so different definitions, more characteristics of good governance like: „openness, participation, legitimacy, transparency, effectiveness, efficiency, accountability, availability, predictability or coherence”[11].

In our opinion all different definitions and characteristics identified by doctrine or legislation, some of them mentioned above, „are similar to and overlap with the nine „core characteristics” of good governance articulated by the United Nations Development Programme (UNDP) in 1994”[12]. In the UNDP it was stipulated that „[g]ood governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources”[13].

The bodies of the Council of Europe have tried to find the most consistent definition of good governance. We consider that one of these definitions is more comprehensive and it states that „good governance has become a model for giving real effect to democracy, the protection of human rights and the rule of law”[14].

In European Union, the European Commission has identified five principles of good governance in a White Paper on European Governance[15]: openness, participation, accountability, effectiveness and coherence.

But, „the article 41 of the Charter of Fundamental Rights of European Union stipulates that every person has a right to good administration towards the institutions or bodies of the European Union”[16].

If good governance can be understood like „a process whereby societies or organization make their important decisions, determine whom they involve in the process and how they render account”[17], „good administration is an aspect of good governance”[18].

Governance means taking fundamental decisions for the future of a nation[19] while administration is just a dimension of governance.

Analysing good administration, like an aspect of good governance, we can identify some specific elements like: impartiality, fairness, termination of proceedings within a reasonable time, legal certainty, proportionality, non-discrimination, right to be heard, effectiveness, efficiency[20].

Even if we pointed out that good governance and good administration are not similar concepts, terms, and more than that we underlined that good administration is just an aspect of good governance, we also must emphasize that both of those concepts could be related to public administration.

It is also important to mention that the principle of proportionality is a benchmark for both concepts. Thus, as we have mentioned above, this principle is a key element in studying good administration. But also „[i]n regard to checks and balances there a number of key institutions namely, parliament, the courts and the high councils of state that play a control role in the

[11] See OECD, *Managing across levels of governement*, OECD Paris, 1997, p. 60 ff; Wimmer, *Dynamische Verwaltungslehre*, Springer Verlag Wien New York, 2004, qouted by F. Bundschuh-Rieseneder, *op. cit.*, p. 28. For more details about each characterstics we have mentioned above, also see F. Bundschuh-Rieseneder, *op. cit.*, pp. 28-31.

[12] E. B. Holiday, *Perspectives on good governance: nature, importance, practice and challenges*, lecture at the University of Utrecht, The Netherlands, February 18, 2013, p. 7, available at: http://www.kabgsxm.com/lecture%20good%20governance%20Utrecht%20february%2018%202013-final.pdf, accessed on: 04.04.2019.

[13] UNDP, *Good Governance – and sustainable human development*, quoted in European Commission for Democracy Through Law (Venice Commission), Draft Report on the notion of „good governance”, *op. cit.*, p. 6.

[14] European Commission for Democracy Through Law (Venice Commission), Draft Report on the notion of „good governance”, *op. cit.*, p. 3. For more details, see: *Council of Europe Strategy on Innovation and Good Governance al Local Level, MCL-15(2007)/8*, adopted at the Conference of European Ministers responsible for local and regional government, at their fifteenth session in October 2007, available at: http://www.namcb-org.bg/gga/images/2015/06.2015/MCL-15(2007)8_EN.pdf, accessed on: 04.04.2019. This strategy also lists twelve principles of good democratic governance, like: effectiveness, efficiency, openness, transparency, accountability or responsiveness.

[15] The White Paper on European Governance is available at: https://ec.europa.eu/europeaid/european-governance-white-paper_en, accessed on: 04.04.2019.

[16] European Commission for Democracy Through Law (Venice Commission), Draft Report on the notion of „good governance”, op. cit., p. 3. The article 41 of the Charter of Fundamental Rights of European Union stipulates: 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions. 3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

[17] J. Graham, B. Amos and T. Plumptre, *Principles for good governance in the 21st century*, Institute on Governance, Ottawa, Ontario, Canada, 2003, quoted by D. Hermana, *The Role of Public Administration Ethics in Achieving Good Governance in Indonesia* in *The Social Sciences* 12 (12): 2365-2368, 2017, p. 2366, available at: http://docsdrive.com/pdfs/medwelljournals/sscience/2017/2365-2369.pdf, accessed on: 04.04.2019.

[18] Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers' Deputies, p. 3, available at: https://rm.coe.int/16807096b9, accessed on: 04.04.2019.

