

THE RELATION BETWEEN PUBLIC ORDER AND PUBLIC FREEDOMS IN TERMS OF ADMINISTRATIVE POLICE. INTERNATIONAL AND NATIONAL REGULATIONS

*Dana VULPAȘU**

Abstract

Often presented in contrast, public order and freedoms are however, a liberal state, perfectly reconcilable and complementary; it can be said that it is necessary, for freedom to be fully exercised, to be regulated to protect public order. As proof, international and national regulations guarantee human rights, but do not exclude the possibility of limiting them because the existence of unconditional rights cannot be accepted in a democratic constitutional system. Harmonious arrangement of individual liberties requires the exercise of liberties by some do not prejudice the one of others. Public freedoms cannot pass public order because the disturbances compromise their full exercise. Also, public order cannot pass freedoms to the extent that, in a liberal state, they are part of its definition.

This article highlights the importance of a balance between maintaining public order in a preventive manner, as purpose of the administrative police, and limiting the exercise of public liberties, as administrative police finality, and also the regulatory processes of these freedoms in a comparative perspective.

Keywords : *Public order, public freedoms, administrative police, public administration*

I. Public order – purpose of administrative police

The purpose of the administrative police is to ensure the public order climate imposed by the normal course of economic, social and cultural activities and promote civilized relations in everyday life.

With the recognition of human rights and fundamental freedoms, the purpose of administrative police begins to acquire new meanings, in the sense that it must comply with the law, while taking the necessary measures, which are subsequent laws, specific to enforcement activity, in order to establish concrete measures of public order¹.

According to the Explanatory Dictionary of the Romanian Language², the word "order" has several meanings, as follows:

* Ph. D. Candidate at National School of Political and Administrative Studies, Bucharest.

¹ I. Corbeanu, *Drept administrativ: curs universitar*, Ediția a II-a, revăzută și completată, Editura Lumina Lex, Bucharest, 2010, pp. 130-131.

² Academia Română, Institutul de Lingvistică „Iorgu Iordan”, *Dicționarul Explicativ al Limbii Române*, Ediția a II-a, Editura Univers Enciclopedic, Bucharest, 1998, p. 726.

- Disposition, regular succession with spatial, temporal, logical, moral, aesthetic character; organization, sequence, row, ordination, ordinance;
- Compliance with a requirement, a norm, a discipline, a rule;
- Principle of causality or finality of the world, its own laws of nature;
- Organization, social, political, economic order; regime; social stability, respect for established social institutions.

Etymologically speaking, the word "order" comes from the Latin *ordo*, -inis and has the meaning of "string, row, sequence, order, rule, law; decree, rank, social class".

The phrase "public order" means "political, economic and social order of a country, which is ensured by a set of rules and measures different from a social order to another and translates the normal functioning of the state apparatus, keeping the peace of citizens and the respect of their rights"³.

According to Professor Paul Negulescu "public order is a fact, material and external, which the legislature guarantees and the administrative authority protects, by preventing any disorder that it would bring. Its content includes: the public peace, the political regime; organization and functioning of public services; safety of persons and property and public sanitation"⁴.

We found in the Romanian literature of 1944⁵ an opinion according to which public order has 3 meanings:

Public order is a state of fact that exists in a certain state and by which the safety of people and their property is insured, every individual being able to see his interests in peace. From this point of view public order is also called public or citizens safety or civic order;

Public order regards the existence of the state, its security and it is called state order or state security;

The two meanings of the public order concept fuse together and form the so called general public order.

Professor Ioan Alexandru believes that "public order in a large sense means the internal peace that can allow a human community to live in peace within the rules that ensure individual rights and freedoms"⁶.

In the sense attributed by the German legislation of police and public safety, public order means all norms whose compliance constitutes a necessary assumption of civilized living together in a community of citizens⁷.

The public order that an administrative police watches has the following features⁸:

- In their materiality, administrative police measures aim to avoid visible, exterior disorders;

³ Academia Română, Institutul de Lingvistică „Iorgu Iordan”, *Dicționarul Explicativ al Limbii Române*, Ediția a II-a, Univers Enciclopedic, Bucharest, 1998, p. 726.

⁴ P. Negulescu, *Tratat de drept administrativ*, Marvan, Bucharest, 1934, p. 373.

⁵ N. V. Danulescu, *Poliția administrativă*, Cartea de Aur, Bucharest, 1944, p. 41.

