

BRIEF CONSIDERATIONS REGARDING THE ADMINISTRATIVE POLICE UNDER THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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ABSTRACT:

THE PUBLIC ADMINISTRATION ACTION OF ENSURING PUBLIC ORDER IS CALLED ADMINISTRATIVE POLICE AND REGROUPS AN ENSEMBLE OF REGULATIONS TRADITIONALLY DEFINED BY A CLEAR AND IDENTIFIABLE PURPOSE, THAT OF PREVENTIVE MAINTENANCE OF PUBLIC ORDER, AND BY A CONCILIATION REGIME BETWEEN THE REQUIREMENTS OF PUBLIC ORDER AND THOSE OF PUBLIC FREEDOMS. CURRENTLY THE PURPOSE AND THE CONCILIATION REGIME DO NOT FULLY CHARACTERIZE THE ADMINISTRATIVE POLICE ACTIVITY, WHICH EXTENDS AS A NECESSITY FOR THE PRESENT NEEDS OF SOCIETY. THIS ARTICLE, BOTH CONCEPTUAL AND PRAGMATIC, TRIES TO ASSOCIATE THE RULES CONTAINED IN THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WITH THE PRACTICAL ACTIVITY OF PUBLIC AUTHORITIES TO VERIFY THE HYPOTHESIS THAT THE ADMINISTRATIVE POLICE IS A PROCESS COMPATIBLE WITH THE EUROPEAN CONVENTION AND TO IDENTIFY A NUMBER OF PRINCIPLES THAT COULD BE GUIDELINES FOR DEVELOPING A EUROPEAN MODEL FOR PREVENTIVE MAINTENANCE OF PUBLIC ORDER.

KEY WORDS: ADMINISTRATIVE POLICE, PUBLIC ORDER, EUROPEAN CONVENTION

1. THE CONSECRATION OF RESTRICTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS EXERCISE ON GROUNDS OF PUBLIC ORDER BY THE EUROPEAN CONVENTION

Whatever the administrative or judicial organizational schemes states have, the European Convention did not lead to the conviction of the administrative police, but even confirmed it in several aspects.

In light of the Convention for the Protection of Human Rights and Fundamental Freedoms, states are authorized to prevent a potential threat, the European Court of Human Rights never condemning the administrative police activity done internally through which the

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Beneficiary of the project “Doctoral and Postdoctoral Fellowships for young researchers in the fields of Political, Administrative and Communication Sciences and Sociology“ POSDRU/159/1.5/S/134650 financed through the Sectoral Operational Programme for Human Resources Development 2007-2013, co-financed by the European Social Fund.

exercise of protected rights was justifiably limited for express reasons of administrative police.

A first case is that under Article 5 of the Convention, which provides that everyone have the *right to liberty and security*. However, this right may be prejudiced, from the perspective of administrative police as a way of preventing riots, if in question is a person capable of spreading infectious diseases, a persona of unsound mind, alcoholics, drug addicts or vagrants.

The same article mentions in letter f) that people can be deprived of their liberty in order to prevent unauthorized entry into the country or when against them action is being taken with a view to deportation or extradition. In this context, according to Article 1 of the Protocol no. 7 from 1984, States shall expel a foreigner in the interest of public order or on ground of national security.

In fact, the public order clause in the broad sense is a condition for the exercise of most rights under the Convention, which public authorities can invoke when they restrict the exercise of rights for administrative police reasons.

In this respect, we recall Article 8 according to which everyone has the *right to respect for his private and family life*, his home and his correspondence, the interference by a public authority with the exercise of this right being accepted only to the extent that is required by 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.

The right to freedom of thought, conscience and religion, under Article 9, which includes the freedom to change his religion or belief and freedom, to manifest his religion or belief, either alone or in community with others and in public or private, in worship, teaching, practice and observance, shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of *public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*.

The right to freedom of expression, under Article 10, includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

It has to be noticed a peculiarity of the administrative police regarding this article, namely that concerning the possibility that states have to subject broadcasters, cinema or television to authorization. Authorization is one of the legal measures that the administrative police have at its disposal. Therefore, the Convention does not prevent the implementation of this legal instrument of authorization through which the administrative police authority shall ensure the public order.

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 in a democratic society. These are necessary measures for the protection of public order, the prevention of crimes, the protection of health, morals, reputation or rights of others.

Another right is specified in Article 11 and considers *freedom of assembly and association*, whose exercise can be also restricted only by law in a democratic society for the *prevention of disorder or crime, for the protection of health, morals or the rights and freedoms of others*.