[19] E. Slabu, Buna administrare în spațiul administrativ european. (Good administration in European administrative space), rezumat al tezei de doctorat (summary of PhD thesis), p. 4, available at: https://drept.unibuc.ro/dyn_doc/oferta-educationala/scoala-doctorala/rezumat-teza/rezumat2017SlabuElisabetaromana.pdf, accessed on: 04.04.2019.

[20] European Commission for Democracy Through Law (Venice Commission), Draft Report on the notion of „good governance”, *op. cit.*, p. 11.

realization of good governance. The parliament as the representative of the people and charged with the control of the government must play a determining role in the realization of good governance"[21]. But the authorities that are exercising their specific powers to control the realization of good administration, they also have to analyse even the proportionality of the measures or actions decided by the public authorities, especially by the authorities from the public administration.

3. Principle of proportionality – the benchmark of good administration

Identified and developed by the German administrative law, especially by doctrine and jurisprudence, from the beginning of the twentieth century, the principle of proportionality has not found its legal consecration in the constituent treaties of the three original European Communities.

But, in time, the Court of Justice of the European Coal and Steel Community has been obliged to examine various aspects of the principle of proportionality in various cases. Even though the Court has not mentioned expressly that it was about the principle of proportionality, we can identify different aspects of this principle as they were highlighted by German administrative courts.

In the German system, the courts have developed a uniform structure for controlling the principle of proportionality, the application of which is also a uniform one[22], to answer to the following requirements that attesting to or not respecting the principle:

- legitimate aim[23]- in administrative law, the identification of the aim is more than a didactic effort, because the administration – in applying a statute – has to pursue the aim that the legislator wanted to achieve by adopting the statute[24], and this is because the discretionary power of the public administration must not exceed the limits of legality;
- suitability (compatibility) of the measure[25]–the assessment of this requirement of the principle of proportionality should not reflect how optimal is the measure taken by the public administration, but rather whether it is probable that the aim of the measure will be achieved or at least that its achievement is encouraged, fostered[26];
- necessity[27]- means that, among several measures that are comparably effective, the administration has to choose the one measure that is the least burdensome for the addressee[28]. This requirement of the necessity of the measure to be answered clearly and correctly by the administration for application of the principle of proportionality has been „the historical nucleus"[29] of this principle and „it has remained the center of its gravity until today"[30];
- - adequacy (adequacy or proportionality *stricto sensu*)[31]– „means that in an over-all balance of all relevant factors, the infringement of the rights of the addressee of the administrative measure has to be proportionate in relation to the advantages for the general public"[32].

The principle of proportionality „was not imported" *mutatis mutandis* from German law into Community law, first of all, different component parts have been taken over by the Court of Justice as we can see in some of its judgments.

The European Court of Justice has justified its particular approach by asking itself: „Does that mean that the fundamental principles of national legal systems have no function in Community law? No. They contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual. In that sense, the fundamental principles of the national legal systems contribute to enabling Community law to find in itself the resources necessary for ensuring, where needed, respect for the fundamental rights which form the common heritage of the Member States. "[33]

Thus, in the Case Fédération Charbonnière de Belgique v High Authority of the European Coal and

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[21] E. B. Holiday, *op. cit.*, p. 18.

[22] N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 32.

[23] Ibidem.

[24] Ibidem.

[25] Ibidem.

[26] See N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 32.

[27] N. Marsch, V. T., *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waarded, 2016, p. 33

[28] See N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 33

[29] I. Kraft, *Der Grundsatzder Verhältnismäßigkeit im deutschen Rechtsverständnis*(2007), BDVR-Rundschreiben p. 14, in N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 33

[30] F. Ossenbühl, *op. cit.*, p. 618, în N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 33

[31] N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 33

[32] Idem, pp. 33-34

[33] Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community (C-8/55, ECLI:EU:C:1956:11), p. 299

Steel Community[34], analysing the reduction or withdrawal of equalization as regards certain undertakings by taking into consideration different arguments of the applicant, the Court of Justice has mentioned also that „equalization must, therefore, not exceed the limits of what is strictly necessary in order to neutralize to a certain extent the effects of the disadvantage resulting from those differences, which does not imply a guarantee that the original level of receipts will be maintained". Also, responding to another argument of the applicant, the Court has underlined that „[i]n accordance with a generally accepted rule of law such an indirect reaction by the High Authority to illegal action on the part of the undertakings must be in proportion to the scale of that action"[35].