⁶ I. Alexandru, M. Cărăușan, S. Bucur, *Drept administrativ*, Ediția a III-a, revizuită și adăugită, Universul Juridic, Bucharest, 2009, p. 36.

⁷ M. Vlad, G. Gornig, *Drept polițienesc roman și german*, C. H. Beck, Bucharest, 2012, p. 43.

⁸ E. Bălan, *Instituții administrative*, C. H. Beck, Bucharest, 2008, p. 133.

- It is a public activity, held by public authoritative qualities to serve the protection of certain general interests;

- It is limited, its intervention cannot look conscience or private property or residence of persons, except to the extent that such action of the administered ones would jeopardize by their outer forms, values protected by public power through law.

Lack of public order would lead to chaos, which could cause disruptions in terms of rights, freedoms and duties.

This public order is presented in three aspects⁹:

- ε. Public peace (defined as the opposite of noise);
- φ. Safety and security of persons (by preventing accidents, natural disasters, fires etc.)
- γ. Sanitation (protection of public hygiene, prevention of epidemics etc.).

Administrative police is often defined by reference to that end: though imperfect, this criterion definition is actually more efficient than that of the police action, i.e. of the activities to which it is liable to be exercised, since this object is unlimited. A police measure will be lawful only if it relates to the preservation, maintenance or restoration of public order¹⁰.

II. Relation between public order and public freedoms

In a state of law, freedom is a fundamental principle and requires the development of legal norms to ensure all people that it shall be according to their options in dealing with other members of the community. Also, it is assumed that the entire system of institutions that structure it is based on the requirements of democracy and freedom, but also that, in the given social framework, the law enforcement by competent state bodies shall be designed to give each individual the necessary safety that is protected in his events and free actions, to the extent that the freedom of others is respected¹¹.

At any time one of the essential elements of the state must be limited freedom for the benefit of general interest, because without this limitation everyone could do what they want. This way the rights of each person should not be respected and we get into a situation where there would be no justice, law and rights. The limitation is, however, an obligation of the state or the person not to be attentive to the rights and freedom of others. Only in this way we can talk about the possibility of asserting the personality of each person, as well as respect for human dignity. The limitation may be interpreted as a change in action content or volume of the legal norm, when it appears the necessity to coordinate divergent interests of the individual with those of the state, society in general¹².

⁹ Ibidem.

¹⁰ C.-E. Minet, *Droit de la police administrative*, Vuibert, Paris, 2007, p. 31.

¹¹ D. Mazilu, *Drepturile omului. Concept, exigențe și realități contemporane*, Lumina Lex, Bucharest, 2008, pp. 177-178.

¹² G. Coca, *Interesul general și drepturile fundamentale ale omului*, Universul Juridic, Bucharest, 2009, p. 196.

Legal norms limiting the exercise of human rights and fundamental freedoms are related to the common good, the general interest of society¹³ in which a man gives up his natural freedom and supports a limited kind of freedom that provides him and others the existence security. Such freedom has a meaning in the social life only if setting limits because to manifest, it must depend on something, to fit in some coordinates¹⁴.

National and international regulations guarantee human rights, but do not exclude the possibility of limiting them because the existence of unconditional rights cannot be accepted in democratic constitutional system. The exercise of fundamental rights and freedoms must not contravene the existent order in society¹⁵.

Regarding international regulations, the Universal Declaration of Human Rights set out in Article 29 (2) that " In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

International Covenant on Civil and Political Rights provides in Article 12 (3) that "The (...) rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

In terms of this covenant, we enumerate the rights and freedoms that can be restricted:

Article 18 (3): "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others";

Article 19 (1) "Everyone shall have the right to hold opinions without interference", (2) "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice", (3) "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals";

¹³ E. Aramă, *Reconsiderarea raporturilor dintre stat, societate, persoană în cadrul tranziției spre o societate democratică*, in „Revista Națională de Drept” no. 12/december 2006 of the State University from Republic of Moldova, Chișinău, pp. 14-16 apud M. Tomescu, *Drepturile omului: tendințe și orientări contemporane*, Pro Universitaria, Bucharest, 2013, p. 131.