As regards the *freedom of movement*, under Article 2 of Protocol no. 4 (1963), everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence, but this right may be restricted,

under the law, when necessary *to maintain public order, prevention of crime, protection of health or morals or for the protection of the rights and freedoms of others.*

Except these situations that are expressly and exhaustively set, Article 15 authorizes states in *a general manner and in exceptional circumstances*, as in the case of war or other public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention to the strict extent that the situation requires and provided that such measures are not in contradiction with other obligations under international law.

The same article notes that states cannot derogate from the right to life, except for deaths resulting from lawful acts of war, prohibition of torture and the prohibition of slavery and forced labor.

In turn, the European Court of Human Rights has never condemned the administrative police activity by judging it as inconsistent with the principles of the convention or a protected right.

A proof of this is the Judgment of 17 July 2001², according to which the Court concluded that there had been a violation of Article 10 in the case of Ekin Association on a ministerial order prohibiting the circulation, distribution and sale of the book in France, on the basis that it promoted separatism, justified the use of violence and therefore represented a potential danger to public order. The contested measure was adopted on the basis of statutory provisions which allowed the Ministry of Interior to prohibit the circulation of any publication written in a foreign language or of foreign origin³.

The provision at issue pursued the legitimate aim of protecting public order and preventing crime. The question was whether it was “necessary in a democratic society”⁴.

The Court considered that *these prior restrictions were not incompatible to the Convention*, but they “must be part of a legal framework that limits in strict terms, the application of such prohibitions and provide effective judicial remedy against any abuse”⁵. The prohibition at issue did not satisfy these two requirements, and the contents of the book did not justify the gravity of the infringement of the applicant's freedom of expression especially in order to protect national security and public order. Therefore, the interference was not “necessary in a democratic society”⁶.

2. RECOGNITION OF NATIONAL COMPETENCE IN MATTERS OF PUBLIC ORDER IN THE JURISPRUDENCE OF THE ECHR

States enjoy a margin of discretion to ensure their security. This margin is inferred from the wording of the Convention authorizing proportionate interference in the exercise of the majority of rights. The judge ensures of the its need and of the existence of clear and accessible rules to determine the interference’s framework.

The exercise of the Conventional right may be restricted even to not risk disrupting public action. Under Article 6 of the Convention, the right to a fair trial is actually enforceable only to measures affecting civil rights and obligations or expressing a criminal charge.

The core area of public power is excluded from Article 6, administrative police measures cannot be a priori contested in light of the right to a fair trial.

²http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/ekin%20association%20v.%20france.htm, accessed on 02.06.2014.

³ <http://www.infoeuropa.md/files/libertatea-de-exprimare-in-europa-jurisprudenta-cu-privire-la-articolul-10-al-conventiei-europene-a-drepturilor-omului.pdf>, accessed on 02.06.2014.

⁴ Agenția de Monitorizare a Presei, *Jurisprudența internațională în materia libertății de exprimare*, Volumul III, 2008, p. 59, document can be found at: <http://www.activewatch.ro/Assets/Upload/files/jimle%20-%20spete%20III.pdf>, accessed on 02.06.2014.

⁵ Hotărârea Curții din 17 iulie 2001, cauza *Association Ekin c. Franța*, nr. 39288/98, para. 58.

⁶ Hotărârea Curții din 17 iulie 2001, cauza *Association Ekin c. Franța*, nr. 39288/98, para. 64.

A person's right to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law cannot be enforced against acts of administrative police as these measures do not affect the civil rights and obligations or express a criminal charge.

In this regard, the former Commission considered that an ordinance ordering the expulsion of a foreigner does not involve any civil right of foreigners in this situation, so that the provisions of art. 6 para. 1 of the Convention cannot be implemented in such cases⁷.

The Court also held that the measure to authorize or not a foreigner to remain in the territory of a State shall not imply any decision on civil rights and obligations⁸ within the meaning of art. 6 para. 1 of the Convention⁹.

This situation is due to the discretionary nature of the administrative police activity.

The decision to authorize or not, that has an administrative nature, of foreigner to remain in the territory of a State is a discretionary act of the immigration public authority. The administrative police authority can prevail on the Court's attitude which does not control the pertinence of a way of action, but must ensure its compatibility with the Convention's provisions.

The case of *Cha'are shalom ve tzedek against France*¹⁰ involved a Hebrew organization certifying as kosher the meat sold in its members' restaurants and butchers. Since it considered that the way animals were slaughtered by the existing Hebrew organization no longer conformed to the strict precepts associated with kosher meat, the applicant requested a permit from the state to conduct its own ritual slaughter of animals. This application was rejected on the grounds that it is not sufficiently representative for the Hebrew community in France and there are already approved slaughterhouses to perform such rituals. ECHR found that, in the given circumstances, there was no real downside to the organization, since it could obtain from other sources meat from animals that are slaughtered according to the required method¹¹.