In another relevant case, analysing even the possible violation of the principle of proportionality, in his Opinion, Mr. Dutheillet de Lamothe concerning the Case 11/70[36] of the European Court of Justice, has stated that this principle in the one „which citizens may only have imposed on them, for the purposes of the public interest, obligations which are strictly necessary for those purposes to be attained".

In time, by its judgments, European Court has acknowledged the principle of proportionality itself.

Therefore, in different judgments, it has been mentioned that „[t]he Court has consistently held that the principle of proportionality is one of the general principles of Community law"[37]. In this particular case, the Court has mentioned that „[B]y virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"[38].

Meanwhile „the principle of proportionality acquired the status of a treaty when the Treaty of Maastricht entered into force"[39], and now this principle „is one of the few principles expressed explicitly in the European Union's acts"[40].

In another case[41], „[d]ealing with the question whether a Member State may make provision for a general, indefinite and automatic ban on exercising civil rights that also applies to the right of citizens of the Union to vote in elections to the European Parliament"[42], the Court has established that „Article 52(1)[43] of the Charter accepts that limitations may be imposed on the exercise of rights such as those set forth in Article 39 (2) of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others". So in the case in point, the deprivation of the right to vote was provided for by law[44], and also it did not call into question as such the right to vote referred to in Article 39(2) of the Charter of Fundamental Rights since it has the effect of excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the

[34] Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community (C-8/55, ECLI:EU:C:1956:11), p. 306.

[35] Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community (C-8/55, ECLI:EU:C:1956:11), p. 299.

[36] Internationale Handelsgesellschaft mbH v Einfuhr – und Vorratsstelle für Getreid und Futtermittel (C-11/70, ECLI:EU:C:1970:100).

[37] The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others (C-331/88, ECLI:EU:C:1990:391), paragraph 13.. But before this judgment, in another one – Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & CO. KG - (C-114/76, ECLI:EU:C:1977:116), the principle of proportionality has been mentioned and analysed in the decision of Court, at paragraph 5. More than that, in this last judgment, other European institutions have referred to the principle of proportionality. Therefore, the Council and the Commission have pointed out that „ [t]he principle of proportionality is not a purely abstract one. It leaves the legislature with plenty of room for manoeuvre in deciding whether the legislative measure concerned, viewed in its context, is in the circumstances proportionate to the objective pursued. " (See paragraph 1 letter d) from Written observations submitted to the Court) In the same sense, these two institutions have shown that [t]he general principle of proportionality must be the only test in determining whether the infringement of this fundamental right serves a purpose which is in itself acceptable, whether it is such as to enable this objective to be attained and whether it does not constitute an arbitrary and intolerable burden". (See paragraph 2 letter d) from Written observations submitted to the Court)

[38] The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others (C-331/88, ECLI:EU:C:1990:391), paragraph 13.

[39] J. Długosz, *The principle of proportionality in European Union Law as a Prerequisite for Penalization* in Adam Mickiewicz University Law Review, DOI 10.14746/ppuam.2017.7.17, p. 283, available at: http://ppuam.amu.edu.pl/uploads/PPUAM%20vol.%207/Dlugosz.pdf, accessed on: 04.04.2019.

[40] Ibidem. See article 5 (4) of the Treaty of European Union Law: „Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality".

[41] Paragraph 46 from (Delvigne Case) – Thierry Delvigne v Commune de Lesparre-Médoc, Préfet de la Gironde (C-650/13, ECLI: EU:C:2015:648).

[42] Court of Justice of the European Union, Annual Report 2015. Judicial Activity, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf, accessed on: 20.03.2019, p. 12.

[43] This article regulates about the scope of guaranteed rights, and in paragraph 1 stipulates that „ [A]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. "

[44] See Court of Justice of the European Union, *Annual Report 2015. Judicial Activity, op. cit.*, pp. 12-13

Parliament [45]. In this context, and more important for our research, the Court also underlined that „such a limitation is proportionate in so far as it takes into account the nature and gravity of the criminal offence committed and the duration of the penalty and in so far as national law provides for the possibility of a person who has been deprived of the right to vote applying for, and obtaining, the lifting of that measure"[46]