¹⁴ G. Liiceanu, *Despre limită*, Humanitas, Bucharest, 1994, p. 11 apud R.-G. Paraschiv, *Exercitarea drepturilor omului și limitele acesteia*, in „Revista Drepturile Omului”, Year XXIII, no. 2/2013, edited by the Romanian Institute for Human Rights, Bucharest, p. 17

¹⁵ Tomescu M., *Drepturile omului: tendințe și orientări contemporane*, Pro Universitaria, Bucharest, 2013, p. 132.

Article 21 “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others”;

Article 22 (1) “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests” and (2) “No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right”.

Under article 4 of International Covenant on Economic, Social and Cultural Rights “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society” and article 5 “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent”.

Article 8 (1) a) regards “The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others”, (3) “Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention”.

The European Convention for the Protection of Human Rights and Fundamental Freedoms establishes at article 17 that “nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention” and in terms of article 18 “The restrictions permitted under this Convention to the

said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed”.

Also in this convention, we can identify provisions on the restriction of certain rights and freedoms, as follows:

Article 8 (1) “Everyone has the right to respect for his private and family life, his home and his correspondence”, (2) “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”;

Article 10 “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”;

Article 11 “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”.

Internally, we notice the provision of Article 53 of the republished Romanian Constitution, under which “The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. Such restriction shall only be ordered if necessary in a democratic society. 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”.

We mention that no matter how they are called, between human rights and public freedoms there is no difference, all being subjective rights, they belong to individuals, and the state has the obligation to determine the conditions for their

exercise in a particular legal system and articulated in such a way as to ensure a balance between public order and the exercise of public freedoms¹⁶.

Therefore, public freedoms are those subjective rights of citizens, essential to life, their liberty and dignity, being essential to the free development of human personality, rights established by the Constitution and guaranteed by the Constitution and law¹⁷.

Thus, we see that the restriction of rights and freedoms on grounds of public order finds legitimacy in both domestic and international regulations, its purpose being to provide a peaceful and creative coexistence in society.

Often presented in contrast, public order and freedoms are however, in a liberal state, perfectly reconcilable and complementary; it can be said that it is necessary for freedom to be fully exercised, to be regulated to protect public order. Since freedoms are protected at higher levels in the hierarchy of norms, it raises the question of the competent authority to define the limits¹⁸.

Harmonious arrangement of individual freedoms requires the exercise of freedoms by some not to prejudice those of others.

For France, the famous Article 4 of the Declaration of the Rights of Man and Citizen states that " Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law". On the other hand, it is equally necessary to impose limits to freedoms that are necessary to defend public order, i.e. the material and ethical bases of the society. This requirement is not really distinct from previous: indeed freedom in his way of exercising that threatens public order can thus affect the rights of others. Constitutional Council of France has made a constitutional goal of defending public order, which is a standard that allows them to review the arbitration conducted between public order and freedom. He believes that freedom of communication must be reconciled with the "constitutional objectives which are defending public order, respect other's freedom and preserving the pluralistic expression of socio-cultural trends" (CC decision no. 82-141 of July 27, 1982 Law on audiovisual communication¹⁹).

The legality of restricting such freedoms is subject to the fulfillment of three conditions:

- a) To be provided by law;
- b) To pursue a legitimate aim;
- c) It must be justified by its necessity "in a democratic society" (ECHR, Handyside judgment against Great Britain, December 7, 1976²⁰).

From this point of view, it seems possible to consider the relation between public order and freedoms, not as opposing two antagonistic ideas, but rather in terms of

¹⁶ D. Big, *Restrângerea exercițiului libertăților publice*, Hamangiu, Bucharest, 2008, p. 6.

¹⁷ I. Muraru, *Protecția constituțională a libertăților de opinie*, Lumina Lex, Bucharest, 1999, p. 8.

¹⁸ C.-E. Minet, *Droit de la police administrative*, Vuibert, Paris, 2007, p. 23.

¹⁹ <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1982/82-141-dc/decision-n-82-141-dc-du-27-juillet-1982.7998.html>

²⁰ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#{%22itemid%22:\[%22001-57499%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#{%22itemid%22:[%22001-57499%22]})

conciliation, even complementary: in the end, it seems that public freedoms cannot pass the public order, as the disorders compromise their full exercise. Also, public order cannot pass freedoms, in the extent that, in a liberal state, they are part of its definition. It all depends, really, on what is meant by the concept of public order: if it is a despotic order, it is clear that it will compromise freedoms. If, however, public order respects individual freedoms and is attributed as the purpose of achieving the best possible balance between the exigencies of life in society, then this order, not only is not the enemy of freedom, but also contributes to their development²¹.