In its defense, the Hebrew association applicant claimed a violation of Article 9¹² of the Convention by the French authorities which refused to grant the necessary approval for having access to slaughterhouses in order to perform ritual slaughter in accordance with ultra-

⁷ Comis. EDO, raportul din 19 martie 1981, nr. 8118/1977, in cauza OmKaranadava contra Elveției; raportul din 15 mai 1984, nr. 9990/1982, în cauza Bozano contra Franței, apud V. Pătulea, *Proces echitabil. Jurisprudența comentată a Curții Europene a Drepturilor Omului*, Editura I. R. D. O., București, 2007, p. 49.

⁸ With regard to civil rights see A. Tabacu, *Principiul dreptului la un proces echitabil, în termen optim și previzibil, potrivit Noului Cod de procedură civilă și contenciosului administrativ*, în *Revista Transilvană de Științe Administrative* 2(3)/2012, pp. 140-151. The text can be found at: <http://rtsa.ro/files/RTSA%20-%2031%20-%209TABACU.pdf> accessed on 03.06.2014.

⁹ CEDO, decizia din 5 octombrie 2000, în cauza Maaouia contra Franței, în „Recueil...”, 2000 – X; para. 36 apud V. Pătulea, *Proces echitabil. Jurisprudența comentată a Curții Europene a Drepturilor Omului*, (București: Editura I. R. D. O, 2007), 49.

¹⁰ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22dmdocnumber%22:\[%22696615%22\],%22itemid%22:\[%22001-58738%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22dmdocnumber%22:[%22696615%22],%22itemid%22:[%22001-58738%22]), accessed on 04.06.2014.

¹¹ Agenția pentru Drepturi Fundamentale a Uniunii Europene, *Manual de drept european privind nediscriminarea*, Oficiul pentru Publicații al Uniunii Europene, Luxemburg, 2010, p. 120. The document can be found at: http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA_CASE_LAW_HANDBOOK_RO.pdf, accessed on 04.06.2014.

¹² Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Orthodox religious prescriptions of its members, showing that foods that can be consumed by Hebrew must be prepared in accordance with the rules of Kashrut¹³.

Ritual slaughter is nevertheless authorized under French law and Council of Europe Convention for the Protection of Animals for Slaughter adopted on 10 May 1979 and Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing.

Subject to the provisions of French law, ritual slaughter may be performed only by slaughterhouses approved for this purpose by religious bodies which have been approved by the Minister of Agriculture, on a proposal from the Minister of Interior. Slaughterhouses must be able to provide documentary evidence of such authorization.

These bodies must inform the Minister of Agriculture about the names of authorized persons and those whose authorization has been withdrawn. If no religious body has been approved, the prefect of the department, in which is located the slaughterhouse used for ritual slaughter, may grant individual authorizations.

The Court also noted that Article 9 applies only to restrictions that would prevent consumers from being able to obtain meat from animals slaughtered ritually.

Thus, as interpreted by the European Court of Human Rights (not unanimous) of the European Convention of Human Rights in the case of *Cha'are Shalom*, there are allowed restrictions on ritual slaughter, but only if it does not prevent the faithful to obtain meat religious sacrificed.

So, we see that regulatory measures of the ritual slaughter of animals taken by the administrative police authorities pursue a legitimate aim, namely to protect health and public order¹⁴, while the organization by the State of the exercise of a cult contribute to religious peace and tolerance¹⁵.

Another case in which the Court has refrained from ruling on police means that administrative authorities have at their disposal to implement them when public order is endangered, we find in the Judgment of 9 April 2002.

In this case, *Cisse against France*¹⁶, the applicant, part of a group of people who did not have a residence permit in France, decided to engage in a collective action in order to draw attention to the difficulties he faced to obtain the review of their administrative situation¹⁷.

This movement culminated in the occupation of a church in Paris by a group of about 200 people undocumented to stay in France, the majority of African origin, of which 10 men decided to go on hunger strike. This movement was supported by many human rights associations, and some of their militants decided to sleep in front of that church¹⁸.

After about two months, the Paris police chief has ordered the evacuation of the area because the church occupation is foreign to the exercise of religious rights, hygiene conditions are precarious and that such a decision is necessary to protect public order, public health, tranquility and public safety. The next day, police evacuated the area in force, and some of the people, who were there, including the applicant, were subject to criminal convictions¹⁹.