In a recent case[47] with further reference to the migration crisis, on 6 September 2017, the Grand Chamber of the Court delivered its judgment in which it dismissed in full the actions seeking annulment of Council Decision 2015/1601 establishing provisional measures for the mandatory relocation of asylum applicants[48]. „The Council had adopted that decision on the basis of Article 78(3) TFEU in order to help Italy and Greece deal with the massive inflow of migrants in the summer of 2015. It provided for the relocation from those two Member States to other Member States, over a period of two years, of almost 120 000 persons in clear need of international protection. Slovakia and Hungary, which had voted against the adoption of that decision in the Council, asked the Court to annul the decision. In support of their actions, they argued, first, that the adoption of the contested decision was vitiated by errors of a procedural nature or was founded on an inappropriate legal basis and, secondly, that the decision was neither a suitable response to the migration crisis nor necessary for that purpose"[49]. In this judgment, concerning the principle of proportionality, the Court has established that „according to settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"[50]. Thus, in this context, „[t]he objective of the relocation mechanism provided for in the contested decision, in the light of which the proportionality of that mechanism must be considered, is, according to Article 1(1) of the decision, read in conjunction with recital 26 thereof, to help the Hellenic Republic and the Italian Republic cope with an emergency situation characterised by a sudden inflow, in their respective territories, of third country nationals in clear need of international protection, by relieving the significant pressure on the Greek and Italian asylum systems"[51]. The Court has also ruled on that „it cannot be denied that the contested decision, in so far as it includes provision for a compulsory distribution between all the Member States of migrants to be relocated from Greece and Italy (i) has an impact on all the Member States of relocation and (ii) requires that a balance be struck between the different interests involved, account being taken of the objectives which that decision pursues. Therefore, the attempt to strike such a balance, taking into account not the particular situation of a single Member State, but that of all Member States, cannot be regarded as being contrary to the principle of proportionality"[52].

In another case[53] the Court has ruled on „the chargeability conditions for excise duty, within the meaning of the first paragraph of Article 9 of Directive 2008/118 concerning the general arrangements for excise duty, interpreted in the light of the principle of proportionality"[54]. Thus, the Court has reminded that „as the Advocate General pointed out in point 32 of her Opinion[55], in the exercise of the powers conferred on them by EU law, the Member States must comply with the general principles of law among which are, in particular, the principle of proportionality which the Commission considers has been breached in the present case"[56].

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[45] Ibidem

[46] Ibidem

[47] Slovakia and Hungary v Council (C-643/15 and C-647/15, EU:C:2017:631)

[48] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80)

[49] See Court of Justice of the European Union, Annual Report 2017. Judicial activity. Synopsis of the judicial activity of the Court of Justice and the General Court, 2018, pp. 46-47, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/_ra_2017_en.pdf, accessed on: 04.04.2019.

[50] Slovakia and Hungary v Council (C-643/15 and C-647/15, EU:C:2017:631) paragraph 206.

[51] Slovakia and Hungary v Council (C-643/15 and C-647/15, EU:C:2017:631) paragraph 212.

[52] Slovakia and Hungary v Council (C-643/15 and C-647/15, EU:C:2017:631) paragraph 290.

[53] Commission v Portugal (C-126/15, EU:C:2017:504)

[54] See Court of Justice of the European Union, Annual Report 2017, op. cit., p. 66. „In this case, an action for failure to fulfil obligations had been brought before the Court seeking a declaration that, by subjecting packets of cigarettes to a prohibition on marketing and sale to the public at the end of the third month of the year following that which appears on the marking affixed, the Portuguese Republic had failed to comply with its obligations under that directive and with the principle of proportionality" (See Court of Justice of the European Union, Annual Report 2017, op. cit., p. 66).

[55] In this Opinion, the Advocate General has underlined that „[t]he Court usually begins its examination of the proportionality of a measure in the field of indirect taxation by stating that the Member States must employ means which, while enabling them effectively to attain the objectives pursued by their domestic laws, on the one hand, cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation, on the other. In accordance with a more precise formulation of the requirements imposed by the principle of proportionality that has been established by case-law, a measure must be appropriate for attaining the legitimate objectives pursued by it and must not go beyond what is necessary to achieve those objectives. When there is a choice between several appropriate measures, recourse must be had to the least onerous; furthermore, the disadvantages caused must not be disproportionate to the aims pursued." Commission v Portugal. Opinion of Advocate General Kokott, delivered on 27 October 2016 (C-126/15, EU:C:2016:822), paragraph 33

[56] Commission v Portugal (C-126/15, EU:C:2017:504) paragraph 62.