French literature²² distinguishes three main techniques for organizing public freedoms: repressive regime, preventive regime and prior declaration system.

Repressive regime, although its name doesn't indicate it, is the one that is most favorable to public freedoms. It consists, in fact, in establishing the criminal behaviors and imposing sanctions. By virtue of the principle of legality of crimes and punishments and non-retroactivity of the criminal law, there can be penalized only those behaviors which, when they were committed, were already established as crimes by the law in force. It follows that, for the freedoms that evolve under this system, everything that is not forbidden is allowed. In addition, individuals are protected by the principle governing criminal law and criminal procedure: Incriminations set of legal texts should be proportionate to the behaviors they intend to repress; they can in principle be imposed only by a judge, with guarantees the rights behave for certain persons²³.

Regarding preventive regime, this is the worst regime for freedoms. It constitutes the opposite of the precedent: the only permissible behaviors are those that are approved on a case by case basis; i.e. prohibition is the rule and freedom becomes the exception. Preventive regime may, first, take the form of a prior authorization: in this system, freedom cannot be exercised without first obtaining public administration approval, which features depending on where discretion is more or less large. There are, for example, subordinated to issuing a prior authorization the broadcasting of a cinematographic work, the exploitation of frequencies for radio or television broadcasting, the exercise of certain professional activities or for foreigners who are not nationals of a Member State of the European Union. Equally, we attach this preventive regime the prohibiting power which is available to police authorities regarding all behaviors that pose a threat to public order. In this "prohibition regime", the individual should not take special steps before exercising a freedom; but at any moment the police authority may intervene as a precaution to prohibit such activity, provided that the measure is justified by the needs of public order. Unlike repressive regime, where individuals know in advance which behaviors are unacceptable, the prohibiting regime allows police authorities to restrict perfect lawful activities however if maintaining public order requires it²⁴.

Finally, the intermediate system of prior declaration imposes for individuals the obligation to inform the public authority of their intention to make use of the considered

²¹ C.-E. Minet, *op. cit.*, p. 25.

²² *Idem*, p. 26.

²³ *Idem*, p. 26.

²⁴ *Idem*, p. 27.

freedom. However, they do not need to obtain an authorization from the administration: once met prior declaration, the freedom can be exercised; therefore, it remains the rule. This system aims to facilitate the exercise of police powers by providing information to the police authority. The typical example is that of demonstrations on public roads: they must be declared to the police authority, but they don't need to be authorized. On the other hand, if the preservation of public order so requires, the mayor or the prefect may regulate or prohibit the protected demonstration. Prior declaration system combines therefore preventive and repressive regimes²⁵.

Also, Romanian literature has identified two systems, namely the preventive system and the repressive system, which are classified according to their trends, more authoritarian or more liberal, and regulates the public freedoms matter as follows:

- The preventive system is characterized in that it allows public authorities to take some measures to prevent breaches of the rule of law, such as prior authorization, censure, warning or suspension or even suppressing public freedoms;
- The repressive system based on the idea that the exercise of public freedoms is incompatible with the arrangement of likely measures. In the parameters of this system, only justice, but after the exercise of public freedoms, may intervene to impose sanctions provided by law.

III. Conclusions

It should be understood that the administrative police action is assigned to a specific purpose, public order, which is narrower than that of other administrative activities, affected in a global way to the public interest. It is about limiting the possibilities of intervention of a power which, as noted, is likely to affect the fundamental rights and freedoms.

The difficulty of establishing the content of the public order concept comes from the fact that it never received a comprehensive definition, neither in law nor in jurisprudence. This is because it is doomed to adapt to infinity of practical assumptions that neither the legislator, nor the judge can provide.

As we have seen, public order and public freedoms are perfectly reconcilable and complementary. Although presented in contrast, public freedoms must be regulated so that they can be fully exercised, but also to protect public order.

In this sense, I presented three general procedures for regulating public freedoms, namely the repressive regime, the preventive regime and the intermediate system of prior declaration.

In conclusion I believe that it is necessary for freedoms to be restricted on grounds of public order in order to ensure peaceful and creative coexistence in society, which finds its legitimacy in both national and international regulations, as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights or the European Convention on Human Rights.

²⁵ Idem, p. 27.