¹³ For more information on *Kashrut* see: <http://ro.wikipedia.org/wiki/Ka%C8%99rut>, accessed on 04.06.2014.

¹⁴ Para. 68.

¹⁵ Para. 84.

¹⁶ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60413#{%22itemid%22:\[%22001-60413%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60413#{%22itemid%22:[%22001-60413%22]}), accessed on 05.06.2014.

¹⁷ <http://jurisprudencedo.com/Cisse-c.-Franta-Libertatea-de-manifestare.-Limite.html>, accessed on 05.06.2014.

¹⁸ <http://jurisprudencedo.com/Cisse-c.-Franta-Libertatea-de-manifestare.-Limite.html>, accessed on 05.06.2014.

¹⁹ <http://jurisprudencedo.com/Cisse-c.-Franta-Libertatea-de-manifestare.-Limite.html>, accessed on 05.06.2014.

None of the priests of the church in question opposed the occupation of their church by demonstrators. Therefore, the Court found that the evacuation was ordered by a public authority, so that there is an interference with the applicant's right to reunite. This interference was prescribed by law and aimed at a legitimate aim. The Court found that the state's reason was not the illegal situation of most Protestants, since they manifested for two months without the authorities to intervene. Their intervention came amid *order and health degradation* in the church area, so that it cannot be considered disproportionate to the aim pursued. Therefore Article 11 on freedom of assembly and association hasn't been violated²⁰.

Thus, in the cases of "*Plattform «Ärzte für das Leben» against Austria*", 1988²¹ and "*Rassemblement jurassien against Switzerland*", 1979, the European Court of Human Rights held that art. 11 implies that each State is able to take reasonable and appropriate measures to ensure peaceful conduct of lawful demonstrations of its citizens and that for meetings taking place on public roads is not exaggerated to impose the obligation to obtain prior authorization, as authorities may, under these circumstances, ensure the observance of public order and take necessary measures so that freedom of demonstrations can be fully ensured²².

Through the Judgment of 7 October 2008 in the Case of "*Eva Molnar against Hungary*"²³, the Court of Strasbourg established that paragraph 2 of Article 11 of the Convention entitles *states to impose legal restrictions on freedom of assembly*. However, these restrictions of freedom of peaceful assemblies held in public places *are designed to protect the rights of others, particularly as regards the prevention of disorder and maintaining traffic order*²⁴.

The European Court of Human Rights held, by Judgment of 18 December 2007 in the Case of "*Nurettin Aldemir and others against Turkey*", that, in principle, the requirement to obtain prior notification does not affect the essence of freedom of assembly and the imposition to prior authorization - for reasons of *public order and national security* - to organize and conduct a public meeting are not contrary to the spirit of Article 11. In the court's view, on one hand, any demonstration in the public space can cause some damage to the normalcy of daily living, and, on the other hand, it is important that the *authorities take the necessary measures*, for example, providing a first aid crew at the demonstration of any kind may be. It is therefore essential that the organizers and participants of any public gatherings - as actors in the democratic process - to comply with the rules of democracy, by respecting legal rules governing this field (Judgment of 29 November 2007 in the Case of "*Balgik and Others against Turkey*")²⁵.

In conclusion, the Court should not assess the appropriateness or effectiveness of the tactics adopted by the police in these situations, but must determine whether there is an arguable claim on the fact that the competent authorities failed to take appropriate action²⁶.

The margin of appreciation of the states refers to the nature of the defense mechanism established by the Convention, which is subsidiary in relation to the national systems of guaranteeing human rights. States have a duty to ensure the rights and freedoms consecrated by the Convention, the institutions created by it bringing their own contributions to the

²⁰ <http://jurisprudencedo.com/Cisse-c.-Franta-Libertatea-de-manifestare.-Limite.html>, accessed on 05.06.2014.

²¹ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57558#{%22itemid%22:\[%22001-57558%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57558#{%22itemid%22:[%22001-57558%22]}), accessed on 05.06.2014.

²² http://193.226.121.81/cedo/199_1999.html accessed on 05.06.2014.

²³ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88775#{%22itemid%22:\[%22001-88775%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88775#{%22itemid%22:[%22001-88775%22]}), accessed on 05.06.2014.

²⁴ <http://www.jurisprudenta.com/lege/decizie-1351-2010-qz6127/>, accessed on 05.06.2014.

²⁵ <http://www.jurisprudenta.com/lege/decizie-1351-2010-qz6127/>, accessed on 05.06.2014.