From the above-mentioned cases and not only, we can see that the Court of Justice of the European Union has analysed the compliance and application of the principle of proportionality in multiple and varied areas like: the common agriculture policy, the competition law in European Union, the free movement of workers, tax provisions from the European Union law, common foreign and security policy, etc. In these cases, the Court of Justice has examined compliance with the principle of proportionality in governance or administration by the European Union's institutions, bodies, offices or agencies, inter alia, in order to make it possible to ensure good governance and good governance within European Union and, implicitly, within the Member States. Even by sanctioning of any breach of the principle of proportionality, the Court of Justice contributes, exercising of its specific competence, to respecting the institutional balance in the European Union.

4. Conclusions

The authorities from the executive branch participate in the governance of a state, mainly through the realization of its internal and external policy and less as the deciding factor of this policy.

However, to ensure the implementation of the domestic and foreign policy of the country, the same authorities, generically identified in this context as public administration, exercise the general management of public administration, but also achieve specific administrative activities, so their contribution to the right to good administration it will be essential in any state of law.

But a right of appreciation is recognized for the authorities and institutions from public administration. On the other hand, exercising this discretionary power, the public administration authorities may infringe the principle of proportionality. But, the acts they issue exercising of their competence, the public administration authorities must not only affect the legality, but also the opportunity. In our opinion this is the moment when, public administration authorities, first of all, have to ensure the compliance and the enforcement of the principle of proportionality.

So, if „the function of the principle of proportionality is to control the manner in which the European Union exercises its power, both in relation to Member States and individuals, and to assess the activities of those states”[57], we appreciate that this function should be adapted at national level and public administration authorities should exercise theirs power taking into consideration this principle in relation with individuals, legal persons or other public authorities. This way it will be easy for any state to ensure good governance and, also, good administration for everyone.

Through this study we initiated a research on the principle of proportionality and its importance in European Union law emphasized by legislation, the case-law of the Court of Justice, and doctrine.

This way, we wanted to highlight the relevance of this principle in achieving good governance, but above all good administration because it is important to develop new regulations regarding this principle in our national legislation.

First of all, we consider that it is appropriate to be mentioned, expressly, in our Constitution this principle of proportionality and also its meaning. Now we have just a reference of proportionality in the Article 53 paragraph 2 of Romanian Constitution[58].

In the Administrative Code that was adopted by our Parliament, but was declared unconstitutional by Romanian Constitutional Court[59], the legislative authority has provided a definition[60] for the principle of proportionality, and has mentioned about proportionality in other articles[61].

Even if by the Strategy for consolidation public administration for 2014-2020, adopted by Government Decision no. 909/2014[62], the principle of proportionality is recognized as a general principle of public administration in relation to its own activity[63]. We appreciate that the indirect references[64] to proportionality that we can find in Law no. 554/2004 of the contentious administrative, are not enough to ensure full implementation of this principle, and also of the right of good administration.

We have the same opinion regarding the right to good administration, appreciating that it is mandatory to establish it, expressly, even in our Constitution.

[57] J. Długosz, *op. cit.*, p. 285.

[58] According to this provision restriction on the exercise of certain rights or freedoms shall only be ordered if necessary in a democratic society and the measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.

[59] See Decision no 681 from November 6, 2018, published in Official Gazette of Romania, Part I, no 190 from March 11, 2019.

[60] Article 9 from the Administrative Code has provided that the principle of proportionality represents: „The forms of activity of the public administration authorities must be appropriate to the satisfaction of a public interest and balanced in terms of effects on individuals. The provisions or measures of the public administration authorities and institutions are initiated, adopted, issued, as the case may be, only after assessing the needs of public interest or the problems, as the case may be, the risks and impact of the proposed solutions”. Proportionality has been mentioned even like principle of administrative liability in Article 574 paragraph 2.

[61] See, for example, Article 313 letter c) regarding the proportionality in concession contract for goods public property.

[62] Decision no. 909/2014 was published in Official Gazette of Romania, Part I, no 834 bis from November 17, 2014.

[63] In this Strategy, the principle of proportionality is defined as follows - any action taken must be appropriate, necessary and appropriate to the intended purpose. See Strategy for consolidation public administration for 2014-2020, p. 18, available at: http://www.dpfbl.mdrap.ro/documents/strategia_administratiei_publice/Strategia_pentru_consolidarea_administratiei_publice_2014-2020.pdf, accessed on: 04.04.2019

[64] See, for example, Article 2 paragraph 1 letter n) form this law where excess of power is defined by exercising the power of discretion of the public authorities by infringement of the limits of competence provided by law or by infringement of the rights and freedoms of citizens

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