²⁶ Cauza Plattform "Ärzt für Das Leben" contra Austriei, para. 36.

mentioned subject, but become involved only through contentious proceedings and once all domestic remedies have been exhausted²⁷.

Therefore States are not accountable for their actions in front of an international body before they have been given the opportunity to improve the situation in their domestic law²⁸, the Convention guaranteeing according to Article 13 the right to an effective remedy which provides that any person whose rights and freedoms recognized by the Convention have been violated has the right to an effective remedy before a national authority even if the violation was due to persons acting in an official capacity.

So an example in this respect is the case of “Handyside against the UK”, 1976, in which the Court held that the comments made above apply in particular to Article 10 paragraph 2 which states that the exercise of freedom of expression, 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.

The Court reasoned that it is not possible to find in the domestic law of the various Contracting States *a uniform European conception of morals*. The viewpoint of national laws on moral requirements vary from one period to another and from one place to another, especially in our century which is characterized by rapid and comprehensive evolution of the views on this subject. Due to continuous and direct contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements and the “necessity” of a “restriction” or “penalty” intended to meet them²⁹.

Therefore, the Court accepted that *states enjoy a certain margin of appreciation*, while making the statement that this is not unlimited in terms of the use of restrictions. The final decision on its compatibility with the Convention belongs to the Court. Also the need in a democratic society means that state interference must correspond to a pressing social need and be proportionate to the legitimate aim pursued by its adoption³⁰.

Returning to the subject of the case of “Handyside against the United Kingdom”, 1976, the Court held that the State was entitled to apply restrictions to the publication of “Little Red Manual” for pupils, a book aimed at sexual education of young people but was considered an “obscene publication” under the negative influence that might have on the morals of young readers³¹.

The public order conventional clause does not give states an unlimited power of appreciation. This is subject to a European supervision that is directed on the purpose and necessity of the measure.

²⁷ Hotărârea din 7 decembrie 1976, Cauza *Handyside c. Regatul Unit*, para. 48. The document can be found at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#%7B%22itemid%22:%5B%22001-57499%22%5D%7D>, accessed on 05.06.2014.

²⁸ P. Dourneau-Josette, *Principiile generale cu privire la CEDO și articolul 10*. The text can be found at: <http://www.acces-info.org.md/index.php?cid=132&lid=133>, accessed on 05.06.2014.

²⁹ Hotărârea din 7 decembrie 1976, Cauza *Handyside c. Regatul Unit*, para. 48. The document can be found at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#%7B%22itemid%22:%5B%22001-57499%22%5D%7D>, accessed on 05.06.2014.

³⁰ <http://jurisprudentacedo.com/Handyside-contra-Marea-Britanie-Conditii-de-aplicare-ale-libertatii-de-exprimare.html>, accessed on 05.06.2014.

³¹ http://www.ivozambello.net/Bucharest_ways_expr_freed_con_rel_int_facts_rom.htm, accessed on 05.06.2014.

If this control should not be substituted to the one performed by the domestic courts, it must allow assessment of the decisions conventionality taken in the exercise of the power of discretion by the national authorities.

These requirements are not new in itself. They refer to the obligation of police powers in a clear and accessible text, to act for reasons of necessity and adopt proportionate measures.

CONCLUSIONS

Analyzing the influence that the Convention on Human Rights has on the administrative police activity, it can be concluded that the latter is a process compatible with European practices, being in the power of each state to develop its own strategy and its adequate structure for implementing it in order to maintain national public order.

In turn, the European Court of Human Rights has never considered administrative police activity to be inconsistent with the principles of the Convention or a protected right.

In the context of ECHR case law the following principles have outlined:

- Prior restrictions are not incompatible with the Convention, but must be part of a legal framework that limits in strict terms the application of such prohibitions and provides for effective judicial remedy against a possible abuse;
- The right to a fair trial under Article 6 of the Convention is not opposable to administrative police measures;
- National authorities have the possibility to watch over the compliance with public order and to take necessary measures for the freedom of demonstrations to be fully insured; prior authorization to conduct demonstrations is not an exaggerated obligation;
- Restrictions on freedom of peaceful assemblies held in public places are designed to protect the rights of others, especially in terms of preventing disorder and maintain traffic order;
- The requirements of morals varies from one period to another and from one place to another;
- States enjoy a certain margin of appreciation, but it is not unlimited in terms of the use of restraints, the final decision on its compatibility with the Convention belonging to the Court.

It can be concluded that the Europeanization of administrative police could provide a precise direction for states in their attempt to bring near their national practices and to unitary and preventively ensure a European public order.